

1987 (2)

THE ZIMBABWE LAWS REPORT 1987 [PART 2]

1987 (2) ZLR p1

MXUMALO & ORS v GUNI 1987 (2) ZLR 1 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil appeal

28 July & 6 August 1987

Flynote

Costs - taxation - fees charged by legal practitioner - Law Society of Zimbabwe By-Laws 1982 (SI 314/82), by-law 68(1) - requirement that fees charged for all professional services except where otherwise legislated for, must be fair and reasonable - fees charged on an agreed lump-sum basis - client entitled to have bill of costs taxed where *prima facie* an enquiry is warranted to determine whether charges are fair and reasonable.

Headnote

Under the common law, a client has no right to taxation of a bill of costs where a legal practitioner has charged him fees on an agreed lump-sum basis for professional services in respect of non-litigious work, unless the legal practitioner has taken undue advantage of him. However, this position has been modified by the Law Society of Zimbabwe By-Laws 1982 (SI 314/82), by-law 68(1) of which provides that fees charged for all professional services, except those which are governed by other legislation, shall be fair and reasonable. Accordingly, even where a lump-sum basis has been agreed to by the client, he has the right to an order for the delivery of a bill of costs for taxation, provided that he is able to point to something which *prima facie* warrants an enquiry into whether the fees charged by the legal practitioner are fair and reasonable.

Quaere whether in any event for a legal practitioner to agree to a lump-sum payment calculated on a commission basis is not foreign to the principle that legal practitioners, in keeping with the high standards and ideals of their profession, are at all times expected to give of their best and charge only for services actually rendered to their clients.

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GUBBAY JA

Cases cited:

Roberts & Letts v Williamson 1911 SR 105

Murray v Yoyo & Anor 1912 CPD 807

Nicholls v Macmuldraw 1923 CPD 401

Incorporated Law Society v Lakofski 1939 TPD 289

Ex parte *Minister of Justice* in re *R v Jacobson & Levy* 1931 AD 466

In re *Palmer* (1890) 45 ChD 291 (CA)

In re *Frape* ex parte *Perrett* [1893] 2 ChD 284 (CA)

Ray v Newton [1913] 1 KB 249 (CA)

Rutter v Sheridan-Young [1958] 2 All ER 13 (CA)

J Sayce for the appellants

E Chatikobo for the respondent

Judgment

Gubbay JA: The twenty-six appellants are South African artistes resident in Johannesburg. They are associated together in partnership as a musical group known as "Isibaya Esikhulu". The respondent is a registered legal practitioner carrying on practice in Harare in the name of "Guni and Guni".

During October 1981 the appellants arrived in Zimbabwe to conduct a pre-arranged musical tour of the country. At the commencement of the tour they were threatened with imminent deportation by the immigration authorities and, in order to avoid any such action being taken against them, on 23 October 1981 one of the appellants, Isaac Luvuno, who acted as agent and promoter, consulted the respondent in his capacity as a legal practitioner. The respondent was requested to use his best endeavours to intercede on the appellants' behalf and in addition to perform whatever legal services might be required of him. It was agreed at this meeting that he be paid a fee amounting to \$3 000 or 10% of the gross takings of the 1981 tour, whichever was the greater. It was further agreed that, in the event of a proposed tour in the following year being undertaken, the respondent would be remunerated in an amount equivalent to 10% of the gross takings of that tour. The respondent was able to obtain the necessary permission for the appellant's engagements in the country for both 1981 and 1982 to be fulfilled. The gross takings derived from the first tour amounted to \$30 103,48 and from the second tour, which took place from 26 August to 22 October 1982, to \$47 039. On 1 November 1982 the sum of \$25 023, representing the net proceeds of the second tour, was deposited to the credit of the respondent's trust account.

In February 1983 Luvuno telephoned the respondent and requested that he

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come urgently to Johannesburg for discussions. It was agreed that the fee to be charged by the

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respondent would be \$500 per day. The respondent travelled to Johannesburg and was absent from his practice for ten days from 14 to 23 February 1983.

On 31 July 1985 Messrs Honey and Blanckenberg, the firm of legal practitioners then acting for the appellants, wrote to the respondent requesting details of both the charges he had deducted from the funds held by him on the appellants' behalf in his trust account, and the credit balance outstanding. Seven weeks later, on 20 September 1985, and only after persistent demands had been made, the respondent provided three fee notes relating to his charges. Accompanying the fee notes was a cheque for \$9 785,75, expressed to be the "balance after deductions of our fees and disbursements".

The first fee note was in the sum of \$3 010,35, being 10% of the gross takings of \$30 103,48 in respect of the 1981 tour. The third fee note was in the sum of \$4 703,90, being 10% of the gross takings of \$47 039 in respect of the 1982 tour. The second fee note was divided into two parts and particularised as follows:

"To Our Professional Fees including disbursements for taking instructions, arranging for funds from Gallo Records (Private) Limited, Bulawayo, conferences with Messrs Mabheba and Luvuno and with Zimbank and Reserve Bank Officials; perusal of papers and handling application generally, drafting and attending to various correspondence; making and attending to various telephone calls to and from Johannesburg at \$2,500,00 flat fee.

To Our Professional Fees and Disbursements for the Johannesburg Urgent Trip as per clients' request; at additional fees of \$500,00 per day inclusive of fares, boarding and subsistence allowance x 10 days (14th to 23rd February 1983) - \$5 000."

Thereafter, on 2 November 1985, acting on the instructions of the appellants, Messrs Honey and Blanckenberg wrote challenging the amount of the respondent's charges which totalled \$15 214,25, and insisting that they be taxed. It was only on 11 December 1985 after a delay of eleven weeks, that the respondent made a substantive response to the demand for taxation. He stated that he was in the course of preparing a bill of costs, but asserted that he did not consider himself obliged to do so because the amount of his charges had been agreed to by the appellants.

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The bill of costs was eventually forthcoming on 27 January 1986. It commenced with a charge in respect of the consultations held with Luvuno on 23 October 1981 and included charges relating to correspondence written to and received from Messrs Honey and Blanckenberg, as well as telephonic personal attendances upon that firm up to 1 November 1985. At best for the respondent, he was aware from 4 June 1985 that the appellants had terminated his mandate as their legal practitioner, yet from that date on his bill of costs debited charges against them amounting to \$832. The total charge inclusive of disbursements of \$64,32 was \$12 670,32.

Upon being apprised of the bill of costs, the appellants insisted that it be submitted to a taxing officer for taxation, and on 26 March 1986 Messrs Honey and Blanckenberg wrote to the respondent requesting that within fourteen days he make arrangements for that to be done. The respondent failed to comply with the request and on 16 April 1986 an application on notice of motion was instituted in the High Court, in which the appellants sought an order directing the

respondent to tax the bill of costs. On 24 April 1986 the respondent filed an opposing affidavit. In it he deposed as follows:

"I have already submitted my Bills of Costs for taxation. I agree to prepare Bills of Costs after talking to Mr Donovan simply as an attempt to amicably settle the problem. This was in no way an admission on my part that my fees were subject to taxation or reduction. For reasons given in this affidavit, I verily believe that my Bills of Costs ought not to be taxed."

The reasons referred to are summarised thus in an earlier paragraph of the affidavit:

"I did not believe, and still do not believe, that I had to provide a debatement of account for my services since Mr Luvuno had agreed on specific scales of my fees ie that I would be paid fees of at least \$3 000,00 for 1982 gross a figure equivalent to at least 10% of the 1981 proceeds, and at \$500,00 per day while in South Africa and disbursements."

It will be noted that the reference to the disbursements while in South Africa being exclusive of the fee of \$500 per day conflicts with the relevant legend in the second fee note.

On 29 May 1986 the respondent's bill of costs was duly taxed by a taxing officer, who disallowed therefrom the sum of \$5 207,38.

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GUBBAY JA

The application came before SAMATTA J on 4 June 1986, the outstanding issue being which of the parties was liable to bear the wasted costs. This necessitated the learned judge determining whether the appellants were entitled to seek an order, as they did, that the respondent tax his bill of costs. He held that, as the agreements between the appellants and the respondent as to his charges related to non-contentious business, and as there was no allegation that in concluding such agreements the appellants had been overreached, they had no right in law to demand a taxation of the respondent's charges. Accordingly the appellants were ordered to pay the costs of the application.

In support of the appeal Mr Sayce advanced two arguments. The first was that the court *a quo* should have held that in the event of a challenge to the fairness and reasonableness of the respondent's charges, the appellants had a right to taxation thereof, whether or not there had been any agreements as to the amounts of such charges or any allegation that the respondent had overreached them in respect of such agreements. The second, which was in the alternative, was that the respondent, by his action in drawing a bill of costs and in delivering it for taxation, had waived any right he may have had to insist upon the observance of the terms of the agreements.

At the outset it is as well to point out that the learned judge appears to have overlooked that the charge of \$2 500 itemised in the second fee note and described there as "a flat fee" had not been agreed to by the appellants. It was not the respondent's case that it had. The only charges agreed to were the \$3 010,35, the \$4 703,90 and the \$5 000. The \$2 500, which save for an excess of \$43,93 accounts for the difference between the \$15 214,25 reflected in the three fee notes and the total bill of costs, was over and above the three agreed charges. It was explained by the respondent in these words:

"My fee notes contained an element of what is called in England 'Brief Fee' - a practice I 'grew up' under. My Bills of Costs did not contain this element. Hence the difference in the two figures. In England the practice is always to charge a brief fee but I learnt from Mr Donovan that this practice is perhaps unpopular in Zimbabwe. I am entitled to have charged a higher rate of fees than normal in view of the fact that I am the Senior Partner in my firm. The taxation tariff sets a minimum scale and does not impose a limit as to what fees one may charge".

The appellants thus had a right under Rule 308(1) of the High Court of Zimbabwe rules 1971 to insist that the charges of \$2 500 be taxed, for the

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effect of that rule is that the costs of services actually rendered by a legal practitioner in his capacity as such, including disbursements made, whether in connection with litigation or not, may be taxed at the instance of either party concerned. See *Roberts & Letts v Williamson* 1911 SR 105 at 107-108; *Murray v Yoyo & Anor* 1912 CPD 807 at 811.

I pass now to consider the main question of whether the three agreements to pay the respondent lump sums for his professional services precluded the appellants from going behind the agreements and insisting that a bill of costs be taxed.

There is respectable South African authority to the effect that under the common law an agreement to pay an attorney a lump-sum for any professional services rendered, or to be rendered, in respect of non-litigious work is unimpeachable unless undue advantage has been taken of one party to the agreement by the other, and neither party can, without the consent of the other, seek to set aside the agreement and demand that a bill of costs be taxed; for such an agreement is not in itself improper or unprofessional. The first exponent of this proposition appears to have been SEARLE J in *Murray v Yoyo & Anor supra*. This is how he expressed it at 911:

"When there is an actual agreement made as between attorney and client to do certain work for a certain sum, neither of the parties can without the consent of the other go behind the agreement and insist on taxation. I am referring, of course, to matters other than contentious civil cases. The agreement stands, and is perfectly good and binding unless some undue advantage has been taken of the one side by the other, which would justify the Court in setting it aside, and no doubt the Court would scrutinise such agreement carefully, if such case were raised."

Eleven years later in *Nicholls v Macmuldraw* 1923 CPD 401, VAN ZYL J, in strongly approving the dicta of SEARLE J, said this at 405:

". . . I must confess that I cannot see why it should in any way be regarded as against public policy for any person to come to an agreement, if an attorney has done work for him, as to the amount which is he prepared to pay, and where a case is brought before this Court for the recovery of professional fees, and the amount of such fees has been fixed by the parties themselves in agreement, I do not think the client can come forward and say: 'No, the attorney cannot, in spite of this agreement, claim the amount'."

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GUBBAY JA

See also *Incorporated Law Society v Lakofski* 1939 TPD 289 at 292 *in fine*.

In entering into such an agreement the law of South Africa is that an attorney must not overreach his client and must not charge a fee which is so excessive as to be unconscionable; for to do so will constitute unprofessional conduct, and the court will interfere by setting aside the agreement relating to the agreed charge and require the attorney to draw and have taxed a bill of costs. (See generally, Jacobs and Ehlers *Law of Attorney's Costs and Taxation Thereof* at pp 8-10.)

It was accepted by both counsel, and correctly so in my opinion, that the common law of Zimbabwe concerning the permissibility of an agreement to pay a lump sum for the services of a legal practitioner accords with that obtaining in South Africa. Indeed Mr *Chatikobo*, for the respondent, relied heavily on the authorities I have referred to for his contention that the appellants had no right in law to demand the taxation of the respondent's charges of \$3 101,35, \$4 703,90 and \$5 000. Mr Sayce, however, submitted that by virtue of the provisions of by-law 68(1) of the Law Society of Zimbabwe By-laws, 1982 (SI 314 of 1982) the common law position has been modified to the extent that it is now a requirement that the lump sum fee agreed to should be fair and reasonable.

By-law 68 (1) reads:

"In regard to all professional services in matters not provided for by the rules of any competent court of law or by the council under by-law 70, legal practitioners shall charge such sum as may be fair and reasonable, having regard to all the circumstances of the case and, in particular, the following matters -

- (a) the complexity of the matter or the difficulty or novelty of the questions raised;
- (b) the skill, labour, specialized knowledge and responsibility involved on the party of the legal practitioner;
- (c) the number and importance of the documents prepared or perused, without regard to length;
- (d) the place where, and the circumstances in which, the business or any part thereof is transacted;
- (e) the time expended by the legal practitioner;
- (f) where money or property is involved, its amount or value;
- (g) the importance of the matter to the client;
- (h) any tariff of recommended charges issued by the council."

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The learned judge was of the view that the Rules of the High Court - in particular Order 38, concerned as it is with costs and the taxation thereof - contain no provision affecting or regulating the measure of a lump-sum payment agreed to in respect of non-contentious business. That it undoubtedly so. But I respectfully disagree with him that the same may be said of by-law 68(1), for the obligation upon a legal practitioner to charge his client a fair and reasonable sum, to be assessed in accordance with the criteria set out, is specifically expressed to embrace all professional services rendered, except for those relating to matters, such as the collection of trade debts (see by-law 70(2)), which have been legislated for

elsewhere. That is the only saving. To seek to exempt an agreement to pay a lump-sum fee from the purview of by-law 68(1), as did Mr *Chatikobo*, to my mind involves a construction which declines to give the word "all" its ordinary and natural meaning. The language used is plain and unambiguous and the intention of the Law Society is to be gathered therefrom. It is not for a court to surmise that the Law Society may have had an intention other than that which clearly emerges from the language used. This principle has been stated frequently and I need only refer to *Ex parte Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466 at 480, where STRATFORD J said that:

"The function of a Court of Law is to construe the language of the Legislature and arrive at its intention in that way; it has no power to redraft or alter the language. (The) intention is not to be ascertained by surmise however probable such surmise may be."

The conclusion I have reached, that the provisions of by-law 68(1) apply to the three agreements entered into by the parties appears to me to be entirely consistent with one of the Law Society's primary objects, which is to maintain and uphold the integrity of practitioners and the standards of professional conduct. To hold a client bound to an agreed lump-sum payment, which although not unconscionable is nonetheless not fair and reasonable, would be to foster a situation likely to adversely affect the status and integrity of the profession in the eyes of the public. In the main, a client has little knowledge of the level of charges levied by legal practitioners and even less as to the extent to which an agreed charge may exceed the amount allowed on taxation. He needs some form of protection.

What then did the appellants have to show to justify the grant of an order that the respondent submit his bill of costs for taxation? As previously mentioned, they had an absolute right to demand that the "flat fee" of \$25 000 be taxed. That sum closely approximated the difference between the total

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GUBBAY JA

charges of the three fee notes and that reflected in the bill of costs; hence the claim for taxation of the bill of costs and not of the charges in the fee notes. Obviously the appellants did not have to go to the length of establishing that the charge of \$12 606 was not fair and reasonable, for that determination is the function of the taxing officer, and under para (2) of by-law 68 it is for the legal practitioner "to satisfy the taxing officer as to the fairness and reasonableness of the charge or charges made."

It is my view that English law provides useful guidance to the answer, for by virtue of statutory jurisdiction it has long been the position in England and Wales that the court has the power to direct a solicitor, whose remuneration in respect of non-contentious business has been agreed, to deliver a bill for taxation for the purpose of ascertaining whether the remuneration is fair and reasonable.

One of the earliest cases dealing with the circumstances in which a court will direct taxation of an agreement for a lump-sum payment is *In re Palmer* (1890) 45 ChD 291 (CA). In his judgment at 298 COTTON LJ remarked that the power will be exercised only when the court considers that on the evidence there is shown to be a ground why it ought to look into the

matter to ascertain whether upon investigation it is, in truth, a reasonable and fair charge. Three years later in *In re Frape*. Ex parte *Perrett* [1893] 2 ChD 284 (CA) at 296 LINDLEY LJ expressed much the same thought:

"It appears to me that it would not be right to say, upon the materials before us, that this agreement was unfair and unreasonable. On the other hand, the evidence about it is such as to render it right to direct an order to tax, and the Taxing Master will have to look into the question and see what the truth is. The fact is, that it is impossible to decide whether the agreement is unfair or unreasonable without taxing the bill. There is a great deal of doubt about it, and it is sufficient for us to say that the case ought to be inquired into."

In *Ray v Newton* [1913] 1 KB 249 (CA) FARWELL and HAMILTON LJJ closely followed the *Palmer* and *Frape* cases, *supra*, and said that it was the right of a client, notwithstanding agreement to a lump-sum fee, to have an order for delivery of a bill, provided he was able to point to something which *prima facie* warranted an enquiry into whether the charge was fair and reasonable.

These three decisions were approved of by LORD EVERSHED MR in *Rutter v Sheridan-Young* [1958] 2 All ER 13 (CA), and I have no difficulty in being

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GUBBAY JA

persuaded by them that the approach to be adopted to this matter is to ask whether on all the evidence placed before the court *a quo*, and bearing in mind that the *onus* rested upon the appellants, it can be said that there was good ground for holding that the bill of costs drawn by the respondent required looking into.

To my mind, the answer is clearly in the affirmative, for the following features of the respondent's conduct, and the overall picture emerging therefrom, allowed of no other:

- (i) Two of the agreements, involving as they did the payment of a percentage of the gross takings of the appellants, by their very nature necessitated an investigation; especially as they had been concluded before any services were rendered by the respondent. See *Halsbury's Laws of England* 4 ed vol 44 para 153 n 7.
- (ii) Despite persistent requests for an accounting, there was a considerable delay before the respondent provided the fee notes.
- (iii) The respondent failed to account to the appellants for any interest received by him on their moneys. He merely deducted the total of the three fee notes from the sum of \$25 000 and furnished a cheque for the balance.
- (iv) The intimation by the respondent that he was preparing a bill of costs, following upon a demand for taxation, only came after another long delay.
- (v) There was a significant difference between the total amount of the fee notes and the total costs as per the respondent's bill. And the explanation ultimately proffered by the respondent was lacking in cogency.
- (vi) The charges in both the fee notes and the bill of costs appeared high as the type of

work performed was of not great complexity. Furthermore, *ex facie*, the bill of costs included charges amounting to \$832 for which the appellants ought not to have been debited.

It follows that the appellants should have been favoured by the learned judge with an order for costs, for the proceedings they brought against the respondent were fully justified, a conclusion which I may say is underscored by the taxing officer's, subsequent disallowance of the sum of \$5 207,38 from

1987 (2) ZLR p11

GUBBAY JA

the bill of costs. It therefore becomes unnecessary to consider the alternative argument raised by Mr Sayce.

The ethical propriety of the respondent's conduct in agreeing to a lump-sum payment calculated upon a percentage commission basis cannot be allowed to pass without comment. That method of charging is more commonly associated with those occupations where it is likely to act as an incentive to achieve better results. But, save for the collection of uncontested trade debts where in the main it is obligatory to charge the client a commission at fixed sliding rates in accordance with para (2) of by-law 70 of the Law Society of Zimbabwe By-Laws, it is foreign to the principle that legal practitioners, in keeping with the high standards and ideals of their profession, are at all times expected to give of their best and charge only for services actually rendered to their clients. To charge in the manner the respondent did, with the ultimate amount being merely a matter of arithmetic, is somewhat akin to champerty. See generally, Lewis *Legal Ethics* para 25 at pp 239-240. I leave open, however, the question of whether the two agreements could have been impeached on that ground alone.

The appeal is allowed. The appellant's costs, both in this court and in the court *a quo*, are to be paid by the respondent.

Dumbutshena CJ: I agree.

Korsah JA: I agree.

Honey & Blanckenberg, appellant's legal representatives

Guni & Guni, respondent's legal representatives

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S v JONGWE 1987 (2) ZLR 12 (HC)

Court High Court, Harare

Greenland J

Criminal review

19 August 1987

Flynote

Criminal procedure - correction of judgement or sentence delivered by mistake - meaning of - Criminal Procedure and Evidence Act [Chapter 59] - s 190(2) - procedure does not apply where court has delivered competent and considered sentence but thereafter reconsidered its decision.

Headnote

The procedure set out in s 190(2) of the Criminal Procedure and Evidence Act [Chapter 59] allows for the timeous correction of a judgment or sentence delivered "by mistake". Such a mistake must be a genuine mistake in the delivery of the sentence - either a mistake in the sense that the judicial officer said something different from what he had intended to say or else a mistake in the sense that the sentence pronounced was an incompetent one. Where, however, a competent and considered sentence is delivered, the judicial officer is *functus officio*. If he thereafter has second thoughts about the matter, the subsection cannot be invoked.

Cases cited:

S v Rabie 1975 (4) SA 855 (A)

R v Sikombozo 1967 RLR 348 (AD); 1967 (4) SA 602 (RA)

R v Armoed 1936 EDL 214

S v Mamwere 1978 RLR 374 (GD)

S v Chikumbirike HH-307-84 (not reported)

Judgment

Greenland J: The accused was properly convicted of housebreaking

1987 (2) ZLR p13

GREENLAND J

with intent to steal and theft by the magistrate at Harare. The learned magistrate then heard the accused in mitigation and, in part, the accused asked for "forgiveness". Bearing in mind that this offence nearly always attracts a sentence of imprisonment, "forgiveness" would have been signified by the imposition of a non-custodial sentence.

It is trite that, except where statute actually prescribes the penalty, sentence will be imposed by a court in terms of a properly exercised judicial discretion. An excellent example of this is to be found in the approach of HOLMES JA in the case of *S v Rabie* 1975 (4) SA 855 (A).

The following extract, from the trial record, reveals the learned magistrate's approach to sentence in this case:

"BY THE COURT:

I have taken note of the fact that you are a contrite first offender and of what you have said in mitigation.

However, the offence you committed is serious and prevalent and must be discouraged at all costs. Society has been overburdened with the likes of you and the misery your type cause, for too long.

However, you are a first offender and will have the option of a fine to help you reform since the chance is still there. The offence was boldly committed in daylight, and you were not satisfied with merely small items but attempted to steal a large amount of property valued at over \$300. Luckily it was all recovered. You compounded your crime though by attempting a quick escape after being observed and chased.

Therefore, I sentence you to pay a fine of **\$500,00, in default of payment you will spend six months' imprisonment with labour. In addition, three months' imprisonment with labour wholly suspended for five years**, on condition you do not within that period, commit any offence involving an element of dishonesty for which you are sentenced to imprisonment without the option of a fine or a fine in excess of \$50,00.

Do you understand? - I do understand Your Worship."

From the above there can be not the slightest doubt that the learned magistrate properly exercised a judicial discretion not to impose a custodial sentence, thereby acceding to the accused's plea for "forgiveness".

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GREENLAND J

The fact that the learned magistrate was settled in his judicial mind on the question is confirmed by the following endorsement which appears on the back of the indictment:

"SENTENCE : \$500 or i/d 6 months IWL . . . "

thereafter follows the rest of the sentence.

The following further endorsement appears:

"W/O/C suspended O/C accused pays
\$40 before 4 pm on 8/6/87 and thereafter
\$210 by 4 pm on 30/6/87 and a further
\$250 by 4 pm on 31/7/87.
Signed 8/6/87."

What has induced this judgment is what happened thereafter. This emerges from a letter written to the Regional Magistrate in which the learned trial magistrate states:

". . . On first sentencing the accused in this matter, I gave the option of a fine. However, immediately after so doing, realised the inappropriateness of this and called the accused back. I informed him that for the offence in question a custodial sentence was more equitable. I hope the above explanation meets with your approval."

The record shows that the learned magistrate amended the trial record by making relevant deletions and substituted a sentence of:

"6 MONTHS IWL in addition 3 MONTHS IWL wholly suspended for 5 years . . . "

on appropriate conditions. He endorsed the deletions with the words: "ITO S 190 (2) of the CP &

E ACT".

Section 190 (2) of the Criminal Procedure and Evidence Act [*Chapter 59*] provides:

"(2) When by mistake a wrong judgment or sentence is delivered, the court may, before or immediately after it is recorded, amend the judgment or sentence, and it shall stand as ultimately amended."

1987 (2) ZLR p15

GREENLAND J

As can be seen the section provides for the timely correction of a sentence "delivered" "by mistake".

In the case of *R v Sikombozo* 1967 RLR 348 (AD); 1967 (4) SA 602 (RA), BEADLE CJ said, at 350F-G (604B-C of the South African report), that the mistake "must be a genuine mistake in the delivery of the sentence - either a mistake in the sense that the judicial officer said something different from what he had intended to say, or else a mistake in the sense that the sentence pronounced was an incompetent sentence. See the leading case on this subject of *R v Armoed* 1936 EDL 214".

In my view, the type of mistake envisaged by s 190(2), and referred to by BEADLE CJ was, in fact, not made by the learned trial magistrate when he imposed a non-custodial sentence. From start to finish he was consciously and quite properly exercising his judicial discretion in the matter. He arrived at a considered sentence which he then delivered, not because of a mistake, but because he was satisfied that it would meet the ends of justice. The sentence itself was not incompetent.

It is appropriate to quote from the judgment of BECK J in *S v Mamwere* 1978 RLR 374 (GD) at 376A-B:

"*Armoed's* case has been followed in a number of cases, among which I draw attention to *Ntuli v Smith* NO 1953 (1) SA 252 (N); *R v Mthembu* 1959 (4) SA 129 (N); *S v Sikeliwe* 1962 (1) SA 408 (E). In all these cases, as in the present case, the sentence that was first pronounced by the court, was **a competent sentence and it was the sentence that the Court intended to impose**. There was **not** therefore, as there is **not** in the present case, a sentence that was delivered by mistake" (my emphasis).

The position here is the same as that described above.

As was stated in *S v Chikumbirike* HH-307-84, once a court has passed a competent sentence the magistrate is *functus officio* and cannot invoke s 190(2) in order to give effect to "second thoughts" on the matter. It is clear that the learned magistrate, in the present case, acted as he did because he had second thoughts on the question of sentence. This was not competent.

An obvious reason why this is not competent is that such a procedure would, in effect, constitute an "instant review" by a magistrate of the appropriateness of his own sentence. There is no provision in law for such review. In fact,

1987 (2) ZLR p16

GREENLAND J

the law specifically provides for scrutiny or review, depending on the severity of the sentence, to be carried out by the Regional Magistrate or High Court as the case may be. See s 63 of the Magistrates Court Act [*Chapter 18*]. The learned magistrate's review and correction of his own sentence therefore was incompetent.

Ideally the original sentence should be restored. However, this would mean ignoring the fact that the accused has already served a period of imprisonment. He started serving the sentence on 9 June 1987. He has therefore served nearly two months' imprisonment in a situation where he was entitled to a non-custodial sentence. In terms of a purely value judgment it is my view that, bearing in mind the loss of liberty, mental anguish and the stigma of imprisonment, the accused has discharged the original obligation to pay a fine of \$500 and is therefore entitled to his immediate release.

The sentence is therefore set aside. The original sentence is substituted save that the alternative to the fine is amended to read "2 MONTHS IWL".

The accused is to be brought before the learned trial magistrate and the provisions of the sentence explained to him.

Reynolds J: I agree.

1987 (2) ZLR p17

S v RUPIYA 1987 (2) ZLR 17 (HC)

Court **High Court, Harare**

Ebrahim J

Criminal review

19 August 1987

Flynote

Criminal procedure (sentence) - Road Traffic Act 1976 - s 6(1)(a) - driving without a licence - acceptable level of fine - rise in cost of living as factor in assessment of appropriate fine.

Headnote

The offence of driving without a licence, in contravention of s 6(1)(a) of the Road Traffic Act 1976, is a prevalent one and there is a need to bring home to offenders that the courts will not take kindly to such offences. During the period 1978-80 deposit fines of, on average, around \$60,00 were accepted. Based on the increase in the consumer price index since that time, a fine of around \$200,00 would now be acceptable as a basic norm for most offences, although this figure will be a general guideline only. Magistrates should not feel obliged to impose a standard sentence for any particular offence, as this would result in an improper fettering of their judicial discretion.

Cases cited:

S v Machinyika GS-91-78

S v Frank GS-141-78

S v Mutemgwase GS-161-78

S v Kamirira HH-223-83

S v Kamanura HH-87-83

S v Machiwenyika HH-250-87

R v David & Anor 1964 RLR 2 (SR)

Judgment

Ebrahim J: The accused was convicted on his plea of guilty of driving a

1987 (2) ZLR p18

EBRAHIM J

motor vehicle without being the holder of a driver's licence, in contravention of s 6(1)(a) of the Road Traffic Act No. 48 of 1976. The accused, a 30-year-old first offender, was sentenced to pay a fine of \$200,00 or in default of payment 50 days' imprisonment with labour.

The record was submitted to the regional magistrate for scrutiny and he has submitted the matter to this court with the following comments:

"There being no obviously aggravating features in the case I queried with the magistrate *a quo* why he had imposed double the standard deposit fine for the offence. In his reply the magistrate drew my attention to a new schedule of deposit fines which he states came into effect on the 1st January, 1987. Though I was not aware of the existence of this schedule at the time I initially wrote to the magistrate, I am now able to confirm that the previous schedule, in which the offence carried a standard deposit fine of \$100,00 has now been replaced by a new schedule which states that perpetrators of this offence must now appear in court. Though the schedule is dated April, 1986, I cannot dispute the contention of the magistrate *a quo* that the police only started using it with effect from the beginning of this year.

Since the introduction of the new schedule, there has been an understandable, though undesirable, lack of consistency in approach to sentence for this offence amongst magistrates. Sentences I have observed on scrutiny range from the old fine of \$100,00 up to the maximum I have thus far observed, of \$200,00 in the present case.

It is respectfully felt that it is desirable that some form of rationality be restored to sentencing for driving without a licence, and that it would be appropriate for the High Court to issue an authoritative judgment on what it considers to be an appropriate fine for the average type of offence of this nature where there are no significant aggravating or mitigating features."

I referred the matter to the Attorney-General for his comments and I am indebted to him for the very helpful opinion he has submitted.

It is apparent that the regional magistrate has submitted this matter for review primarily because, with the introduction of the National Schedule of Deposit Fines, offenders who

contravene s 6(1)(a) of the Road Traffic Act are now required to appear in court.

1987 (2) ZLR p19

EBRAHIM J

I am informed that the schedule, which was printed in April 1986, was brought into effect in April 1987. Prior to the introduction of this schedule, first offenders for driving without a licence were ordinarily invited to pay a deposit fine. In terms of s 336 of the Criminal Procedure and Evidence Act [Chapter 59], "deposit fines", as they are colloquially termed, could be imposed up to \$100,00. The new schedule now obliges an accused person who contravenes s 6(1)(a) to attend court. I am informed by the Attorney-General that the courts are of the view that such offenders must now appear in court owing to the seriousness of the offence, its prevalence and the fact that the \$100,00 maximum penalty allowed in terms of the Act was or is insufficient punishment for would-be first offenders.

This, as pointed out by the learned regional magistrate, has resulted in a lack of consistency in applying the appropriate sentence for such cases: the sentences range from \$100,00 to \$200,00 for first offenders in circumstances where there are no peculiar aggravating or mitigating circumstances.

Quite clearly as a matter of policy some guideline is called for.

An examination of reported cases indicates the following range in sentences.

S v John Machinyika GS-91-78: \$100,00 or 100 days.

S v Michael Frank GS-141-78: \$90,00 or 6 weeks IWL.

S v Future Mutemgwase GS-161-78: \$80,00

(second offender); plus prohibition from obtaining a driver's licence for 3 months and licence to be endorsed in the future.

S v Gilbert Kamirira HH-223-83: \$150,00 or 20 days IWL

and prohibition from driving for 3 months. One previous conviction. Drove in circumstances of taking a sick child to hospital.

S v Baison Kamanura HH-87-83: \$60,00 or 60 days IWL

driving a motor-cycle.

S v Blessings Machiwenyika HH-250-87. The fine of \$200,00 or in default 30 days IWL was confirmed on review.

The above cases indicate that the acceptable range varies from \$60,00 to \$200,00.

1987 (2) ZLR p20

EBRAHIM J

I have not been able to determine quite how the figures are arrived at.

What criteria ought to be examined in arriving at an acceptable quantum?

It is my view that the following factors would be apposite:

The offence itself. The offence of driving a motor-vehicle without a licence is in itself inherently serious. This is so because in a sense a car is potentially lethal and in the same way as a firearm requires some expertise to operate it safely; the same can be said for a driver of a vehicle. A measure of competence must be arrived at before one can set out alone on the road. Such skill can only be arrived at by proper tutelage and the level of competence can only be obtained by tests. Other road users demand a level of expertise so that persons can go about their daily lives safe in the knowledge that users of the road are not only competent drivers but have a knowledge of the rules of the road. To expect anything less is to court disaster.

The Attorney-General advises me that there are no statistics to indicate what incidence of traffic accidents are related to drivers without licences. There are however, statistics indicating that the offence of contravening s 6(1)(a) of the Road Traffic Act 1976 is prevalent.

The statistics office of the ZR Police have furnished him with the following particulars.

September to December 1985	- 1645 cases.
January to December 1986	- 4548 cases.
January to May 1987	- 1651 cases.

The figures quoted above indicate quite clearly that the offence is prevalent and that there is a need to bring home to would be offenders, that the courts will not take kindly to offences of this nature. If one takes into account that only 50% of offenders are detected (and this is a generous figure), this would mean that in 1986 something in excess of 9000 cars were driven on the roads by legally incompetent drivers. The figure of 50% is an arbitrary one, and it is probable that very many more unlicensed road users were not caught.

What then of the quantum of fines? A brief survey of cases for the period 1978-1980 indicates that generally speaking deposit fines in the region of \$60,00 on average were accepted.

1987 (2) ZLR p21

EBRAHIM J

That figure is to some extent an arbitrary one, in that no precise formula for quantum has been worked out or enunciated by the courts or by the legislature.

Using this \$60,00 as a base for the year 1975 and having regard to the Quarterly Digest of Statistics dated December, 1986 published by the Central Statistical Office, at pp 8 and 9 it is seen that consumable items purchased in 1975 to the value of \$64,60 rose in December 1986 to \$232,00. These figures apply to higher income consumers, who one can infer would be those

people expected to own or to have access to motor-vehicles.

That being the case, a fine of \$60,00 in 1975 would translate, in today's figures, to a fine of \$240,00.

These figures, however, do not take into account the rise in wages or earning capacity of higher income groups.

It would seem to me that a fine in the region of \$200,00 would be acceptable as a basic norm for such offences. This would be in accord with the most recent review judgment on the matter and does to some extent take into consideration the statistical factors outlined above. It would be sufficiently high enough to impart to would-be offenders that the offence is viewed seriously by the courts and, hopefully, some deterrence might be achieved by elevating the fines to this level.

Of course, the figure above is merely offered as a general guideline. The degree of moral blameworthiness will of course always play a significant factor as will the relative means of the offender. Magistrates should not feel obliged to impose a standard sentence for any particular offence as this would result in an improper fettering of their judicial discretion. See *R v David & Anor* 1964 RLR 2 (SR).

Reynolds J: I agree.

1987(2) ZLR p22

VOICEVALE LTD v FREIGHTLINK (MALAWI) LTD 1987 (2) ZLR 22 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Civil appeal

25 & 27 August 1987

Flynote

Jurisdiction - contract concluded by peregrini outside Zimbabwe - subject-matter of contract situated in Zimbabwe - High Court, as forum rei sitae, has jurisdiction to entertain actions arising out of contract, whether action is in rem or in personam.

Attachment to found jurisdiction - when granted - balance of convenience - court may look to provability of success in action.

Headnote

Both appellant and respondent were *peregrini*. Appellant sold respondent a quantity of peas in Malawi for delivery to India, via Harare and Beira. Half were shipped to India in terms of the contract, but while the remainder were in Harare the respondent effectively terminated the contract by selling them to a third party. Appellant applied to the High Court for leave to attach

the consignment of peas to found jurisdiction for an order of specific performance against respondent. The High Court dismissed the application on the ground that it had no jurisdiction to entertain the dispute over the contract, since the intended action was *in personam* rather than *in rem*; alternatively, the court held that even if it had a discretion in the matter it would not assume jurisdiction because the balance of convenience dictated that the action should proceed in Malawi rather than in Zimbabwe. On appeal:

Held, that the High Court had jurisdiction in the matter by virtue of being the *forum rei sitae* (ie the court within whose area of jurisdiction the subject-matter of the dispute was situated). This was so whether the action was *in rem* or *in personam*.

1987 (2) ZLR p23

McNALLY JA

Held, further, that where it is impossible to decide which party will be the more inconvenienced by an order of attachment it is proper for the court to have regard to the merits of the case because, if it is clear on the papers that the probabilities favour one party then in a real sense one can say that the balance of convenience favours that party. In the instant case the probabilities, and hence the balance of convenience, clearly favoured the appellant.

Cases cited:

Einwald v German West African Co (1887) 5 SC 86

Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A)

Chattanooga Tufters Co v Chenille Corp of SA (Pty) Ltd 1974 (2) SA 10 (E)

Wilhelm v Francis (1876) 6 Buch 216

Ex parte Kahn (1907) 24 SC 558

Halse v Warwick 1931 CPD 233

Central African Airways Corporation v Vickers Armstrong Ltd 1956 R & N 4; 1956 (2) SA 492 (FS)

X & Y (Pvt) Ltd v Z & Anor 1973 (2) RLR 178 (GD)

Fellowes v Fisher [1975] 2 All ER 829 (CA)

RH Wood for the appellant

AJ Traicos for the respondent

Judgment

McNally JA: This appeal was heard during vacation on a certificate of urgency. The history of the matter may be set out briefly.

The appellant (Voicevale) and the respondent (Freightlink) entered into a contract in terms of

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which Freightlink sold Voicevale 2 500 tonnes of Malawian pigeon peas for delivery in India. The peas came as far as Harare en route to Beira and Madras, and half of them were indeed shipped to Madras. The other half, which I will call "the second lot", are still in Harare.

Freightlink has purported to cancel the contract in respect of the second lot, and has in fact entered into a contract with another purchaser, Angelo Commodities, who is to pay a price which is US\$50 per tonne better than the price agreed with Voicevale. Voicevale denies that Freightlink has any right to repudiate the contract. It petitioned the High Court by way of edictal citation against Freightlink for an order of specific performance. On 10 August 1987 Voicevale was granted a rule *nisi* which was returnable on 21

1987 (2) ZLR p24

McNALLY JA

August 1987. On the return day the matter was opposed and the rule was discharged with costs. Leave to appeal was granted and the matter came before us on 25 August 1987.

In the court *a quo* the learned judge noted that both parties are *peregrini*; Voicevale being a company registered in England and Freightlink being a Malawian company. Accordingly he began by considering whether the court had or should assume jurisdiction in the matter. He decided that because the action was an action *in personam* and not *in rem* the court had no jurisdiction. Alternatively, and if he had a discretion in the matter, he ruled that he should not assume jurisdiction because:

- a. The goods were perishable and by the time the case was decided the judgment for specific performance would be a *brutum fulmen*;
- b. An order for damages in the alternative would be made in Zimbabwean currency, and thus be of little use to either party; and
- c. The balance of convenience dictated that the action should proceed in Malawi and not in Zimbabwe.

When the matter was argued before us, Mr *Traicos*, who appeared for Freightlink, effectively abandoned the "lack of jurisdiction" argument. He did not formally abandon it. So we must deal with it. But we can do so perhaps rather more cursorily than we would otherwise have done.

The learned judge *a quo* relied on a remark by LORD DE VILLIERS CJ in 1887 in the case of *Einwald v German West African Co* (1887) 5 SC 86 at 91, that where the subject-matter is property the action must be *in rem*. He concluded that the present action was *in personam*. It followed in his view that there was no jurisdiction. The passage in the judgement of DE VILLIERS CJ on which reliance is placed reads as follows:

"What then are the grounds upon which the jurisdiction of this court can be exercised, in respect of any contract over any defendant without his consent, express or implied? The grounds are threefold; viz. by virtue of the defendant's domicile being here, by virtue of the contract either having been entered into here or having to be performed here, and by virtue of the subject matter in an action *in rem* being situated in this Colony."

1987 (2) ZLR p25

McNALLY JA

It is beyond doubt that that very learned CHIEF JUSTICE did refer to an action *in rem*. But it has been held consistently since then that this limitation (which was *obiter*) is too restrictive. The generally accepted rule is that set out by Walter Pollack in his treatise on *The Civil Jurisdiction of the Supreme Court of South Africa*. The relevant passage is to be found in (1929) 46 SALJ at p 397, and it reads:

"Rule 7. When the defendant in an action *in personam* is a *peregrinus* . . . (the court) has jurisdiction to entertain the action in the following cases: -

- (1) If the property which is the subject-matter of the action is situate within that area and either the defendant has been arrested or some of his property has been attached *ad fundandam jurisdictionem*."

The matter is also set out in Herbststein and van Winsen *The Civil Practice of the Superior Courts of SA* 3 ed at p 785 in the following terms:

"Before the courts will attach the property of one *peregrinus* at the instance of another, they must have jurisdiction over the contemplated suit between the parties, ie either *rei sitae*, *loci contractus*, *loci solutionis* or on the ground of a delict committed within the court's jurisdiction."

See also *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (AD) at p 300; and *Chattanooga Tufters Co v Chenille Corp of SA (Pty) Ltd* 1974 (2) SA 10 (E) at 13A-E.

The matter is also dealt with quite specifically in *Private International Law* by Forsyth and Bennett at pages 187-8. Under the heading "Delivery of Movables" the learned authors say this:

"If delivery of movable property is sought, it has been held that the *forum rei sitae* has jurisdiction. This rule holds true whether the action is *in rem* or *in personam*."

In a footnote to this they add:

"Pollack *ibid* n1. He suggests, however, that if the defendant is a peregrine, attachment or arrest may also be necessary. He cites in support of this proposition Voet. 2.1.25 and 5.1.76. It is submitted that he is wrong. The *situs* of the property is necessary and sufficient in itself to give the court jurisdiction. Attachment may, according to the decision

1987 (2) ZLR p26

McNALLY JA

in *Jackaman v Arkell* 1953 (3) SA 31 (T) at 34, be granted, but only in order to secure property for the purpose of executing judgment at a later date."

The point of difference in *Einwald's* case, *supra*, was of course that the property proposed to be attached had nothing whatever to do with the dispute. In the present case the property is the subject-matter of the action in the sense that without it the action for specific performance is meaningless. Delivery of that property to the ultimate purchaser in India is the specific performance sought. It may also be said, in general terms, that the decision in *Einwald's* case, *supra*, along with those in *Wilhelm v Francis* (1876) 6 Buch 216, and *Ex parte Kahn* (1907) 24

SC 558 were criticised and not followed in *Halse v Warwick* 1931 CPD 233 at 239. Later, in *Central African Airways Corporation v Vickers Armstrong Ltd* 1956 R & N 4; 1956 (2) SA 492, the Federal Supreme Court held that *Halse's* case, *supra*, should be followed in preference to *Kahn's* case, *supra*. It is true that this was over an issue concerning an action between an *incola* and a *peregrinus*, but it clearly weakens the authority both of *Kahn, supra*, and of *Einwald, supra*.

I am satisfied that Mr *Traicos* was right not to press his argument in defence of the proposition that the court could not exercise jurisdiction on the basis of attachment coupled with the physical presence within the jurisdiction of the disputed pigeon peas.

Mr *Traicos* also raised, albeit faintly, the contention that his client was not the owner of the pigeon peas. The papers show that at all stages Freightlink has acted as if it were the owner. It entered into a contract of sale and it purported to cancel that contract and enter into another. It undertook to convey the goods from Malawi via Harare and Beira to India and to insure them as far as Beira. Yet when the issue of attachment was raised it suddenly said it was not the owner. Now, of course, one who is not the owner may enter into a contract of sale in respect of goods. And it may be that Freightlink is in fact acting as agent for a related company which is the actual owner of the pigeon peas. But it seems to me - and Mr *Traicos* did not seriously dispute this - that in the absence of any positive evidence as to the exact relationship between Freightlink and the goods the court is entitled to assume from its conduct that Freightlink has some proprietary interest in the goods and that that proprietary interest is capable of attachment. I note too that the true owner, who must clearly be aware of these proceedings, has not sought to intervene. This strengthens my conviction that Freightlink has a substantial proprietary interest.

1987 (2) ZLR p27

McNALLY JA

Having thus found that the court has jurisdiction, it is necessary to move on to consider whether the discretion to exercise that jurisdiction by attachment should have been exercised or not.

The learned judge *a quo* considered that he should not attach the property in question, and thus should not exercise his jurisdiction for three reasons, which I have set out earlier in this judgment.

The first reason was that the goods are perishable. He concluded that there was a real possibility that by the time judgment is given the peas will be worthless. Now, in a sense that may be true, though not in the way that the learned judge intended it. It is clear from the papers that these are dried peas. There is a provision in the original contract for their fumigation. Presumably therefore they will keep for some time though no doubt there will be some deterioration. They may, however, become worthless for another reason: it seems that the Indian market for these peas is a very seasonal one. After September the local Indian peas become available and the price drops. They may therefore not be saleable in February. It seems to me, however, that that is a problem for Voicevale. If it is prepared to take that risk I do not think it is for the court, which is not in possession of all the facts about the world market for pigeon peas, to try to protect Voicevale's interest. Accordingly I do not regard the perishability or the possible loss of value of the second lot to be a proper consideration in coming to a

conclusion on the issue before us.

The second consideration was that if the court were to award damages instead of ordering specific performance these would sound in Zimbabwe dollars and thus be of no use to either party. This does not seem to me to be an appropriate consideration. The party claiming the damages would be Voicevale, and an award in Zimbabwe dollars would be at least as useful to it as one in Malawian currency, which is the alternative suggested by the learned judge *a quo*.

The third consideration is the balance of convenience. I must confess that on the facts of this case I can find no guidance in considering the balance of convenience. If Voicevale's contentions are correct it will be seriously inconvenienced if the attachment is not granted. It will lose a large hard currency profit and gain the possibility of an award of damages in non-convertible currency. It may also face an action for breach of contract in India. But, equally, if Freightlink's contentions are correct, it will be seriously inconvenienced if the attachment is granted. It will lose a profitable hard currency contract with Angelo Commodities. For what it is worth it will

1987 (2) ZLR p28

McNALLY JA

then have a claim for damages against Voicevale, which presumably it could pursue in the hard currency English Courts.

The only way out of this deadlock, it seems to me, is to look at the merits. If it is clear on the papers that the probabilities favour one party, then in a real sense one can say that the balance of convenience favours that party. We are, after all, concerned with equitable considerations (see *X & Y (Pvt) Ltd v Z & Anor* 1973 (2) RLR 178 (GD) at 184C and 186B). I proceed therefore to consider the merits.

[The learned Judge then set out the facts of the case as they appeared from the papers, and continued:]

It seems to me that a very clear picture emerges from these documents which strongly supports Voicevale's version of events and suggests that Freightlink had no valid grounds for cancelling the contract. If those are the probabilities, as I think they clearly are, then it seems to me that the balance of convenience must lie on the side of Voicevale. Once the attachment is lifted the pigeon peas will be disposed of by Freightlink, and the action for specific performance will become meaningless. It will probably not be proceeded with.

Mr Traicos has argued strenuously that by looking at the merits we are in effect deciding the case on the merits and not simply the interlocutory matter. It may well be true that if we rule in favour of Voicevale we may effectively decide the whole case in their favour in the sense that Freightlink may be compelled by the realities of the situation to go ahead with the contract which they have sought to repudiate. This, however, is no reason not to take that course. Indeed, if we decide the other way, as I have already indicated, Voicevale will be effectively thwarted and will not be able to proceed in the main action. This is often the effect of interlocutory decisions. The words of LORD DENNING MR in *Fellowes & Anor v Fisher* [1975] 2 All ER 829 (CA) at 836g-h

are apposite. He said:

"Nevertheless the need for immediate decision is such that the court has to make an estimate of the relative strength of each party's case. If the plaintiff makes out a *prima facie* case the court may grant an injunction. If it is a weak case, or is met by a strong defence, the court may refuse an injunction. Sometimes it means that the court virtually decides the case at that stage. At other times it gives the parties such good guidance that the case is settled. At any rate, in 99 cases out of 100, the matter goes no further."

1987 (2) ZLR p29

McNALLY JA

He went on to give numerous examples in various fields of the law. He was speaking of an injunction, which we call an interdict. But the same principle applies in an interlocutory matter like the present. The interlocutory decision may effectively decide the whole case. Nonetheless the interlocutory question, once raised, has to be decided one way or the other.

I have no doubt that in this case the pre-eminent feature is the very strong probability favouring the right of Voicevale to insist on the completion of its contract. Unless the goods, the subject of the dispute, are attached, Voicevale's *prima facie* right to enforce its contract will disappear. Moreover, that right can be protected best by the courts of this country, because this is where the goods are situated. In that sense it may well be said that Zimbabwe is the most appropriate forum.

In the circumstances, while expressing in passing my regret that there has been so much urgency about this decision that fuller research has been impossible, I have come to the firm conclusion that the learned judge *a quo* was wrong to discharge the rule *nisi*. I would therefore allow the appeal with costs and alter the order of the court *a quo* to read:

- "1. The rule is confirmed and the costs of this application are reserved for decision in the main action.
2. The costs of the storage, insurance and maintenance of the property are to be borne in the first instance by the applicant from the date of attachment."

Manyarara JA: I agree.

Korsah JA: I agree.

Atherstone & Cook, appellant's legal representatives

Winterton, Holmes & Hill, respondent's legal representatives

1987 (2) ZLR p30

S v POLI 1987 (2) ZLR 30 (HC)

Court High Court, Harare

Greenland J

Urgent application to set aside remand order

2 September 1987

Flynote

Criminal procedure - arrest and remand - no reasonable suspicion that accused had committed offence - remand unlawful, even if on bail.

Headnote

Section 13 of the Constitution of Zimbabwe 1980 makes it peremptory that a reasonable suspicion of the commission or imminent commission of an offence should exist before a person can lawfully be arrested, detained or remanded. If no such suspicion exists, even a remand on bail is incompetent.

Cases cited:

Bull v Attorney-General & Anor 1986 (1) ZLR 117 (SC); 1986 (3) SA 886 (ZS)

Deary NO v Acting President of Rhodesia & Ors 1979 RLR 200 (GD)

Bickle & Ors v Minister of Home Affairs 1983 (2) ZLR 400 (SC)

A N B Masterson for the petitioner

A Chikumira for the State

Judgment

Greenland J: In May 1987 the petitioner was arrested and thereafter was periodically remanded "for trial" on allegations of contravening the Exchange Control Act [*Chapter 170*].

During the course of these remands, on at least three occasions, the State led evidence in order to establish that reasonable grounds existed for suspecting that the petitioner committed the offences alleged.

1987 (2) ZLR p31

GREENLAND J

On 10 August 1987, the magistrate, at Harare, in a considered judgment, came to the conclusion that there were no grounds to support the reasonable suspicion referred to herein. He has since amplified that finding to hold that there is no *nexus* between the petitioner and the alleged offences.

In the light of these findings, the learned magistrate correctly applied the ruling of the Supreme Court in *Bull v Attorney-General & Anor* 1986 (1) ZLR 117 (SC); 1986 (3) SA 886 (ZS) and held further:

- (a) that the petitioner could not therefore be deprived of his liberty in terms of remands in

custody; and

- (b) that the petitioner's right to liberty could not be frustrated by a ministerial certificate forbidding bail. (See *Bull supra*.)

He therefore remanded the petitioner for a further two weeks, but afforded him bail in terms of s 106 of the Criminal Procedure & Evidence Act [*Chapter 59*]. The question is: was this further remand competent? It must be remembered that placing an accused person on remand, with or without conditions, is necessarily a limitation or restriction on his liberty and exposes him to arrest on failure to comply. In this case, the petitioner was also exposed to the threat of the estreatment of very substantial bail if he failed to accept this restriction or limitation on his liberty.

Bull supra held that a finding of the absence of reasonable suspicion and the ordering of the release of a subject in consequence thereof does not preclude subsequent prosecution of the subject in respect of the alleged offence. See p 125 of the report (p 892 of the South African report). However it was not held that, in such circumstances, it is proper to remand the accused with or without conditions.

It seems to me that the whole situation is governed by s 13 of the Constitution which provides:

"(4) Any person who is arrested or detained -

- (a) for the purpose of bringing him before a court in execution of the order of a court or an officer of a court; or
- (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,

and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion

1987 (2) ZLR p32

GREENLAND J

of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

In my view this section makes it peremptory that a "reasonable suspicion" of the commission or imminent commission of an offence should exist before an accused person can be arrested, detained or remanded with or without conditions. I see no other construction of the section.

It is also my view that ss 29, 36, 151 and 152 of the Criminal Procedure and Evidence Act, which deal with arrest, detention and postponements of trials respectively, must be read in the light of the provisions of s 13 of the Constitution. It is trite that a statute must be so read. See *Deary NO v Acting President of Rhodesia & Ors* 1979 RLR 200 (GD) and *Bickle & Ors v Minister of Home Affairs* 1983 (2) ZLR 400 (SC).

The result therefore is that it was not competent for the learned magistrate to further remand the petitioner in the light of his findings that there was no reasonable suspicion against the

petitioner, and no *nexus* between him and the alleged offences.

There will be an order in terms of the draft which, in its terms, sets aside the remand of the 10 August 1987, a subsequent remand of 26 August and the bail order.

Reynolds J: agrees.

Coghlan, Welsh & Guest, petitioner's legal practitioners

1987 (2) ZLR p33

ATTORNEY-GENERAL v PHIRI 1987 (2) ZLR 33 (HC)

Court **High Court, Harare**

Reynolds J

Appeal by Attorney-General against grant of bail

7 & 11 September 1987

Flynote

Criminal procedure - bail - refusal of on grounds that accused likely to commit further offences - evidence that he has already done so whilst on bail and has long criminal record - onus on accused to show no likelihood of repetition - test to be applied.

Headnote

The fundamental principle governing the court's approach to the granting of bail is that of upholding the interests of justice. This requires the court, as expeditiously as possible, to fulfil its function of safeguarding the liberty of the individual, while at the same time protecting the administration of justice and the reasonable requirements of the State. The mere possibility of the accused committing further crimes, standing alone, would not be sufficient to outweigh the accused's right not to be deprived of his freedom. However, when to a bad criminal record is added the allegation, on evidence of substance, that the accused committed further and similar crimes when on bail, the matter becomes highly persuasive and cogent. A person who commits crimes while on bail shows a disregard for the rule of law and a contempt for the administration of justice, and the *onus* would be on him to satisfy the court that there is no likelihood of repetition if granted bail.

In examining the conduct in question, the court should not be restricted to a decision as to whether the conduct might be a possible exception to the basic principle that an accused person should not be denied bail unless the administration of justice would be prejudiced by bail being granted. The test should be whether there is a real danger or a reasonable possibility that the due administration of justice will be prejudiced if the

1987 (2) ZLR p34

REYNOLDS J

accused is admitted to bail.

In the absence of exceptional circumstances, it would be irresponsible and mischievous for a judicial officer to allow bail to a person who has given every indication that he is an incorrigible and unrepentant criminal.

Cases cited:

R v McCarthy 1906 TS 657

S v Mhlawli & Ors 1963 (3) SA 795 (C)

R v Milne & Erleigh (4) 1950 (4) SA 601 (W)

Lobel & Anor v Claassen NO 1956 (1) SA 531 (W)

S v Barber 1979 (4) SA 218 (D)

S v Baker 1965 (1) SA 821 (W)

S v Patel 1970 (3) SA 565 (W)

S v Ho 1979 (3) SA 734 (W)

S v Hlongwa 1979 (4) SA 112 (D)

S v Fourie 1973 (1) SA 100 (D)

S v Maharaj & Anor 1976 (3) SA 205 (D)

S v Nangutuuala & Anor 1973 (4) SA 640 (SWA)

S v Ramgobin 1985 (3) SA 587 (N)

R v Phillips (1947) 32 Cr App R 47

R v Gentry (1955) 40 Cr App R 195; [1956] Crim LR 120 (CCA)

Y Omerjee and T B Karwi for the appellant

A P de Bourbon SC for the respondent

Judgment

Reynolds J: This is an appeal by the Attorney-General in terms of s 111A(1) of the Criminal Procedure and Evidence Act [*Chapter 59*] against the decision of a regional magistrate to grant bail to the respondent. The facts leading to the present appeal are that the respondent is alleged to have committed some twenty-two crimes involving acts of dishonesty between 1982 and 1984. He was arrested early in 1984, and was eventually placed on trial in August 1985, on these various charges, mainly in a representative capacity as the managing director of two motor companies which were involved in the criminal acts. That trial is still in progress and is

being heard by the same regional magistrate against whose decision the present appeal has been brought. The respondent was granted bail at the time of his initial arrest in 1984, and has at all times complied with the conditions set, and has even left the country, by agreement, for a period of time. The present appeal does not, therefore, relate to any feared breach of the respondent's duty under the recognizance to return to stand trial, but rather to allegations that have now been made that the respondent, while on bail, and in some instances

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while undergoing the current trial before the regional magistrate, committed numerous additional offences of a similar nature. It is contended by the appellant that in this situation the respondent is likely to commit still further crimes, and by virtue of this fact the regional magistrate erred in granting bail.

The background to the present appeal is that, as a result of the respondent's alleged additional crimes, he was once again arrested in June 1987, and was placed on remand on twenty-eight further counts based on acts of dishonesty. Application for bail was made to a magistrate but was refused. The respondent appealed against that refusal to EBRAHIM J, but the appeal was dismissed. At a resumed hearing of the original twenty-two counts before the regional magistrate, bail was again sought, and this time the application was successful. It is against this decision that the present appeal is lodged.

The fundamental principle governing the court's approach to applications for bail is that of upholding the interests of justice. This requires the court, as expeditiously as possible, to fulfil its function of safeguarding the liberty of the individual, while at the same time protecting the administration of justice and the reasonable requirements of the State. As it was expressed by INNES CJ more than eighty years ago in *R v McCarthy* 1906 TS 657 at 659:

"The Court is always desirous that an accused should be allowed bail if it is clear that the interests of justice will not be prejudiced thereby . . . "

The principle was further expounded by DIEMONT J in *S v Mhlawli & Ors* 1963 (3) SA 795 (C) at 796B, as follows:

". . . the Court must strike a balance between protecting the liberty of the individual and the administration of justice."

(See, too, *R v Milne & Erleigh* (4) 1950 (4) SA 601 (W); *Lobel & Anor v Claassen* NO 1956 (1) SA 531 (W).)

In more specific terms, the main considerations that normally require determination by the Court in such matters are whether an accused:

- a) will appear to stand his trial; or
- b) will carry out any act which may prejudice the ends of justice, such as hampering police investigations, or tampering with witnesses.

There are, of course, many other factors which may guide the court in arriving

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at its ultimate decision, but these are, in general, the most familiar questions requiring resolution.

The present matter goes beyond these more usual considerations, however, and concerns an enquiry as to whether the regional magistrate should have come to the finding that there was no likelihood of the respondent persisting in his unlawful behaviour if granted bail. The powers of this court, in coming to a decision in this respect, are limited. It must be satisfied, before there can be any interference with the regional magistrate's order, that he "exercised the discretion which he has wrongly" (*per* HEFER J in *S v Barber* 1979 (4) SA 218 (D) at 220E; *S v Baker* 1965 (1) 821 (W).)

Mr *Omerjee*, for the appellant, took two main points which are usefully summarized in what was produced as "appellant's submissions". The first such point was that the regional magistrate should not have entertained the application for bail on 31 August 1987, as no new circumstances had arisen subsequent to EBRAHIM J dismissing the respondent's appeal. This proposition was raised before the regional magistrate at the time, and he decided that circumstances had in fact altered in that the appellant's two companies - which had allegedly been involved in the various offences - had by then been sold - or, more accurately, it seems that they were subject to provisional orders of liquidation - and in that situation the respondent could no longer commit any criminal acts through those companies. I will accept, for the purposes of this judgment that this situation did indeed constitute a "new fact" which had not been placed before EBRAHIM J, thereby giving the regional magistrate jurisdiction to hear and determine upon the application.

The second point raised by the appellant was that the respondent's criminal conduct in the past, particularly that relating to offences committed while awaiting trial or during the hearing, "strongly militates against the granting of bail to the respondent". It is this aspect that requires particular examination.

The approach adopted by the regional magistrate was that in view of the fact that the respondent's two companies had been lost to him, he no longer had the opportunity of committing further and similar crimes. In giving reasons for his decision to grant bail, he stated that to refuse to do so "would be akin to shutting the stable door after the horse has bolted." I believe that the magistrate was in error in this respect, and took too superficial a view of the avenues open to the respondent to persist in criminal conduct if released from custody. It appears to be common cause that the respondent is in fact a

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director in yet a third motor company, and if he wished to continue using the same *modus operandi* to commit further crimes, he would have no difficulty in doing so. But this is not really

the point. The issue of importance is whether there is a likelihood that the respondent would persist in his unlawful and dishonest behaviour should he be granted bail, and his exact *modus operandi* would be virtually irrelevant. It seems to me that the regional magistrate misdirected himself in this regard.

It is of note that the appellant did not - and could not in the circumstances - disclose to the regional magistrate that the accused has a considerable record of previous convictions for crimes involving acts of dishonesty. Had this been possible, the regional magistrate may well have come to a different decision.

The question of the relevance of propensity in matters of this nature has received judicial consideration previously, although the cases that I have managed to locate appear to show contrary viewpoints. One such case that bears very similar features to the present matter is that of *S v Patel* 1970 (3) SA 565 (W). In that case the accused was approximately 90 years of age, and was alleged while on bail, to have committed further and similar crimes to those with which he was then charged. He, too, had a considerable criminal record, and had in fact been declared an habitual criminal. In view of his propensity to commit similar offences, and in the light of other relevant features, bail in that case was refused. Other cases along the same lines include *S v Ho* 1979 (3) SA 734 (W) and *S v Hlongwa* 1979 (4) SA 112 (D).

Patel's case was discussed in *S v Fourie* 1973 (1) SA 100 (D), in which it appears that MILLER J took a different approach, finding, according to the headnote, that "an accused person should not be denied bail merely because it appears that he may commit a crime if released from custody". In that case MILLER J did say, in fact, however, at 102H:

"This is not to say that evidence of the accused's past record, or of his conduct while out on bail in another case, is irrelevant and may not be considered. On the contrary, the grant or refusal of bail being, in general, within the discretion of the court, any fact or circumstance which may have some bearing on the result is receivable in evidence and ought to be considered by the Court."

The learned judge then went on to advance the view that relevance and cogency are distinct terms, and if there is no allegation against the accused

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that he is likely to avoid trial by virtue of his "long list of previous convictions", then this record becomes "comparatively weightless in the scales as against the fundamental factors which favour his release pending trial". (See, too, *S v Maharaj & Anor* 1976 (3) SA 205 (D), in which MILNE J agrees with this approach.)

I do not, with respect, consider the two approaches to be wholly incompatible, and I believe that the apparently conflicting opinions are capable of some measure of reconciliation. It is a difference of degree. To quote the well-known passage in Dickens' *Martin Chuzzlewit*, just as "one foul wind no more makes a winter than one swallow makes a summer", so, too, one previous conviction, or an unsubstantiated suspicion against the accused would not indicate that he would be liable to commit further crimes if released on bail (*S v Nangutuuula & Anor* 1973 (4) SA 640 (SWA)). At the other end of the scale, however, the fact that the accused has

sustained a very considerable number of previous convictions must surely act as a serious warning, at least, that he may well offend again. I would accept that the mere possibility of the accused committing further crimes, standing alone, would not be of sufficient cogency to outweigh the accused's right not to be deprived of his freedom. But when to a bad criminal record is added the allegation, on evidence of substance, that the accused committed further and similar crimes while on bail, the matter, in my judgement passes beyond the limits of mere relevance, and becomes highly persuasive and cogent. Whereas the presumption of innocence applies to bail applications, this must not be over-emphasized for the ends of justice would not be served if the accused were to be granted bail when there was some "cognizable indication" that the accused would not abide by the conditions of the bail recognizance. (*S v Fourie supra*; *S v Ramgobin* 1985 (3) SA 587 (N).)

It is my view that a person who commits a similar offence to the one with which he is charged while on bail shows not only a disregard for the rule of law, but contempt for the administration of justice as well. He has, in this situation, and by his own act, forfeited his general rights. In these circumstances, the *onus* would be on the accused to satisfy the court that there is no likelihood of any repetition if granted bail. (See *S v Maharaj & Ors supra* at 209H.)

The Court of Criminal Appeal in the United Kingdom expressed strong views in the comparable case which was cited by CILLIÉ JP in *S v Patel supra* at 567F. This was the case of *R v Phillips* (1947) 32 Cr App R 47. In that case the 23-year-old accused had a bad record. In addition, it was accepted that

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he had committed nine similar offences while on bail. In considering an application for leave to appeal against sentence, the court, consisting of LORD GODDARD CJ and ATKINSON and CASSELS JJA, had this to say at pp 48-9:

"The Court feels very strongly that the applicant ought not to have been released on bail. In cases of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction will entail. Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had. It is an offence which can be committed with a considerable measure of safety to the person committing it. There were three charges against the applicant. With regard to one there was no defence and in the case of another he was actually arrested in the act. Yet in spite of all his previous convictions the applicant was given bail, not once but twice, first pending the hearing before the magistrates and again on committal for trial. To turn such a man loose on society until he had received his punishment for an undoubted offence, an offence which was not in dispute, was, in the view of the Court, a very inadvisable step. They wish magistrates who release on bail young housebreakers, such as this applicant, to know that in nineteen cases out of twenty it is a mistake."

(See, too, *R v Gentry* (1955) Cr App R 195; [1956] 40 Crim LR 120 (CCA).)

I would also wish to comment on a further passage in *S v Fourie supra* at 103H, which deals with what was stated by MILLER J to be "exceptions" to the general principle that an accused person should not be denied bail unless the administration of justice would be prejudiced by the granting of bail. The learned judge accepted that conduct which might endanger the security of

the State or public safety had in other cases been held to be grounds for denying the accused bail (*S v Mhlawli & Ors supra*; *S v Ramgobin supra*). He mentioned that he did not find it necessary to decide whether the number of possible "exceptions" would be limited to the two instances referred to, but was of the opinion that matters of public safety might be included as well. It is my respectful view that the court should not be restricted, when examining the conduct in question, to a decision as to whether it might be a possible exception to the basic principles applicable. The test, in my view, should be

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one of deciding whether or not there is a real danger, or a reasonable possibility that the due administration of justice will be prejudiced if the accused is admitted to bail. If this real possibility exists, then the public is entitled to protection from the depredations of the accused, and bail should be denied to him. In the absence of exceptional circumstances, I believe that it would be irresponsible and mischievous for a judicial officer to allow bail to a person who has given every indication that he is an incorrigible and unrepentant criminal. (*S v Maharaj supra* at 209H; *S v Hlongwa supra* at 113H.)

An important factor which serves to distinguish the cases cited from the position in Zimbabwe is that s 106(3)(c) of the Criminal Procedure and Evidence Act [*Chapter 59*] specifically provides that:

"(3) In any case in which the judge or magistrate has power to admit the accused person to bail, he may refuse to admit such person to bail if he considers it likely that if such person were admitted to bail he would -

...

(c) commit an offence."

To the best of my knowledge no similar provision exists in the statutes of those other countries concerned.

Before concluding it is necessary to refer to two matters raised by Mr *de Bourbon*. The first of these was to the effect that it has at all times been alleged by the State that the great bulk of the offences were committed by the two companies concerned, and the respondent was not, accordingly, liable personally at all. Furthermore, the respondent, personally, could not be alleged to have any propensity to commit "further" crimes, when the crimes in question were allegedly committed by distinct *personae* altogether. I do not consider that there is any substance to this contention. In deciding on the matter of bail the issue is whether the accused - whether in his personal or representative capacity - would be liable to perpetrate any further criminal acts. At all times, as I understand the position in the present matter, the State has alleged that the respondent, as an individual, was responsible for instigating and carrying into effect all the offences charged, even though he acted through his companies.

Mr *de Bourbon* was also concerned as to the prejudice to the respondent that will be suffered if there is any undue delay in instituting proceedings on the "new" charges. This is indeed a valid consideration, particularly in the light

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of the extensive delays already experienced in the original trial, and I will include in my decision an order that this matter be reviewed in six weeks' time. The State should certainly be in the position by then to indicate a date of commencement if it has not already done so (see *S v Maharaj supra* at 209D-E).

In the light of the foregoing, I find that the regional magistrate misdirected himself, and erred in granting bail to the respondent. The appeal succeeds, accordingly, and the order of the regional magistrate granting bail is hereby set aside, and bail is refused to the respondent. This matter is to be reviewed on or before 22 October 1987.

Ziyambi & Partners, respondent's legal practitioners

S v ZVINYENGE & ORS 1987 (2) ZLR 42 (SC)

Court **Supreme Court, Harare**

McNally JA (in Chambers, in terms of rule 5 of the Supreme Court of Zimbabwe Rules 1964)

Criminal application

16 September 1987

Flynote

Appeal - review powers of Supreme Court - need for appeal to be properly before Court before review powers can be exercised.

Criminal procedure - charge - statutory offence - desirability of reference to penalty section.

Criminal procedure - plea of guilty - offences involving possession - dangers of accepting plea tendered by unrepresented accused.

Criminal procedure (sentence) - transfer for sentence to High Court - need for magistrate to investigate full facts relating to conviction.

Headnote

The applicants had been convicted, on their pleas of guilty, of possessing rhinoceros horns in contravention of s 36(1)(b) of the Parks and Wild Life Act 1975. Their cases were transferred to the High Court for sentence, where each accused received the mandatory minimum sentence prescribed by the Act, namely, a fine of \$15 000 or imprisonment for five years. While in prison they had completed the necessary forms for seeking leave to appeal in person, but these forms had apparently been mislaid by officials. Eventually they engaged a legal practitioner who applied, long after their right of appeal had lapsed, for the case to be remitted for trial afresh on

the ground that they had wrongly pleaded guilty.

Held, that the wrong procedure had been adopted, since the Supreme Court's powers of review, and the powers of review of its individual judges, will

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normally be exercised only when the matter is properly before the court by way of appeal. However, in the circumstances and because there was merit in the application, the application should be regarded as one for leave to appeal out of time.

Held, further, that where a crime merely involves possession, the dangers of an incorrect plea of guilty are greater than usual because the accused person may not realise that his state of mind is very relevant. In the instant case, the applicants had admitted that they were wrongfully and unlawfully in possession of the rhinoceros horns - an admission of law, not fact - and they were probably not qualified to make it.

Held, further, that where people are charged with possessing rhinoceros horn, it is undesirable to charge them simply with a contravention of s 36(1)(b) of the Parks and Wild Life Act; reference should also be made specifically to the penalty section, namely s 115(4a).

Held, further, that as a matter of practice a magistrate proposing to transfer a case to the High Court for sentence in terms of s 58 or s 59 of the Magistrates Court Act [Chapter 18] should always investigate the full facts upon which the finding of guilt was made, more particularly when a question of "special circumstances" is involved, for the guidance of the judge who will impose sentence.

Cases cited:

S v Tatsvarei S-19-85 (not reported)

S v Murphy S-95-87 (not reported)

S v Maseko 1986 (2) ZLR 52 (SC); 1986 (4) SA 958 (ZS)

Judgment

McNally JA: It is necessary to say something about the manner in which this matter came before me.

The three applicants were convicted on their plea of guilty in the Magistrates Court, Chinhoyi, of the offence of contravening s 36(1)(b) of the Parks and Wild Life Act, 1975 (No. 14 of 1975) by the possession of two rhino horns. They were then transferred for sentence to the High Court where they received the minimum mandatory sentence of a fine of \$15 000 or, in default of payment, five years' imprisonment with labour.

It seems that they may all have completed the necessary forms in prison seeking leave to appeal in person. However, there is no record in this court of any such applications having been

received. Since they were sentenced on 20 March 1987, their right to appeal has long since lapsed. They are all serving their prison sentences.

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McNALLY J

They became concerned about the lack of response to their appeals, and eventually instructed Mr *Musanga* of Chirunda, Chihambakwe and Partners to represent them. Mr Musanga then initiated notice of motion proceedings. No draft order was filed. The papers merely indicated that the applicants would ask "for the Honourable Court to exercise its powers as conferred by Section 15(d) of the Supreme Court Act No. 28/1982". I should add that the affidavits attached to the notice of motion proceedings made out a case for claiming that the applicants had wrongly pleaded guilty and that the matter should be dealt with afresh on a plea of not guilty.

It seemed to me that the applicants had misconstrued the remedy available to them, but also that there was merit in the claim for a retrial. Accordingly I invited the parties to appear in Chambers before me.

Mr *Chikumbirike* indicated that the procedure that had been adopted was followed because of the decision of this court in *S v Tatsvarei* S-19-85 (not yet reported). Certainly it was said by the CHIEF JUSTICE in that judgment that:

"Where an appellant makes an application to the Supreme Court, as in this case, for the setting aside of a conviction and sentence because of some irregularity which does not appear on the record, the application must be made by way of a notice of motion accompanied by an affidavit containing the evidence of such irregularity or otherwise."

But it is necessary to read that statement in the context in which it was made. It was made in the context of an appeal properly noted. What the learned CHIEF JUSTICE was saying was that along with the appeal there should have been a notice of motion. Compare the procedure followed in the recent case of *S v Murphy* S-95-85 (not reported). I refer in particular to the words of KORSAN JA at p 5 of the judgment:

"In order to allow the appellant to move the court to grant an application for a hearing *de novo*, it was necessary to grant the appellant leave to appeal against conviction so that the court may be seized of the matter."

The procedure followed in the present matter was therefore wrong. Generally speaking this court is a court of appeal. Its powers of review, and the powers of review of individual judges, will normally be used only in circumstances in which the matter is properly before the court by way of appeal.

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I indicated, however, that I was prepared to regard the application as an application for leave to appeal out of time. It seemed to me that there was merit in the application so considered. The delay in noting the appeal was attributable to some breakdown in the system and it is apparent that the applicants have at all times since their sentencing wished to appeal. It seemed to me also that there was substance in the allegations made by the applicants if those allegations

could be proved.

Essentially what the applicants are saying is this. They were approached in their village late in 1986 by persons claiming to be Government officials collecting rhino horns and elephant tusks. These persons said there was a reward for such objects. They left a contact telephone number. Some time later a villager found two rhino horns in his lands. They were old. The second applicant telephoned the number given. Two men, one white and one black, came with them to fetch the horns. On their way to Karoi with the horns the car was stopped at a roadblock. The applicants were arrested but the two men were not.

The applicants claim that they tried to say this in the magistrates court, but they were ignored. There is nothing on the record to show that they made these claims, but they allege the record is defective. Certainly in the High Court they made an attempt to explain how "we were tricked into committing this offence" by certain persons, who, they say, "later turned out to be police who arrested us".

What concerns me most is that in the agreed statement of facts put forward by the police there is reference to the presence of a white man driving the car at the time they were stopped. Yet there is no suggestion that he was arrested. This might, if unexplained, support the applicants' version.

It seems to me that where a crime, as here, merely involves possession, the dangers of an incorrect plea are greater than usual, because an accused person may not realise that his state of mind is very relevant. All the applicants admitted, correctly, in the magistrates court, that they had been in possession of the horns. They admitted they had no permit or licence to do so. Again, this was correct. They admitted that they were wrongfully and unlawfully in possession - an admission of law not fact, which they were probably not qualified to make. Similarly they admitted that they had no lawful right to keep or possess two rhino horns and that they had no defence.

Mr *Devittie*, who appeared for the State, agreed that there was a reasonable

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possibility, sufficient to discharge the *onus* as discussed in *S v Maseko* 1986 (2) ZLR 52 (SC); 1986 (4) SA 958 (ZS), that a miscarriage of justice has taken place. There are two possibilities. The one is that, if this was a "trap" situation, the facts may reveal that there were "special circumstances" in terms of the proviso to s 115(4a) of the Act, in which case a lesser penalty might be appropriate. The second is that, if the facts as alleged by the applicants are accepted, there may be a basis for finding either that they are not guilty or that special circumstances exist, by reason of their ignorance of the law or of the nature of the role that they played.

In all these circumstances, and with the consent of Mr *Devittie* for the State, it seemed appropriate, in the context of an application for leave to appeal out of time, to exercise my powers of review and direct a retrial.

One procedural point should be made. Where, as here, people are charged with possessing

rhino horns, it is in my view undesirable to charge them simply with a contravention of s 36(1)(b) of the Act. Reference should be made specifically to the penalty section, more especially in the case of this Act. This is so because the Act, which has been amended so many times as to make it extremely hard to follow, has in fact a very deceptive penalty section. *Prima facie* s 115(1)(a) is the section. This provides for a fine "not exceeding two thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment". However, as a result of the provisions of Act 35 of 85 there is now a new subs (4a) to s 115 which begins "Notwithstanding any other provision of this section . . .". In the result the possession of rhino horns is punishable not in terms of s 115(1)(a) but in terms of s 115(4a). This provides for far greater (and minimum) penalties, subject to the finding of special circumstances.

Accordingly the charge should read "contravening s 36(1)(b) as read with s 36(2) and 115(4a) of the Parks and Wild Life Act, 1975 (No. 14 of 1975) as amended, in that . . .".

As a matter of practice it is I think also important to say that when a magistrate is proposing to transfer a matter to the High Court for sentence he should always, but most particularly when there is a question of special circumstances, investigate the full facts upon which the finding of guilt is based. It must be remembered that a transfer for sentence in terms of ss 58 and 59 of the Magistrates Court Act results in the convicted person appearing, often months later, in a court where neither the judge nor the prosecutor has any knowledge of the facts apart from what appears on the record. The convicted

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person, often unsworn, then proceeds to set out the details of the offence. His version may or may not be true, but there is usually no basis upon which he can be cross-examined.

The present case is an illustration of the difficulty which then ensues. Clearly in this case, before transferring the matter for sentence, the magistrate ought to have investigated the background to the possession of the horns, so as to provide some guidance for the judge in the sentencing proceedings as to the facts upon which a finding as to special circumstances could be made.

In the light of all these considerations I ordered that the convictions and sentences on all three applicants should be set aside, and that the matter be remitted to the magistrates court for hearing before a different magistrate on the basis of a plea of not guilty. If the applicants are again convicted account should of course be taken of the period they have already spent in prison. The magistrate should also bear in mind the provisions of s 87 of the Parks and Wild Life Act, 1975 Act.

The CHIEF JUSTICE has authorised me to say that he agrees with this judgment.

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S v CHIKORE 1987 (2) ZLR 48 (HC)

Court High Court, Harare

Reynolds J

Criminal review

7 October 1987

Flynote

Criminal law - unnatural offence - what constitutes - "buggery" not part of Zimbabwean law.

Criminal procedure - sentence - bestiality - factors to be considered in assessing sentence.

Headnote

There are three categories of offences involving sexual acts contrary to the order of nature: sodomy, bestiality and a third category into which fall certain residual sexually abnormal acts classified generally as unnatural offences. It is not possible to define with precision what types of sexually deviant acts constitute an unnatural offence, although the nature and number of such acts are more limited than they were. It is an open question whether sexual acts between females constitute unnatural offences. The term "buggery" is not known to our law.

In assessing sentence for offences of bestiality, four considerations should be taken into account: the prevalence of the offence; the character and motivation of the accused; whether others were affronted or corrupted by the offence; and whether any injury was caused to the animal. The list is not exhaustive.

Cases cited:

S v Khumalo & Anor HH-292-83 (not reported)

R v Cloete 1950 (4) SA 191 (E)

S v Pienaar 1970 (1) RLR 112 (AD); 1973 (2) SA 737 (RA)

R v Gough & Narroway 1926 CPD 159

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R v K & F 1932 EDL 71

R v Masuku 1968 (2) RLR 332 (GD); 1969 (1) SA 328 (R)

R v S 1950 SR 14; 1950 (2) SA 350 (SR)

S v Taylor 1971 (2) RLR 55 (GD)

S v Chitima GS-285-81 (not reported)

S v Sibanda HH-377-82 (not reported)

Judgment

Reynolds J: The accused was properly convicted of the offence of bestiality in that he had "a venereal affair with a certain female donkey". He was sentenced as follows:

"9 months' imprisonment with labour of that 3 will be suspended for 5 years on condition accused does not commit an assault unnatural or bestial act for which he is sentenced to imprisonment with labour without the option of a fine."

Several matters arise. Firstly, it is important that judicial sentences are written out in full and are properly punctuated. If not it may well be that the accused or some other court examining the sentence in question will not understand what has been said, and will ascribe an incorrect meaning to the words used. In the present matter the trial magistrate should have inserted (a) "months iwl" after "3"; (b) a comma after "assault", and (c) the words "within that period" after "not" or "act". As it happened, the typist preparing the review case cover seems to have misunderstood the sentence for the endorsement on the cover reads -

". . . assault or unnatural bestial act."

The trial magistrate was asked why part of the sentence imposed had been suspended on condition the accused did not commit an "assault". In reply the magistrate stated that he "considered that bestiality inherently involves aggression notwithstanding that it is committed against a dumb brute." His reply to the query as to what was meant by an "unnatural" act, was, "here the magistrate contemplated in addition to bestiality multifarious acts of buggery".

A principle that has been stressed repeatedly in a long line of cases is that the conditions applying to a suspended sentence must "(a) bear some relationship to the circumstances of the crime which is being punished, and (b) be stated with such precision that the convicted person may understand fully the ambit and extent of the prohibition". (*S v Khumalo & Anor* HH-293-83. See

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REYNOLDS J

too, *R v Cloete* 1950 (4) SA 191 (E); *S v Pienaar* 1973 (1) RLR 112 (AD); 1973 (2) SA 737 (RA).) To my mind the word "assault" as used in the present matter is related to the crime of bestiality in only a remote degree, and I do not think that the magistrate's stated reason for including this wording in the sentence passed is of substance.

Similarly, I am in considerable doubt whether the accused would have understood the particular condition that he should not commit an "unnatural act" within the period specified. The expression does not even have a sexual connotation. It certainly seems most unlikely that he would have "contemplated multifarious acts of buggery" as did the trial magistrate, for that term is not, to the best of my knowledge, known to our criminal law. In fact it is a term used in English law which appears to have derived from the decree of Henry VIII in 1533 that the

"detestable and abominable vice of buggery" was to be a crime cognizable by the secular courts. This term appears to have included the two crimes now known as sodomy and bestiality. The offence called "buggery" was extended and modified by succeeding enactments, and still remains operative in the English law today (Sexual Offences Act of 1956 and 1967).

At no time, however, to the best of my knowledge, has the word "buggery" been employed in our law. In fact, the word used in early Roman-Dutch law was "sodomy" and this term, at that time, encompassed virtually any form of aberrant sexual behaviour. The crimes now known as sodomy and bestiality were included under this term, and some authorities also included acts such as self-masturbation, oral intercourse, lesbianism, and many other such practices. Some jurists even regarded normal coitus between a Jew and a Christian as "sodomy". This very broad base was later narrowed so that any sexual act "contrary to the order of nature" fell into one of three categories. These were sodomy, bestiality, and a third category into which fell certain residual, sexually abnormal acts which were classified generally as "unnatural offences" (see *R v Gough and Narroway* 1926 CPD 159, *R v K & F* 1932 EDL 71). These classifications are still operative today, but the nature and number of acts presently accepted as "unnatural offences" are far more limited than they were. It is in respect of this third category that difficulties arise in modern practice, for it is not possible to define with precision what types of sexually deviant acts constitute this crime. Hunt *South African Criminal law and Procedure* 2 ed includes a definition of an "unnatural offence", but the learned author appreciates the problems of interpretation that arise. As he says (at 276), "the adjective 'unnatural' involves a value judgment varying from country to country, race to race, and age to age: it has

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little if any objective content". In seeking clarification of the term it does not help to contrast an "unnatural act" with a "natural" act. Many acts have been held not to constitute an unnatural offence although the act in question could hardly be described as "natural": for example, sodomy on a female - *R v Masuku* 1968 (2) RLR 332 (GD); 1969 (1) SA 328 (R); oral intercourse (*R v K & F, supra*) one male fondling the private parts of another male (*R v S* 1950 SR 14; 1950 (2) SA 350 (SR)). I have been unable to locate any cases which concern allegedly unlawful sexual acts between two or more females. The question is still open, therefore, as to whether such acts would constitute "unnatural offences" in our law.

From the foregoing it is evident that the limits of the crime called "an unnatural offence" are by no means clear. *A fortiori*, the meaning of an "unnatural act" is even more ill-defined. As BEADLE CJ said in *S v Taylor* 1971 (2) RLR 55 (GD) at 59A:

"An accused person must know exactly what he must or must not do if he is to avoid having a suspended sentence brought into effect."

I am satisfied that the accused in the instant case would have had no true understanding of the term "unnatural act" that was included in the suspended sentence imposed, and would not, accordingly, know what he could or could not do.

To turn to the suitability of the sentence passed in more general terms, there are very few cases of bestiality that have come before the courts. It is possible that this is due to those concerned

feeling so embarrassed and defiled by the incident witnessed that they choose not to report to the authorities. In his lectures in the nineteenth century on the subject of what was then known as "sodomy", Professor van der Keessel, for example, expresses this type of sensitivity. He wrote:

"the turpitude of this unspeakable crime is so great that it ought, it seems, to be passed over in silence rather than to be expounded to the ears of the chaste, and hence many commentators on the criminal law too have merely touched on it with very few words" (Beinart & van Warmelo's translation, at 857).

In our modern and possibly more enlightened and less inhibited society, however, I believe the more likely explanation to be that there are, fortunately, very few persons who are so perverted that they seek to gratify their

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REYNOLDS J

sexual desires in this disgusting fashion. Whatever the reasons, however, it is a fact that there are few reported instances of this crime from which to draw guidance as to sentence. In *S v Chitima* GS-285-81, PITTMAN J considered that a sentence of 12 months' imprisonment with labour, of which six months' imprisonment with labour was suspended, for committing bestiality on a goat was too severe, and he halved the sentence. The learned judge listed four considerations that, in his view, should be taken into account in assessing sentence in such cases. These were -

- (a) the prevalence of the offence;
- (b) the character and motivation of the accused;
- (c) whether others were affronted or corrupted by the offence; and
- (d) whether any injury was caused to the animal.

While stressing that this list is not exhaustive, I would respectfully agree that these all material considerations. See, too, *S v Sibanda* HH-377-82.

The present accused is a young man, and is a first offender. There is nothing on the record before me, apart from the facts of the offence itself, that reflects on his character. This offence is not prevalent in Zimbabwe, and the donkey was not injured. It appears that the accused believed that he was alone when he committed this crime. In these circumstances, I consider that the sentence imposed was excessive, and it is hereby set aside. I am of the view that it is desirable to suspend part of the sentence in this case for reasons, *inter alia*, of personal and general deterrence. I am also of the view that anyone sufficiently depraved to commit the crime of bestiality is liable to commit other sexual crimes as well, and this possibility will be guarded against in the sentence passed.

In the result the sentence of the court *a quo* is substituted by the following:

Six months' imprisonment with labour of which three months' imprisonment with labour is suspended for three years on condition that during that period the accused does not commit any

offence of a sexual nature.

Ebrahim J agrees.

1987 (2) ZLR p53

S v SIMON 1987 (2) ZLR 53 (HC)

Court **High Court, Harare**

Greenland J

Criminal review

7 October 1987

Flynote

Criminal law - indecent assault - elements - consent - whether a defence - appropriate charge where complainant consented to act.

Headnote

Consent on the part of the complainant is a defence to a charge of indecent assault, where the complainant was over the age of sixteen years and bodily harm was not occasioned, intended or likely to be caused by the accused's act. In such cases involving unnatural sexual acts between males, other than sodomy, it may be appropriate to charge the commission of an unnatural offence.

Quaere, whether an unnatural offence was committed in the circumstances of the present case, the facts of which appear from the judgment.

Cases cited:

R v M 1961 (2) SA 60 (O)

R v Curtis 1926 CPD 385

R v M 1947 (4) SA 489 (N)

R v Abrahams 1918 CPD 590

S v C 1965 (3) SA 105 (N)

R v Hattingh 1942 (1) PH H114 (C)

R v McCoy 1952 SR 320; 1953 (2) SA 4 (SR)

R v Matomana 1938 EDL 128

S v Sikunyana & Ors 1961 (3) SA 549 (E)

R v Phiri 1963 R & N 395 (SR)

R v Peverett 1940 AD 213

S v Robinson & Ors 1968 (1) SA 666 (A)

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GREENLAND J

S v D 1963 (3) SA 263 (E)

R v Donovan [1934] 2 KB 498

R v Gough & Narroway 1926 CPD 159

R v S 1950 SR 14; 1950 (2) SA 350 (SR)

Judgment

Greenland J: In this case the accused stands convicted of indecent assault by the magistrate at Harare.

The gravamen of the charge reads:

"... indecently and lasciviously assault[ed] P, a male juvenile there residing, did lie with his body against the body of the said P and did place his penis between the legs of the said P, and did emit semen on his legs, and other wrongs ..."

It is common cause that this form of sexual gratification was achieved on five different occasions between May and June 1987. On each occasion the "complainant" was paid \$2. On each occasion the "complainant" consented throughout.

On these facts the propriety of the conviction needs to be decided. In this respect the assistance of Mr *Drury* of the Attorney General's office is greatly appreciated. His extensive research and submissions, now embodied in written form, are of great assistance.

The first point to be decided is whether or not the acts perpetrated by the accused do, in themselves, constitute indecent assault, ie do these acts have the attributes necessary for the crime in question?

In my view there is no difficulty in this respect. Applying the law it can safely be said that the accused's actions contain the necessary constituent elements of:

- (a) assault, ie application of force to the person of another;
- (b) of an indecent nature, ie using his penis during the application of that force;
- (c) with *mens rea*, ie, he fully intended to use that force for an indecent purpose.

(See Hunt *SA Criminal Law and Procedure* Vol II, 1970 2 ed, at p 494 for definition.)

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Also "no violence need be used or caused; a mere touching suffices" (*R v M* 1961 (2) SA 60 (O) at 61-3); mere pressure is sufficient (*R v Curtis* 1926 CPD 385 at 389-90; *R v M* 1947 (4) SA 489 (N) at 493). As to indecency of the assault itself, see *R v Abrahams* 1919 CPD 590 at 593. Abrahams grabbed a girl by the arm and used disgusting language consistent with an intent to rape.

See also *R v M* 1961 (2) SA 60 (O) - getting into bed with a woman and feeling her breasts; *R v Curtis supra* - touching or playing with a woman's private parts; *S v C* 1965 (3) SA 105 (N) - same situation as in *R v Curtis*; *R v Hattingh* 1942 (1) PH H114 (C) - lifting a woman's dress and/or putting a hand up her dress (see also *R v M* 1947 (4) SA 489 (N) at 493).

The difficulty relates to the fourth requirement of the offence and that is the element of unlawfulness. The crisp question is whether or not the presence of consent excludes unlawfulness thus denuding the accused's actions of criminal character. As stated by Hunt, *supra*, at p 456:

"If there is real consent it deprives the *actus* of unlawfulness . . . consent prevents the *actus* from being *reus*."

See, Strauss "Bodily Injury and Defence of Consent" in (1964) 81 SALJ 179, 332. Also see *R v McCoy* 1952 SR 320; 1953 (2) SA 4 (SR).

The difficulty is that it is not in every instance that consent excludes unlawfulness. On grounds of public policy consent is disregarded in duelling. See *R v Matomana* 1938 EDL 128 (stick fighting); also see *Duelling at the Cape* by ACG Lloyd in (1920) 37 SALJ 258. It is also disregarded where the force applied is dangerous to health: *S v Sikunyana & Ors* 1961 (3) SA 549 (E) and *R v Phiri* 1963 R & N 395 (SR). *A fortiori* a person cannot consent to be killed: *R v Peverett* 1940 AD 213 at 218; *S v Robinson & Ors* 1938 (1) SA 666 (A) at 678.

The relevant factor in all these decisions is the element of serious injury or death. It is considered that it is beyond the power of an individual to consent, in such circumstances, because the State has an interest in preserving life and preventing injury. Consent therefore cannot justify actions which essentially harm the interests of the State rather than those of the individual: De Wet and Swanepoel *Die Suid-Afrikaanse Strafbeg* 4 ed p 95.

The difficulty with the present case is that no physical harm was occasioned, intended or likely. In fact, considering the number of occasions involved, it

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must be accepted, as a matter of probability, that the acts were of mutual pleasure or satisfaction. The "complainant" hardly qualifies as such, hence the quotation marks. Had the "complainant" been under the age of 16 years the position would have been resolved by statute. Section 12 of the Criminal Law Amendment Act [Chapter 58] provides:

"12. It shall be no defence to any charge of indecent assault on a person under the age of sixteen years to prove that he or she consented to such indecent assault."

At the relevant time the "complainant" was sixteen years of age. This factor was not established at the trial. The State has now furnished the age of the complainant. I decided to establish this factor in this way rather than remit the matter back to the trial court because, in the circumstances, such remittal would prejudice the accused. He has already served a period of imprisonment in excess of any period which a court would consider imposing even if it were decided that he is guilty of the crime.

Now, according to some cases the law will not recognise consent as a defence, if the act consented to is "*malum in se*". See *R v McCoy supra*; *S v Sikunyana supra*; and *S v D* 1963 (3) SA 263 (E), each following *R v Donovan* [1934] 2 KB 498. A reading of *McCoy supra* reveals that "*malum in se*" was equated with "a criminal act": see p 323 (p 8C-E of the South African report). The court held that the assault was "*malum in se*", ie, a criminal act, since "those blows were likely or intended to do bodily harm". It was simply not concerned with any supposed inherent immorality in the act complained of, which involved the caning on the buttocks by a male superior of a female junior employee. A reading of *Sikunyana supra*, reveals that again "*malum in se*" was equated with "a criminal act", which latter act is constituted if the assault involves bodily harm or the likelihood thereof. Again the court was not concerned with any questions of inherent immorality.

More to the point is the case of *S v D supra*. In that case the accused was charged with indecent assault in that he touched or stroked the complainant's private parts. The court had no hesitation in holding, at p 265G:

"...if the act complained of, although of an indecent nature, does not involve the infliction of bodily harm, consent is a good defence to a charge of indecent assault based on such act (see *R v Taylor* 1927 CPD 16 and *R v P* 1960 (1) PH H159)."

1987 (2) ZLR p57

GREENLAND J

This decision is therefore authority for the additional proposition that "*malum in se*" is not related to any question of inherent or actual immorality, whatever it may mean. In the present case, the only possible objection to the act complained of is this question of immorality.

Should this court refuse to recognise consent because of the essentially objectionable and apparently immoral character of the accused's actions, there having been no question of possible physical harm or danger to the "complainant"? Put another way, should this court now extend the "*malum in se*" concept to situations involving, not physical harm, but harm to or corruption of character or morals? As argued by SA Strauss, (1964) 81 SALJ 336, there may be cases in which, although no bodily harm is involved, the parties' activities so fundamentally breach *boni mores* that consent should not be recognised. He contends that homosexual and other unnatural acts between males fall into this category. Of this approach Hunt, *op cit*, has this to say at p 495:

"Logical though this approach is, it is unlikely to gain acceptance. The courts are content to punish unnatural sexual conduct *eo nomine*, not as assault, unless bodily harm and it is submitted, fairly serious bodily harm, is

involved. [*R v Taring*, 1939 (2) PH H176 (SR); *R v P* 1960 (1) PH H159 (O); *S v D* 1963 (3) SA 263 (E) at 265. Cf *R v Petersen* 1910 TPD 859 at 867.]"

I agree with Hunt and I am persuaded by the approach in the precedents cited. To accept the *contra bonos mores* approach advanced by Strauss is to involve this court in a new concept of precarious, difficult and controversial parameters unnecessarily.

There is already a basis in law for tackling the problem. This is under the general heading of "unnatural sexual offences". As stated by Hunt, *op cit*, at p 267-8, citing authority, sodomy and bestiality are thus charged under this general heading. He goes on to state (p 268):

"There seems to be no doubt also that the crime (*venus monstrosa*) included unnatural acts between males which occurred without penetration of the anus."

In the case of *R v Gough & Narroway* 1926 CPD 159 the court held that to "insert his penis between the thighs of the said T (a male) and move it backwards and forwards until he . . . had an emission of semen", though not

1987 (2) ZLR p58

GREENLAND J

amounting to sodomy, constitutes an offence in Roman-Dutch Law. A conviction for having committed an unnatural offence was upheld on the basis of authorities in the old Roman Dutch Law. This decision has since been referred to in a number of cases without question.

In the case of *R v Curtis* 1926 CPD 385 it was held, following the principles set out in *R v Gough & Narroway supra*, that for a male to obtain sexual gratification by friction with the hand of another male constituted committing an unnatural offence. Compare the Southern Rhodesian case of *R v S* 1950 SR 14; 1950 (2) SA 350 (SR) where the court was not prepared to hold that the mere "touching by a male" constituted an unnatural offence. In reaching that conclusion the court did not disapprove of *R v Gough* and *R v Curtis supra*.

It is concluded therefore that the facts in the present case do not support a charge or conviction of indecent assault as consent was present throughout. It would have been appropriate to charge the commission of an unnatural offence. In such event the adjudicating court would be in a position to decide whether, in the light of present day values, morals and circumstances, the offence is disclosed on the facts.

The conviction is therefore quashed and the sentence set aside.

Sandura JP agrees.

1987 (2) ZLR p59

S v CHIWAMBUTSA 1987 (2) ZLR 59 (SC)

Court **Supreme Court, Harare**

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Dumbutshena CJ, McNally JA & Manyarara JA

Criminal appeal

8 October 1987

Flynote

Criminal procedure - remittal - mental state of accused not properly investigated in trial court - error of judgment of legal representative in not calling available evidence - remittal ordered.

Headnote

The appellant had been convicted of murder and sentenced to death for an apparently irrational killing. Although medical evidence that he was not certifiable under the Mental Health Act 1976 had been led in the form of affidavits from two psychiatrists at the trial, this was not helpful, and there was evidence available as to his family history which suggested mental instability, which evidence the appellant's counsel ⁽¹⁾ had not seen fit to place before the trial court. This might have altered the opinion of the psychiatrists had they been aware of it.

Held, that there was a sufficiently strong case for re-opening the matter on the question of the appellant's mental state to warrant a remittal, despite the general rule that an error of judgment on the part of a legal representative will not normally justify such a course.

Held, further, that even though an accused person may not be certifiable under the Mental Health Act, his mentality and the possibility of his suffering from diminished responsibility are very important factors, particularly in a murder case, to enable the court to decide on the appropriate sentence. It would be helpful to the courts if psychiatrists were to examine accused persons with this in view.

The conviction and sentence were accordingly set aside and the case remitted

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for further evidence as to the appellant mental state when the crime was committed.

Cases cited:

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

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

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

S v Chitiyo 1987 (1) ZLR 235 (SC)

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

R v Muruven 1953 (2) SA 779 (N)

R v Habib 1965 (2) SA 37 (RA); 1964 RLR 609 (A) (sub nom *Habib v Attorney-General*)

Miss *S Mukonoweshuro* for the appellant

T B Karwi for the respondent

Judgment

Dumbutshena CJ: The appellant was convicted of murder with actual intent and without extenuation. He was sentenced to death. He now appeals against the sentence of death. By notice of motion the appellant applies for leave of this court to lead further evidence.

The facts of this case are briefly as follows: The appellant was employed by the Zimbabwe National Army's Intelligence Corps. Prior to 31 August 1984 the appellant, together with members of the Central Intelligence Organization, and the Zimbabwe Republic Police's Internal Security and Intelligence (PISI) assembled at Guinea Fowl near Gweru. They were briefed and instructed on combined intelligence operations which they were going to carry out against dissidents in the Gokwe area. They were to gather security information and intelligence and pass them to the police and army. They were told not to engage the dissidents. Their duty was to report the presence of dissidents they sighted. They were issued with pistols for their own protection. The pistols were to be used in the event of unexpected encounters with dissidents. They were told not to shoot at dissidents they met but to point pistols at them and order them to surrender. If they did not surrender only then were they to shoot first in the air. If the dissidents refused to surrender only then were they to shoot to kill. These instructions, if followed, would enable them to arrest dissidents.

On 31 August 1984, the appellant and his colleagues left Guinea Fowl for Lutope Police Base in the Gokwe area. They arrived there at 1 pm. According to the evidence adduced by State witnesses, Josiah

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DUMBUTSHENA CJ

Mbengeranwa, the deceased, welcomed the group from Guinea Fowl. He took them on a familiarization tour of the camp. He then invited any one of them to accompany him to the water pump. He took his FN rifle. Kahari, a member of the group from Guinea Fowl, accompanied him. The deceased and Kahari walked back to the camp from the water pump. They were met by the appellant who fired at and shot the deceased.

The appellant denied meeting the deceased in the camp or being taken on a tour of the camp. He denied knowing Kahari although Kahari was at Guinea Fowl and travelled with him to Lutope Police Base. The appellant said he shot and killed the deceased because he thought he was a dissident. He testified that he was five to six paces from the deceased at the time he shot him. The deceased shouted to him: "Do not shoot me. I am a policeman". Yet the appellant continued to shoot.

This aspect of the evidence raises some doubts about the state of mind of the appellant. The deceased was carrying a rifle. Kahari was not. They were walking towards a police camp. They

were not hiding. They were not afraid. What kind of dissidents would walk into enemy territory at day time and in the full glare of the police at the camp? If one remembers that the deceased welcomed the group from Guinea Fowl and took them around the camp showing them the various aspects of the camp, one cannot understand how he could be mistaken for a dissident by someone who was in the group.

I appreciate that at his trial there was affidavit evidence adduced by doctors on his state of mind. But that evidence, Exhibits 6 and 7, is far from satisfactory. There are now affidavits sworn by people who have worked and lived with the appellant and who know the history of his family. These people say all is not well with him. The evidence contained in the sworn affidavit of Regimental Sergeant Major Nyakwima, Tabetha Chiwambutsa and WC Simero ought to have been led at this trial. It might have assisted the court in understanding the appellant's state of mind. The deponents' observations and experiences with the appellant raise questions which cannot be answered without hearing further evidence and without further examination of the appellant by psychiatrists who, in the light of the new evidence, should be able to assess the state of his mind. As it is, the affidavits of Dr Vermeulen and Dr Braganza Menezes are not helpful. I feel that had the two psychiatrists interviewed Tabetha Chiwambutsa and RSM Nyakwima they might have formed different opinions. They might have come to a different conclusion. I cannot suggest that the appellant suffers from some mental disability or a diminished sense of responsibility. I am not qualified to give an opinion on

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DUMBUTSHENA CJ

that. However, that possibility was not eliminated. It remains. What the courts require in cases such as this is a medical examination which not only meets the requirements of the Mental Health Act but goes beyond establishing that the person is or is not "mentally disordered or defective". The problem the court's would like to explore is more than what is required by the provisions of the Act. I need not add more to indicate what the courts want because it was aptly expressed by BEADLE CJ in *S v Sulpisio* AD-104-71 (not reported) at 4:

"A man may not be certifiable under the Mental Disorders 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 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."

See *S v Makaka* S-25-87 at 4, *S v Taanorwa* 1987 (1) ZLR 62 (SC) and *S v Chitiyo* 1987 (1) ZLR 235 (SC).

The results of the medical examination we require may or may not benefit the appellant. It may be the doctors will say he is mentally disordered or defective or suffers from a sense of diminished responsibility or other moral or personality defect short of insanity. The factor found by a medical examination may establish the existence of extenuating circumstances. That is good enough for purposes of the court's decision.

In *Chitiyo's* case *supra* I expressed it in this way:

"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., However, that personality change made him less responsible. Doctor Vermeulen, who

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DUMBUTSHENA CJ

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 (AD) 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'."

Factors such as diminished responsibility, personality change, persecution mania or other mental or personality defects may reduce the moral culpability of an accused. It would be helpful to the courts were psychiatrists to examine accused persons with this view.

We agree with Miss *Mukonoweshuro* that this case should be remitted to the High Court for further evidence. It is not clear why the evidence sought to be adduced at the reopened trial was not led. Mr *Gwati*, who represented the appellant at his trial, says in his affidavit that some of the deponents of the affidavits filed of record in the notice of motion were present at the court. The fact that the appellant denied having had in the past any mental illness was not the important issue. What was important was that there were people who were prepared to testify to that effect. It was unfortunate that they were not called. In cases like this the rule that is set out in *R v Muruven* 1953 (2) SA 779 (N) applies. BROOME JP put it thus at 780E-F:

"Now the general rule is that a litigant is bound by what is done by his

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DUMBUTSHENA CJ

representative. I do not say that this rule is entirely inflexible, but it is clear that a very strong case must be made before a decided case can be re-opened on the ground of an error of judgment on the part of the legal representative. But for that, there would be a lack of finality about court judgments which would be entirely against the public interest. In the present case there appears to be nothing which can take the matter beyond the scope of the general rule. The evidence was available at the time of the trial and the applicant's representative deliberately

decided that he would not call it."

In the instant case the most important piece of evidence, that of Tabettha Chiwambutsa, his maternal grandmother which, as Miss *Mukonoweshuro* rightly submitted, "raises the question whether or not the applicant has inherited a mental disorder from his maternal family . . . " should have been led. It was not. If the family history had been put before the psychiatrists I believe they would not have ignored it because it puts a different complexion on the appellants mental state. In my view there is a strong case which will take the case "beyond the scope of the general rule". Tabettha Chiwambutsa's evidence became known subsequent to the conviction and sentence and adds weight significantly to the reasons why this case should be remitted to the trial court. See *R v Habib* 1965 (2) SA 37 (RA) at 37G; 1964 RLR 609 (AD) at 610H-I (reported sub nom *Habib v Attorney-General*).

Mr *Karwi*, who appears for the respondent, agrees for the reasons I have outlined above, with the order we proposed to make at the end of hearing the application. We then made the following order:

"The application for leave to lead further evidence is allowed.

Both conviction and sentence be and are hereby set aside. That prior to the rehearing of this matter a full examination of the appellant be made in terms of s 27 of the Mental health Act, No. 23 of 1976, with a view to determining as precisely as possible what his mental state was when he committed this crime, and in particular whether he could be regarded as a man suffering from some mental disorder or diminished sense of responsibility, having regard to the new evidence deposed in the affidavits of Tabettha Chiwambutsa, Eliah Nyakwima and Thomas Simero.

Leave is given to both the State and the defence to lead any further evidence relevant to the issue of the appellants mental state.

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DUMBUTSHENA CJ

That this matter is remitted to the High Court for the purpose of receiving the aforementioned further evidence and of deciding afresh upon the matter of conviction and sentence in the light thereof."

McNally JA: I agree.

Manyarara JA: I agree.

Pro Deo

1987 (2) ZLR p66

S v NYANDORO 1987 (2) ZLR 66 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Manyarara JA

Criminal appeal

8 October 1987

Flynote

Criminal procedure - plea - accused should plead personally - counsel should not tender plea unless confirmed by accused.

Evidence - murder - defence evidence - accused not to be allowed to acquiesce in conviction without leading evidence to establish intent.

Headnote

Accused persons should plead personally to an indictment, and counsel should not tender a plea on their behalf unless the accused are asked whether they agree with the plea and confirm it.

The appellant's counsel tendered a plea of guilty to murder with actual intent, and then informed the court that the defence was not calling any evidence "apart from the defence outline". In fact, in the defence outline, the appellant had clearly stated that he did not intend to kill and had aimed a shot at the deceased to frighten him away. The appellant was not called by his counsel to testify and was convicted of murder with actual intent and sentenced to death without any evidence being led for the defence.

Held, that no person should face a conviction of murder with actual intent without evidence from the defence to establish whether the offence was committed with actual or constructive intent.

Held, further, that there had not been a fair trial and justice was not done. The conviction and sentence must be set aside and a new trial ordered before a different judge and with a different legal practitioner to represent the appellant.

1987 (2) ZLR p67

DUMBUTHSHENA CJ

Cases cited:

R v Chinowaita & Ors 1967 RLR 54 (AD); 1967 (2) SA 494 (RA)

S v Mpongoshwe & Anor 1980 (4) SA 593 (A)

S v Yantolo 1977 (2) SA 146 (E)

G S Wernberg for the appellant

T B Karwi for the respondent

Judgment

Dumbutshena CJ: The appellant was charged with murder. He pleaded as follows: "I understand the charge I plead guilty to the charge." The trial judge asked his legal practitioner:

". . . is that in accordance with your instructions?" The reply was: "That is correct". Q: "That is a plea of guilty to murder with actual intent?" A: "Yes".

The learned trial judge properly entered a plea of not guilty. However, what went wrong was that the appellant did not plead guilty to murder with actual intent. His legal representative tendered that plea and the appellant was never asked whether he agreed with what his legal representative had said. The appellant was found guilty of murder with actual intent and without extenuation. He was sentenced to death. Against that decision he now appeals.

As a matter of procedure counsel who appear for the accused should not tender pleas on behalf of their clients. The accused should be called personally to plead.

See *R v Chinowaita & Ors* 1967 RLR 54 (AD) 15 55H; 1967 (2) SA 494 (RA) at 495A and *S v Mpongoshe & Anor* 1980 (4) SA 593 (A).

If, after an accused has pleaded not in accordance with his instructions to his counsel, and counsel suggests a plea that conforms to his instructions, the court should find out from the accused whether he agrees with his counsel's assertions as to what his plea should be. The right for counsel to tender his client's plea vicariously and according to his client's instructions is a valid one provided the accused confirms the plea. That right is limited only by the right of his client to know what is being pleaded on his behalf and more importantly to agree or deny the plea tendered by his counsel on his behalf.

In the instant case it is true that the appellant pleaded guilty to murder. It is clear, however, that he did not plead guilty to murder with actual intent. His counsel told the court that that was what he was pleading to.

The learned trial judge proceeded to record a plea of not guilty as is the

1987 (2) ZLR p68

DUMBUTHSHENA CJ

practice. That practice is there to allow the court to hear evidence on the various elements which constitute the crime of murder with actual intent or constructive intent or culpable homicide.

It was unfortunate that the appellant's counsel, for reasons best known to himself, did not call the appellant to give evidence on his own behalf or call witnesses, if any were available. Murder is a very serious offence carrying the ultimate sentence of death. No person should face a conviction for murder with actual intent without leading evidence. His evidence will either establish the intention with which he committed the offence or negative any intention. In this case no evidence was led to establish whether the appellant committed the offence with actual intent or with constructive intent.

The court relied on the appellant's warned and cautioned statement and ignored his defence outline. This attitude was no doubt induced by defence counsel's statement:

"The defence is not calling any evidence apart from the defence outline."

This is an unacceptable remark. The defence outline is not evidence. It is merely an outline of what the evidence will be. Unsupported by evidence or admissions, it is nothing. The statement by defence counsel was meaningless. It was not clarified by the court's comment:

"You are tendering the defence outline as admissions?"

A: Yes."

What was overlooked both by the court and by defence counsel was that the defence outline clearly put forward an allegation of lack of intent, or certainly of actual intent. It contains two very important statements: "I did not intend to kill anybody" and "I fired a shot at him to frighten him away".

How could counsel possibly say that his client was pleading guilty to murder with actual intent when the defence outline contained those statements? Without some clear explanation as to why this defence attitude was abandoned we cannot be satisfied that the appellant had a fair trial.

The only course open to this court is to set aside both conviction and sentence. They should not be allowed to stand.

1987 (2) ZLR p69

DUMBUTHSHENA CJ

See *S v Yantolo* 1977 (2) SA 146 (ECD) at 149G-H. Justice was not done.

Accordingly at the hearing we set aside both conviction and sentence and remitted the case to the High Court for a new trial before a different judge and with a different legal practitioner to represent the appellant.

McNally JA: I agree.

Manyarara JA: I agree.

Pro Deo

1987 (2) ZLR p70

PAHLA v PAHLA 1987 (2) ZLR 70 (HC)

Editor's Note:(2)

Court **High Court, Harare**

Adam J

Civil trial

28, 29 & 30 September & 14 October 1987

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Flynote

Family law - divorce - award of maintenance following - existing order for maintenance granted by magistrates court - whether such order must be discharged before High Court may award maintenance - Matrimonial Causes Act 1985 - s 7.

Headnote

There is no rule of law that, where a magistrates court has made an order for maintenance, the High Court is precluded from making a further order until the order of the magistrates court has been discharged. The Matrimonial Causes Act 1985 specifically empowers the High Court to make orders for maintenance following divorce. If the court does so, its order supplants the order made by the magistrates court, which would be from that time discharged.

Cases cited:

Marufu v Moyo 1983 (2) ZLR 386 (SC)

Kirk v Kirk 1969 (2) RLR 328 (GD)

Russell v Russell [1956] 1 All ER 466 (CA)

Kilford v Kilford [1947] 2 All ER 381 (PDA)

Joseph v Joseph 1958 R & N 500; 1958 (4) SA 268 (SR)

D W Aitken for the plaintiff

G S Wernberg for the defendant

1987 (2) ZLR p71

ADAM J

Judgment

Adam J: The plaintiff seeks an order against the defendant: (a) for a decree of divorce; (b) for custody of the four youngest minor children and maintenance for them at the rate of \$100 per month for each child until the age of 18 years or when the child becomes self-supporting, whichever is the sooner; (c) that the defendant retains the plaintiff and all the minor children at his expense as beneficiaries on his medical and dental aid scheme and that he pays any necessarily incurred shortfalls for medical or dental treatment as long as he is obliged to pay maintenance; (d) that the defendant pays all school fees together with the cost of school uniforms and any other necessary expense pertaining to schooling for the minor children until they have completed their full time secondary education; (e) for the division of assets in terms of s 7 of the Matrimonial Causes Act No. 33 of 1985, so that the plaintiff receives no less than fifty per cent of them in value; (f) for the maintenance for the plaintiff herself at the rate of \$250 per month until death or remarriage; (g) for costs of suit.

The plaintiff commenced action with summons filed on 4 September 1986. The plaintiff and the defendant entered into a Christian Rites Ceremony in India in June 1967. The parties were

married on 30 July 1967 in Mutare and have regarded Zimbabwe as their home. There are six minor children, namely Solan, Rampion, Lurch, Ulysses, Randomly and Merlon, of the marriage.

The defendant agreed to retain all the minor children and the plaintiff at his expense as beneficiaries on his medical and dental aid scheme for as long as he was obliged to pay maintenance. He also agreed to pay all school fees together with the cost of school uniforms and any other necessary expenses pertaining to schooling for the four youngest minor children until each child had completed his full time secondary education.

The plaintiff's declaration states that the marriage relationship has broken down irretrievably and that there is no reasonable prospect of reconciliation. Since 30 October 1983 the parties have not lived together. The plaintiff's declaration alleges that the defendant has assaulted her; threatened her with a knife to her throat; falsely accused her of conducting affairs with other men; used foul and abusive language, to her distress; persistently refused to abide by the custody order for the four youngest children given to her by the magistrate's court and to pay maintenance for the four youngest children and for herself as ordered by the magistrate's court; and failed to show her proper love, affection and consideration. The declaration asserts that it is in the best interest of the four youngest children that she be awarded custody of them.

1987 (2) ZLR p72

ADAM J

The defendant's plea denies the plaintiff's allegations and avers that the defendant has never accused her of having affairs with other men apart from simply alleging on reasonable grounds that she was having suspicious associations with her friends and other men and that it was the plaintiff that has failed to show him proper love, affection and consideration. The defendant denies that it is in the best interest of the minor children that she be given custody of them. Also, the defendant's counter-claim indicates that the parties' marriage has broken down irretrievably in that the plaintiff has during the subsistence of the marriage treated the defendant with such cruelty that normal marriage relationship could not be continued, in that the plaintiff provoked arguments, often left the matrimonial home without his knowledge and behaved towards him in such a manner that she must be mentally ill.

At the trial the defendant abandoned his counterclaim for divorce on the grounds that the marriage had broken down irretrievably. He also abandoned the order sought in his replication filed on 4 February 1987, claiming that the plaintiff be ordered to undergo psychiatric counselling.

The plaintiff during the trial called Patrick Rideway and gave evidence herself. The defendant gave evidence himself.

[The learned Judge analysed the evidence and continued:]

I am satisfied on the evidence I heard that the plaintiff has established that the marriage relationship between the parties has broken down irretrievably. I now turn to the issue of custody and maintenance for the four youngest children.

The Matrimonial Causes Act, 1985 (No. 33 of 1985), provides under ss 7, 9 and 10 as follows:

"7. (1) Subject to the provisions of this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, the court may make an order with regard to -

- (a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;
- (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.

1987 (2) ZLR p73

ADAM J

(2) The power of the court to make an order in terms of paragraph (a) of subsection (1) shall not extend to any assets which are proved to the satisfaction of the court to have been acquired by a spouse, whether before or during the marriage -

- (a) by way of an inheritance; or
- (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
- (c) in any manner and which have particular sentimental value to the spouse concerned.

(3) In making an order in terms of subsection (1) the court shall have regard to all the circumstances of the case, including the following -

- (a) the income, earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
- (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
- (d) the age and physical and mental condition of each spouse and child;
- (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
- (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of dissolution of the marriage;
- (g) the duration of the marriage;

and in so doing the court 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 marriage relationship continued between the spouses.

. . .

9. Without derogation from the provisions of the Maintenance Act [Chapter 35], the court may, on good cause shown, vary, amend, suspend or rescind an order made in terms of section seven, and the provisions of subsections (2) and (3) of that section shall, *mutatis mutandis*, apply in respect of any such variation, amendment, suspension or rescission.

ADAM J

granting any decree of divorce, judicial separation or nullity of marriage, may require evidence to be produced by either party for the purpose of determining whether or not proper provision has been made for the custody and maintenance of such children.

(2) The court may after hearing evidence referred to in subsection (1) -

- (a) commit the children into the custody of such of the parties or such other persons as the court may deem best fitted to have such custody;
- (b) make an order in terms of section seven for maintenance of the children.

(3) The provisions of this section shall not be deemed to derogate in any way from the powers conferred upon the court by any other law in respect of custody and maintenance of children."

[His Lordship dealt with the question of custody of the children, and continued:]

The plaintiff seeks maintenance for the four youngest minor children in the amount of \$100 per month for each child and \$250 per month for herself. The *onus* is on the plaintiff to establish some alteration in the means or circumstances of herself and the defendant before a court can order an increase in the maintenance: *Marufu v Moyo* 1983 (2) ZLR 386 (SC) at 387. Before the magistrates court in April 1986 the plaintiff sought \$614 for herself and the three youngest minor children. Beside the sum of \$100 per month for giving yoga lessons and deriving some income from sale of old clothes, it seems she did not indicate her exact monthly income. The defendant's declared salary was \$10 000 per annum. The magistrates court gave a total of \$320 per month for maintenance for herself and the three youngest minor children. In August 1986 the defendant's net salary was said to be \$800 per month and his occasional consultancy work gave him \$150 to \$200 per month. The plaintiff's net income was shown as about \$300 per month. She sought a little bit more than \$80 for Ulrich but the magistrates court gave \$80 per month for Ulrich's maintenance.

In her evidence, the plaintiff stated that she earned \$300 per month, while the defendant stated that his net income was \$1 100 or \$1 200 per month.

[The judge dealt with the parties' expenses and continued:]

It has been stated that the effect of inflation can be regarded as a factor

ADAM J

justifying variation of a maintenance order. In *Marufu v Moyo supra*, at 388 C-D GEORGES CJ said:

"While it is true that inflation affects both the husband and the wife, if it can be shown that the husband's income allows some room for an increase taking into account his reasonable expenditure then it would be justifiable to

hold that there has been an alteration in circumstances justifying a variation."

It seems that the sum of the items listed by both parties are excessive. Further, it is clear that the court has not been provided with the exact financial status of the defendant. However, I am satisfied that there has been an alteration in circumstances.

No reasons have been advanced by the defendant which would indicate that the magistrates court in April 1986 had erred in denying him custody. I am satisfied on the evidence given that the plaintiff is best fitted to have custody of the four youngest minor children. I have given careful consideration to the feelings of the children who have shown great affection for both parents.

In *Kirk v Kirk* 1969 (2) RLR 328 (GD) at 329 LEWIS J (as he then was) held that as far as maintenance for minor children after divorce was concerned, the court should not make an order where there already exists an order of the magistrates court pertaining to maintenance. He said that the magistrates order should be discharged before the High Court could substitute its own order. However, in *Russell v Russell* [1956] 1 All ER 466 (CA) at 471 JENKINS LJ made reference to *Kilford v Kilford* [1947] 2 All ER 381 (PDA), (a case referred to in *Joseph v Joseph* 1958 R&N 500; 1958 (4) SA 268 (SR), which was relied on by LEWIS J in *Kirk's* case) and observed:

"These cases are directed merely to the proper practice to be followed and the most convenient course to be taken in cases where there are divorce proceedings after the justices have made an order for maintenance. We were referred to no statutory provision and to no authority to suggest that as a matter of law, as distinct from a matter of practice and of convenience, it would be wrong in all circumstances for the Divorce Court to entertain an application for maintenance without first requiring the discharge of a justices' order."

In fact, LEWIS J was of the view that it was most desirable to have total liability for maintenance after divorce to be dealt with in one comprehensive order of

1987 (2) ZLR p76

ADAM J

the High Court. The decision of LEWIS J in *Kirk v Kirk supra*, is highly persuasive but it is not binding upon me. I am persuaded that the proper position is that expressed by JENKINS LJ. Further, the Matrimonial Causes Act, 1985 makes specific provisions on this point and empowers the High Court to make orders pertaining to maintenance. In such matters the order of the High Court supplants the magistrate's court order and it would from that date be in fact discharged.

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

DW Aitken & Co, plaintiff's legal practitioners

Ziyambi & Ziyambi, defendant's legal practitioners

1987 (2) ZLR p77

BORROWDALE COUNTRY CLUB v MURANDU 1987 (2) ZLR 77 (HC)

Court High Court, Harare

Mtambanengwe J

Notice of motion proceedings

8 & 21 October 1987

Flynote

Costs - legal practitioner and client scale - unreasonable and reprehensible conduct on part of unsuccessful party.

Headnote

Whilst the courts will not lightly accede to a prayer for an award of costs on a legal practitioner and client scale, such an award will be granted where the unsuccessful party's conduct has been completely unreasonable and reprehensible. In the present case, the respondent's attitude had been that of a man who has deliberately and stubbornly refused to bring a dispassionate mind to bear on the dispute, which could have been resolved quite amicably and inexpensively if he had showed the slightest co-operation. In such circumstances it was quite unfair for the successful party to be put out of pocket in the matter of costs.

Case cited:

C & Anor v Controller of Customs and Excise 1972 (2) RLR 403 (GD)

J B Colegrave for the applicant

G C Chikumbirike for the respondent

Judgment

Mtambanengwe J: The only issue in this matter is the scale of costs of the action which was brought to restrain the respondent from entering upon, ploughing, planting or in any way cultivating any part of applicant's land; and to compel the respondent to return a portion of applicant's land, previously in dispute, to its original condition and replace the boundary fence, and for costs against respondent on a legal practitioner and client basis.

1987 (2) ZLR p78

MTAMBANENGWE J

The application was originally launched on 6 November 1986 and the original draft order sought to interdict and restrain respondent from entering upon, ploughing, planting or in any way cultivating the disputed land, to compel him to return the land to its original condition and to permit a land surveyor to carry out his duties and replace or locate beacons marked A and B on Survey Diagram SG 71/68 and costs, including the costs of a land surveyor. These orders were sought to stand as a temporary interdict, apparently pending the settlement of the border

dispute. That application was by consent postponed *sine die* on 19 November 1986.

A relevant consideration in deciding the issue of costs in this matter is what had happened up to the stage of the launching by the applicant of the application, ie November 6 1986. It should be noted that the respondent at no time filed any papers in reply to the applicant's claim as originally filed nor as finally filed, except notices of opposition. He eventually contented himself with appearance by his legal practitioner to oppose the claim for costs on the scale claimed by the applicant. Another relevant consideration is the fact that up to 17 September 1987 when the applicant's second affidavit was filed, the dispute seems not to have been resolved hence the prayer for orders (a) and (b) in the applicant's draft order. At the hearing the court was advised that orders (a) and (b) had fallen off meaning that the respondent had at long last moved off the originally disputed land, sometime between the re-launching of the application and the date of hearing.

What happened up to 6 November is that sometime about the beginning of September 1986 respondent, without any reference to the applicant, began to plough a portion of the applicant's land adjacent to his own. In mid-September 1986 the applicant wrote to the respondent cautioning him to discontinue. On 20 September 1986 the applicant, through its chairman, called upon the respondent and requested him to discontinue. The request was refused again. On 23 September 1986 another letter was addressed to the respondent threatening legal action if he did not discontinue his ploughing operations on the disputed land. On 25 September the respondent's legal practitioners wrote to the applicant, alleging that on the contrary it was the applicant who had been using the respondent's land without his authority, and advising that "our client will not desist from ploughing up the field and that any legal action taken by your club to stop him will be strenuously resisted." Then followed a letter by the applicant's legal practitioners, dated 14 October 1986, intimating that a land surveyor would be asked to survey the land and inviting the respondent to share the costs thereof. The reply to this letter was a letter by the respondent's legal practitioners, asserting the

1987 (2) ZLR p79

MTAMBANENGWE J

same stand by the respondent, denying the need for a surveyor to identify the alleged incursion made by the respondent and refusing to share half of the surveyor's fees. The letter reads, in part:

"The beacons are there and they reflect what he contends. If your client feels it is necessary to have further surveying done to satisfy itself of the position, then the charges are to their account.

Please be advised that any action taken against our client will be strenuously resisted."

On 14 October the applicant's legal practitioners in fact instructed a Mr D B Standen, a land surveyor, to carry out a survey and replace two missing beacons on the boundary between the applicant's property and the respondent's. He proceeded to the area of 27 October 1986. This was apparently after further personal efforts had been made by the applicant's chairman to talk to the respondent, including a reference of the matter to the police, who were unable to help. The unchallenged affidavit of Mr Standen states:

- "1. That I am a registered Land Surveyor in terms of the Land Survey Act [*Chapter 147*].
2. That on the morning of Saturday, October 25 1986 I met the Chairman of Applicant at Applicant's premises and was shown the area of land in dispute.
3. That on Monday, October 27 I proceeded to the area in question and after several hours of searching I found various beacons on the southern side of Carrick Creagh Road and the beacon marked D on Diagram SG71/68.
4. That from the found beacons I was able to find the beacon B on diagram SG71/68. It was found as a 15mm (5/8") round iron peg, in a ploughed up area, and about 0,2 metres below ground level and was bent. This beacon was pointed out to the wife of the owner of Subdivision 43 of Helensvale.
5. That the lady mentioned above said she would her husband to see the beacon and went to her house to telephone him.
6. That in the meantime I proceeded to measure the distance B to A in order to search for the beacon A on Diagram SG71/68.

1987 (2) ZLR p80

MTAMBANENGWE J

7. That while I was searching for the beacon A which position falls in the area which has been ploughed up the man who said he was the owner of Subdivision 43 of Helensvale arrived and ordered me to stop searching for the beacon and to get off "his" property. I had no alternative but to do as he ordered.
8. That in the circumstances I cannot complete my task since the owner of Subdivision 43 Helensvale was most belligerent and would not listen to me. He also implied that I had been paid to falsify the boundary in question.
9. That I have marked on diagram SG71/68 my estimate of the area of land belonging to Applicant which has been ploughed by Respondent."

It is thus clear that the respondent adopted a completely uncompromising and unco-operative stance, hence the launching by the applicant of these proceedings on 6 November 1986. Up to this time it would appear to me that a reasonable approach would have required co-operation from the respondent in trying to resolve the dispute on an amicable basis. To compound the difficulty posed in deciding this matter is the complete silence by the respondent in the face of serious allegations against him such as those by Mr Standen. An explanation of his attitude or his stance, going as far as he did to allege that it was the applicant who was encroaching on his (the respondent's) land, was called for. But all we have is complete silence.

Mr *Chikumbirike*, for the respondent, argued first that the fact that the applicant's founding affidavit (at para 13) reveals that Mr Standen was asked "to carry out a survey and replace two missing beacons on the boundary between the applicant's property and that owned by the respondent" means that the applicant did not establish a clear right to entitle it to the remedy it sought in the application launched on 6 November 1986, ie the interdict. That application was, therefore, ill-conceived and the applicant should bear the costs thereby incurred. The persuasive force of this argument is defeated when regard is had to the fact that it was only when faced with the respondent's attitude as described above (see Standen's affidavit) that the application was launched. Apart from that the respondent did not file papers to challenge the applicant's right even at that stage. The letters of his legal practitioner already referred to are

not helpful in this regard. They did not state the basis on which he was claiming that the land was his. The court is not informed why the matter was postponed *sine die*.

1987 (2) ZLR p81

MTAMBANENGWE J

Mr *Chikumbirike* also argued that in view of para 13 of the applicant's founding affidavit it was clear that there were no beacons to satisfy a layman as to the demarcation of the boundaries, so therefore there was nothing unreasonable about the respondent's attitude. This, with respect, is a sword that cuts both ways. If the uncertainty about beacons was shared by both parties, how could the respondent so adamantly claim that the land was his, to the extent of chasing away the land surveyor who came to ascertain the position? It should be borne in mind that the idea of a surveyor being instructed to carry out a survey had been put to the respondent and this most reasonable approach was met with a categorical refusal on the respondent's part to co-operate or to be involved in the exercise (see pp 9 and 10 of the papers). There is nothing on the papers to support Mr *Chikumbirike's* submission that the land in dispute had been used by the respondent without any query from the applicant. The papers before me clearly show that the applicant objected to the encroachment the same month of September 1986 when the encroachment began (see p 4, paras 4 and 5 of the founding affidavit).

Admittedly, the applicant does not explain how Mr Hill, who carried out a second survey, came to be involved. Mr *Chikumbirike* made a statement from the bar to the effect that he suggested that an independent surveyor be engaged and that both parties would be present at the survey to be carried out by him and that he himself contacted Mr Hill. That may be so, but, turning to Mr Hill's report on the survey he carried out in May 1987, the following remarks appear:

"In general I find this survey extremely distasteful. When I met the secretary of the Borrowdale Country Club on site on 30th April he was accompanied by a detail from the Borrowdale Police Station, this proved a judicious precaution as the survey progressed to the disputed area some injudicious and emotional remarks were made by one of the parties which I will not repeat unless called upon to do so. The remarks referred to an alleged conspiracy on racial grounds.

Presumably had a member of the police force not been present as a witness the remarks might well have been a good deal more defamatory, with possibly the same result as experienced by Surveyor Standen when he undertook the same survey."

Mr Hill's survey was carried out in May 1987 and he concluded that "respondent had encroached on applicant's land" (see his affidavit at p 23);

1987 (2) ZLR p82

MTAMBANENGWE J

yet the papers before me show that even then or despite that, the respondent did not back down until after the filing of the applicant's second founding affidavit, of which the new draft order still prays for an order restraining the respondent from encroaching on the land in question and compelling him to "return the land previously in dispute to its original condition and replace the boundary fence". As said above in this judgment, a notice of opposition was filed but no opposing affidavits.

In reaching a decision in this matter I am mindful of the fact that the order sought by the applicant is one that the court will not lightly accede to. I also take into consideration the submissions of Mr *Chikumbirike* to the effect that the respondent has not been shown to have been fraudulent or dishonest, but that he was labouring under a misconception as Mr Hill's report reveals. However, I find the respondent's whole conduct from start to finish to have been completely unreasonable and reprehensible. The offensive remarks allegedly made by him, directed at the surveyors and the applicant, which he has not even attempted to explain, are so unwarranted and unworthy as almost to border on malice. It is the attitude of a man who had deliberately and stubbornly refused to bring a dispassionate mind to bear on the matter. The dispute could have been resolved quite amicably and inexpensively with the minimum of co-operation on his part. In my view it is quite unfair for the applicant to be put out of pocket in the matter of its legal practitioner and client costs. I find his conduct sufficiently vexatious to merit the special order of costs contended for by the applicant: see *C & Anor v Controller of Customs & Excise* 1972 (2) RLR 403 (GD); Cilliers *Law of Costs* 2 ed 4.13 and 4.15.

In the result the respondent is ordered to pay the applicant's costs on a legal practitioner and client basis, including the costs of two land surveyors.

Condy, Chadwick & Elliott, applicant's legal practitioners

Chirunda, Chihambakwe & Partners, respondent's legal practitioners

1987 (2) ZLR p83

S v BIZWICK 1987 (2) ZLR 83 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Criminal appeal

23 October 1987

Flynote

Criminal procedure - plea of guilty - Criminal Procedure and Evidence Act [Chapter 59] - s 255(2)(b) - theft by finding - procedure on plea not correctly followed - four elements of crime not put seriatim to accused - possibility that property was res derelicta not canvassed.

Headnote

The appellant, an apparently respectable and trusted farm employee aged 55 years, had pleaded guilty to theft by finding of a bicycle which he had found lying in the bush and of which he had taken possession. No owner had come forward to claim it.

The magistrate had failed to put separately to the appellant the four elements of the crime of theft for the purpose of satisfying himself as to the plea of guilty, in terms of s 255(2)(b) of the Criminal Procedure and Evidence Act [Chapter 59], and had not canvassed at all the fourth

element viz that the property must be property capable of being stolen. At least three or more avenues of enquiry should have been explored by the magistrate, such as the following:

- (1) has the appellant admitted that the bicycle was not abandoned?
- (2) from what facts does the appellant draw the conclusion that it was not abandoned, and is that conclusion a necessary one on the facts?
- (3) did the appellant genuinely, even though mistakenly, believe it was abandoned?
- (4) did he intend to deprive the owner of the property, or did he intend to use it openly but to hand it over if claimed by the true owner?

Held, that in the circumstances the plea of guilty should be set aside and the matter remitted to the magistrate for him to put the charge to the appellant

1987 (2) ZLR p84

McNALLY JA

again, and with directions as to the proper procedure to be followed by the magistrate.

Cases cited:

S v Mkhize 1978 (1) SA 264 (N)

S v Zindonda AD-15-79 (not reported)

S v Munzhelele 1980 (2) SA 110 (V)

S v Zishumbe & Ors 1983 (1) ZLR 10 (HC)

S v Mutadza 1983 (1) ZLR 123 (HC)

S v Taitoni HH-164-83 (not reported)

S v Tito 1984 (4) SA 363 (Ck)

S v Molauzi 1984 (4) SA 738 (T)

S v Nkosi 1986 (2) SA 261 (T)

S v Mapetese HH-138-87 (not reported)

S v Gresse 1985 (4) SA 401 (T)

R v Bradley 1980 ZLR 107 (GD)

R M Fitches for the appellant

A V M Chikumira for the respondent

Judgment

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McNally JA: In this matter we allowed the appeal to the extent that we set aside the conviction and sentence and remitted the matter for hearing before a different magistrate. In doing so we directed that if the appellant is again convicted he should not be sentenced to a sentence greater than that imposed in the earlier proceedings, namely seven months' imprisonment with labour of which four were suspended.

The charge was theft by finding of a bicycle whose ownership was unknown.

The appellant pleaded guilty. The procedure set out in s 255(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*] was then instituted.

There have been many cases in which the proper approach to this procedure has been discussed. Among them are:

S v Mkhize 1978 (1) SA 264 (N) at 267G-H

S v Zindonda AD-15-79 (unreported) at p 7

S v Munzhelele 1980 (2) SA 110 (V)

S v Zishumbe & Ors 1983 (1) ZLR 10 (HC)

S v Mutadza 1983 (1) ZLR 123 (HC)

S v Taitoni HH-164-83 (not reported)

1987 (2) ZLR p85

McNALLY JA

S v Tito 1984 (4) SA 363 (CK)

S v Molauzi 1984 (4) SA 738 (T)

S v Nkosi 1986 (2) SA 261 (T)

S v Mapetese HH-138-87 (not reported)

The present case involves theft by finding of a bicycle, but the owner of the bicycle is unknown. Normally the owner of stolen property will give evidence and he will be asked the formal question: "Did the accused have any right to take the property?". His answer: "No", together with the fact that the property was taken from his house or his person or from a place where there could be no real suggestion that he had abandoned it, will be enough to prove both that it was not abandoned and that the accused could not possibly have thought that it was. But here the fact is that the bicycle was found "in the bush" and its owner is unknown. The possibility that it was abandoned is therefore a real one, as also is the possibility that the appellant thought that it was.

In the present case the essential elements of the offence were put to the appellant in the following terms:

"Q. Did you steal a bicycle by finding and then keep it for yourself with intent to deprive the owner permanently

of it?

A. Yes, I needed it for myself.

Q. Did you have any lawful right to do so?

A. No.

Q. Do you have any defence to offer?

A. None."

The whole point of putting the essential elements to an accused person is that

they should be put separately. The Oxford English Dictionary defines "element" as "a constituent part of a complex whole".

Yet in his first question the magistrate put to the appellant "the complex whole" rather than a "constituent part". He simply paraphrased the charge.

The element of theft are as follows:

- (a) *Contrectatio*
- (b) Unlawful
- (c) Intent to steal
- (d) Property capable of being stolen.

(SA *Criminal Law and Procedure* Vol 2, 2 ed p 603).

1987 (2) ZLR p86

McNALLY JA

The fourth element was not put to the appellant and the second and third were put inadequately, as I shall endeavour to show.

Where an apparently respectable, apparently trusted 55-year-old farm employee finds a bicycle in the bush and appropriates it (to use a neutral word) for his own use, and no owner has since come forward to claim it, then it seems to me there are at least three avenues of enquiry which must be explored before the court can be "satisfied" in terms of s 25(2)(b) of the Criminal Procedure and Evidence Act:

1. Has the appellant admitted that the bicycle was "property capable of being stolen"? That is to say, has he admitted that it was not abandoned?

There is an important second stage to this enquiry. He is admitting something which he does not know of his own knowledge. From what facts does he draw the conclusion that it was not abandoned? Is that a necessary conclusion? If it is not, have the elements of the offence been established? (See generally *S v Gresse* 1954 (4) SA 401 (T), and 1985

Annual Survey of SA Law at pp 434-6).

2. An entirely separate enquiry (although in practice it may amount to the same thing) must be addressed to the appellant's state of mind. Did he think it was abandoned? If he genuinely thought so, even if in fact it was not, he has committed no crime.
3. Finally, the intent to steal involves an intent to deprive the owner **permanently** of his enjoyment of his property. On facts such as exist in this case, the court should have concerned itself about this aspect. Is it not possible, for example, that a man might find a bicycle near his farm compound, and think it was abandoned, or lost, or stolen and then abandoned? He might say to himself: "I will take it and use it openly. If someone comes looking for it, I will hand it over". This may or may not be theft, depending on the circumstances - see Hunt, *op cit* at p 630 footnote 205. It may or may not amount to a contravention of s 48(1), as read with s 48(3), of the Road Traffic Act 1976 - see *R v Bradley* 1980 ZLR 107 (GD) at 109.

None of these matters was adequately investigated by the magistrate.

Since the State accepts that the conviction and sentence cannot stand, no point need be made of the fact that the appellant should have sought leave to withdraw his plea of "guilty" before initiating an appeal.

1987 (2) ZLR p87

McNALLY JA

At the re-hearing the charge should be put again to the appellant and he should be asked to plead afresh. If he pleads not guilty the matter will proceed in the normal way. If he pleads guilty the magistrate should make inquiries in terms of s 255(2)(b)(ii) along the lines indicated. If the magistrate is not satisfied in one or other of the respects set out in s 255A of the Criminal Procedure and Evidence Act he should, in terms of that section, enter a plea of not guilty and require the prosecution to proceed with the trial. If he is satisfied that the plea of guilty is a proper plea he will proceed in terms of s 255(2)(b).

It was submitted by Mr *Fitches*, for the appellant, that this court should not remit the matter but simply set aside the conviction and sentence. We declined to follow this course. The case of *S v Zishumbe & Ors* (*supra*), relied upon by Mr *Fitches*, is distinguishable because in that case there was a fatal irregularity in the confusion between s 255(2)(a) and s 255(2)(b). Moreover the appellant in that case had already spent some time in custody, which is not the situation here.

This is essentially a review matter in which we have a discretion as to remittal. The appellant pleaded guilty, and that plea is being set aside only for reasons of procedural irregularity. In our view it is a proper case for remittal.

Gubbay JA: I agree.

Manyarara JA: I agree.

Brian Mparadzi & Co, appellant's legal representatives

**TUTANI v MINISTER OF LABOUR MANPOWER PLANNING & SOCIAL SERVICES & ORS
1987 (2) ZLR 88 (HC)**

Court **High Court, Harare**

Mtambanengwe J

Application on notice of motion

8 & 21 October 1987

Flynote

Administrative law - review - whether exhaustion of domestic remedies required before review may be entertained by High Court.

Employment - Labour Relations Act 1985 and regulations made thereunder - appeal from decision of labour relations officer - nature of appeal hearing.

Headnote

The appeal procedure which is provided in respect of appeals from a decision of a labour relations officer is governed by ss 17 and 18 of the Labour Relations Act 16 of 1985. In particular, s 18 provides for an appeal to the Labour Relations Board, with the leave of the Regional Hearing Officer or a member of the Board. It also provides for witnesses to be summoned for each party to the dispute. It is clearly contemplated that the appeals provided in each instance are in the form of a hearing *de novo*, with each party afforded the right to give evidence and call witnesses.

In determining whether judicial review of the decision of an administrative tribunal is excluded or deferred and whether an applicant should first exhaust his domestic remedies, the court will have regard to a number of factors including: the subject-matter of the statute; the body or persons which makes the initial decision and the bases on which it is to be made; the body or persons who exercise appellate jurisdiction; the manner in which that jurisdiction is to be exercised, including the ambit of any rehearing on appeal; the powers of the appellant tribunal, including its power to redress or cure wrongs of a reviewable character; and whether

MTAMBANENGWE J

the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant for review complains.

Cases cited:

Lawson v Cape Town Municipality 1982 (4) SA 1 (C)

Msomi v Abrahams NO & Anor 1981 (2) SA 256 (N)

Hamman en 'n Ander v Algemene Komitee, Johannesburgse Effektebeurs en 'n Ander 1984 (2) SA 383 (W)

C M Jeche for the applicant

B Q P Simelane for the first and second respondents

M T O'Meara for the third respondent

Judgment

Mtambanengwe J: The applicant has brought this proceeding by way of notice of motion to review a decision of a labour relations officer under the Labour Relations Act 16 of 1985 approving his dismissal from employment.

The Act provides that any employee or employer who is involved in a dispute or is aggrieved by an unfair labour practice may refer the matter to a labour relation officer who shall investigate such matter and, after due enquiry, may *inter alia* -

"make such determination in regard to the matter as he deems fit" (see s 109(1)(2)(b))."

The Act also provides for the Minister to make regulations in terms of the Act. Section 3 of regulations made in terms of s 17 of the Act, being the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, hereafter referred to as SI 371/85 reads:

"3. Where an employer has good cause to believe that an employee is guilty of -

- (a) any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of the contract;
- (b) wilful disobedience to a lawful order given by the employer;
- (c) . . . ;
- (d) theft or fraud;

. . .

the employer may suspend such employee without pay and other benefits and shall forthwith apply to labour relations officer for an order or determination terminating the contract of employment."

1987 (2) ZLR p90

MTAMBANENGWE J

In terms of s 3(2) of SI 371/85 -

"Upon application being made in terms of subsection (1) the labour relation 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; or

- (b) serve a determination or order on the employer concerned to remove the suspension of the employee concerned and to reinstate such employee if the grounds for his suspension are not proved to the satisfaction of the labour relations officer."

Section 3(3) of SI 371/85 provides that a determination or order made in terms of subs (2) may provide for back pay from the time of, and compensation for benefits incurred by, such suspension, and s 3(4) provides that the provision of Part III of the Labour Relations (General) Regulations (SI 368/ 85), made in terms of s 141 of the Act, shall apply in relation to any appeal from a determination or order served in terms of subs (2).

Section 109(2) of the Act, s 5 of SI 368/85 and s 3(2) of SI 371/85 provide for investigation or due enquiry before the labour relations officer dealing with any dispute may take any of the courses open to him in terms of the Act. The appeal procedure in terms of Part III of SI 368/85 is contained in s 17 thereof which reads in part:

"17. (1) Any person who is aggrieved by a determination or order served on him by a labour relations officer or hearing officer may within fourteen days of such service, note by handing to any labour relations officer, or . . . an appeal to a regional officer in form LR 27 in triplicate, of which

- (a) one copy each shall be retained by the party noting the appeal and the labour relations officer or hearing officer concerned; and
- (b) one copy shall be delivered by hand or by post by the labour relations officer concerned to the other party in the dispute.

(2) The labour relations officer or hearing officer with whom an appeal is noted in terms of subsection (1) shall, within fourteen days of such noting -

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MTAMBANENGWE J

- (a) endeavour to clarify the issues in the appeal; and
- (b) ascertain what witnesses, if any, either of the parties wishes to call at the appeal, and specify such witnesses names and addresses in the copy of form LR 27 retained by him; and
- (c) deliver by hand or by post the copy of LR 27 retained by him to the regional hearing officer, and append thereto the original or a copy of the determination or order that forms the subject of the appeal, together with any remarks the labour relations officer or hearing officer may wish to make thereon.

(3) Upon receipt of the documents specified in subsection (2), the regional hearing officer shall, as soon as is practicable, notify the parties to the appeal of the date, time and place of the hearing of the appeal in form LR 22."

Section 18 provides for an appeal to the Labour Relations Board with the leave of the Regional Hearing Officer or a member of the Board. It also provides for witnesses to be summoned for each party to the dispute. In brief, it is clearly contemplated in the procedures laid down in these sections that the appeals in each case are in the form of a hearing *de novo* with each party afforded the right to give evidence and call witnesses.

The facts of this matter are that on 19 August 1986 the third respondent suspended the

applicant without pay in terms of s 3(1)(a)(b) and possibly (c) of SI 371/85. The reasons for this action were communicated to the applicant in a letter addressed to him on that day.

The same day the third respondent wrote to the Chief Industrial Relations Officer, seeking the first respondent's authority to terminate applicant's contract of employment. The reasons for so seeking to terminate the contract were as stated in the letter to the applicant and in the letter to first respondent. The determination complained of took place on 23 March 1987. The applicant was still facing a charge of theft by conversion of \$111,00 which the applicant was alleged to have, without permission, removed from the safe under his care. The applicant joined the Agricultural Finance Corporation on 1 May 1982 and had worked his way up to the position of account's assistant at the AFC's Bulawayo office.

It seems that on receipt of the AFC's letter of 19 August 1986 the Chief Industrial Relations Officer referred the matter to the second respondent, as Labour Relations Officer for the Matabeleland Region. It also seems that on

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MTAMBANENGWE J

receipt of the said letter the second respondent had a meeting with the applicant and a representative of the AFC during which both parties to the dispute were notified of a date on which a hearing would be held.

The basis of applicant's complaint is that the matter, if at all heard by the second respondent, was heard in his absence and therefore the determination or order was made without him being given an opportunity to be heard or of presenting his case to the second respondent. On 30 March 1987 the applicant filed Form LR 27 of the First Schedule to the Labour Relations (General) Regulations 1985 (SI 368/85) appealing the decision of the second respondent and stated as his grounds of appeal:

"After having arranged for a meeting with Mr Msimanga myself and my employers, I failed to turn up for the meeting as I had to attend a funeral for my brother-in-law who passed away in Bindura. I notified the Provincial Manager AFC and left a message for Mr Msimanga. A decision was made in my absence."

Despite his admission that he noted the appeal (shown to have been noted on 30 March 1987) the applicant, quite patently untruthfully, maintains on the papers, including his answering affidavits, that he "was never informed by the second respondent that this matter had been referred to him and neither was I informed that he (the second respondent) was looking into the matter nor of the date of hearing" (para 2(ii) of his answering affidavit to third respondent's affidavit); or "I maintain that I was never advised of the date of hearing. Surely if I had been advised of the same it was in my interest to attend since I had been on suspension without pay for over 8 months" (para 2(c) of his answering affidavit to second respondent's affidavit). The first respondent's affidavit was filed on 5 October 1987, and has as Annexure 1, the notice of appeal referred to above. The applicant's answering affidavits, referred to above, were filed on 23 September and 2 October 1987, respectively.

The applicant does not in any way deny receiving the third respondent's letter of 19 August 1986 informing him of the reasons for his suspension. Despite the receipt of that letter, the

applicant seeks in his founding affidavit to give the impression that he was suspended on allegations of theft only (para 6). Despite the arrangement made between him, his employers and the second respondent for a date of hearing of the matter, he states in para 13 of his founding affidavit:

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MTAMBANENGWE J

"The decision by the Labour Relations Officer to have my services terminated was irregular in that the principles of natural justice ie the *audi alteram partem* rule was not followed since everything **was done behind my back and without my knowledge.**"

It is not surprising that, on receipt of the first respondent's affidavit, filed on 5 October 1987 revealing the notice of appeal filed by the applicant on 30 March 1987, the applicant did not file an answering affidavit. He obviously could not do so because, in maintaining, as he had done in the answering affidavits to the second and third respondents' replying affidavits complete unawareness of the fact that the second respondent was seized with the matter and that a hearing date had been arranged, he had told a blatant lie which he could not now undo. The result is that the applicant has clearly shown himself on the papers as a man whose word cannot be relied upon. The question then arises: can his word be relied upon when in the notice of appeal he gave a reason for not turning up for the arranged hearing of the matter? I should point out that nowhere on the papers does he try to explain his failure to turn up for the hearing of the matter before the second respondent. I find myself completely unpersuaded to accept the statement on the notice of appeal as true in these circumstances and to proceed on the basis of an explanation which is not even the applicant's case. One of the inferences that can be drawn from applicant's stance on the papers in the face of the said notice which he deliberately sought to hide, is that in not turning up for the hearing the applicant waived his right to be heard. In taking the misleading stance that he does on the papers, the applicant left the court in a position where it is unable to draw any other conclusion than that the application is ill founded. He has come to court with very dirty hands. The view I take in the circumstances of the case is that the application cannot succeed.

Apart from the circumstances mentioned above the applicant's draft order (b) seeks:

"(b) That the 3rd Respondent reinstate the Applicant in his former position and pay his salary from August 1986, and any other increments which would have been due to him except for reason of his suspension."

In terms of the Act and the Regulations thereunder the third respondent was quite entitled to suspend applicant without pay. There is no basis on the papers on which such an order could be granted. Besides, as the applicant himself says, the court is not being asked to go into the merits of the matter.

1987 (2) ZLR p94

MTAMBANENGWE J

Secondly, I have tried to set out the provisions of the Act and the relevant Statutory Instruments made under it to emphasise the point that domestic remedies are provided which will lead to a proper determination of the matter. In *Lardon v Cape Town Municipality* 1982 (4) SA 1 (C) at 6-7

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COMRIE AJ said:

"In considering the question whether, on the proper construction of the Statutes, judicial review is excluded or deferred, courts have regard to a number of factors. Among these are: the subject matter of the statute . . . ; the body or persons who make the initial decision and the bases on which it is to be made; the body or persons who exercise appellate jurisdiction; the manner in which that jurisdiction is to be exercised, including the ambit of any rehearing on appeal; the powers of the appellate tribunal, including its power to redress or 'cure' wrongs of a reviewable character; and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains."

In discussing the above passage Lawrence Baxter *Administrative Law* at p 721-722 refers to *Msomi v Abrahams NO* 1981 (2) SA 256 (N) and comments:

"In *Msomi v Abrahams NO* the complaint was that an application for unemployment insurance had been refused without a proper hearing. The respondent contended that the applicant should first appeal to an administrative Committee before seeking judicial review. The Court found that the Committee was not equipped to conduct its own inquiry afresh in proper compliance with natural justice, and so that it was not incumbent on the applicant to prosecute the appeal before coming to court."

Of *Lawson v Cape Town Municipality supra*, he comments:

"In *Lawson v Cape Town Municipality*, where the renewal of a licence was refused, it was contended that the applicant should first have appealed to the provincial administrator before seeking review. COMRIE AJ concluded that even though a complete rehearing was theoretically possible, the appeal would in practice be confined to the papers (mainly because the administrator was too busy to invite and entertain oral evidence and representations) and, in any event, while the administrator was well equipped to consider matters of policy, he was less qualified to deal with the issue of legality to which the complaint related. In the

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MTAMBANENGWE J

circumstances, the learned acting judge concluded that the provision of a right of appeal did not defer the right to judicial review."

At page 721 n 338 of the book this passage appears:

"All the circumstances must be considered (see *Welkom Village Management Board v Letano* 1958 (1) SA 490 (A) 503C) and other factors may also be of assistance. For example in *Shames v South African Railways and Harbours* 1922 AD 228, 233, the court, in determining that the provisions of statutory remedies deferred the right to review, placed partial reliance upon the fact that before legislation had been enacted no protection existed at all."

Applying these principles to the facts of the present matter, I find that because of the untruthfulness of the applicant it can be said that he waived his right to be heard. I also find that the domestic remedies provided by the legislation in question are capable of providing effective redress in respect of the complaint and, secondly that the unlawfulness alleged has not undermined the domestic remedies themselves: see Baxter *op cit*, p 721. The appeals provided for in the regulations are a rehearing of the matter in the fullest sense of the word in which both the regional hearing officer and/or the the Board will consider the matter *de novo*; see *Hamman en 'n Ander v Algemene Komitee, Johannesburgse Effektebeurs, en 'n Ander* 1984 (2) SA 383 (W).

The question of the costs of the application was argued. Understandably Mr Jeche for the

applicant was unable to submit that there was any real basis for this application in the circumstances revealed by the papers. It is my view that the applicant lied even to his own legal practitioners thereby placing them in the most invidious position where they were unable to advise him properly. In the circumstances I see no justification for denying the respondents their costs.

In the result the application is dismissed with costs.

Chirunda, Chihambakwe & Partners, applicant's legal practitioners

Civil Division of the Attorney General's Office, first respondent's legal practitioners *Coghlan, Welsh & Guest*, third respondent's legal practitioners

1987 (2) ZLR p96

ATTORNEY-GENERAL v BVUMA & ANOR 1987 (2) ZLR 96 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Manyarara JA & Korsah JA

Criminal appeal

28 September & 26 October 1987

Flynote

Appeal - Attorney-General's right of appeal against acquittal - acquittal at close of prosecution case - appeal limited to point of law not affecting finality of case.

Criminal procedure - discharge at end of prosecution case - State evidence showing no case to answer - improper to put accused on his defence so that his evidence may bolster up State case.

Headnote

The Attorney-General has no right of appeal, under s 69 of the Magistrates Court Act [Chapter 19], against the acquittal of the accused at the close of the State case. His only right of appeal in such a case is under s 188, subs (3) as read with subs (3a) of the Criminal Procedure and Evidence Act [Chapter 59] on a point of law not affecting the finality of the court's decision.

When s 69 of the Magistrates Court Act is read with s 11A of the Supreme Court Act, No. 28 of 1981, it is clear that it deals with a right of appeal after a completed trial where both the State and the defence cases have been closed and a judgement given on the whole case.

In an appeal by the Attorney-General "on a point of law or against the acquittal or quashing of conviction by any court or tribunal", the discretionary powers of the Supreme Court to substitute a verdict of guilt and either pass sentence itself or remit the case for sentence, in terms of s 11A(2)(c) of the Supreme Court Act, can only be exercised after a completed trial and cannot apply to the acquittal of the accused at the close of the State case when only the State evidence

has been heard.

1987 (2) ZLR p97

DUMBUTSHENA CJ

Where at the close of the evidence for the State there is no case for the accused to answer and application is made for his discharge, it is not a proper exercise of judicial discretion to put the accused on his defence so that his evidence may bolster up the State case.

Cases cited:

Attorney-General v Regional Magistrate, Eastern Division & Anor 1987 (1) ZLR 179 (SC)

S v Shuping & Ors 1983 (2) SA 119 (BS)

R v Mall & Ors (1) 1960 (2) SA 340 (N)

R v Mkise & Ors 1960 (1) SA 276 (N)

R v Herholdt & Ors (3) 1956 (2) SA 722 (W)

Practice Note *per* Lord Parker CJ [1962] 1 All ER 448

R v Newcastle-upon-Tyne Justices ex parte Hindle [1984] 1 All ER 770 (QBD)

R v Pedesayai 1953 SR 44; reported sub nom *R v Pedzesayi* 1953 (3) SA 103 (SR)

Government of the Republic of SA & Anor v Government of KwaZulu & Anor 1983 (1) SA 164 (A)

New Modderfontein Gold Mining Co v Transvaal Provincial Administration 1919 AD 367

A V M Chikumira for the appellant

M T O'Meara for the respondent

Judgment

Dumbutshena CJ: This is an appeal by the Attorney-General in terms of s 69 of the Magistrates Court Act [*Chapter 18*], as amended by s 2 of Act No. 3 of 1984. Section 69 reads:

"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

DUMBUTSHENA CJ

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."

This court considered the corresponding ss 44(6) and 20A respectively of the High Court Act 1981 and the Customary Law and Primary Courts Act 1981, which give the Attorney-General, with leave of a judge of the Supreme Court, the right to appeal on a point of law if the court below acquitted the accused "on a view of the facts which could not reasonably be entertained". See *Attorney-General v The Regional Magistrate, Eastern Division & Phiri* S-75-87 *(3). In *Phiri's* case, *supra*, the trial before the regional magistrate had not been completed and the application for leave to appeal was dismissed as being premature.

In this appeal the two respondents were charged with four counts of fraud and in the alternative with four counts of theft by conversion. The State alleged that the respondents falsely pretended that the invoices whose amounts were paid by the respondents were the only invoices issued to them by Aluminium Industries Limited, Willowvale, whereas the company had issued more invoices for the number of aluminium sheets which were supplied to them. It was alleged that on 26 July 1985 the respondents were issued with two invoices, number W24634 for which they paid \$28,06 and W24634 showing the value of aluminium sheets purchased as \$198,95 - an amount they did not pay. And yet the respondents took with them aluminium sheets worth \$227,01. On 29 July 1985 it was alleged they were supplied with aluminium sheets worth \$269,52 and only paid \$28,66 reflected on invoice number W24643. The amount of \$240,86 on invoice number W24642 was not paid. On 13 August 1985 it was alleged they were supplied with aluminium sheets worth \$248,98, yet they only paid \$31,17 reflected on invoice number W24900 and not the \$217,81 on invoice number W24899. It was alleged they took away aluminium sheets worth \$248,98. On 16 September 1985 they paid \$28,98, the price of goods on invoice number W25347, and did not pay \$236,67, the price of aluminium sheets on invoice number W25346. The sheets supplied to them were worth \$265,65. The State therefore alleged that the total value of aluminium sheets stolen was \$894,29. The respondents denied the charges.

At the close of the prosecution case the magistrate acquitted the respondents because the State had not made a *prima facie* case for them to answer.

DUMBUTSHENA CJ

The magistrate did not give his reasons for ruling that there was no case to answer in the ordinary manner. He engaged in a question and answer exercise with the prosecutor, after which he came to the conclusion that there was no case to answer. It is to be regretted that he did not state his reasons in a written judgment, and when the notice of appeal was sent to him he was away on holiday.

From a reading of the record it is clear that he was not satisfied with the evidence adduced by prosecution witnesses. He thought that the evidence established suspicion and nothing else. He

did not place any reliance on the piece of paper picked up from the toilet. He said there was no evidence that the two respondents were in possession of two invoices which they destroyed in the toilet. He thought and said in the question and answer session with the prosecutor:

"Everything you have here is mere conjecture and assumptions. All of it steeped in hearsay."

According to the trial magistrate the prosecutor had spent the whole day trying to prove the theft of \$236,67 worth of aluminium sheeting. To prove that, the prosecution relied on a piece of paper supposedly found in a toilet but which could have been found anywhere. When the magistrate asked the prosecutor whether he had made a *prima facie* case the prosecutor replied: "I do not think we have, Your Worship". The court ruled that there was no case to answer.

The respondents were acquitted on 2 April 1986. The application for condonation for the late noting of an appeal was filed on 6 December 1986, some eight months after acquittal - a very inordinate delay not conducive to the doing of justice to all parties. However, leave to appeal was granted.

The appeal is based on two grounds - that:

- "1. the learned magistrate erred in rejecting the evidence of the State witnesses, Mangezi, Michael Francis and Joshua Gudo.
2. the learned magistrate misdirected himself in holding that a *prima facie* case had not been made out by the State. There was, it is respectfully submitted, more than adequate evidence to place the accused on their defence."

In his heads of argument, Mr *Chikumira*, who appeared for the appellant, did

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DUMBUTSHENA CJ

not address his mind to the question whether the magistrate had acquitted the respondents "on a view of the facts which could not reasonably be entertained". In the course of argument counsel did not address the court on what should be regarded as "facts which could not reasonably be entertained". That view is the only reason for allowing the Attorney-General to appeal on a point of fact.

I do not like to venture an interpretation of the phrase "on a view of the facts which could not reasonably be entertained". I have come to the conclusion, without necessarily deciding the meaning of the phrase, that by inserting the adverb "reasonably" the Legislature meant to emphasise a view of the facts which a reasonable man could not have used to arrive at his decision; in other words, a view of the facts which a reasonable man could not have used as a basis for his decision.

Mr *Chikumira* submitted that what was to be determined was:

- "(i) is there evidence on which a reasonable man might convict? if not;
- (ii) is there a reasonable possibility that the defence evidence might supplement the State case?"

If the answer is yes, there should be no discharge and the accused should be placed on his defence.

Mr *Chikumira* relied on *S v Shuping & Ors* 1983 (2) SA 119 (B), a review judgment of HIEMSTRA CJ who favoured a two-pronged approach to the question whether there was a case to answer. He said at 120H:

"If there is no evidence on which a reasonable man might convict, and there is also no ground to expect sufficient evidence from the defence, the accused ought to be discharged. If there is reason to believe that the State evidence can be supplemented by defence evidence, the court should not discharge. That is the standpoint of this court. Preparatory examinations have practically disappeared from the scene, but in present conditions there might be indications in the explanation of plea or in the cross-examination, combined with the State evidence, giving reason to believe that the accused might supplement the State case."

He summed up at 121A as follows:

"At the close of the State case, when discharge is considered, the first question is: (i) Is there evidence on which a reasonable man might

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convict? If not (ii) is there a reasonable possibility that the defence evidence might supplement the State case? If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence."

In the instant case the respondents denied in their defence outline stealing aluminium sheets. They said they were issued with two invoices and they paid and were issued with two receipts which they showed to the manager when he demanded them. They say in their defence outline one of them handed back the pass card which had been issued to them.

The gate guard looked at the aluminium sheets and asked for receipts which he checked against the sheets. He counted the sheets and they confirmed they had bought four aluminium sheets. Their defence, even if they were to give evidence, would not confirm the State case.

In my view, if the State evidence is not sufficient for a reasonable tribunal to convict upon, the accused should be acquitted.

There is no doubt that the court has a discretion to acquit the accused or to put them on their defence. That is not the issue in the appeal. Subsection (3) of s 188 of the Criminal Procedure and Evidence Act [*Chapter 59*] reads as follows:

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

There is a discretion vested in the court, arising from the use of the word "may" in the section. But that discretion is to be exercised judicially and may mean the court is empowered to discharge or continue with the trial. It is not a judicious exercise of that discretion when a court puts an accused on his defence so that his evidence may strengthen prosecution evidence.

In *R v Mall & Ors* (1) 1960 (2) SA 340 (N) CANEY J said at 342G-343B:

"In this Province, in the case of *R v Mkise & Ors* 1960 (1) SA 276 (N), it was decided, to quote the second paragraph of the head-note:

'The word "may" in s 157(3) of Act 56 of 1956 means "is empowered to" and the court's discretion in those cases where it has a discretion,

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to discharge an accused at the end of the Crown case flows not from the word "may" but from other sources."

That decision is a decision of a Full Bench of this court, and is not entirely in accord with the view of ROPER J in the Transvaal case. It may be that the discretion (if there is one) goes no further than in deciding whether the evidence then before the court is such that a reasonable man might convict upon it. There is much to be said for the proposition that if the Crown fails to make a case, the accused is entitled to be discharged and not to be put on his defence to face the risk of being convicted out of his own mouth or out of the mouth of a co-accused. If, however, there is a discretion, in the sense spoken of by ROPER J to discharge or not, clearly this discretion must be exercised judicially (*R v Herholdt & Ors* (3) 1956 (2) SA 722 (W)). In that case, BEKKER J said at p 723:

'I have no doubt that the discretion which is so vested in a court is to be exercised judicially; and that, as a general rule, but not apparently without exception, an accused person should be discharged if at the close of its case, the prosecution has failed to present evidence upon which he might be convicted. It is, of course, beyond question that in a particular case the attendant circumstances, which I do not propose to circumscribe or to define, might be such that a failure of justice could possibly result if an accused person were to be discharged at the close of the case for the prosecution, and though it has failed to present a necessary degree of evidence. But the attendant circumstances in such event should, in my opinion, at least be of such a nature as to afford the necessary grounds upon which that discretion could be judiciously exercised.'"

I agree with that view.

It is, in my opinion, not a judicious exercise of the court's discretion to put an accused on his defence in order to bolster the State case - a case which, standing alone, cannot be proved. In this regard I prefer the approach of the English courts. In that approach an accused person is entitled to a discharge if there is no evidence against him or if that evidence does not prove some essential elements of the offence or the witnesses are discredited in cross-examination. In this regard I go along with what LORD PARKER CJ said in a Practice Note ([1962] 1 All ER 448) on submissions of no case to answer:

"A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential

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element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on

whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

See *R v Newcastle - upon - Tyne Justices, ex p Hindle* [1984] 1 All ER 770 at 777j-778b. In that case a situation that might easily arise on a submission of no case to answer did arise. The Justices thought that the point that the accused had consumed alcohol after the accident had been raised in evidence because the accused's counsel had said his case was that he had consumed alcohol after the accident. "But their actual conclusion appears to have been based on the opinion formed by them that 'Evidence indicating that alcohol had been consumed after the accident was introduced by the prosecution in the examination in chief . . .'" - an assumption which was not correct. The opinion was based on the assumption that the policeman's evidence of what the accused told him constituted the truth of the statement that he had consumed alcohol after the accident. See at p 778c-d. The court was of the view that the accused should have been put on his defence to give evidence of his consumption of alcohol after the accident or that that evidence should have been introduced through prosecution witnesses.

The court might also put an accused on his defence if he relies on self-defence which he has not successfully introduced through State witnesses. This is different from putting an accused person on his defence in order to supplement the State evidence. *(4)

Let me now consider the evidence adduced by the State witnesses in this case. That evidence was meant to prove that the respondents had defrauded the

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complainant on four different occasions. It was common cause that there was no evidence in respect of the first three counts. There was some evidence on the fourth count which related to a theft of aluminium sheets worth \$236,67.

Franklin Nyaumwe, the warehouse salesman, said of the fourth count:

"What I remember about the 16th (September) is that the invoices had a very small amount. I do not quite remember but it must have been \$28 or \$29 on the invoice."

He was then asked: "Do you remember what the other invoices and goods were worth?". He replied: "I cannot quite remember how much it was but it was about \$100".

Paul Mubaiwa, the warehouse assistant, testified to the method of making purchases. There was not a single piece of evidence in his testimony that incriminated the respondents.

The sales manager, Mike Francis, met the respondents at the gate as they were going out. His evidence contradicts that of other witnesses. He said that he asked the respondents to produce invoices other than the ones for which they paid for sheets worth \$28. They produced the other invoices. He took them. He does not know what happened to those invoices. They were not tendered in evidence. He was given four copies and he was asked: "Do you know what happened to the other copies pertaining to the \$236,67?". He replied: "I believe they were torn

up by the accused". Then a leading question was put to him: "You had seen the other copies which he had and there was this \$236,67 written on it?". He answered: "Yes". It is not clear from his evidence whether the four copies given to him by the respondents related to the sum of \$236,67 and how these copies tie up with the torn piece of paper picked up in the toilet. The invoices produced to him by one of the respondents which he says were stamped "Paid" were not related to any date or invoice number. Francis said in evidence he only saw the top copy of the four invoices produced by one of the respondents and yet when he was re-examined he readily stated that all four copies were not stamped "Invoice paid".

Joshua Godo, the security guard, had a somewhat different version of what happened. Somewhere in his evidence he said the respondents did not produce invoices which were not stamped. He testified that they searched one of the respondents and found an invoice in his pocket. The two

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respondents were kept in a guardroom until the police came. The court was not told when that invoice was handed back to the respondents because after that, so it appears from the evidence, the respondents had occasion to visit the toilet where they tore the invoice and flushed the pieces into the toilet. Part of the invoice fell onto the floor, presumably witnessed by Godo, the narrator of the story. When questioned further he said the number of copies was four. When asked whether the respondents took the invoices which he found in the pocket of one of them to the toilet, Godo replied: "They had the paid ones". He was then asked:

"The four copies? - Yes.

When did you realise that they had destroyed these copies? - When they went to the toilet I realised there was a delay and I wanted to know what was happening, then I found a piece of part of the invoice on the toilet seat.

Do you remember what amount was written on that invoice? - I cannot remember but it was over \$200.

Would you like to look at this invoice? - This is it, \$236,67.

Would you like to produce that piece of paper as evidence in this court? - Yes I agree.

Did you ever ask the accused what had happened to the invoice they had with them? - I only asked them where the invoice had gone to.

What did they say? - They said they had no invoice. I asked them where they had put the one they had a short time ago.

And then what did they say? - It was the time I went into the toilet and found the piece".

It seems to me that Godo's pieces of evidence do not tie together. There is also a conflict between his version of what happened at the gate and that of Francis.

In my judgment, on this evidence it cannot be said the magistrate took a view of the facts which could not be reasonably entertained. There was no evidence in respect of Counts One, Two and Three and the evidence on Count Four did not make up a *prima facie* case.

Mr *O'Meara*, who appeared for the respondents, contended that by reason of s 188 of the Code the Attorney-General did not have the right of appeal on a question of fact, and, as the appeal affected the finality of the magistrate's

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decision, his right of appeal on a point of law was precluded by subs (3a) of s 188. Subsection (3a) reads:

"(3a) Notwithstanding the provisions of any other enactment, no appeal shall lie from a decision in terms of subsection (3), other than an appeal by the Attorney-General on a point of law where the result in no way affects the finality of the decision of the court."

It was Mr *O'Meara's* contention that, since the Attorney-General was appealing both on a point of law and a point of fact, he could only appeal in terms of s 69 of the Magistrates Court Act, as amended, and only if that section is in conflict with and is construed as repealing s 188 of the Code.

It was further submitted on behalf of the respondents that, by reason of s 188 of the Code, the Attorney-General had no right of appeal on a question of fact and that, as his appeal affected the finality of the magistrate's decision, his right of appeal on a point of law was precluded by subs (3a) of s 188.

In my view there is merit in this submission. Subsection (3) of s 188 says:

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

Subsection (3a) prohibits an appeal against the decision of the magistrate given in terms of subs (3) unless the appeal is on a point of law. But the result of that appeal will not affect the finality of the court's decision. The effect of subs (3a) is, as Mr *O'Meara* rightly submits, to render a decision in favour of the accused final, even if there has been an error of either fact or law.

"In using the words 'notwithstanding anything contained in any other law' the Legislature clearly expressed its intention that any such other laws should be abrogated to the extent to which they were inconsistent with the new enactment": *per* MORTON J in *R v Pedesayi* 1953 SR 44 at 45; 1953 (3) SA 103 (SR) at 105G *(5). That, however, is not the case here. Section 188 (3a) is not inconsistent with the provisions of s 69 of the Magistrates Court Act.

In this case the Attorney-General's appeal is based both on a question of fact and law. It is an appeal in terms of s 69 of the Magistrates Court Act, as

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amended. Mr *Chikumira* agrees with Mr *O'Meara* that the Attorney-General can only appeal against the decision to discharge an accused after a submission of no case to answer in terms

of subs (3) if the result of the appeal does not affect the finality of the decision.

Mr *Chikumira*, however, contends that if the appellant's present appeal is successful the result would affect the finality of the magistrate's decision. He, therefore, relies on s 11A(2) of the Supreme Court of Zimbabwe Act, No. 28 of 1981. Subsection (2) of s 11A of the Supreme Court of Zimbabwe Act reads:

"(2) On an appeal by the Attorney-General on a point of law or against the acquittal or quashing of a conviction by any court or tribunal the Supreme Court -

- (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."

Mr *Chikumira* submits that the Attorney-General, in view of the wording of subs (2) of s 11A, does not have a right of appeal under s 69 of the Magistrates Court Act where the decision appealed against is an interlocutory one pending the continuation of the trial. I agree. In *Attorney-General v The Regional Magistrate, Eastern Division & Phiri, supra*, GUBBAY JA, in considering the right of appeal in terms of s 69, said on the point raised by Mr *Chikumira*:

"The submission becomes even more cogent when regard is had to the position prior to the repeal and substitution of section 69 by Act No. 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

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magistrates' court. The deliberate change of the word 'finding' to 'judgement' 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*."

In the instant case the trial was finalised by the acquittal of the respondents at the close of the State case. But in this case the court cannot substitute its judgment for that of the trial magistrate, nor can this court pass sentence or remit the case to the magistrate's court for the passing of sentence. It has no power to do that because finality in this case was reached before the accused gave evidence. The trial terminated before the defence case was heard.

Mr *Chikumira* contended that the appellant has a right of appeal and meets the requirements of s 69 of the Magistrates Court Act because the decision made by the magistrate was a final judgment. In the case of a final judgment reached at the close of the State case different considerations apply. Mr *Chikumira* argued that, because a point of law is involved in

determining whether the magistrate applied "the proper legal test" when he acquitted the respondents or whether he acquitted them on a view of the facts which could not reasonably be entertained, the Attorney-General has a right of appeal.

That, of course, is the issue which falls for decision in this matter - the right to appeal against the decision of a magistrate after a submission of no case to answer.

Section 69 of the Magistrates Court Act, as amended by s 2 of the Criminal Procedure Laws Amendment Act, No. 3 of 1984, and as read with s 11A(2) of the Supreme Court of Zimbabwe Act, does not, in my judgment, give the Attorney-General the right to appeal against an acquittal made after the close of the State case, for the reasons I have mentioned above.

This is clear from the provisions of s 11A(2)(c). In terms of paragraph (c) of subs (2) of s 11A of the Supreme Court of Zimbabwe Act which gives a discretion to this court "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" to substitute "a verdict of guilty and either pass sentence itself or remit the case to the court concerned for the passing of sentence", to do the various things mentioned in paragraph (c) and above. An

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acquittal at the close of the State case is not covered by paragraph (c) of subs (2) of s 11A.

Mr *Chikumira* concludes his written heads of argument with this submission:

"... since the application of s 188(3a) of the Code would be repugnant and inconsistent to the letter and spirit of s 69 of the Magistrates Court Act it should in the circumstances be read as repealed by the latter and in the circumstances the Attorney-General has a right of appeal."

I see no inconsistency or repugnance between s 188(3a) of the Code and s 69 of the Magistrates Court Act, as read with subs (2) of s 11A of the Supreme Court of Zimbabwe Act. A repeal by implication can only be inferred where there is inconsistency or repugnance between the two statutes. Section 188(3a) of the Code deals with an appeal on a point of law after an acquittal at the close of the State case. The decision of the Supreme Court does not affect the finality of the trial court. Section 69 of the Magistrates Court Act is relevant to appeals in which there is finality in the sense that the trial has terminated, that is, both the State and the defence have adduced evidence and the court has delivered its judgment and sentence, if there is a conviction.

Mr *O'Meara* contended that subs (3) of s 188 of the Code explicitly refers to the situation pertaining "at the close of the case for the prosecution" while subs (3a) of s 188 specifies the circumstances in which an appeal will be from the decision of the court given at the close of the prosecution case. He argued that the effect of subs (3a) is to render a "decision" in favour of an accused final even if there has been an error of either fact or law. I agree with Mr *O'Meara's* submission.

It was contended for the respondents that s 69 of the Magistrates Court Act refers explicitly to a right of appeal on "judgment", presumably after a full trial although a discharge at the end of the

State case does give a "definite and distinct" relief the converse does not because, if the discretion is exercised against an accused, the trial continues. Mr O'Meara submitted that by the use of the word "judgment" the Legislature recognised the distinction between the two situations and must have intended to so distinguish. He concluded that the two sections were irreconcilable, inconsistent and repugnant, one to the other.

In support of his contention Mr O'Meara relied on *Government of Republic of South Africa & Anor v Government of KwaZulu & Anor* 1983 (1) SA 164

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(A) at 200D-E. It reads:

As to the circumstances in which a statutory provision may be said to have been impliedly repealed, counsel referred us to what was said by KOTZE AJA in *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 400, in a passage which has subsequently been referred to with approval in several decisions of this court. The passage reads as follows:

"The books tell us that a repeal by implication of an earlier statute by a later one is neither presumed nor favoured. It is only when the language used in the subsequent measure is so manifestly inconsistent with that employed in the former legislation that there is a repugnance and contradiction, so that the one conflicts with the other, that we are justified in coming to the conclusion that the earlier Act has been repealed by the later one."

I am of the opinion that the Legislature deliberately enacted s 69 of the Magistrates Court Act, s 20A of the Customary Law and Primary Courts Act, 1981 and s 11A of the Supreme Court of Zimbabwe Act, in order to deal with those matters which were not covered by the provisions of subs (3) and subs (3a) of s 188 of the Code and intentionally left out verdicts given by a court at the close of the State case because subs (3a) of s 188 had already dealt with that situation. Section 60 of the Magistrates Court Act is not inconsistent with subs (3a) of s 188 of the Criminal Procedure and Evidence Act. The Attorney-General has a right of appeal in terms of subs (3a) of s 188 of the Code, but has in terms of s 69 of [Chapter 18], no right of appeal against a verdict of acquittal made at the close of the State Case.

In conclusion it is my opinion that in terms of s 69 of the Magistrates Court Act, as read with s 11A of the Supreme Court of Zimbabwe Act, the Attorney-General has no right of appeal against a verdict of acquittal made by a court at the close of the State case. It also has not been shown that the magistrate acquitted the respondents on a view of the facts which could not reasonably be entertained.

Accordingly the appeal is dismissed.

Manyarara JA: I agree.

Korsah JA: I agree.

Pro Deo

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NGANI v MBANJE & ANOR MBANJE & ANOR v NGANI 1987 (2) ZLR 111 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Dumbutshena CJ, Manyarara JA & Korsah JA

Civil appeals

28 September & 26 October 1987

Flynote

Appeal - civil appeal - point of law raised on appeal but not canvassed in court below - when appeal court will allow point to be argued.

Practice and procedure - default judgment - judgment obtained when no cause of action had accrued - proceedings a nullity.

Costs - order for stay of execution granted ex parte - issue of costs should only be dealt with on return day of rule nisi.

Headnote

The Supreme Court will allow a point of law to be taken on appeal which was not canvassed in the court *a quo* if the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is taken. Where the facts on which it is based are common cause and clear beyond doubt on the record, there can be no unfairness.

If legal process is instituted, based on a cause of action which has not yet accrued, it is a nullity and a default judgment granted on the non-existent cause of action is void and of no effect.

At an *ex parte* hearing at which an order is sought restraining a party from acting in a particular manner, that party is not usually afforded the opportunity to be heard; a rule *nisi* is granted in his absence. The *audi alteram partem* rule demands that the question of the award of costs cannot be entertained when the party against whom the order is obtained has not been afforded a hearing; it is only on the return day of the rule *nisi* that the question of costs can be entertained.

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KORSAH JA

Cases cited:

Cole v Union Government 1910 AD 263

Morobane v Bateman 1918 AD 460

Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A)

SA Hotels Ltd v Wienburg 1950 (1) SA 516 (C)

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

Le Grand v Carmelu (Pvt) Ltd 1979 RLR 402 (AD); 1980 (1) SA 240 (ZRA)

M T N Chingore for the appellant (respondent in the second appeal)

J B Colegrave for the respondent (appellant in the second appeal)

Judgment

Korsah JA: In the first of these two appeals, the appellant Enock Ngani appeals against the judgment of EBRAHIM J dismissing his application for rescission of a default judgment; and in the second, the respondents in the first appeal, as appellants, dispute the correctness of the order of GIBSON J staying the warrant of execution on an *ex parte* application and awarding costs to the applicant. As the first of the two appeals is the more substantial, it will be more convenient to refer to Enock Ngani as the appellant throughout.

The background to the first of these appeals is that, on 17 February 1987, the appellant entered into an agreement of sale with the respondents in terms of which he sold to the respondents the property generally known as 15 Queensway road, Hatfield, for the sum of \$35 000. In compliance with the terms of that agreement the respondents paid a deposit of \$10 000 to the agent of the appellant and became entitled, in the absence of any fundamental breach of the terms of the agreement, to take up occupation of the property on 1 May 1987.

By a letter dated 14 April 1987, the appellant's agents, Merctrust, intimated to the respondents that the appellant had had problems with the purchase of his new house and wanted to know whether the respondents would agree to a cancellation of the agreement of sale. The respondents indicated their unwillingness to allow the appellant to resile from the agreement. The appellant telephoned the respondents' house to say that he was not vacating No. 15 Queensway Road. The respondents' legal practitioners then addressed a letter to the appellant, the penultimate paragraph of which reads:

"We regret to advise you that unless we receive your assurance that you will vacate the property on due date, we will make application to court for your eviction."

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KORSAH JA

On 27 April 1987 the respondents' legal practitioners had service of notice of motion proceedings, initiated on behalf of the respondents, effected on the appellant. The notice of motion stipulated that an application was to be made to the High Court, Harare, on 6 May 1987 for an order that the appellant, and all persons holding through him, be directed to vacate 15 Queensway Road, Hatfield. The appellant filed no papers in opposition to the application as he was invited to, and failed to attend court on the day scheduled for the hearing of the application. The order for his eviction was accordingly granted, and a copy of the court order was served on him on 18 May 1987.

On 28 May 1987 the appellant commenced notice of motion proceedings for a rescission of the order granted against him. In the affidavit in support of that application he averred that as the papers served on him did not bear a case number and a stamp from the High Court, indicating that they were issued out of the High Court, like other court papers that he had seen, he elected to ignore the papers.

The appellant also alleged in the founding affidavit that the respondents were in breach of the sale agreement, firstly, because they had not obtained a mortgage bond to discharge the outstanding balance of the purchase price as stated in the agreement and, secondly, because he had not received the deposit or any instalment payments from the sale of his house. He, therefore, had a good defence to the action.

The condition in the agreement regarding a mortgage bond merely stipulates that:

"The purchase shall make immediate application for a mortgage bond to discharge the balance outstanding."

The condition is thus complied with if the application is made.

And as regards the deposit and instalment payments, the letter of 14 April 1987, written on his behalf by his agents, states that:

"He (the appellant) would agree to refund you your full deposit of \$10 000 (including our fees) as well as \$1 000 representing the two instalments you have so far paid."

It is clear from this extract that the respondents had paid the deposit and the instalments to date to the appellant's agent and were thus not in breach of any of the clauses of the agreement.

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KORSAH JA

As the reason given by the appellant for not filing papers in opposition to the application for an order to evict him were spurious and unreasonable, EBRAHIM J declared his default wilful and rightly refused to grant an order for the rescission of the default judgment granted on 6 May 1987.

In the first appeal before us, the appellant's counsel has raised a point of law which was not canvassed before EBRAHIM J. He contended that under the sale agreement he was to vacate the premises on 1 May 1987. The process initiating proceedings for his ejectment was served on him on 27 April 1987 and filed at the High Court registry on 28 April 1987. The action was thus commenced prematurely.

As I understand the Rules, a question of law may be advanced for the first time on appeal, if the point is covered by the pleadings and if its consideration involves no unfairness to the party against whom it is directed. As INNES J observed in *Cole v Union Government* 1910 AD 263 at 272:

"The duty of an appellate tribunal is to ascertain whether the Court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal

with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and, there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset."

In the case before us, the date of service of the initiating process and the time for the appellant to vacate the premises were both common cause and clear beyond doubt on the record. And these are the two factors upon which the point of law impinges. See also *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23.

It seems to me that the process initiating action in the court, whether it be by the issue of a writ of summons or notice of motion, has the effect of freezing the rights of the parties at the time that it is filed in the registry. So that, if at the time action was instituted, a right of action had not accrued to the plaintiff or applicant, as the case may be, then no cause of action is established by the initiating process. Put another way, the plaintiff or applicant should, at or

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before filing the initiating process, have a complete cause of action against the defendant or respondent.

It is clear from the record that the notice of motion proceedings initiated by the respondents on 27 April 1987 were commenced before their right to eject the appellant on 1 May 1987 accrued to them. Therefore, the respondents had no cause of action against the appellant at the time the initiating process was filed at the registry, and the fact that the application was entertained some six days after a right of action had accrued to the respondents does not affect the relative positions of the parties at the time of commencement of the action: "There can be no action before anything is due and owing". Voet, Book 5, 1.27. It follows, therefore, that the respondents had no right in law to launch proceedings for the ejectment of the appellant before the expiry of the period stipulated in the agreement of sale: *South African Hotels Ltd v Wienburg* 1950 (1) SA 516 (C) at 520. For a reference to this authority I am indebted to Mr Colegrave who, in the true traditions of the legal profession, drew this court's attention to it, although it was not in his favour, during the very argument he advanced on behalf of the respondents.

This objection *in limine* is, in my view, not a mere technical point affecting some provision of adjectival law; it strikes at the very root of the action. It is so fundamental as to render the initiating process a nullity. If there is no cause of action then a judgment pronouncing that a non-existent cause exists is void and of no effect. As LORD DENNING observed in *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172l:

"If an act is void, then it is in law a **nullity**. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity."

In *Le Grand v Carmelu (Pvt) Ltd* 1979 RLR 402 (AD); 1980 (1) SA 240 (ZRA) the respondent sued the appellant for the price of goods sold and delivered during January and February 1978. Payment was to be effected by the appellant by 27 April 1978. The appellant repudiated the

contract on the alleged ground that the goods were defective and attempted to redeliver the goods to the respondent on 21 February 1978. The respondent issued his summons on 21 March 1978. At the trial, the appellant's attorney raised the

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KORSAH JA

point that the summons had been issued before payment of the goods was due. The magistrate ignored the point and gave judgment in favour of the respondent. It was held on appeal that the point raised was in the circumstances wholly technical and academic, and that the magistrate correctly paid no regard to it.

It seems to me that the *Le Grand* case *supra*, is distinguishable from the case before us. Usually, with regard to breaches of contract, the cause of action accrues when a breach occurs. The position is succinctly stated by Christie in his book *The Laws of Contract in South Africa* at 486:

"... a debtor whose failure to perform amounts to repudiation thereby puts himself *in mora*, no demand by the creditor being necessary ... No useful purpose could be served by demanding that a debtor perform what he has just evinced an unequivocal intention not to perform, and it can come as no surprise to him to be told by the court that his own repudiation put him *in mora*."

This, in my view, is the real reason for the decision in the *Le Grand* case *supra*. A cause of action accrued to the respondent upon the appellant's repudiation of the contract of sale, and the summons in that case was thus not prematurely issued.

This is not so in the instant appeal. Here, the appellant was to vacate the premises by 1 May 1987. The right to eject would have accrued to the respondents no earlier than 2 May 1987. The initiating process issued on 27 April 1987 was taken out before the right to evict had accrued to the respondents. Thus, at the time process was issued no cause of action had accrued to the respondents.

It was also urged upon us that because of the provisions of Rule 32 subrule (2) of the Rules of the Supreme Court, which recite that:

"The appellant, whether on appeal or on cross-appeal, shall not without leave of the court urge or be heard in support of any ground not set out when the appeal was entered ... ,"

the point of law belatedly raised by the appellant should not be considered, as no amendment to the notice of appeal has been made, nor has explicit leave of this court been granted to raise the point. But the same rule empowers this court in deciding an appeal not to confine itself to the grounds so stated:

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KORSAH JA

"Provided that the court shall not rest its decision on any other ground unless the parties have had sufficient opportunity to contest the ground."

In my view, every opportunity has been accorded the parties to contest the point of law raised,

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and it is within this court's competence to consider and rule upon it.

I am of opinion that the commencement of action before a cause of action accrued to the respondents renders the default judgment void and of no effect. The appeal succeeds and that judgment is accordingly set aside, but without any derogation from the respondents' right to commence fresh proceedings to enforce any legal right which has accrued to them under the agreement of sale.

With regard to the question of costs, I think that if the appellant had not been in wilful default and had raised the point of law, even at the hearing of the application to set aside the default judgment, it may have been unnecessary to institute this appeal. On the other hand the respondents must shoulder part of the blame for bringing about this appeal by initiating proceedings prematurely. It is only fair that in the circumstances each party should bear his own costs in this appeal.

Turning now to the second of these appeals, the appellant in the first appeal, having lost the battle to have the default judgment against him set aside, filed an urgent application for orders staying the warrant of ejectment issued against him and awarding costs against the respondents.

As Mr *Colegrave* rightly points out, the order staying execution of the warrant of ejectment was valid only up to the time of filing of an appeal against the refusal to set the default judgment aside, and the appeal against that order is of academic interest only. More important, however, is the appeal against the order awarding costs to the appellant on an *ex parte* application at which the opportunity of being heard was denied the respondents.

It seems to me abundantly fair and to be well established that in *ex parte* applications, filed because of the urgency of the matter, seeking an order restraining a party from acting in any particular manner, the applicant usually requests and is granted a rule *nisi* in the absence of the respondent. The question of the award of costs against the respondent cannot be entertained at this stage when he has not been afforded the opportunity of a hearing. The

1987 (2) ZLR p118

KORSAH JA

audi alteram partem rule clearly demands that a party be given an opportunity of being heard before he is condemned. It is, therefore, on the return date, when the respondent has had an opportunity of ventilating his side of the matter, that the issue of costs can rightly be entertained.

No reasons were given by the trial court for awarding costs against the respondents on an *ex parte* application and I do not consider it my duty to do more than ascertain whether, on the facts as presented, the award of costs against the respondents was justified. It clearly was not. The costs of the application before GIBSON J should have been borne by the appellant and I accordingly so order.

In the result, in the substantive appeal, the default judgment is set aside, and each party is to bear his own costs. And in the second appeal, the order of GIBSON J awarding costs against the respondents is set aside and the costs of this appeal are to be borne by the appellant,

Enock Ngani.

Dumbutshena CJ: I agree.

Manyarara JA: I agree.

George Seirlis & Associates, appellant's legal representatives

Winterton, Holmes & Hill, respondent's legal representatives

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CHIDYAUSIKU v NYAKABAMBO 1987 (2) ZLR 119 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Korsah JA

Civil appeal

14 October & 10 November 1987

Flynote

Appeal - notice of appeal - must be directed to order of court below and not to reasons for judgment -review - whether Supreme Court may review decisions of High Court.

Headnote

The respondent instituted a claim for damages against the appellant, who was at the time the Attorney-General. Subsequently the appellant was appointed as a judge of the High Court. When the respondent sought leave in terms of Rule 18 of the Rules of the High Court of Zimbabwe 1971 to continue the proceedings against the appellant, an order was made without opposition. The appellant noted an appeal to require the judge *a quo* to reconsider the matter. The notice of appeal merely required the matter to be remitted, without claiming that the decision was necessarily wrong. On appeal the validity of the notice of appeal was challenged. It was also argued, on behalf of the appellant, that the Supreme Court should treat the proceedings as though before it on review.

Held, that in order to be valid, a notice of appeal must be directed against the whole or part of the substantive order of the court below and not to its reasons for making the order.

Held, further, that the review powers of the Supreme Court are no greater than those of the High Court and are restricted to inferior courts.

Cases cited:

Western Johannesburg Rent Board & Anor v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A)

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GUBBAY JA

Molteno Bros v SA Railways 1936 AD 408

Haviland Estates (Pty) Ltd & Anor v McMaster 1969 (2) SA 312 (A)

Lipschitz NO v Saambou-Nasionale Bouvereniging 1979 (1) SA 527 (T)

Associated Mineworkers of Zimbabwe v Chamber of Mines S-97-87 (not reported)

Ex parte *Scott* (1909) 26 SC 520

Genticuro AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A)

A N H Eastwood for the appellant

A P de Bourbon SC for the respondent

Judgment

Gubbay JA: The respondent, a domestic worker, was arrested by members of the Zimbabwe Republic Police on 3 January 1985, on an allegation of murder. She was held in custody pending investigations on that charge. On 7 January 1985 she was brought before a magistrate and was remanded in custody on a charge of murder, pending the completion of the investigation into the alleged offence. Thereafter, and until 29 October 1985, the respondent was remanded in custody on sixteen occasions. All such remands and detentions in custody were requested by and ordered at the instance of various public prosecutors and law officers, who represented to the presiding magistrate on each occasion that there were and continued to be good and sufficient reasons for suspecting that the respondent had committed the offence of murder and for her to continue to be held in custody on that charge.

On 29 October 1985 the appellant, in his capacity as Attorney-General of Zimbabwe, utilized his powers under s 105(1) of the Criminal Procedure and Evidence Act [*Chapter 59*] to cause a notice to be served upon the respondent and the magistrate of his intention to indict the respondent summarily for trial before the High Court upon the charge of murder. In consequence, the magistrate, as he was obliged to do, committed the respondent for trial before the High Court and granted a warrant committing her to be held in custody until so brought to trial.

The trial commenced on 11 December 1985 and continued on 12 and 13 December 1985. It was resumed on 7 and 9 January 1986, upon which last date the respondent was acquitted at the close of the State case and discharged from custody.

On 22 January 1987 the respondent instituted an action against the appellant in his personal capacity, claiming: (a) by virtue of the provisions of s 13(5) of the Constitution of Zimbabwe 1980, compensation in the sum of \$10 000

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GUBBAY JA

for the wrongful deprivation of her personal liberty; (b) general and special damages in the sum of \$10 000 suffered by reason of his malicious prosecution of her; and (c) costs of suit.

The first claim, as formulated in the declaration, is based upon two breaches of the respondent's rights under ss 13(1) and (4) of the Constitution of Zimbabwe, for which it is alleged that the appellant was responsible. These are, respectively, a wrongful detention and deprivation of personal liberty from 7 January 1985 to 11 December 1985, conjoined with a failure to be brought to trial within a reasonable period of time or released upon reasonable conditions pending her trial.

The gravamen of the second claim is founded upon the allegation that the appellant proceeded with the prosecution on 11 December 1985 when the nature and quality of the evidence available against the respondent remained such that there was no reasonable prospect of the State securing a conviction of any offence against her.

The appellant filed his plea on 9 February 1987, disputing the respondent's right to recover either compensation of damages from him. It is alleged that in citing him in his personal capacity, the respondent is prompted by malice and improper motives. The respondent filed a request for further particulars to the plea. This was done on 13 February 1987 and has not been answered.

On 27 February 1987 the appellant was sworn in as a judge of the High Court and continues in that office. Subsequent to such appointment, the respondent filed a replication to the plea and a notice to make discovery. On 30 April 1987, the respondent's legal practitioners were advised by letter that the appellant joined issue on the replication. Discovery has not been provided and the appellant has declined to attend a pre-trial conference.

Following upon certain discussions, it was decided by the respondent's legal practitioners to make an application to the High Court in terms of Rule 18 of the High Court Rules, which reads

"No summons or other civil process of the court may be sued out against the President, or against any of the judges of the 'High Court, without the leave of the court upon motion made for that purpose."

The appellant's legal practitioners were agreeable to the application being raised informally from the Bar without the necessity of proceeding by way

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GUBBAY JA

of notice of motion, as required by the Rule. The attitude adopted, which was in accord with the appellant's instructions and knowledge, was that no stance would be taken either in support of or in opposition to the application, save to the extent their assistance was sought by the court. The reason for that neutral approach was an understanding that the protection afforded by Rule 18 exists, not so much for the benefit of the single judge concerned, but for the Judiciary as a whole; for the personal involvement of the judge in the suit may be such as to affect the reputations, integrity and standing of all the judges. It was thus considered inappropriate and ethically questionable for the appellant to act as a protagonist in the application. It was more fitting that his counsel should merely indicate a willingness to assist the court and, if so requested, advance in a balanced and impartial manner those factors in favour and those

against the granting of the application.

What occurred on 6 July 1987, when the application came before MRS JUSTICE GIBSON, is best described in the words of the appellant's counsel, Mr *Eastwood*, as they appear in para 9 of his affidavit filed of record:

"... Mr *de Bourbon* (on behalf of the respondent) immediately rose and drew to the attention of the Judge that there was the further matter concerning an application under Rule 18 and he explained that he was making this application by consent. He drew the Judge's attention to the terms of Rule 18 and the fact that the Defendant had become a Judge. The Judge began to say that as it was by consent she proposed ... (granting the Order), when I rose on behalf of the Defendant and informed her that whilst the Defendant consented to the application being brought forward at this stage and indeed felt that the application should be made, the Defendant for obvious reasons, not least that it would be invidious for him to do so, took no stance on whether or not the application should be granted and merely consented to and indeed supported the raising of the application. The Judge then announced that she accordingly entertained the application and granted it"

Mr *Eastwood* did not again interject before the court adjourned.

A few days later Mr *Eastwood* and Mr *de Bourbon* were requested to attend upon MRS JUSTICE GIBSON in Chambers. At that meeting Her Ladyship asked for consideration to be given by the parties to her withdrawal of the order of 6 July 1987, as apparently it had been suggested to her that some confusion or misunderstanding might have prompted its making. In the event Mr *de Bourbon* did not consent to the withdrawal of the order because he had been

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GUBBAY JA

assured by Mr *Eastwood* that the latter had not misunderstood his client's instructions and that he was satisfied (or, to put it more accurately, was under the impression) that the learned judge had correctly understood his attitude immediately prior to making the order.

On 17 July 1987 a notice of appeal was filed on behalf of the appellant. Thereafter, being uncertain as to whether the order of 6 July 1987 might be regarded as being interlocutory in nature, it was considered advisable to apply for condonation of the late noting of an appeal and for leave to appeal. The notice of motion, together with the supporting affidavit of Mr *Eastwood* and the opposing affidavit of the respondent's legal practitioner, Mr Masterson, were filed on 4 August 1987. The application was granted by GIBSON J but no judgment accompanied the order.

The notice of appeal is framed in these terms:

"The Defendant hereby notes an Appeal against the whole of the Order made by the Honourable Mrs Justice Gibson on 6th July 1987 granting leave to the Plaintiff in terms of Rule 18 of the High Court Rules to proceed with the prosecution of Case No HC 213/87, upon the following grounds:

1. The Judge erred in granting the Order by Consent when in fact it was not by consent and rather only the raising of the application was by consent and the relief sought by the Plaintiff was not consented to by the Defendant;
2. The Judge erred in not considering the merits of the Plaintiff's application.

The Defendant seeks an Order on Appeal.

1. Considering the merits of the Plaintiff's application, alternatively
2. Remitting the matter to the High Court to consider the merits of the Plaintiff's application.

No Order as to costs in the High Court or on Appeal is sought."

Before us the validity of the notice of appeal was challenged by Mr *de Bourbon*. He submitted that what the appellant was seeking to attack in the first ground was a misapprehension on the part of the learned judge which caused her to grant the order without having regard to the merits or demerits of the application; and in the second ground of appeal (even if she had not

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laboured under such a misapprehension) a failure on her part to consider the merits and demerits of the application and exercise a discretion accordingly: that the notice is directed, not against the correctness of the order, but rather against the procedural errors which occasioned its making. In other words, so the argument went, the appellant's dissatisfaction, as expressed in the notice of appeal, is not with the grant of leave, for there is no prayer seeking that the order made by the learned judge be substituted by one dismissing the application. It is with the "thought process" of the learned judge which prompted her to make the order. That is the true essence of the appeal.

In order to be valid, a notice of appeal must be directed to the whole or part of the order made by the court *a quo* and not to its reasons for making the order in question. It must be lodged against the substantive order. This much emerges plainly from the decision in *Western Johannesburg Rent Board & Anor v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) where at 355 CENTLIVRES JA said this:

"... it is clear that an appeal can be noted not against the reasons for judgment but against the substantive order made by a Court. For instance, it is open to a respondent on appeal to contend that the order appealed against should be supported on grounds which were rejected by the trial judge: he cannot note a cross-appeal under Rule 6 (4) unless he desires a variation of the order. See *Municipal Council of Bulawayo v Bulawayo Waterworks Ltd* 1915 AD 611 at pp 625, 631, 632. In the present case the notice of appeal is not against the order granted by the Transvaal Provincial Division but against that part of the reasons for judgment in which it was held that the appellants had acted arbitrarily."

See also *Molteno Bros v SA Railways* 1936 AD 408 at 413; *Haviland Estates (Pty) Ltd & Anor v McMaster* 1969 (2) SA 312 (A) at 335D; *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T) at 5429A; *Associated Mineworkers of Zimbabwe v Chamber of Mines* S-97-87; Herbstein and van Winsen *Civil Practice of the Superior Courts in South Africa* (3 ed) at 702.

In my view, Mr *de Bourbon*'s objection is well taken. What this court is being asked to do is not to reverse the order of the learned judge but to cure the procedural defects, by either considering the merits of the application itself or remitting the matter for the learned judge to do so. Once that is done, the appellant will be content whatever the outcome should happen to be. That this is the approach is evident from the wording of the so-called prayer to the

GUBBAY JA

notice of appeal, which omits to seek an order that the application brought in terms of Rule 18 be dismissed.

It was Mr *Eastwood's* request that in the event of this court holding that the notice of appeal was invalid he be afforded the opportunity to amend it. But the insuperable difficulty facing him is that the effect of the invalidity of the notice of appeal is the same as if no notice of appeal had been given at all. The appeal was not properly lodged and so is not before this court. We have no power to deal with it. See *Molteno Bros* case *supra* at 413.

This conclusion makes it unnecessary to consider the other arguments which were advanced on the basis of the validity of the notice of appeal.

It remains only to deal with the question, debated briefly before us, as to whether this court is empowered to treat the present proceedings as if brought before it on review.

Section 23 of the Supreme Court of Zimbabwe Act, 1981 deals specifically with the review powers of the Supreme Court. It gives the Supreme Court, and every judge thereof, the same powers as are vested in the High Court and its judges to review the proceedings and decisions of **inferior courts of justice**, tribunals and administrative authorities. The limitation to the exercise of that power is that proceedings of **superior courts**, into which category the High Court falls, are not amenable to review. This is made clear, not by the use of the phrase "inferior courts" but by the Legislature granting the Supreme Court the same power, and no greater power, than that vested in the High Court. See *Ex parte Scott* (1909) 26 SC 520; *Genticuro AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 601F.

In the result this court is left with no option but to strike the appeal off the roll. As there is no warrant to deprive the respondent of the costs of the appeal, I would order as follows:

"The appeal is struck off the roll with costs".

McNally JA: I agree.

Korsah JA: I agree.

Kantor & Immerman, appellant's legal representatives

Coghlan, Welsh & Guest, respondent's legal representatives

MAKANDA v LAMBAT 1987 (2) ZLR 126 (HC)

Court High Court, Harare

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Mtambanengwe J

Application on notice of motion for further particulars

29 October & 11 November 1987

Flynote

Practice and procedure - further particulars - application for - particulars need only be sufficient to enable party to plead.

Headnote

An application for further particulars should not amount to an application for the supply of evidence; all that the party requesting further particulars is entitled to is enough to enable him to plead. Where there was a claim for liquidated damages in respect of repairs to a house, the defendant was entitled to ask for particulars about what the damage was but not how the defendant arrived at the figure claimed.

Cases cited:

Timsecurity (Pvt) Ltd v Castle Hotel (Pvt) Ltd 1972 (1) RLR 155 (AD)

Bronte Hotel (Pvt) Ltd v Low 1974 (1) RLR 25 (GD)

White v Moffett Building & Contracting (Pty) Ltd 1952 (3) SA 307 (O)

Costa v van Zyl & Anor 1957 (4) SA 156 (T)

G S Wernberg for the plaintiff

J Sayce for the defendant

Judgment

Mtambanengwe J: This is an application on notice of motion to compel the supply by the defendant of particulars requested.

The brief facts are that the plaintiff (applicant) is suing the defendant (respondent) for a refund of an amount of \$7 195,00 paid towards the purchase of a house from which plaintiff has now been evicted. The

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MTAMBANENGWE J

defendant admits the plaintiff's allegations but counterclaims for damages in the sum of \$7 973,20 and \$841,85.

The claim in reconvention states:

"3. It was a further term of the said agreement that:

- (a) the Plaintiff would keep the buildings and other fixed improvements and erections on the property in good order and in a proper state of repair and would keep the grounds in a good and clean condition; and
 - (b) the Plaintiff would pay the owner's rates levied on the property.
4. During the subsistence of the agreement and in breach of his obligations thereunder the Plaintiff failed to keep the said house and grounds in the required condition.
 5. The cost of restoring the said house and grounds to the said condition, for which the Defendant is liable, amounts to \$7973,20."

The request for further particulars says:

"To enable Defendant in reconvention to plead Plaintiff in reconvention is required to supply the following particulars: -

- (a) How is the figure of \$7 973,20 arrived at? Plaintiff is requested to supply the estimates of such repairs."

The defendant declined to furnish the particulars requested, stating that they are not reasonably necessary to enable plaintiff to plead. Mr *Wernberg*, for the plaintiff, submitted that the nature of the particulars requested is that the plaintiff, in order to plead, needs to know what damages are being alleged to have been suffered by the defendant. These, he continued, are left completely in the air; how then can the plaintiff be able to plead? Mr *Sayce*, for the defendant, in substance made two submissions in reply, to the effect that -

- (a) If what the Plaintiff wanted was the damages alleged to have been suffered, he did not ask for that. That question would have been properly directed to para (4) of defendant's claim in reconvention.
- (b) The request is directed at para (5) of defendant's claim in reconvention. Had defendant replied by saying that the figure of \$7 973,20 is arrived at by the various items of repairs, this would have been an adequate reply

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MTAMBANENGWE J

which still would not enable plaintiff to plead. Alternatively, the request embodied in the second limb of plaintiff's request amounts to requesting for the evidence on which the defendant would rely and therefore is not compellable. In other words, the plaintiff is stuck with his request and cannot ask the court to exercise its discretion to order the furnishing of particulars not requested.

I agree. I would make the trite observation that it is not the function of the court to conduct pleadings for litigants, and that the court can only come to the assistance of a party unreasonably denied what he is legitimately entitled to and what he has legitimately and correctly sought from the other party. In this case, it is obvious, having regard to Mr *Wernberg's* submission and to the defendant's claim as it stands, that the plaintiff simply has not asked the right questions or requested the correct information. A look at the progress of this litigation illustrates the point.

Summons was issued on 20 March 1986. On 21 April 1986 the defendant requested for further particulars to the plaintiff's declaration. These were filed on 28 July 1986. On 13 August 1986, a notice was given that the declaration, amplified by further particulars, was excipiable and that unless the defect was rectified an appropriately worded exception would be filed within seven days. Nothing was done and accordingly the exception was filed on 21 August 1986. On 27 October 1986, when the exception was to be argued, the plaintiff applied to amend his declaration. Leave to amend was accordingly granted on that date and the plaintiff was ordered to pay the costs of defendant's exception. Thereafter, the defendant's plea and claim in reconvention was filed on 5 January 1987. The plaintiff's request for further particulars was only filed nearly five months later, on 27 May 1987. The reply, declining to furnish the particulars, was filed on 4 August 1987 and this application was accordingly launched on 15 September 1987.

This sketch history of the progress of the matter shows the almost half-hearted manner in which the plaintiff has prosecuted his claim to date, which manner in turn seems to explain the half-hearted manner in which the present request for further particulars was drawn; and it seems to me in these circumstances, the application is an abuse of the court's process and a mere attempt to buy time. I say so because the request, to my mind, does not seem calculated to achieve any of the purposes for which particulars are requested as discussed in all the decided cases on the subject. See, for example, *Timsecurity (Pvt) Ltd v Castle Hotel (Pvt) Ltd* 1972 (1) RLR 155 (AD) at 160 E-G; *Bronte Hotel (Pvt) Ltd v Low* 1974 (1) RLR 25 (GD); *White v Moffett*

1987 (2) ZLR p129

MTAMBANENGWE J

Building & Contracting (Pty) Ltd 1952 (3) SA 307 (O).

The fact that the most obvious information reasonably necessary for the plaintiff to plead was not requested, fortifies me in the view that I take of the plaintiff's request, that it was unnecessary and frivolous and that, in the circumstances, this application amounts to an abuse of the courts process. See *Costa v van Zyl & Anor* 1957 (4) SA 156 (T).

For these reasons it must fail.

Accordingly the application is dismissed with costs.

Chirunda, Chihambakwe & Partners, plaintiff's legal practitioners

Gill, Godlonton & Gerrans, defendant's legal practitioners

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REID v GORE 1987 (2) ZLR 130 (HC)

Court High Court, Harare

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Mtambanengwe J

Application for summary judgment

5 & 11 November 1987

Flynote

Practice and procedure - summary judgment - defence - vague and untrue allegations raised - no prima facie defence.

Headnote

In opposing an application for summary judgment, all that the defendant needs to do is show that there is a mere possibility of success, that he has a plausible case, that there is a triable issue or that there is a reasonable possibility that an injustice may be done if summary judgment is granted. He will not do this by making vague or untrue allegations.

Cases cited:

Kassim Bros (Pvt) Ltd v Kassim 1963 R & N 876; 1964 (1) SA 651 (SR)

Chrismar (Pvt) Ltd v Stutchbury & Anor 1973 (1) RLR 277 (GD); 1973 (4) SA 123 (R)

Jena v Nechipote 1986 (1) ZLR 29 (SC)

B Brighton for the plaintiff

R I Costa for the defendant

Judgment

Mtambanengwe J: This is an opposed application for summary judgment. The plaintiff claims:

- (a) an order ejecting defendant from the property;
- (b) cancellation of an agreement of sale;
- (c) an order that the plaintiff retain a sum of \$4 000,00 as and by way of occupational rent;

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MTAMBANENGWE J

- (d) damages in the sum of \$200 per month calculated from 1 June 1987 to date of defendant's vacation of the property;
- (e) costs of suit.

The facts, which are common cause, and as they appear on plaintiff's declaration are these. By written agreement dated 22 October 1985, the plaintiff sold to the defendant property situate at 12B Ruwa Avenue, Waterfalls, Harare for \$14 000; \$100 00 of this was payable on 5 November 1985 and the balance of \$4 000,00 was payable on 1 February 1986. By 1 February 1986 the

defendant had only paid \$900,00. On 3 February 1986 the parties, in writing, varied the terms of the original agreement, so that \$8 000,00 was to be payable on 3 February 1986, of which \$3 000,00 was to be in cash and \$5 000,00 by cheque, the balance of \$6 000,00 was to be payable on 30 April 1986. The \$3000,00 in cash was duly paid but the cheque for \$5 000,00 bounced on presentation and was not replaced. Thereafter, in April 1986, defendant paid \$200,00 and \$700,00 in August 1986. Significantly, on 14 August 1986 the plaintiff wrote to the defendant's legal practitioners as follows:

"Re: Rosten Gore : Purchase of 12B, Ruwa Avenue

With reference to your letter dated 6 August 1986 I would like to point out to you that your client has already breached two previous contracts with me. As a result I am not prepared to renegotiate a new contract.

My position is that your client pays the outstanding balance of \$11 000 or rent arrears of \$400,00 (for period ending 31st August 1986). If he does not pay up by the 25th of this month then I will ask him to vacate the premises by the 1st of September 1986."

Subsequently, and consequently (apparently) in September 1986 defendant paid \$400,00.

Also significantly, the second agreement states:

"I Rosten Gore of 52 Kenneth Kaunda Avenue, Harare, have this day (3 February 1986) paid John Reid the sum of Eight thousand dollars (\$8 000,00) of which \$5 000 is by cheque. This is part of \$14 000,00 (fourteen thousand dollars) for the purchase of 12B Ruwa Avenue, Waterfalls, Harare. I promise to pay the balance (\$6 000) by April 30, 1986. I promise to pay \$200 (two hundred dollars) a month till the outstanding amount of \$6 000 has been paid (thus) the two hundred

1987 (2) ZLR p132

MTAMBANENGWE J

dollars will be taken as a penalty for not paying off the balance in time. I will also be responsible for paying the rates and maintaining the property."

In opposing this application, the defendant has filed an affidavit which states (para 10):

- "(a) . . . but this agreement was further varied by Plaintiff and me. It was agreed between us that I would make an application to various Building Societies for a mortgage bond in order to pay the balance outstanding, and the Plaintiff would withhold all action pending the outcome of this application.
- (b) In pursuance of the aforesaid arrangement, I duly made application for a mortgage bond to various Building Societies.
- (c) My application to Beverley Building Society was initially unsuccessful from their letter to me dated 10th November, 1986, a copy of which is annexed as "A".

Sub - paragraph (d) (e) and (f) need not be repeated; they all deal with as yet unfruitful subsequent applications for a mortgage bond.

- "(g) I respectfully submit that for reasons in addition to the aforementioned arrangement in respect of the bond application, the Plaintiff is now estopped from relying upon the terms and conditions of the varied agreement, that is, the second agreement for the following reasons:
 - (i) The Plaintiff sent my Legal Practitioners a letter demanding payment by the 25th August 198(7) [this is a mistake for 1986], as will more fully appear from the letter from Plaintiff to my Legal Practitioners

dated 14th August 1986, a copy of which is annexed headed as "E".

- (ii) The said letter clearly gave me the option of paying \$11 000,00 or \$400,00 in respect of rent arrears. I duly paid an amount of \$400,00 in or about September 1986 and such payment was accepted by Plaintiff without further protest."

In para 11 of his affidavit the defendant states:

"For the reasons mentioned in paragraph 10 hereof, the Agreement

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MTAMBANENGWE J

between myself and Plaintiff as well as his subsequent conduct clearly indicate that the two previous agreements were superseded by a new method of paying the Plaintiff, that is, through a mortgage bond."

In argument, Mr *Brighton*, for the plaintiff, submitted that the defendant's attempt to raise an issue of fact by alleging a new agreement, after breaches of the two written agreements, should be seen as a mere attempt. It is a mere bald allegation, unsupported in anyway on the papers. The allegation does not say when, where, or if made, what were the terms of the alleged new agreement. I would agree. In view of the written agreements and of the plaintiff's letter of 14th August 1986, saying he was not prepared to negotiate a new contract, it seems to me that if there was any new agreement that can only be extracted from the letter of 14 August. To my mind, the defendant clearly condemns himself on the papers when he says that he was given an option to pay \$11 000,00 or \$400 as rent arrears to 31 August 1986 or vacate the property by 1 September 1986. The plaintiff's letter of 14 August 1986 clearly shows that the defendant's legal practitioners had, in their letter of 6 August 1986, approached him with proposals to negotiate a new contract. I doubt the *bona fides* of the defendant in not producing that letter and in not stating when and where such new agreement was made between him and the plaintiff. The obvious inference from the plaintiff's letter of 14 August is that any such new agreement would have been after that date. If so made, such agreement would have been made through the defendant's legal practitioners or they would at least have been advised of it, since they were already acting for defendant in that connection. There is nothing on the papers to show or indicate any such awareness on their part.

On 3 October 1986, the legal practitioners wrote to the plaintiff to say that the defendant had lodged an application with Founders Building Society to enable him to take transfer (para 8 of the plaintiff's founding affidavit). The defendant had paid \$400,00 in or about September 1986 in terms of the option in the plaintiff's letter of 14 August. There is not the slightest suggestion that that letter of 3 October 1986 was addressed to the plaintiff pursuant to any new arrangement. Significantly, the letter of 3 October indicates the time period within which such a new agreement could have been entered into, that is, between sometime in September 1986 and 3 October 1986. It is completely unlikely that any such agreement, fresh upon the plaintiff's refusal to renegotiate a new contract and the exercise of the option to pay rent arrears, would have taken place then and gone unrecorded or subsequently unrecorded by them in the circumstances where defendant's legal practitioners were clearly acting for the defendant in that connection. All these circumstances

MTAMBANENGWE J

show that the defence being attempted by the defendant is inherently untruthful.

It seems to me that the issue of the alleged new arrangement is a self-saving device by the defendant. Hence the extremely vague allegations and the use of the "peculiarly ambiguous word 'arrangement'" (see *Kassim Bros (Pvt) Ltd v Kassim* 1963 R&N 876 (SR) at 882E. I cannot see how by any reasoning it can be accepted that in the circumstances of this case the defendant has set up a *prima facie* defence.

If I am wrong in this conclusion, regard has to be had to Mr *Brighton's* alternative argument. He said that, even on his own word, the defendant is in breach. That is, granting that the second written agreement was varied, there is still no *bona fide* defence to plaintiff's claim, as in the absence of any allegation to the contrary the assumption is proper that it would have been an implied term of that new agreement that a bond would be raised within a reasonable time. In the last twelve months the building societies have been granting loans and the defendant has had ample opportunity to obtain a bond; he has not raised and to date there are no prospects that he will raise a loan or that he will be in a position to do so. The papers before me clearly support this. In this respect also the plaintiff's case remains completely unanswerable. I agree with Mr *Brighton's* submission in answer to Mr *Costa*, for the defendant, that the test in *Chrismar (Pvt) Ltd v Stutchbury & Anor* 1973 (1) RLR 277 (GD); 1973 (4) A 123 (R) is satisfied. In this connection Mr *Costa* did concede that in the circumstances it is difficult to establish that defendant will be able to secure a bond.

In *Jena v Nechipote* 1986 (1) ZLR 29 (SC) at 30, GUBBAY JA stated:

"All that defendant has to establish in order to succeed in having an application for summary judgment dismissed is that 'there is a mere possibility of his success'; 'he has a plausible case'; 'there is a triable issue'; or 'there is a reasonable possibility that an injustice may be done if summary judgment is granted'. These tests have been laid down in many cases, typical of which in this country are *Davis v Terry* 1957 R&N 392; 1957 (4) SA 98 (SR); *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957 R&N 723; 1957 (4) SA 631 (SR); *Kassim Brothers (Pvt) Ltd v Kassim and Another* 1963 R&N 876; 1964 (1) SA 651 (SR); *Shingadia v Shingadia* 1966 RLR 285; 1966 (3) SA 24 (SR); *Webb v Shell Zimbabwe (Pvt) Ltd* 1982 (1) ZLR 102 (SC); 1982 (2) SA 763 (ZS)."

MTAMBANENGWE J

The learned JUDGE OF APPEAL found in that case that

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

In that case defendant had alleged, in answer to a debt sued for on an acknowledgement of debt, "this debt has been paid in full and the money is not due to plaintiff".

In the instant case I have fully set out the circumstances surrounding the not only bald but

vague allegation made by the defendant; the inherent untruthfulness of the allegation in those circumstances, the two written agreements and the plaintiff's letter of 14 August 1986, all of which show up the spuriousness of the issue raised as defence by the defendant. I am satisfied that the plaintiff's case remains completely unanswerable and that upon the application of any of the tests referred to in *Jena's* case, *supra*, the defendant has not succeeded in raising a *prima facie* defence.

It follows, therefore, that the application succeeds; and judgment is granted in terms of the plaintiff's summons.

Winterton, Holmes & Hill, plaintiff's legal practitioners

Stumbles & Rowe, defendant's legal practitioners

1987 (2) ZLR p136

S v NATHOO SUPERMARKET (PVT) LTD 1987 (2) ZLR 136 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

3 & 16 November 1987

Flynote

Evidence - single witness evidence - test of acceptability.

Statutes - interpretation - patent error in wording of statute - court's power to correct - Control of Goods (Distribution and Disposal of Commodities) Regulations SI 556A/82 - s 5.

Criminal law - statutory offences - prohibition against conditional selling - proviso allowing such selling where goods form "part of same set of commodities" - meaning.

Headnote

In deciding whether to convict on the evidence of a single witness, no magic formula can be applied. The court must approach his evidence with caution and its merits must be weighed against any factors which militate against its credibility. A common sense attitude must be applied. If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respects unsatisfactory.

The court has the power to correct an obvious drafting or printing error in the wording of a statute. In the proviso to s 5 of the Control of Goods (Distribution and Disposal of Commodities) Regulations in SI 556A/82, the words "that subsection" and "subsection (1)" must be read and interpreted as "this section".

The appellant had been convicted of conditional selling in contravention of s 5 of the

Regulations, by refusing to sell a bar of washing soap to a customer except on condition that the customer purchased two bars of toilet soap.

1987 (2) ZLR p137

GUBBAY JA

Held, that washing soap and toilet soap do not form "part of the same set of commodities" for the purposes of the exception contained in proviso (b) to s 5, and the appellant was rightly convicted.

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 Mpofu 1978 RLR 435 (GD)

Matereke v C T Bowring & Associates (Pvt) Ltd 1987 (1) ZLR 206 (SC)

A M Donagher for the appellant

D P Drury for the respondent

Judgment

Gubbay JA: The appellant, a limited liability company, which conducts the business of a supermarket in Mutare, was charged with contravening s 5 of the Control of Goods (Distribution and Disposal of Commodities) Regulations, 1982 (SI 556A of 1982), in that on 15 October 1986 its managing director, Thankor Nathoo, had unlawfully refused to sell a bar of "Skyline" washing soap to a customer, except on condition that the customer purchased with it two tablets of "Romance" toilet soap; the gravamen of the charge being that the appellant was practising what is termed "conditional selling".

To this charge Mr Nathoo, on behalf of the appellant, pleaded not guilty. The defence set up, as testified to by him and the assistant manager, was that, although specially made-up packs comprising a single bar of "Skyline" soap and two tablets of "Romance" soap were being offered for sale at \$2,50 (representing a saving of 20 cents on the three individual prices), both "Skyline" soap and "Romance" soap were displayed on the shelves individually. It was left to the customer to choose whether to purchase the pack or the separate soaps.

The magistrate rejected the defence. He convicted the appellant and ordered it to pay a fine of \$100. It is against both the finding of guilt and the *quantum* of the fine that this appeal is now brought.

The State case rested solely on the evidence of Willard Machunge, a price inspector in the employ of the Ministry of Trade and Commerce. He said that on the day in question he went to the supermarket in order to investigate a report he had received that the appellant was

practising conditional selling in respect of "Skyline" washing soap. At that time there was a countrywide

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GUBBAY JA

shortage of both washing soap and washing powder, though toilet soap was in plentiful supply. Upon entering the supermarket, an establishment with which he was well familiar, he observed an employee busily binding together into packs one bar of "Skyline" soap with two tablets of "Romance" toilet soap. He enquired from the employee whether he could purchase the washing soap separately, but was informed that it was only being sold as part of a pack. Upon being approached with the same request, Mr Nathoo confirmed to him the manner in which the washing soap was being offered for sale and added that if customers wished to purchase it as separate item they would have to seek it elsewhere. Having ascertained from a personal inspection of the supermarket that there were no loose bars of "Skyline" soap being displayed for sale, he issued Mr Nathoo with a "ticket".

The magistrate considered Inspector Machunge to be entirely credible and reliable. Accepting his version as the truth, he dismissed as false the contrary evidence adduced from the appellant's two witnesses.

It is, of course, permissible in terms of s 253 of the Criminal Procedure and Evidence Act [Chapter 59] for a court to convict a person on the single evidence of a competent and credible witness. The recognised test is whether his evidence is found to be satisfactory in every material respect. See for instance, *R v Mokoena* 1932 OPD 79 and *R v Ellis* 1961 R & N 468 (FSC). But, as cautioned by LEWIS JP in *S v Nyati* 1977 (2) RLR 315 (AD) at 318E-H, that test is not to be regarded as an inflexible rule of thumb. There is no magic formula which determines when a conviction is warranted upon the testimony of a single witness. His evidence must be approached with caution, and the merits thereof weighed against any factors which militate against its credibility. In essence a commonsense approach must be applied. If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respects unsatisfactory. See Hoffmann and Zeffertt *South African Law of Evidence* 3 ed at 451.

In this case, however, I can discern no unsatisfactory features in Inspector Machunge's evidence. He told a simple and logical story and told it well. His actions were in no way precipitate or incautious. He satisfied himself that the washing soap was being offered for purchase on a conditional basis and only then did he issue a ticket. He either spoke the truth or deliberately lied against the managing director of a company against whom he had no cause to be vindictive.

1987 (2) ZLR p139

GUBBAY JA

Moreover, the probabilities favoured the State version. It is highly unlikely that in the course of his duties Inspector Machunge would have summarily issued a ticket because, for some obscure reason best known to himself, he did not want the appellant to sell the soap in packs as

a mid-month special, as alleged by Mr Nathoo. And it is equally unlikely that he issued the ticket in a fit of pique without conducting an inspection of the supermarket, as claimed by the assistant manager.

I am not persuaded, therefore, that there is merit in the submission, advanced on the appellant's behalf by Mr *Donagher*, that the magistrate erred in relying on the evidence of a single witness to convict the appellant.

Mr *Donagher's* next argument was that s 5 of the Regulations does not disclose an offence because of the inclusion in the proviso of the words "that subsection" and "subsection (1)" which are meaningless.

Section 5 reads:

"5. No person shall refuse to sell, let or hire or dispose of any commodity to another person except on condition that the other person purchases, hires or acquires from him or anyone else any other commodity whatsoever in addition to such first-mentioned commodity.

Provided that the provisions of this section shall not apply if the other commodity referred to in that subsection is -

- (a) a commodity which, according to the normal usages and customs of the trade relating to that commodity, is not sold separately from the commodity first mentioned in subsection (1); or
- (b) a commodity which forms part of the same set of commodities as the commodity first mentioned in **subsection (1)**" (my emphasis).

That there has been a patent mistake on the part of the legal draftsman in the use of the words "that subsection" and "subsection (1)" is unquestionable. It would seem that the mistake arose in consequence of the draftsman's reference to the predecessor to s 5, as contained in SI 370/80, which was framed under two subsections. However that may be, I do not consider that there is any obstacle preventing this court from rectifying the error by reading and interpreting the words in contention as "this section".

1987 (2) ZLR p140

GUBBAY JA

If authority is required for that proposition, it is to be found in *S v Mpofu* 1978 RLR 435 (GD). In that case the error concerned was the omission in the Fifth schedule to the Criminal Procedure and Evidence Act [Chapter 59] of the paragraph: "Any conspiracy, incitement or attempt to commit any of the offences mentioned in this Schedule". The omission was due to the erroneous reproduction, by either the legal draftsman or the Government Printer, of the Fifth Schedule to Chapter 59 of the *Statute Law of Rhodesia*, Revised Edition 1974, from its forerunner, the Second Schedule to Chapter 31 in the *Statute Law of Southern Rhodesia*, Revised Edition 1963. In finding myself at liberty to supply the omission I said this at 438H-439A:

"It is pertinent to note that this is not the first mistake of its kind to have been detected by the courts. In *M v S* 1964 (1) SA 319 (SR), the words 'or father' had been omitted by the draftsman or printer from the penultimate line of section 4(1) of the Deserted Wives and Children Protection Act, 1959 (since repealed)). The omission was quite out of harmony with the context of the section. YOUNG J, with whom BEADLE CJ, concurred, held that there was nothing to obstruct the Court from supplying the omission and so curing the error. Similarly, in *S v Gaughan &*

Anor 1970 (4) SA 318 (RAD), a printing error had been responsible for the use of the word 'absconds' for the word 'abducts' in section 54(1)(a) of the Children's Protection and Adoption Act [Chapter 172] (1963 Edition). After referring to the correspondent section in the original Act (No. 41 of 1949) and to the provisions of the relevant South African Act upon which it had been modelled, the Court decided that the word 'absconds' was to be read and interpreted as 'abducts'."

See also *Matereke v CT Bowring and Associated (Pvt) Ltd* 1987 (1) ZLR 206 (SC) at 208A-B; *Maxwell on the Interpretation of Statutes* 12 ed at p 228. If anything, there is more justification for curing the error in this case than there was in that of *Mpotu*, *supra*.

The final submission advanced by Mr *Donagher* was that even on the State case the appellant's action fell within the exception under proviso (b) to s 5, in that the washing soap "Skyline" and the toilet soap "Romance", both being soaps, formed "part of the same set of commodities".

The words "commodity" and "set" are not defined in the Regulations and recourse must be had to authoritative dictionaries. Of the many meanings assigned to these words in the Oxford English Dictionary the following appear to me to be the most appropriate having regard to the context of s 5:

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GUBBAY JA

"Commodity - a kind of thing produced for use or sale; an article of commerce; an object of trade; in pl. goods, merchandise, wares, produce.

Set - a number of things that belong together as essentially similar or as complementary to each other."

Examples of the word "set" within the above meaning would be a set of golf clubs, a set of spanners, a set of fire irons or a set of books, such as the Encyclopaedia Britannica. In other words, things which complement one another and are customarily, though not invariably, sold together.

Washing soap and toilet soap, though falling into the same category or class of articles, have an essentially different function: The one is sold for the purpose of washing clothes; the other for cleansing the body. They are not complementary to one another and they do not customarily belong to or get sold together. Ordinarily they are sold individually. I entertain no doubt therefore that these two types of soap cannot be said to form part of the same set of commodities.

In the result the attack against the conviction fails.

It was submitted before us that, having regard to the fairly low value of the washing soap and to the absence of any evidence of actual prejudice to members of the public, the fine imposed was manifestly excessive.

I am unable to agree. The gravity of the offence lies in the fact that in order to buy washing soap, which at the time was very difficult to obtain, a customer was being induced to purchase toilet soap which he may not have required, thereby involving him in more expenditure than

necessary. That method of conditional selling was aimed at profit-making, in the sense that the appellant was taking the opportunity of moving commodities which did not sell or did not have a high turnover, by offering them for sale with a commodity which was scarce and in great demand.

That the Legislature takes a serious view of this type of conduct is amply borne out by the penalty provided in s 10(2)(a) of the Regulations, which are a fine of an amount not exceeding the value of the commodity or \$5 000, whichever is the greater, or imprisonment for a period of five years, or both such fine and such imprisonment.

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GUBBAY JA

In my view the fine imposed was, if anything, on the lenient side.

It follows that the appeal in its entirety must be dismissed.

Dumbutshena CJ: I agree.

McNally JA: I agree.

Higham, Lewis & Lock, appellant's legal representatives

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WITHAM v MINISTER OF HOME AFFAIRS 1987 (2) ZLR 143 (HC)

Court High Court, Harare

Ebrahim J

Civil trial

16 August & 18 November 1987

Flynote

Delict - vicarious liability - mentally unstable policeman shooting member of public - whether acting in course of duty - negligence - foreseeability - danger foreseeable in allowing mentally unstable policeman to go on duty armed - duty of care of police to public - failure of police to warn public when aware that gunman at large in area.

Damages - loss of future earnings - extent to which husband can rely on support from wife - expected income from wife's own business - whether can be taken into account - pain and suffering - quantum - assessment.

Headnote

A policeman, despite a known history of alcohol-related psychiatric problems, had been detailed to guard the residence of Government minister in a Harare suburb. He had been issued with a rifle and ammunition. He had deserted his post during the night and gone on a shooting spree,

ending up in the servant's quarters at the plaintiff's house, which was not far away in the same suburb. The plaintiff and his wife, unaware that the policeman was in their servant's quarters, went out to the quarters early in the morning when their servant failed to appear at the arranged time. The policeman fired at the couple, killing the plaintiff's wife and severely injuring the plaintiff. The policeman was himself later shot and killed by other police details.

The plaintiff sued for damages on the basis that the defendant Minister was liable because the policeman was acting in the course of his employment; alternatively, he was negligent in allowing the policeman, who was

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known to have psychiatric problems, to be armed and assigned to guard duties; alternatively, he was liable for the negligence of his servants, members of the police, who, although aware that the deceased gunman was at large in the area, failed to take steps to warn the local residents or apprehend the gunman. He claimed special damages relating to his medical expenses and general damages for loss of income and pain and suffering.

Held, on the question of whether the Minister was vicariously liable for the acts of the policeman, that the policeman's digression from his appointed duty was so great in respect of space and time that it could not be reasonably said that he still exercised the functions to which he was appointed. His digression was a complete relinquishment or abandonment of his master's business in favour of some activity of his own. The situation might have been otherwise had the policeman fired accidentally at the premises he was meant to be guarding.

Held, further, that the danger created by putting the policeman, with his mental history, in charge of a weapon was foreseeable and as a result of the danger serious injury to a member of the public was foreseeable.

Held, further, that the police owed a duty of care to the public to protect them against either a gunman in general terms who is loose in the area, but more specifically against a fellow member of the police who was in uniform and using a police weapon.

Held, further, on the question of damages for loss of income, that although the plaintiff's late wife contributed to the upkeep of the matrimonial home through her own income, he was not her dependant and could not recover damages to which he had no legal claim. The *Lex Aquilia* traditionally did not allow for claims resulting purely from loss of monetary support; the claim must usually be for patrimonial loss only. While over the years the ambit of the *Lex Aquilia* had been widened, the courts had to be careful to observe the distinction between extending and creating law. Public policy played a part in the court's decisions in these matters, and an award based on the loss of income which would have accrued as a result of a business operated by the plaintiff's late wife would not accord with public policy. The projected profits from the company, which had only been in operation for a few months at the time of the plaintiff's wife's death, were purely speculative.

Held, further, on the question of damages for pain and suffering, that this was a matter notoriously difficult to quantify. Judgments from other countries, where the social and economic situations were different, were of little assistance. It was more relevant to base the assessment

on local cases; and based on these, an award of \$10 000 was appropriate.

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Cases cited:

Mhlongo & Anor NO v Minister of Police 1978 (2) SA 551 (A)

H K Manufacturing Co (Pty) Ltd v Sadowitz 1965 (3) SA 328 (C)

Nel & Anor v Minister of Defence 1978 RLR 455 (GD); 1979 (2) SA 246 (R)

Nott v ZANU (PF) 1983 (2) ZLR 208 (SC); 1984 (2) SA 115 (ZS)

Minister of Police v Rabie 1986 (1) SA 117 (A)

Lomagundi Sheetmetal & Engineering (Pvt) Ltd v Basson 1973 (1) RLR 356 (AD); 1973 (4) SA 523 (RA)

Minister van Polisie v Ewels 1975 (3) SA 590 (A)

Silva's Fishing Corporation (Pty) Ltd v Maweza 1957 (2) SA 256 (A)

King v Dykes 1971 (2) RLR 151 (AD)

Atlas Organic Fertilisers v Pikkewyn Ghwano (Pty) Ltd & Ors 1981 (2) SA 173 (T)

Magwara v Minister of Health 1981 ZLR 315 (GD); 1981 (4) SA 472 (Z)

van der Merwe Burger v Warrenton Munisipaliteit 1987 (1) SA 899 (NC)

Carstens NO v Southern Insurance Association 1985 (3) SA 1010 (C)

Plotkin v Western Assurance Co Ltd & Anor 1955 (2) SA 385 (W)

de Harde v Protea Assurance Co Ltd 1974 (2) SA 109 (E)

McKelvey v Cowan NO 1980 ZLR 235 (GD); 1980 (4) SA 525 (Z)

Shanahan v Shanahan (1907) 28 NLR 15

Union Government (Minister of Railways & Harbours) v Warneke 1911 AD 657

Zimbabwe Banking Corporation v Pyramid Motor Corporation 1985 (1) ZLR 358 (SC); 1985 (4) SA 553 (ZS)

Tobacco Finance (Pvt) Ltd v Zimnat Insurance Ltd 1982 (1) ZLR 47 (HC); 1982 (3) SA 55 (ZH)

Aercrete SA (Pty) Ltd & Anor v Skema Engineering 1984 (4) SA 814 (D)

Santam Insurance Co Ltd v Paget (1) 1981 ZLR 73 (AD)

Ashcroft v Curtin [1971] 3 All ER 1208 (CA)

Mair v General Accident, Fire & Life Assurance Corporation 1970 (1) RLR 124 (AD); 1970 (3) SA 25 (RA)

Smith v Fourie NO & Anor GS-130-77 (not reported)

Sadomba v Unity Insurance Co Ltd & Anor 1978 RLR 262 (GD); 1978 (3) SA 1094 (R)

Shepherd v Zimnat Insurance Co Ltd 1987 Supp C & B 532 (HC)

Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194

Gorah v Mahona & Anor 1984 (2) ZLR 102 (SC)

Manyenga v Manyenga HH-385-86 (not reported)

1987 (2) ZLR p146

EBRAHIM J

Mutandiro v Mbulawa 1987 C & B 495

Panganayi v Sinoya HB-4-86 (not reported)

Benney v Kusema HB-219-86 (not reported)

A P de Bourbon SC for the plaintiff

M T O'Meara for the defendant

Judgment

Ebrahim J: The plaintiff alleges that on 6 April 1983 he was resident with his wife at 41 Pendennis Road, Harare. At about 3.15 am on 7 April 1983 he was awakened by the sound of gunfire. He phoned the police to report the incident and was informed that they had already received a report. The police took no details from him although he did mention to them that he was telephoning from Pendennis Road. The gunfire continued thereafter intermittently for about a couple of hours. As is his habit, at first light the plaintiff went to his front gate to collect his morning newspaper and there saw the newspaper delivery man, Mr Mawadza, who was making his usual morning delivery of the newspaper. The plaintiff disputes that he was warned by the police whilst at the gate to get back into his house and stay there because of the presence in the area of the gunman. Mr Mawadza, the newspaper delivery man, was at the gate at the time and he states that he did not hear any such warning either and it was his evidence that he was not told to leave the area in view of the lurking dangers.

The plaintiff deposed furthermore that at about 6 am he and his wife decided to investigate the non-arrival of their domestic employee who, by arrangement, was due to arrive to make the early morning tea at that time. They walked out of their kitchen door to determine what had gone wrong. They observed a person putting a dog into their yard by manhandling it over the security fence. They continued walking towards their domestic quarters and as they did so the plaintiff heard his wife cry out that she had been shot. He noted that she had collapsed. He made her comfortable and telephoned the police again and having made a report to them proceeded to

his front gate and requested that a doctor who lived across the road be called. After the doctor and a policeman entered his yard, the plaintiff heard another shot fired and the policeman and the doctor ran for cover. The plaintiff armed himself with a pistol but by this stage a police dog handler who had entered his yard provided him with another weapon as he considered the plaintiff's weapon inadequate.

They proceeded towards the domestic quarters and the offender, a man dressed in police uniform, fired a shot at the plaintiff and missed. He fired

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EBRAHIM J

another shot and this time struck the plaintiff in the chest. A further shot went through the plaintiff's left forearm. The dog handler, a Mr Chindawi, then shot and killed the assailant.

The plaintiff was subsequently taken to hospital where he spent 10 days. He was operated on and has stated that he was in a great deal of pain and to this day he still suffers from pain, particularly in damp or cold conditions. He finds himself unable to sleep on his left side and he now cannot straighten his arm. He has been to the physiotherapist many times following the incident and there remains a need for him to visit the physiotherapist from time to time. He cannot partake in a number of the sporting activities he enjoyed previously such as golf and badminton and now has to drive a left-hand drive car. Because of his wife's death, he has had to give up their adopted daughter who is a minor and he misses the pleasure of her company which he enjoyed prior to this tragic incident.

It was his evidence furthermore that following the tragedy he has sold their former home and now resides in a flat and that there is now a gap in his life both in relation to business and his social activities.

The plaintiff and his wife were the joint owners of two companies, the first being Aviation Traders (Pvt) Ltd, which was a business related to the buying and selling of aircraft and a company which provided for the maintenance of aircraft, licencing, and a hangar service for customers' aircraft. They would also fly customers to keep their appointments if that service was required. He averred that his wife was good at public relations and was a pilot in her own right, with 20 years of experience in aviation in Africa.

The other company jointly owned by them was Ansam (Pvt) Ltd, which carried on a business as an exclusive dress shop, under the name of La Mode. This company commenced trading in February 1983 but following his wife's death the business floundered and had to be closed.

In support of his case, the plaintiff also called Paul Taringwa Mawadza who in July 1983 was employed as a newspaper delivery man in the Mount Pleasant area. Mr Mawadza stated that he usually commenced his delivery rounds at about 3.30 am and this is what he had done on 7 July 1983. Whilst proceeding on his duties in this regard he heard gunfire and, although concerned, he continued to deliver his newspapers and eventually found his way into Pendennis Road. He saw policemen in Pendennis Road but they did not stop him. When he got to 41 Pendennis Road he saw the owner and

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handed him a newspaper. Thereafter he proceeded to numbers 46 and 44 Pendennis Road before he heard further gunfire which caused him to take cover in a trench which runs along the road. He was joined by a number of policemen. After about 4 or 5 minutes he continued on his way making deliveries of his newspapers. He deposed that he was not warned of the presence of an armed man and that he did not see any police cordon. He also did not hear any loudhailers warning of the dangers in the area.

His evidence was not challenged at all and he gave his evidence well and in a truthful manner.

Alexander Katz was the next witness called. He is a chartered secretary who was responsible for managing the affairs of the plaintiff and his wife. He gave evidence as to their financial affairs.

The only other oral evidence led by the plaintiff was that of Mr Walter Edwin Harding, who stated that at about 6 pm on 6 July 1983 he heard the sound of a rifle shot and that he saw a police-type raincoat in his driveway. He proceeded to a Minister's house where he knew guards were posted and asked them if they had heard gun shots but they reported that they had not. He also telephoned the Marlborough police who arrived and after they had carried out investigations they left. In his view they had acted efficiently. Mr Harding and his wife went to bed thereafter and their minor daughter who has a nervous disposition slept with them in their room because of the rifle shots having been heard earlier.

Mr Harding stated that he heard a number of gun shots intermittently through the night and during the course of the early hours of the next morning.

He deposed that he heard no loudhailers warning of the dangers nor were any police dogs brought into his yard to investigate the presence of any armed intruder. He also received his morning newspaper and it was his evidence that this usually arrives at between 5 and 5.30 in the morning. He conceded, however, that he heard on the radio the warning of the presence of an armed man in the Mount Pleasant area. His evidence again was largely unchallenged.

To complete the plaintiff's case, Mr *de Bourbon* put in as Exhibit 2 three police reports. These relate to Constable Mhembere, the person responsible for the shootings prior to him being killed.

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In the report dated 10 July 1984 appears the following passage:

"He was last seen at this hospital on September 29th, 1981 by the then Officer-in-Charge when he was found to be fit for full duty having undergone treatment for psychiatric symptoms related to drinking alcohol. This was between 29/1/81 and 4/5/81. The Government Psychiatrist had last seen him on 4/5/81 with instructions to see him again only if it was necessary. He was supposed to report for review on 3/9/81 at this hospital but failed to do so. On 29/9/81 he was brought to Camp hospital on the instruction of the Officer-in-Charge who found him fit for

full duties. He indicated he was no longer taking alcohol."

In the report dated 30 January 1981 appear the following passages:

"Would you please see the above Police Constable who was arrested and detained in the Support Unit Police Camp from 10 pm on Wednesday 28th, to Thursday 29th January, because of "strange behaviour."

Early in the afternoon of 28.1.81 after a domestic dispute with his wife, the patient purchased three litres of beer at the Camp beerhall. He had only consumed about a litre of the beer when he started talking loudly about his wife's recent infidelity and about her slipping him some herbs, with the connivance of her two sisters, to make him more loveable. He shouted to everyone about him that his next door neighbours would poison him before 6 pm. He said his two sisters-in-law were 'married in the same place' and that this would kill him.

His lifelong friend and fellow Support Unit member, Constable Kufazvinei, was called and took him and the remaining two litres of beer, from the beerhall to his home. No more beer was consumed. Knowing that his friend was due on duty at 10 pm on the evening of the 28th, Constable Kufazvinei assisted him into his uniform and took him, still talking loudly and aggressively, to his place of duty whereupon he was promptly arrested and placed in detention for his own safety."

In the report dated 1 October 1981 appear the following passages:

"Following referral to a psychiatrist with the attached medical history resumé, the above member has been on medication and observation since 29th January, 1981 for 'an acute alcoholic re-action'.

The mental symptoms soon resolved. However, the physical effects of

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the alcoholic poisoning included an enlarged liver which has gradually returned to normal size and function over the past eight months.

He has been counselled and warned by both the psychiatrist and myself on the effects on the body and mind brought about by alcoholic poisoning, and he now appears to appreciate the severity of his illness and the detrimental effects a relapse would cause, both to his health and career in the Force.

No further treatment or medical reviews are necessary and it is recommended he returns to normal duties.

Normal duties are interpreted as being permanent light duties with no extended foot patrols since a medical board held on 3rd January, 1980 to assess the effects of a gun shot wound awarded a permanent 2% medical disability, and advised permanent light duties and excusal from wearing hard leather footwear for the rest of his Police service. Constable MHEMBERE has been employed on light duties at Support Unit Headquarters (Camp Section) since the injury to his left foot on the 29th May, 1979."

As its first witness the defence called Mr Harper Barnabus Chindawi who, at the time of this incident, was a Police Officer in the Zimbabwe Republic Police dog section. He deposed that he received a report in the early hours of the morning of 7 July 1983 and proceeded to Pendennis Road with his dog. At the scene he awaited instructions and later entered 41 Pendennis Road giving his police dog instructions to locate the gunman. He saw the plaintiff and asked him if he could use a gun. He gave him a pistol and obtained an FN rifle himself. They both advanced towards the quarters where this armed assailant was located. He and the plaintiff then planned their approach. They were spotted by the gunman who shot the plaintiff firing two shots at him. The plaintiff screamed and fell. Chindawi then shot and killed the gunman.

Two other police witnesses were called by Mr *O'Meara* for the defendant. Mr Chisadza said in his evidence that he received a report on 6 July 1983 of shooting taking place in the Mount Pleasant area and the fact that a detail on guard at a Minister's house had gone missing. He referred the matter to the control room with the instructions that he be found. He went to the scene at about 4 am following a further report received about shooting in that area. He said that he saw the plaintiff at his front gate collecting a newspaper from the newspaper delivery man and he told Mr Witham to go back into his house and remain there. This is disputed by Mr Witham and is not confirmed by Mr

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Mawadza. I am at a loss to understand why Mr Witham was not removed from the scene once he had reached the gate, bearing in mind the danger present. There may well have been resistance from Mr Witham to such a course of action as his wife was still in their house, but this is where the police acting properly could have provided the assistance necessary for her removal as well. This witness did not impress me with his assertions that he spent some 11/2 hours at the scene attempting to determine where the shooting was coming from. I accept that it is difficult at night to pin point with certainty the exact whereabouts of gun fire but I do not accept on the facts of this case that the authorities were oblivious of where the shots were fired from by the time Mr Witham came to the gate to collect the newspaper.

This witness suggested furthermore that a cordon was established in the area. I am satisfied on the unchallenged evidence of Paul Taringwa Mawadza that this was not done prior to the fatal shooting. Had a cordon been erected Paul Taringwa Mawadza would not have been able to walk along Pendennis Road at will as he obviously did. It was his unchallenged evidence furthermore that he heard no loudhailers warning of the dangers in the area.

I have no hesitation in rejecting the evidence of this witness where it conflicts with the evidence of the plaintiff and his witnesses. This witness did not only leave me unimpressed with the content of his evidence but also I found him glib and he exhibited a poor demeanour.

The other witness called by the defence was a Mr Chivandire who stated that a cordon had been established at approximately 4.30 am. This is not only in conflict with what Mr Mawadza has stated but also is in conflict with what Mr Chisadza stated when he said the cordon was established at around 6 am. I do not believe his assertion in this regard. It seems to me that the only reasonable conclusion I can come to is that the cordon was only established after the shootings of the Withams had taken place.

I have no reason to doubt furthermore that no loudhailers were used to warn residents in Pendennis Road of the dangers lurking in the area as a result of the presence of the gunman. This was the corroborated evidence of Mr Witham, Mr Mawadza and Mr Harding. I can find no basis for finding otherwise.

I am satisfied that it is the corroborated versions deposed to by Mr Mawadza, Mr Witham, Mr Harding and Mr Chindawi that is the acceptable version of what happened in relation to this incident. Their evidence is not only

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corroborated by each other but they each gave their evidence in a manner which impressed me.

It is against the background of this evidence that the plaintiff bases his claim on the following premise:

- (a) that the defendant is liable as the gunman who was employed by the defendant was acting within the scope of his employment;

Alternatively,

- (b) there was negligence on the part of the defendant when he permitted a member of the Zimbabwe Republic Police Force, who was known to have psychiatric problems to be armed with a rifle together with ammunition to carry out guard duties and as a consequence of such negligence the deceased was killed and the plaintiff injured;

Alternatively -

- (c) The defendant, acting through his servants, was negligent in that members of the Zimbabwe Republic Police were well aware that an armed and dangerous man was at large in the Mount Pleasant area of Harare, and had been so at large for about twelve hours, and failed to take adequate steps to warn the inhabitants of that area, including the plaintiff and his late wife, of such danger and failed to take sufficient, reasonable and adequate steps to apprehend the said armed man, and as a consequence of such negligence the plaintiff was injured and his wife was killed.

It is the plaintiff's contention that as a consequence of such negligence the plaintiff has suffered and will suffer the following damages:

a.	medical expenses	\$ 1 857,76
b.	expenses relating directly to nursing treatment of himself	\$ 833,08
c.	transport charges incurred in order to obtain medical treatment	\$ 200,00
d.	cost of repairs of damage to his premises	\$ 1 624,00
e.	general damages for future medical expenses	\$ 1 000,00
f.	special damages for loss of earnings to date	\$ 28 000,00

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g	general damages for loss of future earnings and loss of support	\$ 80 000,00
h	general damages for pain and suffering, disfigurement, shock, loss of amenities	<u>\$ 12 000,00</u>
		<u>\$ 125 514,84</u>

So far as these claims for damages are concerned the first three claims under a, b, and c, are not in issue as regards the *quantum*. The claim under paragraph d is not persisted with in view of the concession by the plaintiff that the matter was a company matter. The rest of the claims were put in issue as to the *quantum* payable in the event of the defendant being found liable for damages.

I turn now to deal with the question of whether or not the defendant, as the employer of Constable Mhembere, the person responsible for shooting and killing the deceased and the shooting and injuring of the plaintiff, bears any liability for the shootings.

The liability on the part of the defendant arises only because of s 2 of the State Liabilities Act [Chapter 54]. This provides as follows:

"2. Any claim against the State which would, if that claim had arisen against a subject, be the ground of an action in any competent court, shall be cognizable by any such court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant:

Provided that nothing in this section contained shall be construed as affecting the provisions of any law which limits the liability of the State or any department thereof in respect of any act or omission of its servants or which prescribes specified periods within which a claim shall be made in respect of any such liability or imposes conditions on the institution of any action."

See also *Mhlongo & Anor NO v Minister of Police* 1978 (2) SA 551 (A) at 566.

It is not in dispute that Constable Mhembere was a member of the police force and as such a servant of the State. It is not in dispute that he shot and killed Mrs Witham and also shot and injured Mr Witham. It is common cause that

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the plaintiff has the *onus* of establishing that the defendant is vicariously liable, in that Constable Mhembere was acting in the course of the scope of his employment.

As to the test to be applied to determine whether a servant is acting within the course of or

scope of his employment, I am guided by the words of TEBBUTT AJ (as he then was) in *HK Manufacturing Co (Pty) Ltd v Sadowitz* 1965 (3) SA 328 (C) at 332C-E where he stated as follows:

"It is, of course, now a well-established principle in our law that a master is liable for harm caused to third parties by the negligence of his servant if such servant was acting within the course or scope of his employment - expressions which have been held to be synonymous (see *Estate van der Byl v Swanepoel* 1927 AD 141 at 151; *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 741). Our Courts have adopted the expressions of the law by Voet 9.4.10, viz that masters are liable *in solidum* for the delicts of their servants whenever they inflict injury or damage 'in the duty or service' (in *officio aut ministerio*) set them by their masters but that the masters are not liable when the delict is committed 'outside of' (*extra*) their duty or service, and by Pothier on *Obligations*, s 453, viz (*Evans'* translation) -

"Whoever appoints a person to any function is answerable for the wrongs and neglects which his agent may commit in the exercise of the functions to which he is appointed'."

Then in *Nel & Anor v Minister of Defence* 1978 RLR 455 (GD) at 457G-458A; 1979 (2) SA 246 (R) at 247 *in fine*-248C, GOLDIN J, as he then was, said:

"The principle governing vicarious liability of a master for the negligence of a servant was summarized by LEON J in *South African Railways & Harbours v Albers & Anor* 1977 (2) SA 341 (D) at 345 as follows:

It is important to bear in mind that an act outside the authority of the servant is not done in the course of his employment even though it may have been done during his employment (*Mkize v Martens supra* at p 390).

A distinction has been drawn between three classes of cases, viz :

- (1) A master is liable for all acts actually authorized by him.
- (2) A master is liable even for acts which he has not authorized provided they are so connected with acts which he has authorized that they may rightly be regarded as modes, although improper modes, of doing them.

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- (3) But if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it but is an independent act, the master is not responsible.'

...

The liability of a master is not confined to negligence of his servant but includes criminal acts or offences such as assault or theft or fraudulent misrepresentation. . . "

Then again, in the case of *Nott v ZANU (PF)* 1983 (2) ZLR 208 (SC) at 211F-H and 212A-E; 1984 (2) SA 115 (ZS) at 118G-119D, BECK JA said:

"The leading South African decision in which extensive consideration was given to the problem that is presented by the servant's delictual act committed when he has diverted from the immediate furtherance of his master's affairs; is the case of *Feldman (Pty) Ltd v Mall* 1945 AD 733. Two of the judgments in that case stress that it is the degree of the servant's deviation from the execution of his master's work, or, looked at conversely, the degree of the servant's retention of his master's work, that is the determining factor. WATERMEYER CJ at 742 said:

'If he does not abandon his master's work entirely but continues partially to do it and at the same time to

devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs.'

TINDALL JA put the matter this way at 756:

'In my view the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms; I can see no escape from the conclusion that ultimately the question resolves itself into one of degree and in each particular case a matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed.'

In the earlier case of *Union Government v Hawkins* 1944 AD 556 the South African Appellate Division had adopted the same approach. In a judgment in which all concurred, CENTLIVRES JA (as he then was) said at 563:

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'Even when a servant makes a deviation solely for his own purposes the master may remain liable for any negligence committed by the servant while he is on that deviation. In each case it is a question of degree. . .'

The learned judge went on to discuss the extent of the particular deviation under consideration and concluded this passage in his judgment by saying that the deviation 'was not such a complete relinquishment or abandonment of his master's business in favour of some activity of his own as to relieve his master from liability for any damages caused by the negligent driving'."

He went on at p 213C-E (120A-C) as follows:

"The assertion that it is the degree of the servant's deviation that lies at the heart of the question of the master's liability is therefore common to all the judgments in *Feldman's* case *supra*. In conformity with the general trend of English decisions up to that time GREENBERG JA adopted an approach which suggested that the degree of variation would not need to be very great in order to take a servant outside the course of his employment. The other judgments required a higher degree of deviation in order that it might be held, in the judgment of DAVIS AJA, to be deviation of such a character as not to have been reasonably foreseeable; or, in the judgments of WATERMEYER CJ and TINDALL JA, to lead to the conclusion that the servant had completely divested himself of his functions as a servant."

In the present case whilst it is common cause that the shootings occurred during the time Constable Mhembere was on duty it cannot be disputed that they did not occur at a place where he was supposed to be on duty. He was appointed to guard the premises of a government minister. For this purpose he was issued with an FN rifle. The minister's house is a distance of 700 to 800 metres away from where the plaintiff and his wife lived. I cannot find fault with Mr O'Meara's contention that Constable Mhembere's digression from his appointed duty was so great in respect of space and time that it cannot reasonably be said that he still exercised the functions to which he was appointed. I agree with Mr O'Meara's submissions that Constable Mhembere's digression was a complete relinquishment or abandonment of his master's business in favour of some activity of his own. I accept what TEBBUTT AJ said in *HK Manufacturing Co (Pty) Ltd v Sadowitz supra* at p 337, that:

". . . the fact that the servant was using property or 'apparatus' supplied

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by or belonging to the employer is really irrelevant. The enquiry still is: was such use in the exercise of his functions to which he was appointed?"

In my view Constable Mhembere was not exercising the functions to which he was appointed and there was no sufficiently close link between his conduct and his duties. In arriving at this conclusion I have had regard to what was said by JANSSEN JA in the case of the *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134 D, H and I where he stated:

"It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention (of *Estate van der Byl v Swanepoel* 1927 AD 141 at 150). The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that according to the *Salmond* test (cited by GREENBERG JA in *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 774):

'A master . . . is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them . . . '

In my view a more apposite approach to the present case would proceed from the basis for vicarious liability mentioned by WATERMEYER CJ in *Feldman (Pty) Ltd v Mall* (*supra* at 741):

'a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work. . . '

By approaching the problem whether van der Westhuizen's acts were done 'within the course or scope of his employment' from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State. By appointing van der Westhuizen as a member of the Force, and thus clothing him with all the powers involved, the State

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created a risk of harm to others, viz the risk that van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution."

I am satisfied that had Constable Mhembere fired accidentally at the premises he was meant to be guarding or in trying to prevent an intrusion, even in error, then such would have been within the risk created. The view I take of the matter, however, is that this was not the case for the reasons I have already indicated above.

This does not, however, dispose of the matter. The alternative basis of the claim as submitted by Mr de Bourbon rests on two distinct grounds of negligence. Firstly, the issue of the

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psychiatric problems of Constable Mhembere arises. Secondly, the question of the performance of the police is put in issue on the basis that they acted negligently in dealing with the incident.

The police, and thus the defendant put Constable Mhembere on duty, gave him a weapon and ammunition to undertake that duty, gave him a uniform and appointed him rather surprisingly to guard a government minister's home when it was perfectly apparent to the police authorities that he had a history of psychiatric problems. Mr O'Meara argued that as Constable Mhembere was inspected prior to his going on duty on the evening of 6 July 1983 and nothing untoward was found about his conduct it was not foreseeable that he would behave as he did. I do not accept this submission. I find it incredible that a person with a psychiatric history was put in possession of a lethal weapon and given the task of guarding a government minister, as happened in this case. The realities of the situation are that Constable Mhembere did react abnormally and because of his conduct shot and killed Mrs Witham and shot and injured Mr Witham. I have no doubt whatever that the danger created by putting Constable Mhembere in possession of a weapon was foreseeable and a result of the danger serious injury to a member of the public was foreseeable.

The failure to guard against such danger as was the case in this instance amounts to clear negligence. In the case of *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson* 1973 (1) RLR 356 (AD) at 362-363; 1973 (4) SA 523 (RA) at 524 to 525 BEADLE CJ said :

"I now turn to the principles of law to be applied. There have been many

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cases dealing with culpability through negligence, many cases dealing with what I may call the degree of foreseeability which must be established by a plaintiff before a defendant can be held to be liable. The cases which I consider most helpful in approaching this question of foreseeability in the present case are these: *Herschel v Mrupe* 1954 (3) SA 464 (AD) - the *dicta* of SCHREINER JA at p 477; the two so - called *Waggon Mound* cases, No 1 reported in [1961] All ER 404 and No 2 reported in [1966] 2 All ER 709 and in particular the judgment of LORD REID at pp 717 to 720 and, finally, the decision of this Court in the case of *King v Dykes* 1971 (3) SA 540 (RA). *King's case supra*, also reviewed a recent Privy Council case dealing with this subject, the case of *Goldman v Hargrave* [1967] 1 AC 645. At the onset, I should like to emphasise what was said generally by my brother MACDONALD at p 5421 where he said:

'The essential attribute of the law of negligence is that it should be flexible so as to be capable of providing an answer to the infinite variety of situations in which negligence is alleged. Once inflexible rules are adopted as the test of the existence of negligence, either generally or in a special type of case, a quite unwarranted inroad is made into the basic concept underlying the law.'

What a prudent man would or would not do, or would or would not foresee in any particular case, must depend on a very wide variety of circumstances and few cases are ever identical in the relevant circumstances. The sort of circumstances, however, which the Courts often look to in cases such as this in deciding what degree of foreseeability must be proved by the plaintiff before a defendant can be held responsible for the resultant damage are these: (1) how real is the risk of the harm eventuating? (2) if the harm does eventuate, what is the extent of the damage likely to be; and (3) what are the costs or difficulties involved in guarding against the risk? I give two examples to illustrate these points. If the risk of harm eventuating is very great indeed amounting almost to a certainty, even though in such a case the damage which is likely to result may only be very slight, and even though the costs of eliminating the risk might be very great, a defendant would still be liable if he took that risk in those circumstances, as the risk of harm eventuating was so great he should not have taken it at all. To take an example at the other extreme, supposing the risk of the harm eventuating is very slight indeed, the odds against it

eventuating being almost astronomical, then, even though in such a case the damage which might result from the risk eventuating might be reasonably extensive, if the difficulty of eliminat-

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ing the risk was almost insurmountable, the defendant would not be blamed for taking that risk, should the harm actually eventuate."

I am satisfied that a prudent person would not have put a lethal weapon into the hands of a person who had a psychiatric history, and then sent him out to guard a senior government official in the middle of a populated area. It was certainly not beyond the bounds of human experience that a person with a psychiatric history would react as Constable Mhembere did in this case.

I turn now to consider whether the police having been alerted on receiving reports of Constable Mhembere's irrational behaviour conducted themselves properly and not negligently in all the circumstances.

It was Mr *de Bourbon's* submission that the police owed a duty of care to the public to protect them against either a gunman in general terms who was loose in the area, but more specifically against a fellow member of the police, also, who was in police uniform, and using a police weapon. He submitted that the duty of care was to ensure that members of the public did not suffer damage.

Both counsel are in agreement that the case which sets the standard for police conduct is the case of *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) (at 684 in translation). The relevant passages from the translation in *Ewels's* case at p 684 which provide assistance are the following:

"597E Just as a duty to rescue can sometimes be a legal duty, so a duty to protect may be a legal duty, and it would depend on all the facts whether such duty is a legal duty or not. Clearly it is impossible to determine in general when such a legal duty would arise . . . and in

598 the context of the cause of action this must be understood as an obligation that they ought to have foreseen that their inaction could cause damage to plaintiff and that they failed, by reasonable action to prevent the damage".

See also the case of *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256 (A) at 263D where SCHREINER JA stated as follows:

"A duty to rescue is not special or subject to peculiarly restricted rules. It is simply a duty to act reasonably and such a duty may arise out of the circumstances of the case. It will be for the court to decide in each case

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whether circumstances are such as to give rise to a legal duty (cf LORD WRIGHT in *Bourhill v Young* [1943] AC 92 at p 110)."

This approach in *Ewel's* case has been applied in other situations involving negligence, see for

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example *King v Dykes* 1971 (2) RLR 151 (A) at 153, *Atlas Organic Fertilisers v Pikkewyn Ghwano (Pty) Ltd & Ors* 1981 (2) SA 173 (T) at 189; *Magwara v Minister of Health* 1981 ZLR 315 (GD); 1981 (4) SA 472 (Z); and *van der Merwe Burger v Warrenton Munisipaliteit* 1987 (1) SA 899 (NC) at 907.

The approach of *Ewel's* case is discussed in detail by Boberg *The Law of Delict* vol 1 at pp 210-214 and 266-267.

It is in the light of these principles that I now turn to consider the submissions of counsel in this case. It is Mr *de Bourbon's* submission that there was a duty of care owed to the plaintiff and his wife and the general public at large and that there was a breach of that duty and foreseeable loss. Mr *O'Meara* for his part contended that the police do have a duty of care to the general public but it is necessary to determine whether the defendant was in breach of this duty only in relation to the plaintiff and his wife. It was his contention that the police did act reasonably in the circumstances.

It is apparent from Mr Witham's evidence that on hearing gunfire in the early hours of the morning of 7 April 1983 he telephoned the police. There is no suggestion that this telephone call was not made and neither is it alleged that the plaintiff was warned on this occasion to stay indoors in view of the gunman being at large.

At first light the plaintiff went to his front gate and there saw the newspaper delivery man. The police did not remove either Mr Witham or the delivery man from the scene in the interests of their safety. Mr Witham deposed that he was never told to return to his home and to stay indoors. I accept his evidence in this regard. Had he been told to do so Mr Mawadza the newspaper delivery man would have heard such an order and he says he heard no such order. It seems improbable that had Mr Witham been given such an order that Mr Mawadza would not also have been told to leave the scene immediately. Far from him doing so he was allowed to continue delivering newspapers. It seems improbable, furthermore, that had the plaintiff been given such an order that he would risk leaving the safety of his house, with his wife and walk towards his domestic quarters.

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A witness called by the defendant, a Mr Chindawi, who was a member of the Zimbabwe Republic Police at the time this incident occurred, far from stating that the plaintiff was requested to stay inside his house, deposed that he was assisted by him in dealing with the gunman. This is hardly consistent with the police assertions that Mr Witham was warned to stay indoors.

The suggestion by the police that they warned the public by the use of a loudhailer is not supported by the acceptable evidence. Mr Witham heard no such warning, neither did Mr Harding who lived close by, and the evidence of Mr Mawadza is that he heard no such warnings. It was never elicited from Patrol Officer Chindawi, as he then was, that any warnings through the loudhailers were given. The corroborated evidence of Witham, Harding and Mawadza in my view is the truth of the matter, that no warnings were given through loudhailers.

I reject Mr Chisadza's evidence that such warnings were given. Not only is his evidence not supported by Mr Chindawi but it is improbable in my view that had such warnings been given that Witham, Harding and Mawadza would not have heard them and that in any event that Mawadza would have continued to deliver newspapers in an area where such warnings were allegedly being given.

The evidence of the police that a cordon was established timeously is also suspect. Here again, had a cordon been established I find it improbable in the extreme that Mr Mawadza would have been able to enter the danger area to deliver newspapers and continue to do so right up until he heard a gun shot which led him to take cover in a ditch where he was joined by other police details. I understood Mr Chisadza's evidence to be that a cordon was constructed at around 6 am that morning. I find it surprising, when regard is had to the fact that the first shot fired by the gunman was at about 6 pm on the evening of 6 April 1983, that nothing was done in setting up a cordon until twelve hours later.

It is common cause that Mr Witham was not telephoned by the police requesting him to stay indoors. I do not accept that it was difficult to pinpoint by 5 am on the morning of 7 April 1983 at the latest where the shooting was coming from. By that stage there had been intermittent gunfire over an extended period. Mr Chindawi already had a good idea where the shooting was coming from, otherwise he would hardly have involved himself in placing his dog over the fence and into the plaintiff's yard. The police in fact had already telephoned the Canadian Embassy which is close by to warn them of the dangers and yet failed to warn the plaintiff, or, for that matter, Mr Harding on the same basis.

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EBRAHIM J

Having regard to all the factors that I have outlined above I find myself unable to disagree with Mr *de Bourbon's* submission that the police were negligent in their handling of the incident.

The defendant in his pleadings also raised the issue of contributory negligence. Mr *O'Meara* quite properly in my view whilst making no concessions on this issue advanced no argument in support of it. I do not find the plaintiff as having been negligent in his conduct. He did what any law abiding citizen would have done in the circumstances. He assisted the police in attempting to apprehend the assailant. He and his wife showed concern about the whereabouts of their employees. In any event the plaintiff and his wife were not given adequate warnings of the dangers existent at the time.

I find negligence proved.

I turn now to deal with the issue of damages.

As I have already indicated the first three claims relating to medical expenses \$1 857,76, expenses relating to nursing treatment, \$833,08 and transport charges in order to obtain medical treatment in the sum of \$200,00 is not in issue as to the *quantum* of these amounts claimed. The claim relating to the cost of repairs of the damage to his premises has been abandoned by the plaintiff and the general damages for future medical expenses has been reduced to a claim from \$1 000,00 to one of \$700,00, which amount is not put in issue by the

defendant in the event of me finding that the defendant is liable for the conduct of Constable Mhembere.

The plaintiff nevertheless seeks in addition, general damages for loss of support and loss of future earnings \$80 000); general damages for pain and suffering (\$12 000); and special damages for loss of earnings to date (\$28 000).

It is to be noted that, in the context of claims for loss of income, the designation of claims into categories of "general" and "special" damages is chiefly for historic reasons. The damages awarded are, both in the case of prospective and retrospective claims, compensation for impaired or diminished earning capacity. In the case of both species of damages the court has a discretion as to the amount of the award. (See *Carstens NO v Southern Insurance Association* 1985 (3) SA 1010 (C) at 1020J.)

For convenience, I will deal first with the claim for loss of earnings to date.

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EBRAHIM J

Obviously compensation is due in some degree to compensate the plaintiff for his inability to work for the past four years. By agreement between the parties, the relevant period is July 1983 until July 1987. Various arguments were presented to me towards a basis for the assessment of this loss. In the final analysis, however, I am satisfied that counsel for the defendant was correct when he maintained that the only evidence on which I could rely in assessing this loss was contained in the income tax assessment for the years 1979-1983 which were produced as exhibits. The figures forming the basis of these assessments reveal that the plaintiff's average annual income for these tax-years was \$4 640 before tax. Plaintiff's counsel conceded that it would be fair to estimate the after-tax income at \$3 000. Using this figure as a base, I would make an award of \$12 000 in the category of loss of earnings to date. I did consider adding a factor for the increased cost of living but the disparity between the yearly assessments are so great that such an allowance would be meaningless.

An attempt was made to have a proportion of the profits from the deceased's boutique, La Mode, included in the calculation of the plaintiff's loss of income. This was on the basis that as plaintiff's wife, the deceased was bound to contribute towards the upkeep of the matrimonial home. It is an established principle of our law that husband and wife have a mutual obligation to support each other (see *Plotkin v Western Assurance Co Ltd & Anor* 1955 (2) SA 385 (W); *de Harde v Protea Assurance Co Ltd* 1974 (2) SA 109 (E); *McKelvey v Cowan NO* 1980 ZLR 235 (GD); 1980 (4) SA 525 (Z). However, traditional custom is not, and cannot be, ignored by the law. In Western culture it is traditional for the husband to be the breadwinner. Therefore the duty of support rests primarily on him: *Plotkin's* case p 395 A (see also s 11(3) of the Maintenance Act [Chapter 35] for a tacit acknowledgement of this position). Nonetheless, the law is sufficiently flexible to recognise that there are circumstances in which the roles may be reversed: *Plotkin loc cit*; see also *Shanahan v Shanahan* 1907 28 NLR 15). But in every claim by a husband for the support of his wife he has been required to prove that she was under a legal obligation to provide the support claimed, (ie that he was unable to do so). There was certainly no obligation on the plaintiff's wife to support him. The couple appear to have been

"comfortably off" before the unfortunate incident.

It must be stressed that the plaintiff was not a dependant of his deceased wife and therefore cannot recover damages for support to which he had no legal claim. A claim for damages arising out of negligence is based, in our law, on the *Lex Aquilia*. Traditionally this remedy does not allow for claims resulting

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purely from loss of monetary support. The claim must usually be for patrimonial loss only (see *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd supra*).

Warneke, in his case, sued the Railways for the deprivation of the comfort and society of his wife and her assistance in the care, clothing and up-bringing of his seven children, after she had been killed through their negligence. It was held that since comfort and society are not quantifiable in monetary terms the declaration founded no cause of action. However, the claim for loss of assistance did disclose a cause of action since the duty to assist in the up-bringing of the children was mutual and could be calculated in monetary terms.

INNES J (as he then was) indicated in the *Warneke* case (at p 664) that the *Lex Aquilia* had steadily been widened in scope and broadened in application in both Roman and classical Roman-Dutch law. He expressed the view that there appeared no reason why the Courts should not continue to adapt the doctrine and reasoning "so far as that can be done without doing violence to its principles".

Counsel for the plaintiff urged me to accept that the ambit of the law had widened sufficiently to allow an award of damages calculated on the anticipated future loss of earning which his wife's company might have been expected to add to his income over his actuarially projected life-span of 13 years. The claim of \$80 000 was calculated on this basis, having been reached after making various adjustments common to damages claims.

In considering whether to recognise an extension of the law such as that for which counsel contended, courts are bound by circumspection. The line between extension of law and creation of law is often ill-defined (cf the comments of McNALLY JA in *Zimbabwe Banking Corporation v Pyramid Motor Corporation* 1985 (1) ZLR 358 (SC) at 369; 1985 (4) SA 553 (ZS) at 560 G). To avoid encroaching on the latter strict adherence must be kept to the basic principles of law involved (cf the remark of INNES J quoted above) and close regard should be paid to the question of whether public policy requires the extension (see *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Ltd* 1982 (1) ZLR 47 (HC) at 60F; 1982 (3) SA 55 (ZH) at 65; *Zimbabwe Banking Corporation* case (*supra*) at 369-70; (560D-561F and 562J ff); *Atlas Organic Fertilisers (supra)* at p 188H; *Aercrete SA (Pty) Ltd v Skema Engineering* 1984 (4) SA 814 (D).

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In the present case the plaintiff applies for damages resulting from loss of income which he claims would have accrued to him as a result of a business operated by his late wife. I do not think such an award would accord with public policy. Firstly, the deceased's business was owned by a company which had perpetual succession. No evidence was adduced to explain why it was necessary to close the company - other than an admission from the plaintiff that it was "not his scene". It is, perhaps, pertinent to remark here that this does not seem to indicate that the plaintiff needs the money or is particularly concerned at its lack. Secondly, there is force in the argument of counsel for the defendant that as the business in question did not commence operating until February 1983, two months before plaintiff's wife's death, the projected profits therefrom must be regarded as purely speculative. The business might not have prospered as anticipated, plaintiff's wife might not have been able or willing to continue in business (she was not pursuing the activity of necessity). The court is constrained to ask whether, in circumstances where it is asked to award damages of a speculative nature to enable a plaintiff to enjoy a lifestyle he merely anticipated would result from his wife's activities in a business in which he neither assisted, nor displayed particular interest, it is in the public interest to extend the *Lex Aquilia* to accommodate the claim. The answer, I think, must be firmly in the negative. The allowance of such a claim would entail a major extension of the ambit of the *Lex Aquilia*. The cases referred to by plaintiff's counsel, in which exceptions were made to the aquilian requirement excluding pure economic loss, all concerned situations where commercial considerations demanded an award of damages to redress an obvious injustice. In this case, a private individual claims damages to an amount which will enhance his standard of living to a degree well in excess of that which he enjoyed before tragedy befell him. While not minimising the magnitude of the loss he has suffered, the court is by duty bound to view the matter objectively and ensure that what he receives accords with the dictates of public policy which, in this context, has been defined as ". . . the general sense of justice in the community, the *boni mores*, manifested in public opinion" (*per* VAN DIJKHORST J in the *Atlas Organic Fertilisers* case *supra* at page 188H). I cannot conceive that public opinion, appreciating the circumstances of the case, would approve of the award of damages in the sum contended for under this head. I therefore decline to make the award sought.

I accept, however, Mr O'Meara's submission that, although a distinction must be drawn between what the plaintiff was able to earn from his own work with Aviation Traders (Pvt) Ltd and what was earned by his wife's work with Ansam (Pvt) Ltd, it may be accepted on the evidence led before me that for

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two years after trial the plaintiff will suffer a loss of income from his aviation company. There is nothing in the evidence to support such a future loss at any greater amount than his actual pre-trial loss ie \$3 000 per year making the total an amount of \$6 000,00.

Although there was no direct evidence on the point it may be accepted that even when the plaintiff returns to work, he will suffer a loss of earning capacity.

Prior to the incident the plaintiff was director of his own aviation - linked company. He was a qualified pilot. Although it is apparent that the bulk of the company's business has to do with

buying, selling and maintaining aircraft and providing hangar services, there was evidence that a charter service was available. Presumably such a service would have been provided by the plaintiff or his wife. There is no evidence before me from which I can deduce the proportion of income derived from the plaintiff's charter operations. But account must also be taken of the fact that had he not been able to fly commercially it is unlikely that he would be in this field of business. By extension of this reasoning, the potential to fly commercially, while not readily ascertainable from the records of the company, must have been an important consideration to the plaintiff when he considered his future earning power. I think, therefore, he ought to be compensated for the loss of this facility. The compensation here should be viewed separately from compensation for loss of the amenity of flying. It is stressed that the damages being considered under the present category are for loss of future earning capacity.

As indicated above, the proportion of income the plaintiff derived from his flying activities was fairly small. There is no indication that the plaintiff's ability to perform other requirements of his office as director will be impaired by the disability occasioned through the negligence of the defendant's servant. The task of fixing a *quantum* is never easy. It often entails "plucking a figure out of the air": *per* FIELDSEND CJ in *Santam Insurance Co Ltd v Paget* (1) 1981 ZLR 73 (AD) at 80H, following EDMUND DAVIES LJ in *Ashcroft v Curtin* [1971] 3 All ER 1208 (CA) at 1213h.

Taking a proportion of 10% of the plaintiff's average after-tax earning as a rough guide to his earnings from the charter operation (it was mentioned in evidence almost as an afterthought, so in the absence of contrary evidence I find myself unable to allocate a higher percentage), 10% of his earnings would amount to \$300 per annum. The plaintiff has a projected life expectancy of 13 years. However, it cannot be assumed that he would retain

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his licence for his full lifetime. I would make an award of \$1000,00 under this head being an approximation of three years calculated loss of charter revenue (until the plaintiff is 65 - normal retirement age) rounded off to a thousand. I do not think it is worth building an interest factor into this size of award granted in respect of so short a period.

The total amount awarded therefore for the loss of future earnings is \$7 000,00.

The remaining claim is for pain, suffering, disfigurement, shock and loss of amenities. The plaintiff has claimed \$12 000 and the defendant has suggested an amount of \$10 000,00 would be more appropriate. Awards in this category are notoriously difficult to assess, for the simple reason that it is virtually impossible, with any degree of accuracy, to translate feelings into money value. See, *inter alia*, the comments of LEWIS AJP (as he then was) in *Mair v General Accident, Fire and Life Assurance Corporation* 1970 (1) RLR 124 (AD) at 128-129; 1970 (3) SA 25 (RA) at 29, especially the passage there cited). Nonetheless such assessments do fall to be made, and to be made in accordance, as far as possible, with similar cases decided in the jurisdiction, bearing in mind the value of money. Cf *Smith v Fourie NO & Anor* G-S-130-77; *Sadomba v Unity Insurance Co Ltd & Anor* 1978 RLR 262 (GD); 1978 (3) SA 1094 (R);

Shepherd v Zimnat Insurance Co Ltd 1987 Supp C&B 532.

In approaching this problem, courts in this jurisdiction have traditionally followed WATERMEYER JA's injunction that:

"it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair, in all the circumstances of the case"

(*Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199).

Undoubtedly among the "general considerations" to which the learned judge referred were comparisons with awards made in previous cases of a similar nature. See his comments at pp 199-200. See also the comments of the

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learned judge in *Mair's* case *supra* at 29H where he points out that the most useful precedents are those cases decided in courts of the same jurisdiction. English precedents present a particular difficulty because the approach of English law to the question of damages may differ substantially from that of our law (cf *Mair loc cit*). In *Smith's* case (*supra*) PITTMAN J said:

"... I must be careful not to set a precedent for extravagant awards in the future, and I think it must be accepted that, in a small and far from opulent country the scale should generally be smaller than in a large and rich one."

And in *Shepherd's* case (*supra*) SAMATTA J remarked (at p 535) that:

"If, in assessing awards for pain and suffering, the courts ignore the social and economic realities obtaining in the country, they may very easily find themselves giving awards which are either shocking or laughable."

In *Shepherd's* case an issue was whether or not Zimbabweans in the higher income bracket had as affluent a standard of living as their South African counterparts. I respectfully express the opinion that they do not and therefore South African precedent as regards *quantum* must be treated with care. As was well observed by SAMATTA J in *Shepherd's* case "... Courts in this country tend to be conservative, but not over-conservative, in granting awards." *Shepherd* was a company secretary and financial director. He was awarded \$4 000 in respect of a claim for damages for pain and suffering consequent on an injury to his right foot which was likely - as in the case of the present plaintiff's injury - to become arthritic. *Shepherd* also suffered facial lacerations which required stitching and temporary pains in the chest. He was awarded \$4 000. This was in 1985. In *Gorah v Mahona & Anor* 1984 (2) ZLR 102 (SC), a 15-year-old boy, who had expectations of becoming a white collar worker, lost his right leg below the knee. He was awarded \$12 000 for pain, suffering and loss of amenities. See also *Manyenga v Manyenga* HH-385-86.

In *Mutandiro v Mbulawa* 1987 C&B 495, a case heard in 1984, the Zimbabwe High Court awarded \$10 000 in the general category of pain and suffering for an accident in which the

claimant received five bone fractures of his arms and legs. He was hospitalised for three months and after release had to spend four months at home on crutches. His left leg had been in plaster from foot to hip and his right arm had to be immobilised. He would walk with a limp for the rest of his life and would be unable to participate in contact

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sport. Prior to the accident he had been a builder. Subsequently he would be able to pursue this trade in a supervisory capacity only.

During 1986 two relevant cases were heard by the High Court, both in Bulawayo. The first was *Panganayi v Sinoya* HB-4-86. The plaintiff, a 32-year-old diesel mechanic with the ZRP lost an eye when he was assaulted by the defendant. His consequent loss of binocular (three dimensions) vision was a great handicap to his future employment prospects. He was awarded \$10 000 damages.

The second case I refer to is, I consider, of immediate relevance to the present matter. In *Benney v Kusema* HB-219-86, the plaintiff, a 59-year-old motor-cyclist, was knocked from his vehicle by the defendant, who was driving a car in a manner found to be negligent. He sustained fractures in the left shoulder and collar-bone, two fractured ribs, cuts to the forehead, chin and neck which required stitches, bruises to the nose and right eye and was unconscious in hospital for four days. He was detained in hospital for two weeks and four years after the accident still suffered bouts of dizziness which were likely to continue. He was awarded \$3 000 for pain and suffering and loss of amenities.

Mutandiro's case and *Panganayi's* case I regard as of particular significance as regards customary *quantum*. Both resulted in awards of \$10 000 - the amount the defendant concedes to be proper in this case. However, in both cases the injuries for which this amount was considered appropriate were perhaps more serious than the injuries sustained by the present plaintiff. I will take into account, however, the ravages of inflation when determining what is a appropriate award on the facts of this case.

I consider that the award in *Benney's* case was unduly low, in relation to similar awards made by our courts. So, although, in my opinion *Benney* suffered more pain and inconvenience than this plaintiff I think I am justified in making a higher award because, with respect, I consider *Benney* was under-compensated.

Taking account of the pain, suffering and inconvenience occasioned to the plaintiff by the negligence of the defendant's servant, and also considering the loss of amenities which flow from the plaintiff's injuries, particularly the amenity of flying which pleasure the plaintiff is clearly deprived of quite apart from its financial aspect and taking into account the full value of money I would estimate the damages for pain and suffering at \$7 000, and for loss

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of amenities at \$3 000. Thus a grant of \$10 000 in general damages is the most I feel able to make in the circumstances without triggering an inflationary spiral in damages claims.

The final computation of damages is:

Loss of earnings to date	\$	12 000
Loss of future earnings	\$	7 000
General Damages	\$	10 000
Previously agreed liability	\$	<u>2 890,84</u>
Total	\$	31 890,84

Accordingly damages are awarded to the plaintiff in the amount specified above with interest at the rate of 10% per annum from the date of judgment to the date of payment, and costs of suit.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

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

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CARVALHO v MINISTER OF HOME AFFAIRS 1987 (2) ZLR 172 (HC)

Court High Court, Harare

Sandura JP

Application on notice of motion

5 & 18 November 1987

Flynote

Criminal procedure - bail - Ministerial certificate prohibiting bail - whether Minister bound by audi alteram partem rule before issuing certificate - costs - criminal matter - application to set aside Ministerial certificate.

Headnote

When issuing a certificate in terms of s 106(2)(b) of the Criminal Procedure and Evidence Act [Chapter 59] (which has the effect of preventing an accused person from being released on bail), the Minister of Home Affairs is not obliged to observe the requirements of the *audi alteram partem* rule and give the accused person the opportunity of making representations.

An application to the High Court to set aside a Ministerial certificate granting bail is a criminal matter and no order of costs may be made. * (6)

Cases cited:

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S v Baleka & Ors 1986 (1) SA 361 (T)

Bull v Attorney-General & Anor 1986 (1) ZLR 117 (SC); 1986 (3) SA 886 (ZS)

M R D Stonier for the applicant

A O Agyemang for the respondent

Judgment

Sandura JP: This is an application on notice of motion in which the applicant seeks an order setting aside a certificate issued by the respondent in terms of s 106(2)(b)(i) of the Criminal Procedure and Evidence Act, [Chapter 59], barring the granting of bail to the applicant. The application is opposed by the respondent.

The facts of this case are these. The applicant was arrested on 26 October 1986 on charges of contravening the Exchange Control Act [Chapter 170], the allegation being that acting in collusion with certain persons holding diplomatic positions in the embassy of Mozambique in Harare he unlawfully exported to Portugal foreign currency amounting to about \$250 000. However, after further investigation of the matter, the State now alleges that the amount of foreign currency exported is the equivalent of \$60 000. After his arrest, the applicant appeared before the Harare Magistrate's Court on 30 October 1986. On that day he applied for bail. However, the prosecutor informed the presiding magistrate that an application would be made to the respondent for the issue of a certificate by the respondent barring the granting of bail in terms of s 106(2)(b)(i) of the Criminal Procedure and Evidence Act. Consequently, the magistrate adjourned the hearing to 6 November 1986, as he was obliged to do by s 106(2c) of the Act. When the hearing was resumed on 6 November 1986 the prosecutor produced a certificate signed by the respondent and barring the granting of bail to the applicant in terms of s 106(2)(b)(i) of the Act. As a result, the application for bail was refused. Since then the applicant has been held in custody. However, the police have now completed their investigations and the matter will come up for trial before the Regional Magistrate's Court on 21 December 1987. The matter has taken so long to investigate because some of the investigations had to be undertaken in Mozambique and Portugal. In these circumstances, the applicant seeks a court order setting aside the certificate issued by the respondent barring the granting of bail to him.

Section 106(2)(b)(i) of the Criminal Procedure and Evidence Act, in terms of which the respondent issued the certificate in question, reads as follows:

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"106. (1) . . .

(2) The Minister of Home Affairs may, in an application for bail in terms of subsection (1) -

- (a) . . .;
- (b) in respect of any -
 - (i) offence under any law relating to the illicit possession of or dealing in or the unlawful importation or exportation of any precious metal, precious stones, currency, bills of exchange, travellers' cheques, letters of credit, bank drafts or promissory notes; or
 - (ii) conspiracy, incitement or attempt to commit any of the offences referred to in subparagraph (i);

certify that it is likely that the administration of justice would be prejudiced if the applicant were admitted to bail."

Section 106(2b) goes on to state that where such a certificate is issued the application for bail shall be refused.

In this case, the respondent has certified that it is likely that the administration of justice would be prejudiced if the applicant were admitted to bail. In the respondent's view, if the applicant is granted bail and released he is likely to abscond because he is facing very serious charges. Dealing with this allegation, the applicant avers in his founding affidavit that he has been a resident in Zimbabwe since 1974 and holds a permanent residence permit. His passport has been surrendered to the police and he holds no other travel documents. He is married and has four children. He owns substantial property in this country. This property includes a house, a flat and four motor vehicles. In the circumstances, the applicant avers as follows:

- "8.2. I respectfully submit that by virtue of these facts, had the Respondent applied his mind to the question to be decided, he would not have arrived at the decision which he did, and has accordingly acted irrationally.
- 9. I further respectfully submit that the actions of the Respondent are contrary to the principles of natural justice in that I was not afforded the opportunity of making any representations on my own behalf."

Dealing with the applicant's averments in para 8.2 the respondent has this to say:

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"Ad Paragraph 8(2)

The contents of this paragraph are disputed. I properly appraised (*sic*) myself of the allegations against the Applicant including the Applicant's personal circumstances. Upon due consideration of the whole matter I am satisfied that it was and is likely that the administration of justice would be prejudiced if the Applicant were admitted to bail."

In submitting that the certificate in question should be set aside, Mr *Stonier*, who appeared for the applicant, relied upon two main grounds. The first ground was that the respondent's decision was irrational and the second ground was that the respondent was guilty of procedural impropriety in that he breached the *audi alteram partem* rule of natural justice. I shall first consider whether the respondent's decision was irrational.

Whether the respondent's decision was irrational would depend upon the meaning of that word. Recently, DUMBUTSHENA CJ had occasion to deal with the grounds upon which administrative actions are subject to judicial review in *Patriotic Front - ZAPU v Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC) at 326; 1986 (1) SA 532 (SC) at 548. The learned CHIEF JUSTICE quoted with approval the following passage from a recent House of Lords decision:

"... By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680; [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. . . ."*(7)

Bearing in mind that definition of "irrationality" I do not think that the respondent's decision to issue a certificate barring the granting of bail to the applicant can be described as irrational. The applicant is facing a very serious charge involving the unlawful exportation of a large amount of foreign currency from this country. The foreign currency has not been repatriated. In the circumstances, if the applicant is found guilty at his trial, he will almost

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certainly receive a prison sentence. The temptation to abscond if he is released on bail is, therefore, very high. The first ground relied upon by Mr *Stonier*, therefore, fails.

I now wish to deal with the second ground relied upon by counsel. Counsel submitted that the certificate in question should be set aside because the respondent breached the *audi alteram partem* rule in that before issuing the certificate he did not give the applicant the opportunity of making any representations. The issue here is whether s 106(2)(b) of the Criminal Procedure and Evidence Act implies that observance of the requirements of the maxim *audi alteram partem* is a pre-condition which must be fulfilled before the Minister of Home Affairs can validly issue the certificate contemplated by that section. Recently, in *S v Baleka & Ors* 1986 (1) SA 361 (T), ELOFF DJP considered the provisions of s 30(1) of the South African Internal Security Act, which empower the Attorney-General in certain circumstances to issue an order barring the granting of bail to any person who has been arrested upon a charge of having committed any offence referred to in the third schedule. One of the issues which the learned judge had to decide was whether the Attorney-General was obliged to observe the requirements of the *audi alteram partem* rule before issuing the orders in terms of s 30(1) of the Act. After considering the issue at length, the learned judge, in a well reasoned judgment, concluded that the Attorney-General was not obliged to observe the requirements of the *audi alteram partem* rule. During the course of his judgment the learned judge had this to say at 406E-I:

"It is also in my view relevant that the effect of the section is that persons affected by the issue of an order thereunder shall not have a hearing by a court on the question of their release on bail or warning. I think it unlikely that the Legislature contemplated that the Attorney-General should conduct his own hearing, and that he should afford the persons concerned the right to be heard by him.

The other major factor which leads me to the conclusion that the duty to observe the *audi alteram partem* rule is

not implied is related to what is involved in the duty to afford a hearing. COLMAN J set it out as follows in *Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor* 1980 (3) SA 476 (T) at 486F-G:

'But on the other hand (and for this no authority is needed) a mere pretence of giving the person concerned a hearing would clearly not be a compliance with the Rule. Nor in my view will it suffice if he is given such a right to make representations as in the circumstances does

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not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the last-mentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward representations; secondly he must be put in possession of such information as will render his right to make representations a real and not illusory one.'

To like effect is this passage in *Minister of the Interior v Bechler & Ors; Beier v Minister of the Interior & Ors* 1948 (3) SA 409 (A) at 452, where it was emphasized:

'... that generally speaking a person liable to be affected by such a decision ought to be informed of the substance of the prejudicial allegations against him, for otherwise it cannot be said that he had a sufficient opportunity of controverting such allegations.'

Later on in his judgment the learned judge had this to say at 407A-C:

"Earlier herein I pointed out that it is inconceivable that the Attorney-General would be expected to disclose the substance - and with it possibly the source - of his information on the strength of which he issues a s 30 order. In my opinion that circumstance renders it highly unlikely that the Legislature could have envisaged that a hearing, with the concomitant obligations mentioned in the *Heatherdale*, *Beier* and *Sachs* cases, should be conducted."

I agree entirely with the views expressed by the learned judge. For the same reasons, I have come to the conclusion that the Minister of Home Affairs, the respondent in this case, was not obliged to observe the requirements of the *audi alteram partem* rule before issuing the certificate in terms of s 106(2)(b)(i) of the Criminal Procedure and Evidence Act barring the granting of bail to the applicant. That conclusion disposes of the second ground relied upon by counsel for the applicant in this case.

Finally, there is one other matter which I ought to deal with before concluding this judgment. Two affidavits were filed in support of this application, some three or four weeks after the application had been filed with the Registrar of this court. In these affidavits, the deponents allege that the investigating officer in this case is having an affair with the applicant's wife. The suggestion is that because of the existence of that relationship the investigating officer is opposed to the applicant's release on bail and has given

1987 (2) ZLR p178

SANDURA JP

misleading advice and information to his Commanding Officer and to the Minister of Home Affairs in order to prevent the applicant's release on bail. Dealing with these allegations, Assistant Commissioner Murahwa, the Officer Commanding CID Fraud Squad, avers as follows

in his supplementary affidavit:

"5. Ad Paragraph 12 of the Affidavit:

The contents of this paragraph are disputed in the following particulars:

- a) I did not seek the views or opinion of Superintendent Tonde with regard to obtaining the Ministerial Certificate.
- b) During the final stages of the investigations into this matter I perused the contents of the criminal docket, including all relevant documentary exhibits and statements and concluded that the Applicant was facing charges of a serious nature."

In view of what the Assistant Commissioner says I am satisfied that the decision to apply for a certificate from the Minister had nothing to do with the investigating officer. However, it is both undesirable and improper for an investigating officer to behave as alleged. I hope that the matter will be thoroughly investigated and that if the alleged affair is established appropriate action will be taken against the investigating officer.

With regard to costs, since this application is in the context of its facts and background a criminal matter, I shall make no order. See *Bull v Attorney-General & Anor* 1986 (1) ZLR 117 (SC); 1986 (3) SA (ZS).

In the circumstances the application is dismissed.

Byron Venturas & Travlos, applicant's legal practitioners

1987 (2) ZLR p179

LEAFAM INVESTMENTS (PVT) LTD v KUPARA 1987 (2) ZLR 179 (HC)

Court High Court, Harare

Sandura JP

Application for eviction

5 & 18 November 1987

Flynote

Landlord and tenant - eviction of statutory tenant - "good and sufficient grounds" therefor - landlord requiring eviction to enable sale to take place - possibility that sale concluded only to evict tenant, previous attempts having failed - application refused.

Headnote

Before a landlord may evict a statutory tenant from commercial premises, s 22(2) of the Commercial Premises (Rent) Regulations requires that he shows "good and sufficient grounds" for evicting the tenant. The grounds which may be considered to be good and sufficient are not specified in the Regulations, and the courts must make a value judgment based on the merits of each case. In the present case, the applicant sought the eviction of the tenant, ostensibly

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because it had agreed to sell the premises and the sale was conditional upon the applicant obtaining vacant possession before transfer. However, the background to the case indicated that several doubts existed about the sale, such as whether the sale was merely a device designed to secure the eviction of the respondent, other attempts having failed. There was also a history of negotiations between the parties for the purchase by the applicant of the business run by the tenant and failure to agree on a purchase price.

Held, that the applicant had failed to establish good and sufficient grounds for the eviction of the tenant.

Cases cited:

Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech 1987 (2) ZLR 338 (SC)

Trustees in Mashonaland of the Church of the Province of Central

1987 (2) ZLR p180

SANDURA JP

Africa v Timms 1973 (1) RLR 307 (GD); 1973 (4) SA 464 (R)

Georgiades & Florey Building (Pvt) Ltd v Borrowdale Butchery (Pvt) Ltd 1985 (2) ZLR 188 (HC)

Moffat Outfitters (Pvt) Ltd v Hoosein & Ors 1986 (2) ZLR 148 (SC)

M J Gillespie for the applicant

A P de Bourbon SC for the respondent

Judgment

Sandura JP: This is an application for the eviction of the respondent from certain business premises at the Chisipite Shopping Centre in Harare. The application is strenuously opposed by the respondent.

The facts of this case are these. In 1985 the respondent entered into a written agreement of lease, in terms of which he agreed to lease from Simitsidellis Investments (Pvt) Ltd certain business premises at the Chisipite Shopping Centre in Harare. The lease was effective from 1 June 1985 and the agreed monthly rent was \$1 200. It was a term of the lease agreement that in the event of the lessor disposing of the premises during the currency of the lease, the purchaser and new owner would be entitled to terminate the lease upon giving the respondent six months' written notice. Subsequently, on 18 September 1986, Simitsidellis Investments (Pvt) Ltd transferred the premises in question to the applicant in terms of a sale agreement. A week later, the applicant through its agents gave to the respondent 6 months' written notice of its intention to terminate the lease. The respondent refused to vacate the premises. As a result, the applicant instituted proceedings for the eviction of the respondent in the magistrates court on 14 April 1987. Before those proceedings were concluded, the applicant entered into an agreement in May 1987 in terms of which it undertook to sell the premises in question to Delta Corporation Limited. That sale agreement was conditional upon the applicant obtaining vacant possession

of the premises in question prior to transfer. The applicant now seeks the respondent's eviction from the premises in order to sell those premises to Delta Corporation. The proceedings in the magistrates court have now been withdrawn.

The origin and background of this dispute is given by the respondent in his replying affidavit as follows:

- "15. The premises concerned were occupied by a bakery called Delice Bakery, which in September 1984 was in financial difficulties. I was approached by the Deputy General Manager of Blue Ribbon Foods (the bakery's largest creditor) in September 1984 who suggested

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SANDURA JP

that I purchase the bakery and take over the liability of some \$17 500,00 owing to Blue Ribbon Foods. I approached the bakery management, and eventually concluded an agreement whereby I became the new owner of the business on the 15th December, 1984. By that time the business had declined further, there were serious cash flow problems and I eventually invested over \$100 000 in the business by the end of May 1985 by which time I had cleared off all its debts.

16. This bakery is situated in the Chisipite Shopping Centre on the Enterprise Road. It is the only bakery in the area and there is a great demand for bread there. I employ 35 people. The closing of the bakery if I am evicted will cause hardship to my employees, the residents in the area, and to me, because I will lose all the time and money and effort I have put into establishing it and building it to a profitable and viable business.
17. After I had been trading for some six months at the premises, a Mr Gardiner representing Mr Pascoe approached me and wanted to purchase Stand Nos 9 and 10 Chisipite Shopping Centre; but said that there was no point in doing so unless they could also buy the bakery premises of which I was tenant. At the time I did not want to sell, or to discuss selling; but after numerous telephone calls I met Mr Gardiner, Mr Pascoe and an accountant from Peat Marwick & Mitchell. After lengthy discussions I offered to sell the bakery at that time for \$120 000,00, which they did not agree to; and to which they refused to make a counter offer. The discussion ended by their stating that as I was being unreasonable they were going to purchase the building and have me evicted.
18. Mr and Mrs Gardiner visited the bakery several times; and on at least two occasions informed my manager that they had bought the property and that we would be evicted; but they would like to retain my manager as their manager.
19. to 21. . . .
22. On 22nd July 1986 I received a letter (annexure K) from Knight Frank and Rutley informing me that I was committing a breach of the lease agreement by carrying out certain alterations and additions. I took this as an attempt to prove a breach of the lease so that I could be evicted but nothing came of it because in fact the alterations had been approved by the landlord's agent.

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SANDURA JP

23. On or about 25th September 1986 I received the letter which is called a letter of notice and is annexure D in these proceedings.
24. I took no notice of the said letter (notice) of the 25th September 1986 because I had made it very clear to the landlords or their representatives from time to time that I did not wish to leave the premises; and in any

case I did not regard the notice as a valid notice under my lease for reasons I will deal with later.

25. At intervals during the whole of the history of my tenancy there have been intermittent negotiations or approaches for the purchase of my bakery and its goodwill and these led to discussions from time to time. In on about October 1986 I offered to purchase the Stands myself for \$400 000 but this was refused as per letter from Knight Frank and Rutley copy annexed hereto marked Annexure L
26. In February 1987 there were further negotiations and I refer to letter dated 5th March 1987, from Knight Frank and Rutley to me (Annexure M). This letter specifically states that the landlord has no intention of selling; but the landlord now says it sold as early as 6th May 1987.
27. It was clear to me by the beginning of 1987 that the landlords were not prepared to pay what I thought was a fair price for the property and that they were carrying out their threat of trying to evict me and thereby to acquire my business and goodwill for nothing or to bring to an end the whole of my bakery business and make my investment virtually worthless."

From the above history and background of the dispute the respondent draws the following conclusion:

- "10. Furthermore, I sincerely believe, and I am of the opinion, that there has been a conspiracy between the said Pascoe, the companies of which he is controlling shareholder and managing director, the agents appointed to manage the property which I occupy, and the persons purporting to represent Delta Corporation Ltd, to present to this Honourable Court an incomplete and therefore misleading representation of the true position with regard to my statutory tenancy and with regard to my right to security of tenure and with regard to the identity of the landlord and what is planned for the future of the property occupied by me as a Statutory Tenant. There is a great deal of money at stake."

1987 (2) ZLR p183

SANDURA JP

There are many issues in this case which are in dispute and the question arises as to whether these issues can be resolved on the papers. In this regard I refer to what GUBBAY JA said in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (SC). At p 339C of the judgment the learned JUDGE OF APPEAL had this to say:

"It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently there is a heavy *onus* upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact."

Applying that test, I am of the view that the matter before me can be resolved on the papers. I say so because there are, I think, two important issues which I must consider in this case. The first issue is whether the respondent is a statutory tenant and the second is whether the applicant has established good and sufficient grounds which justify the respondent's eviction from the premises in question.

It was common cause, I think, that the premises in question are commercial premises as defined in s 3(1) of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) (hereinafter referred to as the Regulations). The provisions of the Regulations, therefore, apply to the premises in question.

Section 22(2) of the Regulations reads as follows:

"No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee -

- (a) continues to pay the rent due, within seven days of due date; and
- (b) performs the other conditions of the lease; unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that -
 - (i) the lessee has declined to agree to an increase in rent; or
 - (ii) the lessor wishes to lease the premises to some other person."

1987 (2) ZLR p184

SANDURA JP

Before determining whether the applicant has established good and sufficient grounds for the relief sought I shall deal very briefly with the first issue, which is whether the respondent is a statutory tenant. Although Mr *de Bourbon*, who appeared for the respondent, submitted that the respondent was not a statutory tenant, the respondent himself appears to have accepted that he was a statutory tenant because he describes himself as such in his replying affidavit. I shall, therefore, assume without deciding, that he is a statutory tenant and proceed to determine the main issue in this case.

The main issue in this case is whether the applicant has established good and sufficient grounds justifying the respondent's eviction from the leased premises. As to what constitutes good and sufficient grounds BEADLE CJ had this to say in *Trustees in Mashonaland of the Church of the Province of Central Africa v Timms* 1973 (1) RLR 307 (GD) at 312-313; 1973 (4) SA 464 (R) at 467D-E:

"The regulations provide no yardstick as to what a court should regard as sufficient ground for ordering the ejectment of a statutory tenant. The application of this section was considered by the Appellate Division in the case of *Tucker v Buchan* 1968 (2) RLR 192 (AD); 1968 (4) SA 809 (RA). The judgment in that case does not attempt to itemise the grounds which a court would regard as sufficient. The approach of MACDONALD JA, in that case clearly indicates that the Court must make a value judgment based on the merits of each particular case, and that is the manner in which I consider I must approach this matter."

I am satisfied that that is the correct approach to adopt in this matter.

More recently, the phrase "good and sufficient grounds" has been considered in a number of cases. In *Georgiades & Florey Building (Pvt) Ltd v Borrowdale Butchery (Pvt) Ltd* 1985 (2) ZLR 188 (HC), the court found that good and sufficient grounds had been established where the applicant had satisfied the court that it had *bona fide* embarked on an extensive reconstruction programme which required that the lessee vacate the leased premises so that the rebuilding could be carried out. There was no evidence that the applicant had undertaken the scheme merely in order to have the respondent in that case evicted.

In *Moffat Outfitters (Pvt) Ltd v Hoosein & Ors* 1986 (2) ZLR 148 (SC), the court found that the applicants had established good and sufficient grounds where they were *bona fide* in their

desire and intention to undertake necessary, urgent and substantial renovations to the shop in question.

1987 (2) ZLR p185

SANDURA JP

In the present case the applicant seeks the respondent's eviction from the premises because it has agreed to sell the premises to Delta Corporation and the sale agreement is conditional upon the applicant obtaining vacant possession of the premises prior to transfer. The question which I must determine is whether this constitutes "good and sufficient grounds" for the relief sought. Bearing in mind the history and background of the dispute between the parties in this case a number of questions immediately come to mind. Why was the sale agreement made conditional upon the applicant obtaining vacant possession of the premises before transfer? Was the sale agreement not designed to secure the eviction of the respondent from the leased premises after previous attempts had failed? Is the sale agreement a genuine one? What guarantee is there that after the eviction of the respondent the property will be transferred to Delta Corporation? Is the sale agreement not a way of circumventing the provisions of the Regulations? These and other questions make it quite clear that the present case is different from the *Georgiades* case, *supra*, where the learned judge found no evidence to show that the applicant in that case had undertaken the reconstruction scheme merely in order to have the respondent in that case evicted. The same cannot be said in the present case. In the circumstances, I agree with the following submission made by Mr *de Bourbon*:

"It is respectfully submitted that the whole purpose of the Commercial Premises (Rent) Regulations 1983, and the Commercial Premises (Lease Control) Act 1983 is to ensure that existing statutory tenants are not required to vacate their premises as a consequence of a series of manipulations such as is occurring in the instant case. The applicant, who has no use for the premises itself, seeks to pass transfer to Delta Corporation or its nominee. As already submitted, there is no certainty as to the identity of the purchaser, nor as to the identity of the company which will operate from the premises. What has been undertaken is a series of agreements to frustrate the respondent's position as a statutory tenant."

In the circumstances, and making a value judgment based on the merits of this particular case I am satisfied that the applicant has failed to establish good and sufficient grounds for the relief sought.

The application is, therefore, dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Gollop & Blank, respondent's legal practitioners

1987 (2) ZLR p186

NYAMUSWA v MUKANYA 1987 (2) ZLR 186 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Gubbay JA & McNally JA

Appeal against rescission of a default judgment

2 & 20 November 1987

Flynote

Appeal - civil case - rescission of default judgment - not appealable - not a final judgment unless rescission granted on grounds of fraud or mistake.

Headnote

An order rescinding a default judgment is not a final judgment and is, therefore, not appealable, except where the order of rescission has been granted on the grounds that the default judgment is invalid or has been obtained by fraud or mistake. In a case of invalidity or fraud or mistake, the rescission order puts an end to the litigation, and the plaintiff cannot persist in his claim unless the order is set aside on appeal.

Cases cited:

Gatebe v Gatebe 1928 OPD 145

Ranchod v Laloo 1942 TPD 211

Motsamai v Read 1959 (4) SA 124 (O)

Botha v Muir 1952 (2) SA 358 (E)

Terblanche v Thyssen & Anor 1957 (4) SA 244 (C)

R M Fitches for the appellant

No appearance for the respondent

Judgment

Dumbutshena CJ: The history of this matter is as follows: The appellant and the respondent had a lease agreement. It must have been an oral agreement because it was not exhibited in the court below. However, the respondent rented and occupied flat No. 23 at 22 Fifth Avenue, Harare. He

1987 (2) ZLR p187

DUMBUTSHENA CJ

paid to the appellant a rental of \$100 per month, payable in advance. It appears that the respondent defaulted in paying his rent. He denies this.

The appellant issued a summons against the respondent claiming arrears of rent in the sum of \$200, being rent for the months of July and August 1985. She also prayed for the ejectment of the respondent from the premises and damages for the daily occupation of the flat in the sum of

\$3.331/2 from 1 September to the date of ejectment.

Although there was no return of service filed of record, the respondent filed a notice of intention to defend, together with his defence, on 9 September 1985. Nothing happened after that.

About one year after the issue of summons the appellant's legal practitioners filed a notice to plead on 13 August 1986. Nine days after the notice to plead was filed the respondent's wife filed an affidavit and a letter requesting postponement because the respondent was away on operational duties.

This seemed not to have impressed the appellant who on 3 September 1986 applied for and was granted a default judgment. On the same day she issued a warrant of ejectment and execution against the respondent's property.

The magistrate was somehow taken aback because the amount of arrears prayed for in the summons and granted in the default judgment was \$200 and yet in the warrant of execution the amount to be collected was \$800. This point was not taken up when the two applications were heard. It need not detain us now.

On 1 October 1986 the respondent applied for the rescission of the default judgment. He paid into court \$49,04 for security of costs. On 6 October 1986 he applied *ex parte* for a stay of execution. The application was granted and later set aside because the magistrate who heard the application considered the order defective.

In the affidavit in support of the application for a stay of execution the respondent stated:

"I went to the magistrates court where I was informed by the clerk of the court that no judgment had been entered against me.

Nevertheless I applied for a rescission of the judgment on 1 October

1987 (2) ZLR p188

DUMBUTSHENA CJ

1986, since I was not in wilful default and do believe that I have a good and valid defence to the judgment creditor's claim."

He repeated his assertion that he had a valid defence to the claim in his application for the rescission of the default judgment.

It is not necessary in this matter to consider the merits of the application for rescission of the default judgment. I set out the above facts to show that the respondent did not allege that the default judgment was obtained by fraud or mistake.

The court below found that the respondent was not in wilful default of the default judgment, that he had a valid defence to the claim, and had paid the rent. The magistrate, however, ordered the rescission of the default judgment.

It is against this order that the appellant purports to appeal. She appeals on two grounds:

"1. The learned magistrate erred in making a finding that the respondent's (applicant's) failure to file his plea

within the time limits was not wilful.

2. The learned magistrate erred in making a finding that respondent has a *bona fide* defence to the action, when on the papers, respondent did not disclose a defence to the action."

Having read the record and listened to counsel's submissions, we requested Mr *Fitches*, who appeared for the appellant, to deal *in limine* with the question whether an appeal lies against an interlocutory order setting aside a default judgment. Mr *Fitches* said he had not addressed his mind to the question and indicated that he would be in a better position to deal with our request after consulting relevant authorities.

Mr *Fitches* has now sent us a list of cases which conclusively indicate that no appeal lies from a decision of the court rescinding a judgment granted in the absence of the party against whom it was granted. This is in accord with the provisions of the Magistrates Court Act [*Chapter 18*]. Section 40(1)(a) states:

"(1) In civil cases the court may -

- (a) rescind or vary any judgment which was granted by it in the absence of the party against whom it was granted."

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DUMBUTSHENA CJ

But in terms of s 41(2)(b) the order rescinding a default judgment is not a final and definitive judgment. Paragraph (b) of subs (2) to s 41 reads:

"(2) Subject to the provisions of subsection (1), an appeal to the Supreme Court shall lie against -

- (a) . . .
- (b) any rule or order made in such suit or proceedings and having the effect of a final and definitive judgment, including any order as to costs."

Such an order does not have the effect of a final and definitive judgment. It leaves the rights of the plaintiff, in this case the appellant, unaffected and the issues in the main action undisturbed. Those issues are not disposed of by the order of rescission. The appellant will still pursue her claim for arrears of rent at the trial. She is still in court. See *Herbstein and van Winsen The Civil Practice of the Superior Courts in South Africa* 3 ed p 711; *Gatebe v Gatebe* 1928 OPD 145 at 149; *Ranchod v Lalloo* 1942 TPD 211; *Motsamai v Read* 1959 (4) SA 124 (O); *Botha v Muir* 1952 (2) SA 258 (E) at 361.

An order setting aside a default judgment is appealable where the default judgment is invalid or is obtained by fraud or mistake. Under one or other of these circumstances the default judgment is final. In other words, it terminates litigation. The plaintiff cannot go to court and continue with his claim unless he appeals and succeeds. See *Terblanche v Thyssen & Anor* 1957 (4) SA 244 (C) at 246; *Botha v Muir supra* at 360-361; *Ranchod v Lalloo supra*.

Here the default judgment was not invalid, it was not obtained by fraud or mistake. The magistrate's order rescinding the default judgment was not a final and definitive judgment within the meaning of para (b) of subs (2) of s 41 of the Magistrates Court Act and is therefore clearly

not appealable.

For this reason the matter is struck off the roll.

Gubbay JA: I agree.

McNally JA: I agree.

Ziumbe & Mtamabanengwe, appellant's legal representatives

1987 (2) ZLR p190

BANK OF CREDIT AND COMMERCE ZIMBABWE LTD v MBIDZO 1987 (2) ZLR 190 (HC)

Court **High Court, Harare**

Sandura JP

Application for provisional sequestration

19 & 25 November 1987

Flynote

Insolvency - acts of insolvency - provisional sequestration - basis on which provisional order will be granted - Insolvency Act [Chapter 303] - s 15.

Headnote

In order to obtain a provisional order of sequestration in terms of s 15 of the Insolvency Act [Chapter 303], three facts need to be proved:

- (a) that an act of insolvency has been committed;
- (b) that it will be to the advantage of creditors of the debtor if his estate is sequestrated;
and
- (c) that the petitioning creditor has a claim of not less than \$100.

Only *prima facie* proof of these three facts is required to obtain a provisional order, whereas in the case of a final order the court must be satisfied that these facts exist.

Cases cited:

Moodley v Hedley 1963 (3) SA 453 (N)

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

Wilkins v Pieterse 1937 CPD 165

R M Fitches for the applicant

J Sayce for the respondent

Judgment

Sandura JP: This is an application for the provisional sequestration of the respondent's estate on the ground that the respondent has committed an act

1987 (2) ZLR p191

SANDURA JP

of insolvency in terms of s 13(b) of the Insolvency Act [*Chapter 303*]. The application is opposed by the respondent.

The facts of this case are these. On 13 March 1987 judgment in favour of the petitioner was entered against the respondent in the sum of \$30 415,61 together with interest thereon at the rate of 17% per annum from 31 December 1986 to the date of payment. On 25 March 1987 the petitioner's legal practitioners issued a writ of execution and on 7 April 1987 the Deputy Sheriff attached the respondent's interest in a Datsun 1500 motor vehicle found on the respondent's premises ie Stand 5982, Western Triangle, Highfield, Harare. On 22 April 1987, the Deputy Sheriff instructed the auctioneers, Bill Hyland (Pvt) Ltd, to sell the attached motor vehicle. However, the auctioneers could not find the motor vehicle on the respondent's premises. They communicated this fact to the petitioner's legal practitioners and on 27 July 1987 the Deputy Sheriff rendered a *nulla bona* return. That is the return upon which the petitioner relies in seeking the sequestration of the respondent's estate.

Section 15 of the Insolvency Act [*Chapter 303*] reads as follows:

"15. The court shall not grant an order of provisional sequestration unless it is of the opinion that, *prima facie* -

- (a) the debtor has committed an act of insolvency or is insolvent; and
- (b) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated; and
- (c) the petitioner has a claim against the debtor to the extent referred to in subsection (1) of section fourteen."

It is pertinent to note at this stage that in the case of a provisional order of sequestration there need only be *prima facie* proof of the three facts stated in s 15 of the Act, whereas in the case of a final order of sequestration there must be a more positive degree of persuasion in that the court must be satisfied that those facts exist. See Catherine Smith *The Law of Insolvency* 2 ed p 58. I shall first consider whether the respondent has committed an act of insolvency.

Section 13(b) of the Insolvency Act reads as follows:

"13. A debtor shall be deemed to have committed an act of insolvency if -

...

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SANDURA JP

- (b) a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment . . . "

The South African Insolvency Act has a section which is the equivalent of our s 13(b). Dealing with that section MILLER J had this to say in *Moodley v Hedley* 1963 (3) SA 453 (N) at 454C-D:

"It has repeatedly been held that s 8(b) includes two acts of insolvency; one, where the writ is presented to the debtor and he fails to satisfy the judgment or to indicate sufficient disposable property with which to satisfy it, and two, where the execution officer himself fails to find sufficient disposable property."

Later on in his judgment the learned judge goes on to say that the second act of insolvency is dependent upon the first in the sense that it is only where the first act of insolvency cannot be established that the second act of insolvency may be committed. A good example of where the first act of insolvency cannot be established is where the execution officer cannot find the debtor and cannot, therefore, demand of him that he satisfy the writ or indicate sufficient disposable property to satisfy the judgment debt. It appears that this is what happened in the present case because the writ was not served on the respondent personally. This belief is confirmed to a certain extent by what the petitioner's manager of its Highfield branch says in paras 9 and 10 of his answering affidavit, which read as follows:

- "9. THAT the correspondence annexed to the Respondent's Opposing Affidavit clearly shows that the Petitioner has given him ample opportunity to put his affairs in order but the Respondent has made promises to repay the capital sum, which he has not kept, made appointments with the Petitioning bank but has failed to attend and has embarked on a course of conduct calculated to avoid the service of documents upon him and employed delaying tactics.
10. THAT I am informed and verily believe that the Respondent was served with the Petition in the precincts of the Magistrates' Court where he had been called as a witness, after there had been fruitless attempts to serve him at various addresses and the hearing of the

1987 (2) ZLR p193

SANDURA JP

Petition had been postponed because personal service had not been effected."

In the circumstances, it is clear that the first act of insolvency stated in s 13(b) of the Act cannot be established because there was no personal service of the writ upon the respondent. I now proceed to determine whether the second act of insolvency has been established. In terms of s 13(b) of the Act, the second act of insolvency is established where the execution officer fails to find sufficient disposable property to satisfy the judgment debt. In terms of the same section, disposable property is not limited to movable property but includes immovable property: *Rodrow (Pty) Ltd v Rossouw* 1975 (3) SA 137 (O). In the present case, the *nulla bona* return states that no goods or chattels belonging to the respondent were either pointed out or found after a diligent search and enquiry. This return, therefore, appears to cover movable property only. However, the writ of execution specifically directed the Deputy Sheriff to attach the respondent's

immovable property if the movable property found was insufficient to discharge the debt. It reads as follows:

"YOU are further required and directed that if after due inquiry and diligent search you are unable to find any movable goods belonging to the said Defendant or insufficient to satisfy the amount due under this Writ that you attach and take possession of certain piece of land situated in the district of Harare being: Stand 5982 Highfield Township, Harare."

There is nothing in the papers before me to indicate whether or not the immovable property referred to in the writ was attached. Be that as it may, the stand in question is the only security which the petitioner holds because the petitioner has a first mortgage bond over it. However, whether or not the immovable property was attached and whether or not the *nulla bona* return covers immovable property appear to be of little or no significance when one has regard to the fact that the respondent admits that the immovable property in question is insufficient to discharge the respondent's debt. Thus, on the basis of his own admission, the respondent does not have sufficient disposable property (movable or immovable) to satisfy the judgment debt. What he seems to be suggesting is that he should be given time within which he can pay the judgment debt by instalments. In my view, that is not good enough. I am, therefore, of the opinion that, *prima facie*, the respondent has committed an act of insolvency.

I now proceed to consider whether, *prima facie*, there is reason to believe that it will be to the advantage of the respondent's creditors for his estate to be

1987 (2) ZLR p194

SANDURA JP

sequestrated. Dealing with a similar issue DAVIS J had this to say in *Wilkins v Pieterse* 1937 CPD 15:

"Very strong grounds would have to be adduced to cause the court even to doubt whether, an act of insolvency having occurred, sequestration proceedings would be to the advantage of creditors. Of this I am certain; Parliament is not intending to make it progressively more difficult for a creditor to obtain his just rights against a recalcitrant debtor."

Catherine Smith has this to say in *The Law of Insolvency* at p 60:

"Creditors have the right to obtain payment of amounts due to them as soon as possible. Failing such payment, they are entitled to levy execution against the debtor's property. Sequestration is the ultimate form of execution and this should be borne in mind when considering the question of advantage to creditors."

I agree with the above comments. In the circumstances, I am of the opinion that, *prima facie*, there is reason to believe that it will be to the advantage of the respondent's creditors for the respondent's estate to be sequestrated.

The third fact which must be proved in terms of s 15 of the Act is that the petitioner has a claim against the debtor to the extent referred to in s 14(1) of the Act, ie a liquidated claim for not less than \$100. This fact has been proved because it is common cause that judgment in the sum of \$30 415,61 was entered for the petitioner.

Mr Sayce, who appeared for the respondent, submitted that even if I found that the respondent had committed an act of insolvency I should exercise my discretion and refuse to grant the order

sought because sequestration would prejudice a third party who has entered into a lease agreement with the respondent in respect of the respondent's premises, namely, Stand No. 5982, Western Triangle, Highfield, Harare. Whilst I agree that the court has an overriding discretion in the matter, such discretion must be exercised judicially upon consideration of all the facts and circumstances of this case. After a careful consideration of the facts of this case I am unable to accede to counsel's request.

In the circumstances, I order as follows:

1. That a rule *nisi* do issue, returnable to this Honourable Court sitting at

1987 (2) ZLR p195

SANDURA JP

Harare on 9 December 1987, calling upon all interested persons to show cause, if any, why:

- (a) the respondent's estate should not be sequestrated in terms of the Insolvency Act [Chapter 303]; and
 - (b) the costs of these proceedings should not be costs of the sequestration.
2. That this rule do operate as an order of provisional sequestration.
 3. That the Master of this Honourable Court be and is hereby directed to appoint Malcolm Fraser as Provisional Trustee of the said estate.
 4. That this rule be served on the respondent personally.
 5. That there be one publication of this Order in the Government *Gazette* and one in a Friday edition of *The Herald*.

Gollop & Blank, petitioner's legal practitioners

Morris, Beale & Collins, respondent's legal practitioners

1987 (2) ZLR p196

S v DANGAREMBIZI & ANOR 1987 (2) ZLR 196 (HC)

Court High Court, Harare

Adam J

Criminal review

20 & 25 November 1987

Flynote

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Headnote

Before a magistrate may, at the end of a hearing, invoke the provisions of s 58(2) of the Magistrates Court Act [*Chapter 18*], he is required to reach an opinion that a sentence in excess of his jurisdiction is required. This is a judicial decision and must be based on all the factors pertaining to the question of sentence; he is not to abandon his judicial function and abdicate in favour of the prosecuting authority. If a magistrate does decide to invoke the provisions of s 58(2), he must give his reasons for so doing. The reasons need not be elaborate but they should be adequate to satisfy any court looking at the record of proceedings why he so acted.

Case cited:

S v Ndlovu HB-146-86 (not reported)

Miss *E F Ndewere* for the State

Mr *Chinogwena* for the accused

Judgment

Adam J: The two accused aged 16 years and 17 years respectively were convicted on 16 July 1987 on their pleas of guilty of the crime of robbery. The agreed statement of facts, which was entered as an exhibit, disclosed that both accused were school boys who left Harare on 12 March 1987 to visit accused Timothy Dangarembizi's brother at Kutama College. They arrived when

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ADAM J

lessons were in progress and sat near the bursar's office, having previously been in 1986 to Kutama College and being aware of where that particular office was located. Seeing one Brother Outlet leaving they entered the bursar's office with the intention of stealing money which they knew was kept in that office. On entering the two accused were surprised to find an occupant in the office, who, on seeing them reached out for the telephone; but, before he could do so, the two accused grabbed hold of him and pushed him to the floor injuring him to the extent that he lost consciousness. The two accused took \$3 400 from the safe and ran away leaving the occupant unconscious. Later the two accused shared the proceeds and none of the money taken from the safe was recovered.

The presiding Provincial Magistrate went through the essential elements with the two accused and entered a verdict of guilty. The record of the proceedings indicate that on 28 July 1987 a probation report was prepared on the two accused and there was a recommendation as to sentence. Those probation reports were available on 29 July 1987 according to the record of proceedings. On 30 July 1987 the trial was resumed and the public prosecutor advised the Provincial Magistrate that the probation officer had prepared a report. On that date the record

indicates that the Provincial Magistrate observed:

"I wish to refer the matter to [the Attorney-General's] office for his guidance in terms of s 58(2) of the Magistrate's Court Act."

On 17 August 1987, the clerk of court wrote to the Attorney-General's Office, attaching the record for attention and stating that the trial had been stopped in terms of s 58(2) of the Magistrate's Court Act.

The record does not disclose that the Provincial Magistrate prepared any report and attached it with the record of proceedings before being sent to the Attorney-General.

On 9 September 1987, Mrs A E Otoo, for the Attorney-General, wrote to the clerk of court (with a copy to the Provincial Magistrate), stating that perusal of the record transferred to the Attorney-General's office in terms of s 58(2) of the Magistrate's Court Act, revealed that none of the stolen money was recovered and that no enquiry had been made by the magistrate as to the whereabouts of the money. It was suggested by the writer that the accused persons be taken before the magistrate so that further enquiries could be made, that the effect of restitution must be impressed upon the accused

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ADAM J

persons and that if they made restitution before being sentenced, that fact would have due weight in imposing sentence. The clerk was informed that after the above-mentioned exercise, typewritten transcripts of the proceedings were to be prepared and the case was to be transferred to the High Court for sentence. The attention of the magistrate was drawn to the case of *S v Ndlovu* HB-148-86.

The record provides that the trial was resumed on 29 September 1987 and that the Provincial Magistrate observed that he had been directed to make further enquiries.

However, the record of proceedings do not reveal that after the resumption of the trial proceedings the Provincial Magistrate had adjourned the case and submitted a report to the Attorney-General.

The Magistrates Court Act [*Chapter 18*] provides under ss 54(4) and 58(2) as follows:

"54. (4) Save as specially provided in this Act or any other enactment, the jurisdiction of the court in respect of any offence when exercised by a provincial magistrate, whether on summary trial or on remittal by the Attorney-General, shall be -

- (a) imprisonment for a period not exceeding three years, with or without labour and with or without solitary confinement and spare diet;
- (b) a fine not exceeding three thousand dollars or, in default of payment, such period of imprisonment as aforesaid;
- (c) whipping, subject to the provisions of this section, not exceeding twelve strokes.

58. (2) If upon the conviction of an accused person upon summary trial or trial on remittal by the Attorney-General, before sentence is passed, the magistrate is of the opinion that a sentence in excess of his jurisdiction is justified,

he may adjourn the case and remand the person convicted and submit a report to the Attorney-General, together with a copy of the record of the proceedings in the case."

The Criminal Procedure and Evidence Act [*Chapter 59*] provides under ss 212 and 213 as follows:

"212. Where a magistrate has adjourned a case and submitted a report

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ADAM J

to the Attorney-General in terms of section 58 of the Magistrates Court Act [*Chapter 18*], the Attorney-General may -

- (a) . . .
- (b) if the magistrate acted in terms of subsection (2) of that section direct that the case -
 - (i) be transferred to the High Court for sentence; or
 - (ii) be continued by such magistrate.

213. Upon the receipt of the Attorney-General's direction in terms of section *two hundred and twelve* the magistrate shall cause the accused or the person convicted, as the case may be, to be informed of the Attorney-General's decision and shall -

- . . .
- (c) where the Attorney-General has given a direction in terms of subparagraph (1) of paragraph (b) of that section -
 - (i) grant a warrant committing the person convicted to prison, there to be detained till brought before a judge for sentence or till admitted to bail or liberated in due course of law; and
 - (ii) forthwith transmit the record of the proceedings, together with his reasons for convicting the person concerned to the registrar of the High Court; or
- (d) where the Attorney-General has given a direction in terms of subparagraph (ii) of paragraph (b) of that section, cause the person convicted to be brought before him and pass sentence upon that person."

It is very clear from the foregoing that the trial magistrate is required, after the conviction of an accused person, to reach an opinion that a sentence beyond his jurisdiction is justified. Further, that trial magistrate has to submit a report to the Attorney-General together with a copy of the record of proceedings. It follows from this that the accused is entitled to be informed on what basis the trial magistrate has decided to decline jurisdiction to sentence him and to proceed by way of s 58(2) of the Magistrates Court Act since the accused person, who now faces the prospect of a higher sentence, should be put in a position which would allow him the opportunity of being able to make submissions on sentence. This the accused person can only do if the trial magistrate gives his reasons (which should form part of the record) for opting for the provisions of s 58(2) of the Magistrates Court Act.

Further, once the trial magistrate opts to proceed under s 58(2) of the Magistrates Court Act,

the Attorney-General can only act under s 212(b) of

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ADAM J

the Criminal Procedure and Evidence Act. Unless the Attorney-General gives the trial magistrate a direction pursuant to s 212(b)(ii), the trial magistrate is *functus officio*, once he submits a report together with a copy of the record of proceedings pursuant to s 58(2) of the Magistrates Court Act.

The purported act by the Provincial Magistrate in terms of s 58(2) was not in accordance with the provisions of that section. The Provincial Magistrate specifically states that he was seeking guidance from the Attorney-General's Office which clearly indicates that he had not directed his mind to the question of sentencing. In so doing, he abandoned his judicial function, abdicating in favour of and becoming dependent upon the prosecuting authority to tell him how and when to exercise his powers that were given to him specifically by the Magistrates Court Act.

The purported direction by Mrs Otoo was not in accordance with the provisions of the Criminal Procedure and Evidence Act. The resumption of the trial in pursuance of those directions was not in accordance with any statutory provision.

I would like specifically to draw to the attention of presiding officers that they discharge a judicial function. Further, when on the conviction of the accused person and the completion of the trial, the incantation or perfunctory observation that is often made, which is something to the effect that this proceeding is being halted and the record is being sent to the Attorney-General to obtain his views on the question of sentence in terms of s 58(2) of the Magistrates Court Act, does not, in itself, in my view show that the trial magistrate was acting judicially. It is of utmost importance that trial magistrates take all the factors into account pertaining to the question of sentencing and, after applying their minds judicially, give their reasons for proceeding by way of s 58(2) of the Magistrates Court Act. The reasons need not be elaborate but they should be adequate to satisfy any court looking at the record of proceedings what the reasons were for him so acting.

Once the Attorney-General receives the trial magistrate's report together with a copy of the record of proceedings he is obliged to act in terms of s 212(b) of the Criminal Procedure and Evidence Act. That particular provision gives him a discretion, which has to be exercised in a reasonable manner, by requiring him to consider the record of the proceedings and the report from the trial magistrate and to determine in a *quasi*-judicial manner whether the trial magistrate should pass sentence or whether the case should be transferred to the High Court for sentencing since the legal practitioner

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ADAM J

appearing before the High Court on behalf of the Attorney-General must of necessity submit that, in his view, a higher sentence is called for and why this should be the approach the High

Court should adopt.

The High Court of Zimbabwe Act 1981 under s 29(2)(b)(v), provides as follows:

"29. (2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings -

...

(b) are not in accordance with real and substantial justice, it may, subject to the provisions of this section -

...

(v) remit the case to the inferior court or tribunal with such instructions relative to the further proceedings to be had in the case as the High Court thinks fit."

Accordingly, the case is remitted to the Provincial Magistrate so that he may properly proceed further in terms of the provisions of the Magistrates Court Act.

1987 (2) ZLR p202

S v NYOKA 1987 (2) ZLR 202 (SC)

Court Supreme Court, Harare

Gubbay JA, Manyarara JA & Korsah JA

Criminal appeal

10 & 27 November 1987

Flynote

Criminal law - statutory offences - Customs and Excise Act [Chapter 177] - s 156(1)(a) - failure to declare goods to a customs officer - "officer" - meaning - includes customs cadet carrying out duties of customs officer - maxims - omnia praesumuntur rite esse acta - application of.

Criminal procedure (sentence) - matters affecting - failure to declare goods to customs officer - attempt to bribe officer - whether can be taken into account.

Headnote

The definition of "officer" in s 2 of the Customs and Excise Act [Chapter 177] covers all persons employed in the Customs Department, it being left to the Controller of Customs to decide administratively which officers are to perform the duties and exercise the powers set out in Part 1 of the Act.

The appellant had been convicted of failing to declare foreign currency, in the sum of R21 400, on arrival back in Zimbabwe from South Africa, having been questioned by a customs cadet in terms of s 156(1)(a) of the Act. When the cadet found the currency, the appellant offered him and his immediate superior some of the money.

Held, that although the person who questioned the appellant was still a customs cadet at the time, he had been appointed to duty as, and was performing the duties of, a customs officer and was accordingly an "officer" for the purposes of s 156(1)(a) of the Act.

Held, further, that the fact that a person acts in a public office is *prima facie*

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GUBBAY JA

evidence of the validity of his appointment, and the appellant had failed to discharge the *onus* of rebutting the presumption of regularity relating to the cadet's appointment.

Held, further, that it would have been improper for the magistrate to take into account for sentence the fact that the appellant attempted to bribe the customs officers. That conduct disclosed a distinct and more serious offence for which the appellant might still be prosecuted.

Cases cited:

R v Gordon (1789) 1 Leach 505; 168 ER 359

R v Roberts (1878) 14 Cox CC 101

Campbell v Wallsend Slipway & Engineering Co Ltd [1977] Crim LR 351

R v Suliman 1923 AD 659

R v Dumezweni 1961 (2) SA 751 (A)

S v Makandhla 1981 ZLR 423 (SC)

Attorney-General v Moyo 1979 RLR 283 (AD)

R v Wardle 1958 R & N 446 (SR)

R v Conrad & Ors 1966 RLR 626 (AD)

R v Nkinki & Anor 1968 (1) RLR 103 (AD)

R v Poswell & Anor 1969 (4) SA 194 (R)

R v Barclay 1975 (2) RLR 87 (AD); 1969 (4) SA 195 (RA)

M R D Stonier for the appellant

Y Omerjee for the respondent

Judgment

Gubbay JA: On 18 September 1985 the appellant, a Zimbabwean resident, arrived at Harare International Airport on a flight from Johannesburg. He had already completed Customs Form No. 47, by listing in the space provided the nature of the goods and their individual values which he proposed to import into the country. The goods concerned consisted in the main of clothing

and their total value was \$42. After being allowed to pass through the immigration barrier, the appellant proceeded with his belongings to the red route desk in the customs hall for inward clearance. The desk was manned at that time by Bedrock Nyaude.

After eliciting certain preliminary information from the appellant, Nyaude requested and was handed Customs Form No. 47. After perusing the form Nyaude obtained the appellant's confirmation that all the goods he had to declare were listed thereon. The appellant then signed the form. Thereupon Nyaude enquired whether the appellant had any currency, either local or

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GUBBAY JA

foreign, in his possession. He received a negative reply. A search of the appellant's luggage, which consisted of three plastic bags and a small leather suitcase, followed. The plastic bags, which were searched first, contained nothing but clothing. Clothing had also been packed at the top of the suitcase. When Nyaude commenced to remove it the appellant became nervous. As each item of clothing was lifted out so the appellant immediately returned it to the suitcase. Despite such obstructive action, Nyaude eventually managed to empty the suitcase of all clothing. Upon doing so the depth of the suitcase immediately aroused his suspicion. Underneath a cardboard partition, which extended the full width and length of the suitcase, he discovered a quantity of Rand currency notes. He asked the appellant how he had obtained this money and why he had not declared it. The appellant did not answer either question. What he did do was to suggest to Nyaude that they should make a deal - that Nyaude should take some of the money and allow him through. Nyaude declined this offer.

Nyaude took the appellant, together with the suitcase, to the office of his superior, Ogrady Usiri, who was in overall charge of that particular shift. Usiri asked the appellant how much money was in the suitcase. He was told R5 000, which was untrue, for a subsequent count revealed that there was as much as R21 400. The appellant made two unsuccessful attempts to bribe Usiri into allowing him to leave with some of the money. First, he offered R4 000, and then he proposed that they should share the money equally; Usiri receipted the money and took it into his possession. He asked the appellant to record why he had failed to declare it. The appellant wrote: "I failed to declare money because it was too much". The incident was reported to the police and the appellant was arrested.

The appellant was duly charged before the regional magistrate with a contravention of s 156(1)(a) of the Customs and Excise Act [*Chapter 177*] in that:

"... on arriving in Zimbabwe from the Republic of South Africa and having been questioned by a customs officer as to whether he had upon his person or in his possession any goods (defined in s 156(2) to include foreign currency) whether dutiable or otherwise, ... he did unlawfully fail to declare South African Rand 21 500, equivalent to \$15 033,37, which he had in his luggage."

He pleaded not guilty and the prosecutor proceeded to call evidence.

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GUBBAY JA

At the close of the State case an application was made for the discharge of the appellant on the ground that the State had failed to establish that he had been questioned by an "officer" as required by s 156 of the Act, it being submitted by his legal representative that on the evidence adduced by the State, Nyaude was merely a customs cadet.

The regional magistrate refused the application. Thereupon the appellant declined to testify in his own defence and closed his case. He expressed a refusal to answer any questions the prosecutor or the court might have intended to put to him in accordance with the provisions of s 188(6) of the Criminal Procedure and Evidence Act [*Chapter 59*].

In a carefully considered judgment, the regional magistrate reaffirmed his view that there was no merit in the point taken by the defence and convicted the appellant on an acceptance of the facts I have outlined. He imposed a fine of \$500 or, in default of payment, two month's imprisonment with labour, and, in terms of subpara (i) of s 190(1)(b) of the Act, ordered that the R21 400 be forfeited to the State.

The propriety of the conviction and the sentence relative to the order of forfeiture are now the subject of this appeal.

The evidence in respect of the capacity in which Nyaude was employed by the Department of Customs and Excise was to this effect: He had joined the Department in November 1984, when eighteen years of age, as a Customs cadet, and was only eligible to become what he termed a "Customs officer" after completing one year of service and passing a special course for Customs officers. In fact, he had attended and passed that course in March 1986 (three months before the appellant's trial) but was still awaiting promotion due to a delay on the part of the Public Service Commission in approving it. In July 1985 he had attended a one month induction course for Customs officers, but since March 1985 he had been appointed to duty at Harare International Airport, alternating at two weekly intervals between the incoming red and green routes and the departure route. On 18 September 1985 he was one of the Customs personnel on duty at the red route, responsible for dealing with passengers arriving in Zimbabwe who wished to declare the importation of goods. He was under the control and direction of Ogrady Usiri, who was then the collector of values.

In s 2 of the Act the word "officer":

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GUBBAY JA

- " (a) means an officer of the Department; and
- (b) includes a person exercising the powers or performing the duties of an officer conferred or imposed upon him in terms of subsection (4) of section *four*;" (which provision refers to persons who are not in the employ of the Department).

Section 2 also contains the following definitions of "Controller" and "proper officer":

"'Controller', subject to the provisions of section *four*, means the Controller of Customs and Excise referred to in subsection (1) of that section;" (namely, the person responsible for the administration of the Act and any other law relating to customs and excise and whose office shall be a public office and part of the Public Service)

"'proper officer' means, in respect of any port or matter, the officer designated by rule or regulation or by the Controller to be the proper officer at that port or in that matter."

There are no further definitions of positions in the Department, though "deputy Controller" is referred to in s 4.

Mr *Stonier*, who appeared for the appellant, advanced the same argument as that addressed to the court *a quo*. Put succinctly, it was that, in determining which personnel in the employ of the Department fall within the first meaning of "officer", regard is to be had to the definitions of "officer" and "employee" in the Public Service (Officers) (General) Regulations, 1979 (SI 537 of 1979). "Officer" is therein defined as a person in the employment of the State other than, *inter alios*, an employee; and "employee" is defined as a person remunerated at an hourly, daily or monthly rate. Accordingly, so the argument went, the State had failed to establish that Nyaude was an officer and not an employee, and the Legislature could not have intended the powers and duties of an officer, as detailed in Part I of the Act - in particular, the powers of search and arrest - to be lawfully held and carried out by an employee.

Apart from the specific designations of "officer", "proper officer", "Controller" and "deputy Controller", the ranks or positions of other employees of the Department, such as "collector", "shift leader", "Customs officer" and "Customs cadet", are not detailed in the Act. The definition of "officer" is not qualified so as to exclude employees below a certain rank. Having given

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GUBBAY JA

"proper officer" a separate definition, it would have been an easy matter for the law-maker to have distinguished between such various rankings as "collector", "shift leader", "Customs officer" and "Customs cadet", had it been minded to do so. In the Police Act [*Chapter 98*], for instance, "officer" is defined as: "any person holding commissioned rank in the Force". And the Prisons Act [*Chapter 91*] contains definitions of "junior officer", "officer-in-charge", "prison officer" and "senior officer".

I am in agreement therefore with Mr *Omerjee's* submission that the definition of "officer" covers all persons employed in the Department and that it is left to the Controller to decide administratively which officers are to perform the duties and exercise the powers set out in Part I of the Act. This interpretation is, I think, borne out by two features: First, s 191 of the Act prohibits an officer from disclosing any information relating to any person, firm or business acquired in the course of his duties. Since all employees are in a position to acquire such information in the course of their duties, whether in typing documents or acting in the position of customs cadets, it would be absurd to hold that the legislative intention was to exclude them from the prohibition. Consequently, if "officer" in s 191 must bear a wide meaning, there is no justification for the word to have a different and narrower meaning in Part I of the Act, especially in the absence of any clear indication to the contrary. Secondly, under para (e) of the proviso to s 4(4) of the Act, the Controller may even appoint a private individual, who consents thereto, to the position of an officer. Whom he chooses so to act is left entirely to his discretion and good sense.

In the result I am satisfied that when Nyaude spoke of his position in the Department as that of

a Customs cadet and that the next step up the promotion ladder was to be appointed a Customs officer, he was referring solely to administrative designations which do not prevent the employees known by them as being classified as "officers".

But there is, I consider, another basis for rejecting the appellant's argument. It is simply this: Nyaude's evidence was that since March 1985 he had been appointed to perform the duties and exercise the powers of a Customs officer. And, save for the month during which he attended the course, he had continued to act in that capacity to the knowledge of his superiors. In other words, he had been appointed to public office. That being so, the presumption of the regularity and validity of such appointment, which is expressed in the maxim *omnia praesumuntur rite esse acta* and embodied in s 256 of the Criminal Procedure and Evidence Act, operated in favour of the State. The

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GUBBAY JA

section provides:

"256. Any evidence which would, if credible, be deemed in any criminal case pending in the Supreme Court of Judicature in England to be sufficient proof of the appointment of any person to any public officer or of the authority of any person to act as a public officer shall, if credible, be deemed, in criminal cases in Zimbabwe and before magistrates holding preparatory examinations, sufficient proof of such appointment or authority."

Under English law the fact that a person acted in a public office is *prima facie* evidence of the validity of his appointment to such office, and if uncontradicted is sufficient evidence. See *R v Gordon* (1789) 1 Leach 505; 168 ER 359; *R v Roberts* (1878) 14 Cox CC 101; *Campbell v Wallsend Slipway and Engineering Co Ltd* 1979 Crim LR 351; *R v Suliman* 1923 AD 659 at 660; *R v Dumezweni* 1961 (2) SA 751 (A) at 755B-E; *Phipson on Evidence* 13 ed para 41-17; Richard May *Criminal Evidence* 1-34; Swift's *Law of Criminal Procedure* 2 ed at 472; Hoffmann and Zeffertt *South African Law of Evidence* 3 ed at 433.

The *onus* therefore rested upon the appellant to rebut the presumption of regularity relating to Nyaude's appointment. This he completely failed to do.

The exercise by the regional magistrate of his discretion to order the forfeiture of the R21 400 was claimed by Mr *Stonier* to be unreasonable on the ground that the offence was of a technical nature. He submitted that, unlike smuggling, it did not involve the illegal importation of foreign currency into Zimbabwe with a potential loss of duty to the State, and that the appellant had no illegal motive for failing to declare his possession of that currency.

It is true that in his address at the trial the prosecutor intimated that it was not part of the State case that the appellant intended to deal with the foreign currency illegally. That, if I may say so, was a most ill-advised submission to make, but was one which in no way was binding upon the court. Indeed, the regional magistrate appears to have disregarded it.

The appellant secreted the money in the suitcase. He tried to obstruct Nyaude's search. He offered no explanation as to how he had obtained the money and why he had failed to declare it. And finally he falsely gave out that the currency notes totalled R5 000. These aspects of the

GUBBAY JA

conduct, taken with his refusal to answer questions which the prosecutor or the court might have wished to ask him (as to which, See *S v Makandhla* 1981 ZLR 423 (AD) at 426A), point conclusively to the inference that his motive in committing the offence was an intention not to subsequently surrender the foreign currency to an authorised dealer in accordance with the obligation to do so under s 5(1) of the Exchange Control Regulations, 1977. That motive, which did not involve proof of the commission by the appellant of another offence (for it had not been translated by action into further criminal conduct), was a factor which gravely aggravated his moral blameworthiness. See *Attorney-General v Moyo* 1979 RLR 283 (AD) at 287C.

What is to be disregarded, however, as constituting aggravation is the evidence relating to the appellant's attempts at bribery, for that conduct disclosed a distinct and more serious offence for which he may still be prosecuted. See *R v Wardle* 1958 R & N 446 (SR) at 449E-F; *R v Conrad & Ors* 1966 RLR 626 (AD) at 630F-H; *R v Nkinki & Anor* 1968 1 RLR 103 (AD) at 104I-105B.

In these circumstances, the offence, in my opinion, was far from technical. Moreover, the appellant had a material criminal record. On 3 March 1981 he had been convicted on one count of exporting foreign currency in contravention of the Exchange Control Regulations and on another of contravening s 5(1)(b) of the Exchange Control Act [*Chapter 170*], in that he had counselled or procured another person to make a false application to purchase foreign currency.

It is apparent to me that in limiting the find to \$500 the regional magistrate correctly took into account his decision to order the forfeiture of the money. See *R v Poswell & Anor* 1969 (4) SA 194 (R) at 195B; *R v Barclay* 1975 (2) RLR 87 at 89A-D; 1969 (4) SA 195 (RA) at 196H.

All in all the sentence is quite beyond reproach.

Accordingly I would dismiss the appeal in its entirety.

Manyarara JA: I agree.

Korsah JA: I agree.

N H Franco & Company, appellant's legal representatives

TOBACCO SALES FLOORS LTD v CHIMWALA 1987 (2) ZLR 210 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

3 & 30 November 1987

Flynote

Employment - contract - termination - summary dismissal - misconduct justifying - what is.

Headnote

The respondent had been employed as a floor manager in the appellant's tobacco auction floors. While so employed, he re-handled bales of several growers' tobacco which had been sent for auction but which had been rejected for sale. He then marked and resold the tobacco, using the grower's number of one farmer, with whom he was in collusion. In so doing, he deceived his employers, made a profit for which he should have accounted to the several growers involved, and breached the law governing the auctioning of tobacco, by using a grower's number other than the numbers of the actual growers to sell the tobacco. He was summarily dismissed for misconduct but the High Court ordered his reinstatement. On appeal by the employer,

Held, that the respondent's actions had amounted to misconduct "inconsistent with the fulfilment of the expressed or implied conditions of his contract" of employment, and the dismissal was therefore justified under s 8(1)(a) of the Employment Act 1980.

Cases cited:

Robinson v Randfontein Estates GM Co Ltd 1921 AD 168

Rashayi v Bakasa African Council 1978 RLR 389 (AD)

Kwete v Lion Stores (Pvt) Ltd 1974 (1) RLR 242 (GD); 1974 (3) SA 477 (R)

Clouston & Co Ltd v Corry [1906] AC 122 (PC)

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McNALLY JA

Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285 (CA)

Matereke v C T Bowring & Associates (Pvt) Ltd 1987 (1) ZLR 206 (SC)

M T O'Meara for the appellant

A M Donagher for the respondent

Judgment

McNally JA: The appellant company (TSFL) is an auctioneer of Burley tobacco registered in terms of the Tobacco Marketing and Levy Act No. 32 of 1977. The respondent (Mr Chimwala) was, for some ten years, employed by TSFL until his dismissal on 10 October 1984. This summary dismissal was in terms of s 8(1)(a) of the Employment Act No. 13 of 1980, which has

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since been repealed and replaced by the Labour Relations Act, No. 16 of 1985. The provisions of the latter Act are therefore not relevant to this dispute.

Mr Chimwala was successful in an action in the High Court in which he claimed:

1. An order declaring his dismissal unlawful;
2. Reinstatement in his post of Floor Manager;
3. Payment of all remuneration and entitlements from 11 October 1984 to the date of reinstatement; and
4. Costs of suit.

TSFL appealed against this decision. It relied on six grounds of appeal which I summarise as follows:

1. The court *a quo* erred in failing to find that the employee was guilty of misconduct justifying summary dismissal under the Act. The misconduct relied on was:
 - (a) removing tobacco from TSFL's premises;
 - (b) causing it to be re-sold on TSFL's floors;
 - (c) causing it to be sold under the number of a grower who had not grown it well knowing he had no authority to do so.
2. The court *a quo* erred in holding that an employee's conduct must amount to a disowning or repudiation of his contract of employment before he could be summarily dismissed.
3. The court erred in failing to accept the evidence of TSFL's witnesses and in questioning their credibility.

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McNALLY JA

4. The court erred in holding that the employee acted on the authority of one Le Roux, or misunderstood the extent of the authority he had been given.
5. The court erred on the question of *onus* and should have found that the employee had failed to discharge the evidentiary *onus* cast on him once TSFL had established a *prima facie* case.
6. The court erred in law in holding that the employee was entitled to be reinstated and in so ordering.

I propose to deal with the case in four stages. First, I will set out the general picture of the company's operations. Second, I will set out what Mr Chimwala was proved to have done. Third, I will examine the question whether what he did amounted to misconduct as that term is used in s 8(1)(a) of Act 13 of 1980. Fourth, and if misconduct was not established, I will consider

whether he was entitled to the relief that he claimed and was awarded.

TSFL is an auctioneer not only of Burley but also of Virginia tobacco. We are concerned only with its Burley operations. Burley tobacco is grown by registered growers, and each grower is allotted a registered number. Many of the Burley growers are small-scale peasant farmers. Some are large-scale commercial farmers. Growers by law are required to deliver their tobacco to a licenced auction floor such as TSFL in bales marked with their growers number. It is an offence to mark a bale with some other grower's number, or to deliver bales grown by some other grower which are marked with the number of the grower delivering them, unless the permission in writing of the Tobacco Marketing Board has been obtained. (Section 29(2) of Act 32 of 197.)

When bales arrive at TSFL's floor they are placed on the floors for sale. Then, one of two things takes place. The bale may be bought by the buyers, or it may be rejected. If it is rejected, then again one of two things may happen. It may be wholly rejected, in which case it is destroyed unless the grower opts to take it back, or it may be classified for "rehandling", which means that the fault is rectified and the tobacco is re-offered for sale on the floors.

The reasons for rejection are various. They include:

1. Too dry;
2. Too wet (over-conditioned);

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3. Flunked, ie undergoing some decay;
4. "No sale" or "destroy" tobacco, ie totally unacceptable to the buyers, fit only for destruction or return to the grower;
5. Mixed styles - the buyers preferring an even and uniform style of tobacco in each bale.

Pending re-handling the tobacco remains on the floors whilst awaiting transmission to the re-handling sheds.

Two further important facts must be mentioned. First, re-handling takes time, and therefore as the closing date for sales approached, re-handling ceases to be a viable proposition. In 1984 re-handling ceased approximately ten days before the closing date for sales.

Secondly, the end of the sales season does not mean there are no further sales. What happens is that some of the rejected tobacco, mainly but not exclusively the bales which earlier in the season would be re-handled and resold, are offered to the buyers at a reduced price.

The 1984 season was a particularly heavy one. A degree of congestion developed on the floors and tobacco marked "destroy" and tobacco for re-handling was removed from the floors and kept in the re-handling sheds. In accordance with the computer system in use the symbol "destroy" was used to ensure the bales so marked were removed from the floors. But it did not

necessarily follow that the bales would be destroyed. That decision would be taken only after the final "reduced price" sale to the buyers had taken place. Whatever was then left would be destroyed, unless the grower wanted it back or unless it was given away, with the approval of Mr Le Roux, the Manager of the Burley Division, for use as tobacco scrap on lawns.

The employee, Mr Chimwala, was the Floor Manager in the Burley Division, directly answerable to Mr Le Roux. He was responsible for the off-loading of Burley Tobacco, the control of the floor, the supervision of staff, staff wages and the distribution of tax and sales statements to growers.

In this particular season he played an additional role, in a private capacity. Towards the end of the season by agreement with Mr Le Roux, and in his spare time, he undertook the redrying of over-conditioned burley tobacco. He was paid 8 or 8 1/2 cents per kilogram for this task, and it was his responsibility to pay the workers he employed. The redried bales would then

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be sold on behalf of the grower, who would be credited with the proceeds, less Mr Chimwala's charges.

That concludes my general summary of the relevant operations of TSFL during a selling season. I turn now to consider what it was that Mr Chimwala did that was regarded as misconduct by his employers.

Before setting out these details I should say that there is really no dispute, or no meaningful dispute, as to what he actually did. The only dispute is as to whether:

- (a) He had authority to do it; or
- (b) He reasonably thought he had authority to do it; or
- (c) What he did was not serious enough to warrant summary dismissal.

What happened was this. On the last day of the sales, 17 September 1984, Mr Le Roux found one of the workers sewing bale labels on a consignment of tobacco. The worker said it was re-handled tobacco and Mr Chimwala had instructed him to sew the labels on. Mr Le Roux was not satisfied with this explanation and asked Mr Chimwala about it. Mr Chimwala said it was not re-handled tobacco but belonged to a grower. (It was true that TSFL sometimes assisted growers by sewing on labels or resewing them.)

This consignment involved some 86 bales. Mr Le Roux, still unsatisfied, caused further investigations to be made. What he discovered as a result of further investigations by him and by other experts was quite clearly established on the evidence.

He found that the tobacco in 71 of these bales was so varied in quality and type that it could not possibly have come from one grower. Moreover, the grower under whose name it was sold, a Mr Ngwenya, could not possibly have grown that number of bales.

All this was confirmed by a visit to Mr Ngwenya's farm. And finally, inside a number of bales

were other growers numbers, and reference to the files showed that those growers had had bales rejected and placed in the "destroy" stack.

What had happened was quite clear. Mr Chimwala had "rescued" these bales from the "destroy" stack, possibly to some extent re-handled them, and had then arranged with Mr Ngwenya to sell them as Ngwenya's tobacco under Ngwenya's registered number. Obviously some arrangement had been

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reached between Mr Chimwala and Mr Ngwenya as to a sharing of the proceeds, which were in the region of \$3 000.

The learned trial judge said that Mr Chimwala had given his evidence very well and was not shaken in cross-examination. I must say I find this comment surprising. Mr Chimwala was after all forced to admit that he had originally lied to Mr Le Roux about these bales. He never actually admitted that he personally was making a profit from other people's tobacco, but the facts speak for themselves. He said he did not know he was stealing or cheating. He had used Mr Ngwenya's number out of sheer convenience because he himself had no growers numbers. He did not think this was a serious infringement of his contract, or that he was breaking one of the terms of his contract.

He sought to attract sympathy by claiming that he was concerned that peasant growers were being treated unfairly. Many saleable bales belonging to peasant growers were being marked "destroy". His approach to Mr Le Roux to be allowed to re-handle some of these bales was motivated by his concern for these growers.

This may well be true, though there was of course an advantage to him as well in obtaining this sub-contract for re-handling. But there is a world of difference between re-handling a grower's bale so that the bale can be resold to that grower's advantage under that grower's number, and re-handling a bale so that it can be resold under your accomplice's number for your own advantage. It is the difference between carrying out your duty and breaching it.

I cannot believe that Mr Chimwala could possibly have thought that his oral agreement with Mr Le Roux could be extended to cover an operation which involved what can only be called a secret profit for himself. With respect, I cannot accept the findings of the learned judge *a quo* in this regard.

Mr Chimwala also sought to minimise the seriousness of his conduct by saying that the tobacco which he "rescued" was virtually abandoned tobacco, destined for destruction or for giving away as garden scrap. There are I think two answers to that contention. In the first place the evidence was that a final decision to destroy tobacco was taken only after the "clearance sale" which took place after the end of the selling season. Furthermore a lot of the tobacco marked "destroy" in the final ten days of the season was in fact re-usable, and it is likely that it was that type of tobacco that he "rescued".

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Secondly, insofar as he was able to "rescue" bales marked for destruction, his clear duty was to rescue then on behalf of the grower concerned, and not his own behalf.

The classic expression of this principle in Roman Dutch is in *Robinson v Randfontein Estates GM Co Ltd* 1921 AD 168 at 177-178 as follows:

"Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty . . . [The doctrine] prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own [principal's] property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent."

In applying these words of INNES CJ to the facts of the present case I regard both parties as the agent, and the growers as the principal. An auctioneer is nothing more than an agent and his duty is "to show good faith, to exercise care and skill, to obey all instructions and to act in the ordinary way according to the customs and usages of the place where he sells" (De Villiers and Macintosh *Law of Agency in SA* 3 ed p 185). "Neither he nor his clerk . . . must bid or buy either personally or by the interposition of a third party" (MacKeurtan *Sale of Goods in SA* 5 ed p 247).

I can well understand that Mr Chimwala may have thought that his employer was wasteful of saleable tobacco and that the peasant growers suffered unduly from this approach. This was of course denied by TSFL's witnesses, but there is room for a difference of opinion and the methods of large operators may seem unduly wasteful to individuals, and may indeed be unduly wasteful. But by doing what he did Mr Chimwala became a party to the exploitation of the growers and ceased to protect their interests.

I have given thought to the question whether Mr Chimwala's actions could be considered analogous to the ancient and world-wide privilege of gleaning. In terms of that privilege farm labourers and their families are allowed to go through the fields after the harvest has been reaped, to help themselves to the

McNALLY JA

small amounts of grain left behind. On that basis one might say the offence is trifling and did not warrant summary dismissal.

I have been unable to sustain that argument. What Mr Chimwala did was done before and on the last day of the sales. He knew that a final cut-price sale to buyers would follow, and that some of the rejected bales would be sold on behalf of the growers. In pre-empting that final sale he was potentially depriving some of the growers of a profit. He and his company TSFL owed a fiduciary duty to those growers, and he was in clear breach of that duty. As I said earlier,

it would have been a totally different matter had he re-presented those bales for sale on behalf of the true growers. Once he rendered them saleable it was his duty to sell them on behalf of the true growers. By not doing so, and by attempting to sell them for his own benefit, he fundamentally abused his position of trust.

It is no argument for him to say "But if I had done nothing the bales would have been destroyed and the true grower would have got nothing anyway." In the first place that is not necessarily so. But in any event he did do something. He rescued the bales. Once he did that, his duty was to the true grower.

I have not yet adverted to the fact that he committed an offence, at least as a *socius* to Mr Ngwenya, by delivering bales for sale under Mr Ngwenya's number, which contained tobacco grown by other registered growers, without the permission of the Board, (not to mention the absence of permission from the true growers). The offence is punishable by a fine of \$1000 or one year's imprisonment or both.

I consider that there is an *onus* on an employer to justify summary dismissal. (See *Rashayi v Bakasa African Council* 1978 RLR 389 (AD).) The relevant provisions of s 8(1)(a) of the Employment Act, No. 13 of 1980 read as follows:

"... an employer shall not dismiss an employee summarily except -

- (a) where an employee is guilty of misconduct, whether in the course of his duties or not, inconsistent with the fulfilment of the expressed or implied conditions of his contract."

There was some argument about that *onus*. The learned trial judge called it a "heavy *onus*". Mr O'Meara for the appellant, argued that it was no more than the ordinary civil *onus* on a balance of probabilities, and that it rested on

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McNALLY JA

Mr Chimwala to discharge the *onus*. For this he relied on a statement to that effect in *Kawete v Lion Stores (Pvt) Ltd* 1974 (1) RLR 242 (GD) at 250E; 1974 (3) SA 477 (R) at 482. Alternatively, he said, the *onus* was the ordinary civil *onus* on the employer, and once the employer made out a *prima facie* case, the evidentiary *onus* shifted to the employee.

I cannot accept that the *onus* can be said to be on the employee (see *Rashayi's case, supra*) particularly in the light of the wording of the section in the 1980 Act. But in any event there are two separate considerations. I am satisfied, regardless of *onus*, that the facts allegedly amounting to misconduct have been established on more than a balance of probabilities.

The real question is "do these facts amount to misconduct justifying summary dismissal?". The value judgment implicit in the assessment of whether misconduct is or is not "inconsistent with the fulfilment of the expressed or implied conditions of his contract" must inevitably be affected by changing perceptions of social *mores*.

In *Halsbury's Laws of England* 4 ed Vol 16 para 642 it is said:

"Misconduct inconsistent with an employee's proper discharge of the duties for which he was engaged is good

cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify dismissal."

That passage is based on a *dictum* by LORD JAMES of Hereford in *Clouston & Co Ltd v Corry* [1906] AC 122 at 129 (PC), cited with approval in *Laws v London Chronicle (Indicator Newspapers Ltd) Ltd* [1959] 2 All ER 285 (CA) at 287H as follows:

"Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be conduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal."

I consider that the seriousness of the misconduct is to be measured by whether it is "inconsistent with the fulfilment of the express or implied conditions of his contract". If it is, then it is serious enough *prima facie* to warrant summary

1987 (2) ZLR p219

McNALLY JA

dismissal. (It seems clear that the wording of our Act is modelled on the words from *Clouston's* case, *supra*.) Then it is up to the employee to show that his misconduct though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted. See *Rashayi's* case, *supra*, at 393F.

In making his value judgment in this regard the learned judge said:

"The matter is made all the more difficult by the fact that it was not clear . . . which contract was being claimed to have been breached by plaintiff. Was it the contract of employment which was concluded between the parties in 1980 in terms of which the plaintiff was authorised to re-dry or re-grade tobacco?"

Here it seems to me with respect that the learned judge was allowing himself to be confused by a red herring successfully drawn across the trail by Mr Chimwala. The 1980 contract (I think in fact it was a 1984 contract) had nothing to do with it. I have already said that Mr Chimwala could not possibly have thought that a contract under which he assisted growers could be extended or expanded into a contract under which he helped himself at the expense of growers.

The relevant contract is the 1974 contract. Its particular details are immaterial. Whatever its terms might be, they are clearly breached by conduct which involves:

1. a secret profit;
2. a breach of trust owed to the growers;
3. a breach of the law governing the industry in which he was employed.

Those actions amount to misconduct. It must be an implied term of a contract of employment in the tobacco auction business that you will not make a secret profit without accounting to your employers; that you owe a duty of good faith to the growers on whose behalf you sell tobacco;

and that you will obey the law which governs the industry.

The misconduct was not trivial. It was not inadvertent, but deliberate and wilful. It involved deception of his employers. It involved the making of a profit for which he should have accounted to the growers. It involved a knowing breach of the law governing the business in which he was involved.

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The learned judge concluded:

"The probabilities are that either plaintiff acted on the express authority of Mr Le Roux at best, or at worst he misunderstood the extent of the authority which was given to him by Mr Le Roux."

I regret that I cannot accept that conclusion. There is absolutely no basis for suggesting or suspecting that Mr Le Roux authorised Mr Chimwala to make a secret profit. Nor could Mr Chimwala possibly have thought that a contract to let him help growers could be expanded into a contract to help himself.

The learned judge also said:

"To my mind the word 'inconsistent' in s 8(1)(a) of the Employment Act, No. 13 of 1980 is operative and significant, in that it denotes conduct on the part of the guilty party which bespeaks disowning or repudiation of the contract of employment. The conduct complained of must be such that no reasonable person would deem it compatible with the class or type of employment to which that contract relates."

Insofar as the learned judge requires the conduct to amount to a "repudiation of the contract" I would associate myself with the remarks of GUBBAY JA in *Matereke v C T Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (SC) at 212C-D where he said this was too narrow a construction. But even relying on that construction I would say that it must be inconsistent with a contract of employment in the tobacco auctioneering business to break the law governing the business in order to make a secret profit at the expense of the growers on whose behalf your company sells tobacco.

Since I have concluded that the appeal must be allowed, it is not necessary to pursue the fourth line of enquiry as to the extent of the relief which the employee should have been awarded had he succeeded.

Mr O'Meara did not ask for the costs of appeal, but submitted correctly that his client should be awarded the costs of the trial. In the circumstances I would make the following order:

The appeal is allowed.

The order of the court *a quo* is altered to read "Judgment is entered for the defendant with costs".

1987 (2) ZLR p221

McNALLY JA

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Winterton, Holmes & Hill, appellant's legal representatives

Gollop & Blank, respondent's legal representatives

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S v NYAMARO & ANOR 1987 (2) ZLR 222 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Korsah JA

Criminal appeal

7 December 1987

Flynote

Criminal procedure - evidence - document produced by consent in terms of s 262B of the Criminal Procedure and Evidence Act [Chapter 59] - only admissible as evidence if requirements of section satisfied - witness - trial court's right to call *mero motu* - should be sparingly exercised.

Headnote

A document produced and put in by consent in terms of s 262B(2) of the Criminal Procedure and Evidence Act [*Chapter 59*] (which allows the production of certain documents relating to trade transactions) is not admissible evidence of the contents thereof unless all the requirements of the section are complied with.

The discretion which a trial judge has to call witnesses *mero motu* should be sparingly exercised, particularly when the accused has closed his case. It is a gross irregularity to do so for the purpose of building up a case which the prosecution has failed to establish or of rebutting the defence case.

Cases cited:

R v Blom 1939 AD 188

R v Swart 1937 TPD 168

R v Rose 1937 AD 467

R v Naidoo 1934 NPD 393

R v Rosenthal 1917 CPD 29

KORSAH JA

A M Donagher for the second appellant

D P Drury for the respondent

Judgment

Korsah JA: We upheld these appeals, quashed the convictions, set aside the sentence imposed and issued a warrant for the liberation of the second appellant, who alone was in custody pending the determination of his appeal. We now furnish our reasons for our decision.

The appellants were convicted of the theft of a motor vehicle and each of them sentenced to five years' imprisonment with labour of which one year's imprisonment with labour was suspended on conditions. They appeal against both conviction and sentence.

This was by no means a simple uncomplicated case of car theft. At the material time the first appellant was a co-director of a business trading as ABC Spray Painters, and the second appellant was a vehicle inspector at the Vehicle Inspection Depot in Harare.

The chronological order of the events on which the State relied to establish its case is as follows. On 26 November 1983, Dr Emmanuel Bodia Magoche was involved in an accident. His vehicle was written off as damaged beyond economic repair and he was paid off by his insurers. That vehicle was a Datsun Pulsar hatchback, fitted with a sun roof and was marine green in colour. It bore the registration number 365-196B as well as engine number 822614 and chassis number A2790. A Datsun Pulsar 140A bearing registration number 365-196B was purchased by FD Arian (Pvt) Ltd from Guardian Royal Exchange Insurance Company and subsequently scrapped (Exhibits 14 and 15).

On 29 August 1984, Robert Louis Ison, an employee of Tarphalt Paving, was in possession of a company car - a Datsun Pulsar 130A, registration number 381-344D, light blue in colour. He parked the vehicle outside the Harare show grounds, and the vehicle was stolen from where he had parked it. That vehicle bore the engine number 404127 and chassis number A52495. It was equipped with a two way radio, fitted underneath the driver's seat by means of an L-shaped bracket and two bolts. The screws for the bolts penetrated the carpet and the floor of the vehicle. It also had a car radio fitted into the dash board.

On 12 June 1985 a Datsun Pulsar 130A, registration number 456-525X registration in the name of the second appellant was recovered from the second

KORSAH JA

appellant by DSO Tiwaringe. On 17 June 1985, Dr Leonard Tendayi Nhari, the Chief Forensic Scientist with the Zimbabwe Republic Police, examined the vehicle recovered from the second

appellant and found that a small aluminium plate rivetted inside the bonnet bore the number 5135. There is no evidence to indicate that this number had been tampered with. The forensic report prepared by Dr Nhari states that there were file marks on the area of the engine block where the engine number is normally located, and that this indicated that the original engine number had been erased and the new engine number A14818804B punched on. Chemical etching in this area of the engine block restored part of the original engine number, that is: 4*4****, the first and third digits of a number.

This was all the real evidence that the forensic report, which was produced as Exhibit 17, contained. The rest of the contents of that exhibit was information solicited from another source and does not cover any matter of which Dr Nhari himself had first hand knowledge. In short, the rest of the forensic report offended the rule against the reception of hearsay evidence.

However, a photocopy of the vehicle record card kept by Datsun Zimbabwe relating to a blue Datsun Pulsar was produced by consent as Exhibit 13 by the prosecution. No witness at that stage was called to testify to either the compilation of the contents of Exhibit 13, or to the identity of the person who prepared it.

After several fruitless adjournments at the instance of the prosecution to get a Mr Gilmore who, it was alleged, sold a Datsun Pulsar to ABC Spray Painters to come from South Africa and give evidence in this matter, the State closed its case. Counsel for both appellants immediately applied for the discharge of the appellants on the ground that the State had not led evidence of the nature upon which a reasonable court might convict.

The gravamen of the argument in support of the application for a discharge was that the State failed to prove that the vehicle allegedly stolen from Mr Ison, and the vehicle which was found in the possession of the second appellant, were one and the same vehicle.

The evidence before the trial court at this stage was that:

- (a) both vehicles were blue Datsun Pulsar 130A;
- (b) each vehicle had two holes in the bodywork and carpet under the driver's seat; and

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KORSAH JA

- (c) both vehicles bore an engine number of an unknown number of digits that had as the first and third digits the figure 4.

That the vehicles were both Datsun Pulsar 130A is in itself colourless, and that they are both blue is equally unhelpful; for the Datsun Pulsar is a very common car in Zimbabwe and the colour blue is not restricted to a few of them.

Mr Ison himself could only identify his vehicle by means of two holes in the bodywork and carpet underneath the driver's seat. These holes, he said, were made to fasten an L-shaped bracket which supported a two way radio, and that that was the only place in the vehicle where such equipment could be installed. Considering how common the Datsun Pulsar is in Zimbabwe, that the use of a two way radio is not uncommon in business vehicles, and that the space under the

driver's seat was the only place in a Datsun Pulsar to put a two way radio, the identification by Mr Ison of his vehicle is most uncertain. Mr Ison himself admitted that he could identify his vehicle only by the existence of the holes under the driver's seat and that such holes may be found on any other vehicle. At best such identification only raises a possibility that the car found in the possession of the second appellant may be the same vehicle stolen from Mr Ison.

The chemical etchings conducted by Dr Nhari revealed that the first and third digits of the engine number in respect of the car recovered from the second appellant were the figure 4. So were the first and third digits of the engine number of the car stolen from Mr Ison. The State was obliged to concede from the very onset that by mathematical computation, there could be in existence thousands of cars having as the first and third digits of their engine numbers the figure 4. Clearly, the coincidence of the figure 4 appearing as the first and third digits of the engine number in respect of both vehicles, raises no more than a possibility that the car recovered from the second appellant was the same car stolen from Mr Ison.

As WATERMEYER JA observed in *R v Blom* 1939 AD 188 at 202 and 203:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not

1987 (2) ZLR p226

KORSAH JA

exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

If the pieces of admissible evidence are taken cumulatively, an inference that the two cars are one and the same cannot be said to flow from them. Thus at the close of the State case, in the absence of admissible evidence from which it could be inferred that the car recovered from the second appellant was Ison's vehicle, the appellants were entitled to an acquittal.

It seems that the admission of inadmissible evidence led the trial court to rule that the appellants had a case to answer. Ison, in the identification of his vehicle, did not allude to a body number on the vehicle. Dr Nhari, the investigating officer and the trial court examined the vehicle recovered from the second appellant and saw the number 5135. The only evidence called by the State to substantiate the fact that Ison's vehicle had the body number 5135 was Exhibit 13.

It was submitted by counsel for the first appellant, which submission was adopted by the second appellant, firstly that Exhibit 13 offended the best evidence rule as it was only a photostat copy; and secondly that Exhibit 13 was produced without compliance with the requirements of s 262B(2) of the Criminal Procedure and Evidence Act [Chapter 59]. That section provides as follows:

"(2) In any criminal proceedings in which direct oral evidence of a fact would be admissible, any statement of such

fact contained in a document, whether such document purports to be an original or a copy, shall, upon the mere production of the document by any person, be admissible as evidence of that fact if -

- (a) that fact relates to any transaction or intended transaction, either inside or outside Zimbabwe, in the course of any trade, business or occupation of whatsoever kind or to any other matter in connexion with such trade, business or occupation;
- (b) that document is part of or that fact has been obtained from records kept in the course of that trade, business or occupation and compiled from information supplied, directly or indirectly, by a person who had or who may reasonably be supposed to have personal knowledge of the matter dealt with in that information; and

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- (c) the person who supplied that information is outside Zimbabwe or is unknown or is not available to give oral evidence for any reason whatsoever."

Exhibit 13 is a photostat copy of a Vehicle Record Card bearing the stamp of Nissan Zimbabwe (Pvt) Ltd. It has on it the number 5135 without any designation as to the significance of the number. On the face of it is also to be found all the particulars of Ison's car including the engine number - 404127 - and the fact that the vehicle had been sold to Tarphalt Paving by British Leyland.

Exhibit 13 was produced by consent. It purported to be a document compiled from information furnished, directly or indirectly, during the course of business. Nobody knew who prepared it or from whence he or they obtained the information contained therein, or how that information came to his or their knowledge. Was it information obtained first-hand by the compiler, or did he come by it second-hand from another person?

Prior to the enactment of s 262B of the Act, a document, prepared in the course of trade or business, such as Exhibit 13, was inadmissible in evidence because its cogency depended on hearsay. The person producing it could only say that a record, made by someone else, showed that, if the record was correctly compiled, a Datsun 130A had left British Leyland Motors on 8 June 1982 bearing an engine number 404127, chassis number A52495 and possibly a number 5135, which appears on Exhibit 13, but without any designation. He could not prove that the record was correct or that the numbers which it contained were in fact the numbers on the car when it was assembled.

Section 262B of the Act created an exception to the hearsay rule, **if the requirements** of the section are satisfied. The Legislature, in its wisdom, perceived the dangers in permitting, without safeguards, the introduction into evidence of information received second-hand. The producer of such information cannot attest to its veracity under cross-examination. Thus, while the production of Exhibit 13 by consent is an admission of the fact of the existence of that record, without compliance with all the requirements of the section, the contents of Exhibit 13 are inadmissible in evidence.

Unfortunately, the trial court misdirected itself in believing that once Exhibit 13 had been

produced by consent, its contents were admissible in evidence, without satisfying the requirements of s 262B. This is not so. The document

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is excepted from the hearsay rule only upon compliance with all the requirements of that section.

The position at the close of the State case was that, without satisfying the requirements of s 262B, the contents of Exhibit 13 had not been excepted from the hearsay rule and were not admissible in evidence against the appellants. The State failed to prove that the car recovered from the second appellant was that stolen from Ison.

Section 11(3) of the Supreme Court Act No. 28 of 1981 provides that:

"If any point raised is decided in favour of the appellant and it consists of a misdirection by the trial court or tribunal of itself on a question of law or a question of fact or a question of mixed law and fact, the Supreme Court shall dismiss the appeal if it is satisfied that the evidence which has to be considered has not been substantially affected by the misdirection and that the conviction is justified having regard to the evidence."

There is persuasive authority for saying that, in the application of the above provision, the question for the court to decide is whether it could say that without this evidence the trial court would have given the same verdict: *R v Swart* 1937 TPD 168 at 173. Clearly, if the contents of Exhibit 13 were excluded from the evidence, it would not have been possible for the trial court to have arrived at the same verdict at the close of the State case; for clearly there was no evidence from which it could be inferred that the car recovered from the second appellant was the one stolen from Ison.

It was as a result of the trial court misdirecting itself that the appellants were called upon to make their defence to the charge. If the guidelines laid down in *R v Rose* 1937 AD 467, that in deciding whether an irregularity or defect in the record or proceedings has in fact resulted in "a failure of justice", the test to be applied is whether the appellant has suffered any actual and substantial prejudice (from the admission of inadmissible evidence) is applied to the facts thus far, the answer must still be the same. Without the inadmissible evidence, there was no case made out by the State against the appellants at the close of the State case.

The defence put forward by the appellants made the allegations by the State even more implausible. Ison's car was stolen on 29 August 1984. Some time in May 1984, the second appellant informed ABC Spray-painters that he wanted to buy a car. A few days later he was summoned by phone to go and

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view a vehicle at ABC, which had been involved in an accident. ABC offered that car to him for sale and he agreed to buy it if they could repair it. The car was a Datsun Pulsar, blue in colour. ABC were going to buy the car from the owner, repair it and sell it to the second appellant.

On 9 August 1984, the first appellant told the second appellant that repairs to the car were almost complete and if the second appellant was still interested he should pay a deposit to ensure he got it. The second appellant accordingly paid \$500 by cheque, Exhibit 26, to ABC Spray-painters on 9 August 1984 and was issued a receipt, Exhibit 20. This was twenty days before Ison's car was stolen. A second payment of \$1 000, Exhibit 22, was effected by the second appellant on 21 August 1984. The bank stamps on these documents put their authenticity beyond doubt.

Counsel for the first appellant highlighted the improbability of the appellants mounting a scheme so elaborate that payments were made, and receipts issued, twenty days before the theft of the vehicle.

Suffice it to say that at the end of the defence case no further evidence had been elicited to support the contention of the State that the vehicle recovered from the second appellant was that stolen from Ison.

The first appellant admitted selling a vehicle to the second appellant, but contended that if the recovered vehicle was the stolen vehicle, then it was not the vehicle he sold to the second appellant. The second appellant on his part was adamant that the vehicle recovered from him was purchased by him from the first appellant without knowledge of any wrong doing.

It would appear that after the appellants had each closed his case, the trial court became alive to the flaw in the prosecution case, that is, that the contents of Exhibit 13 were inadmissible in evidence, and that there was no evidence upon which the court could rely in establishing that the car recovered from the second appellant was the vehicle stolen from Ison. In an attempt to mend its fences the court decided to call a Mr Charnley to testify on the contents of Exhibit 13.

Although the decision to call Mr Charnley after the defence had closed its case was greeted with strenuous objection in the trial court only a cursory reference was made to it on appeal, and so I do not feel obliged to say any more than that the discretion reposed in a judge to call witnesses should at all times be exercised sparingly, but more so when the defendant in a criminal

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case has closed his case. See *R v Naidoo* 1934 NPD 393; *R v Rosenthal* 1917 CPD 29. It is the duty of the court neither to build up the case which the prosecution has failed to establish, nor to undertake the function of rebuilding a defence. To do so is a gross irregularity. And if such action substantially prejudices the accused in his defence his conviction must be quashed.

Mr Charnley was the Workshop Manager for Kenning Motors when the Datsun Pulsar was introduced into this country in 1980. He was not with Datsun Zimbabwe at the time Exhibit 13 was compiled. He produced the original of Exhibit 13 and said it was a Vehicle Record Card kept by Datsun Zimbabwe. He could not confirm that he had custody of the record cards. There was no evidence that whoever made the entries or supplied the information on Exhibit 13, including the figure 5135, was outside Zimbabwe or was unknown or was not available to give oral evidence, so the explanation of the entries on Exhibit 13 by Mr Charnley did not satisfy the

requirements of s 262B(2) of the Act. The contents of Exhibit 13 still remained hearsay evidence and as such inadmissible in evidence, as was the evidence of Mr Charnley.

We were thus obliged to uphold counsel's submission that the admissible evidence did not establish beyond a reasonable doubt that the car recovered from the second appellant, and later examined by the court, was the one stolen from the complainant.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Coghlan, Welsh & Guest, first appellant's legal practitioners

Surgey, Pittman & Kerswell, second appellant's legal practitioners

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S v DEHWE 1987 (2) ZLR 231 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Criminal appeal

26 October & 10 December 1987

Flynote

Criminal procedure - murder trial - plea of "not guilty" should be entered, irrespective of what accused says - accused convicted and sentenced to death without *viva voce* evidence being led - importance of *viva voce* evidence in murder trials to establish accused's intent.

Headnote

In a murder trial, the established practice in Zimbabwe, which must be followed, is for the court to enter a plea of not guilty, even if the accused actually pleads guilty.

Where the trial court had entered a plea of not guilty, but had convicted the appellant of murder with actual intent, with no extenuating circumstances, and sentenced him to death on the basis of documentary admissions and a confession, without any *viva voce* evidence having been led at all,

Held, that in the circumstances he had not had a fair trial and the conviction and sentence should be set aside, leaving the State to re-indict him if so advised.

Held, further, that it is of particular importance, in deciding the question of intention in murder cases, that the court should hear evidence.

Cases cited:

R v M'Kosi 1935 SR 96; 1935 (2) PH H134

S v Jokasi 1986 (2) ZLR 79 (SC); 1987 (1) SA 431 (ZS)

R v Vent (1935) 25 Cr App R 55

S v Nzuza 1963 (3) SA 631 (A)

R v Kumalo & Anor 1930 AD 193

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S v Mokgeledi 1968 (4) SA 335 (A)

S v Mjoli & Ors 1981 (3) SA 1233 (A)

S v Mbambo 1975 (2) SA 549 (A)

S v Nangani 1982 (1) ZLR 150 (SC); 1982 (3) SA 800 (ZS)

S v Nyandoro 1987 (2) ZLR 66 (SC)

Miss *S Ahmed* for the appellant

Mrs *S C Mavangira* for the respondent

Judgment

McNally JA: The appellant was sentenced to death in the High Court, Harare for the murder of a foreman at Chinyika Farm, Goromonzi, with actual intent.

When the charge was put to him he said "I understand and admit the charge". Those were the only words spoken by a witness during the whole trial until after he had been found guilty of murder without extenuating circumstances. All the rest of the evidence was in the form of documents, as follows:

1. the outline of the State case;
2. a post mortem report in affidavit form;
3. a confirmed warned and cautioned statement by the appellant admitting the killing of the deceased and explaining why it was done and how the gun used in the killing had been fetched from where it was hidden near Mabvuku;
4. a confirmed warned and cautioned statement accompanying indications made by the appellant;
5. an affidavit by a police firearms expert linking the cartridge cases found at the scene with the weapon found in the appellant's possession when he was arrested;

6. a list of admissions admitting all the facts and allegations in all the above documents;
7. an album of photographs.

The court, having formally entered a plea of "Not Guilty" delivered a short judgment in which it was correctly stated that "everything is virtually common cause in this case". It then found the appellant guilty of murder with actual intent.

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Defence counsel then proceeded to make submissions as to extenuating circumstances without leading any evidence. He was not specifically asked if his client wished to give evidence, and he did not specifically say that he had no witnesses to call. It is not entirely clear whether he appreciated either that he had that right, or that in the absence of evidence his client's situation was a hopeless one. From his submissions it emerged that the appellant was a fully trained and experienced Frelimo freedom fighter who had run away from the war in Mocambique and who was between 25 and 31 years old at the time of the trial which was some twenty months after the alleged killing took place. He had been "engaged in the killing of a number of people, his targets being Portuguese colonialists and sell-outs".

These facts seem to have been common cause.

After the court found no extenuating circumstances the appellant was asked, in the usual way whether he had anything to say why sentence of death should not be passed on him. He replied:

"I did not have the occasion to consult my defence attorney. If I could be given that chance?

By the court: Yes? (But in fact there is no record of any such opportunity being granted)

By the accused: Before the court imposes a sentence on me I was asking this court if the court could wait or stop giving sentence at this juncture whilst I wait for my co-accused persons who I committed this offence together with. That is the only application I wish to make."

He was then sentenced to death.

The "evidence" against the appellant is overwhelming in one sense, and yet extraordinarily unreal in another sense. This is the first case of which we are aware in which there has been no oral evidence at all (apart from the plea) before the passing of the death sentence. Our concern in this regard was not allayed by the appellant's counsel's submission that there was nothing that could usefully be said, and accordingly at the conclusion of the hearing we reserved our judgment.

The first point for consideration relates to the entering of a plea in a murder case. The report of *R v M'Kosi* 1935 SR 96; 1935 (2) PH H134 reads as follows:

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"The accused on being asked to plea admitted he had killed the deceased with the intention of killing her.

THW Beadle, for the accused, pointed out that in a recent case the English courts had accepted a plea of guilty on a murder charge, and asked for a ruling on the effect of this decision on Southern Rhodesian practice, which had always been to decline to accept a plea of guilty in such cases.

The Court (McILWAINE J) stated that it would not depart from existing practice and ordered a plea of not guilty to be entered."

Generally speaking this practice has been followed in our courts, and should be followed - see *R v Jokasi* 1986 (2) ZLR 79 (SC) at 80; 1987 (1) SA 431 (ZSC) at 432A. It was followed in the present case.

No doubt the English case to which the court was referred was that of *R v Vent* (1935) 25 CR App R at 556. In that case the appellant had pleaded guilty to a charge of murder. He was then, at the request of the court, interviewed by counsel who said he was unable to obtain any coherent statement from the appellant and wondered if he was fit to plead. The judge then heard evidence on that question from the Senior Medical Officer of Brixton Prison and satisfied himself that the appellant was fit to plead. Counsel then took no further part in the trial, the indictment was again put to the appellant and he again pleaded guilty. He was sentenced to death and the court of Criminal Appeal declined to interfere.

In 1935, of course, murder in England carried the death penalty and there was no question of extenuating circumstances. Now England has abolished the death penalty for murder and a plea of guilty to murder is still acceptable, though the facts must be stated in open court before sentence is imposed. See *Practice Direction* [1968] 2 All ER 144; *Archbold Criminal Pleading Evidence and Practice* 41 ed paras 4-57 (p 232) and 4-177 (p 293).

In South Africa, it appears (Hunt *SA Criminal Law and Procedure* Vol 2 2 ed p 373) that a plea of guilty to murder may be accepted by the court, but in terms of s 112(1) of their Criminal Procedure Act, where the accused pleads guilty to murder, the court may not sentence him without hearing any evidence. The section is the equivalent of our s 255(1) which reads:

"Where a person arraigned before the High Court on any charge pleads guilty . . . and the prosecutor accepts that plea, the court may, if the accused has pleaded guilty to any offence other than murder, convict and

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sentence him for that offence without **hearing** (my emphasis) any evidence."

It would seem to follow logically from that wording that, where there is a plea of guilty to murder, the court must hear evidence. And it would seem to follow *a fortiori* that where the plea is not guilty the court must also hear evidence.

Does the use of the word "hear" necessarily imply that there must be oral or *viva voce* evidence?

A very similar point was raised in *S v Nzuza* 1963 (3) SA 631 (A). In that case there had been a preparatory examination in which the State witnesses had given oral evidence. But at the trial,

and by consent, the record of that evidence was put in, and its contents formally admitted by defence counsel. The record of that evidence was read out by counsel for the State. The State case was then closed and defence counsel:

"states that he does not wish to make any submissions as to whether the accused is to be found guilty or not; that he does not wish to call the accused to give evidence; that he does not wish to examine any of the witnesses and that he does not propose to call evidence."

The trial court thereupon found the accused guilty of murder and (it seems, without further evidence) found no extenuating circumstances and sentenced him to death.

The reasoning of HOEXTER AJA (as he then was) on appeal proceeded along the following lines:

He began by referring to s 284(1) of the Criminal Procedure and Evidence Act. That section is identical in substance to s 291(1) of our Criminal Procedure and Evidence Act, and I will therefore set out the provisions of our section as follows:

"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."

He then, by reference to the Afrikaans text, decided that the word "evidence" in that passage should be interpreted to mean "proof". He continued:

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"Counsel for the appellant accordingly argued that there was no evidence before the trial court on which it could have convicted the accused. Before dealing with this argument, I must point out that the terms of s 258(1)(a) of the Code, which refers to a plea of guilty, and on which counsel for the appellant also relied, are irrelevant because the trial judge entered a plea of not guilty and the trial accordingly had to proceed as in any other case in which a plea of not guilty has been entered (*R v Kumalo & Anor* 1930 AD 193 at p 200)."

The learned ACTING JUDGE OF APPEAL then went on to point to the provisions of s 156(1) of the Code. Since these are identical to the words of our s 185(1) I shall set out the latter, as follows:

"Every criminal trial shall take place and the witnesses shall, save as is otherwise expressly provided by this Act or any other enactment, give their evidence *viva voce* in open court in the presence of the accused . . ."

He then continued:

"It appears from the record that no witnesses were called at the trial; all that the prosecuting counsel did was to read the evidence given at the preparatory examination. *Prima facie*, therefore, no evidence was led before the trial court.

But the matter does not end there, because the appellant did more than to make admissions of facts; what he did was to consent to the proposition that the evidence given at the preparatory examination should be regarded as having been given at the trial. In other words, the appellant consented to a form of procedure other than that specified in s 156(1). The question now arises whether the appellant could validly so consent."

He went on to conclude that despite the statutory provision as to admissions of fact, the words

of s 156(1) (our s 185(1)) are peremptory. He ended with these words:

"That section decrees that witnesses shall give their evidence *viva voce* and the only exceptions made are those expressly allowed by statute. It follows that the appellant could not by his consent validate the invalid procedure adopted by counsel for the prosecution in the present case.

In the result the evidence given at the preparatory examination was not evidence at the trial and the appellant was, in effect, convicted on no evidence at all. The appeal must be allowed and the conviction and sentence set aside."

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He indicated that he had considered remitting the matter but decided against that course. "It is for the State to decide whether it will re-indict the appellant".

It has been pointed out in Hoffmann and Zeffertt *SA Law of Evidence* 3 ed at pp 341-2 that the new provisions of s 213 of the South African Criminal Procedure Act 1977 "neutralise substantially those decisions which held that an accused cannot waive the requirement that testimony has to be *viva voce*". But for two reasons this does not apply in the present case. First, we have no equivalent amendment. Second, the amendment applies only to written statements made by persons, signed by them and accompanied by a declaration in specified form. This is not what we have in the present case.

Accordingly it seems to me that *S v Nzuza, supra*, remains as an authoritative interpretation of our law.

There is, in addition, another line of reasoning which leads to the same conclusion. It is based on the provisions of s 255B of our Act which reads as follows:

"Any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of a 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 proposition sought to be established is simply that in the present case there was no evidence at all, other than a combination of extra-curial and intra-curial admissions and confessions by the appellant, and thus there was nothing which either confirms these admissions and confessions or proves the commission of the offence.

The first case to be considered is *S v Mokgeledi* 1968 (4) A 335 (A). It was a case of robbery. The appellant pleaded not guilty. A confession was handed in by consent. The defence admitted the commission of the offence by someone. There was a dispute as to whether the confession was made freely and voluntarily by the accused. It was found that it was, after which it was handed in. The Appellate Division queried whether the admission amounted to compliance with the requirement that "the offence has, by competent

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evidence, other than such confession, been proved to have been actually committed."

At p 337F BOTHA JA held (in a passage criticised below):

"... it cannot be contended that an accused person's confession is, for the purposes of s 258(2) (our 255B) capable of confirmation by an admission made by himself or on his behalf in terms of s 284(1) (our 291(1)) even if such an admission constitutes 'other evidence' for the purposes of s 258(2), a question I deal with presently."

He then went on to say:

"Though the admission of a fact made by or on behalf of an accused person is sufficient proof of that fact in criminal proceedings, it can never in such proceedings be evidence which is required to be given *viva voce* by the witnesses in open court in the presence of the accused.

The expression 'competent evidence' cannot therefore include an admission in terms of s 284(1). It should be emphasised that s 258(2) requires not merely proof of the actual commission of the offence charged, but 'proof by competent evidence' other than the accused person's confession."

He explained the object of the proviso to s 258(2) - which is our s 255B - in these words:

"It is to preclude the conviction of the accused person of an offence which has not been committed but to which he has confessed in an unconfirmed confession. If an admission by such an accused person were, for the purposes of s 258(2), to be sufficient proof of the actual commission of the offence, the object of the Legislature would be completely defeated. The admission in such a case being necessarily simply a repetition of at least part of the confession, it cannot be regarded as 'competent evidence, other than such confession' and the accused would still be convicted on nothing more than his unconfirmed confession."

I pause here to observe that the words "unconfirmed confession" as used in this passage means "not confirmed by other evidence". It is no answer to say that the confession in this present case was confirmed in terms of s 105C and therefore admissible in terms of s 242(1a) of our Act.

The outcome of *Mokgeledi's* case, *supra*, was that the conviction and

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sentence were set aside.

The judgment in this case has been to some extent questioned. In *S v Mjoli & Ors* 1981 (3) SA 1233 (A) the court was dealing with an amended section about the sufficiency of a confession, which differs significantly from our s 255B. (See the judgment of RUMPFF CJ at 1237H-1238B). In this case it was held that extra-judicial confessions could be confirmed by confessions and admissions in court. Thus, JANSEN JA said at p 1242D:

"It would seem from the foregoing that formal confessions (pleas) and formal admissions made in court are now considered generally not to be subject to the risk of falsity (except where a death sentence is to be imposed?). On principle therefore there would seem to be no reason why an extra-judicial confession should not be confirmed by such confessions and admissions, and even those informally made in court. In this respect the *obiter dictum*, above cited, from the judgment of *S v Mokgeledi* 1968 (4) A 335 (A) at 337F does no longer appear to reflect the true position. However, in that case this court for other reasons went further and held that an admission in terms of

s 284(1) of Act 56 of 1955 of the actual commission of the offence could not serve to corroborate an extra-judicial confession."

He went on however, and, in a minority judgment on this aspect, upheld the decision of *Mokgeledi's* case, *supra*, posing the rhetorical question:

"Could a plea of guilty to murder without extenuating circumstances *per se* serve as confirming in a material respect an extra-judicial confession of murder?"

VILJOEN JA relied on the amendment to the law to come to a conclusion different from that in *Mokgeledi's* case, *supra*. He considered that the requirement of confirmation "in a material respect" was wider than the requirement of confirmation "by competent evidence". He accepted that admissions by the accused are not evidence by the accused (p 1247 *in fine*). That, so far as the present case is concerned, is a most relevant point.

It seems therefore that both RUMPFF CJ and VILJOEN JA differed from *Mokgeledi's* case essentially because of the new wording of the South African section. Since our wording remains the same as the old South African wording, it would seem to follow that *Mokgeledi* reflects our law and *Mjoli* does not. (Note the criticism of *S v Mbambo* 1975 (2) SA 549 (A), which was followed in *Mjoli*, in Hoffmann, *op cit* p 447.)

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It may be contended that the post mortem report and the ballistics report put in terms of ss 260(1) and (2) are on a different footing from admissions by the appellant, and may be regarded as evidence *aliunde* of the commission of the offence, or as evidence confirming the confession. Yet it may also be said that receiving these documents does not amount to "hearing" evidence. And it may be questioned whether such documents are "evidence" in view of the fact that the section describes them as "*prima facie* proof".

I must confess that in the final analysis I am loath to rely on what seems to me to be a somewhat hair-splitting distinction between "evidence" on the one hand and "proof" on the other. I prefer to say that if, as required by s 255(1) of our Act, the court must hear evidence when a person charged with murder pleads guilty, then *a fortiori* it must **hear** evidence when a plea of not guilty is entered.

The matter was dealt with, albeit in rather general terms, by this court in *S v Nangani* 1982 (1) ZLR 150 (SC); 1982 (3) SA 800 (ZS). As in the present case, affidavits, post mortem reports and the State outline were formally admitted and the High Court immediately found the appellant guilty of murder (at 153C-H). FIELDSEND CJ commented, at the top of p 154:

"While it is true that some evidence had been taken so that Section 255(1) had not been entirely ignored, the reality is that the provisions of that section are not normally satisfied merely by formal evidence *aliunde* of the commission of the offence. **In every murder case the mental element which accompanies the killing is a vital issue. This can normally be determined only after hearing oral evidence of the circumstances of the killing**" (my emphasis).

The absence of oral evidence before conviction led to difficulties in *Nangani's* case, *supra*. In this connection it is apposite to refer again to the words of FIELDSEND CJ when he said at

154G:

"Having followed the course which it did the court realised when it came to consider sentence and the question of extenuating circumstances that it had made no decision as to whether the appellant had an actual or constructive intent to kill and indeed that it had no material on which to make that decision. This would not have been the case had evidence of the circumstances of the killing been given, at least by David Sibanda, who was presumably the person with whom the appellant thought the deceased was being unfaithful."

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The trial court had then proceeded to hear evidence on the subject of extenuation, and in doing so, misdirected itself. Moreover the evidence led after conviction raised a question as to the correctness of the verdict of guilty of murder, which verdict had already been reached. In the event therefore the Supreme Court altered the verdict to one of culpable homicide and imposed a sentence of five years' imprisonment with labour.

In the present case there was undoubtedly a considerable amount of "evidence" as to the apparent rationality of the appellant's actions, the deliberateness with which he planned and carried out the killing, and the apparent absence of factors of drink, drugs, provocation, insanity or self-defence. It was this that led the court to make a finding of murder with actual intent even though not a word of evidence had been spoken in the court room apart from the plea.

But one comes back to the question - has the appellant had a fair trial? Has he had a trial at all?

I do not wish in this judgment, to make statements of general application to cases other than murder cases, or to make a definitive statement as to the extent that *viva voce* evidence must be led in murder cases. This is largely because the matter was not fully argued before us. Indeed it was not argued at all.

I am satisfied however on the facts of this particular case that this particular appellant has not had a fair trial, and he has a constitutional right to a fair trial in terms of ss 18(2) and (9) of the Constitution of Zimbabwe. Indeed the appellant's own comments at the stage of the *allocutus*, which I have set out earlier in this judgment, indicate very clearly that he was conscious that events were moving too quickly. I think he was right.

I draw attention, also, to the words of the CHIEF JUSTICE in a very recent decision of this court, *S v Nyandoro* S-144-87 *(8). He said:

"It was unfortunate that the appellant's counsel, for reasons best known to him, did not call the appellant to give evidence on his own behalf, and to call witnesses if any were available. Murder is a very serious offence carrying the ultimate sentence of death. No person should face a conviction for murder with actual intent without leading evidence. His

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evidence will either establish the intention with which he committed the offence or negative any intention."

A murder trial differs from other trials, not only in the sense that it involves a possible death

sentence, but also in that it involves a consideration of extenuating circumstances at a separate and distinct stage of the trial. Because murder, more than other crimes, involves human passions whose operation may often give rise to circumstances of extenuation, it is vitally important, before a decision on extenuation is made, that the court has some impression of the motives and relationships which have led to the killing. How can it gain a meaningful insight into these vital matters simply by reading a summary of the evidence prepared by someone wholly remote from the realities? There is no opportunity to assess the character of the witnesses, to absorb the atmosphere of the time, to gain some impression of the relationships between the accused and his fellow workers, between the deceased and the accused or indeed between the deceased and the other witnesses.

In this case it is possible that justice has been done. The objective "evidence" is certainly very strong. But there has been no investigation of the subjective elements which are so important where extenuation is concerned. And in any event justice has not been seen to be done. Defence counsel must have known that by following the course that he did he was in essence abandoning his task and his client.

In the result therefore the conviction and sentence must be set aside by reason of fundamental procedural defects. In the event that the State decides to re-indict the appellant it is directed that he be represented by a different defence counsel.

In view of the fact that this is a decision of some procedural importance I would add that it has been seen and approved by the CHIEF JUSTICE.

Manyarara JA: I agree.

Korsah JA: I agree.

Pro Deo

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NYONI v NYONI 1987 (2) ZLR 243 (HC)

Court **High Court, Bulawayo**

Blackie J

Application to amend declaration and exception

11 December 1987

Flynote

Family law - divorce and proprietary claims - action commenced under Matrimonial Causes Act [Chapter 39] - leave to continue action under Matrimonial Causes Act 1985 - application for leave must be made by both parties.

Headnote

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The 1985 the Matrimonial Causes Act [*Chapter 39*] was repealed and replaced by the Matrimonial Causes Act No. 33 of 1985. The new Act introduced irretrievable breakdown of marriage as the main ground for divorce and fundamentally changed the courts' power to distribute the matrimonial assets of the parties following divorce. Section 17(2)(a) of the new Act provides that proceedings which had commenced under the old Act should continue in full force and effect under the old Act. However, the court may grant leave to the parties to continue the proceedings under the new Act, with suitable amendments. The use of the words "the parties" (in the plural) means that the application for leave to continue under the new Act must be a joint one; no discretion is given to the court to grant the application of one of the parties alone.

Case referred to:

Nyoni v Nyoni HB-95-85 (not reported)

S K M Sibanda for the plaintiff and respondent

H I Bisset for the defendant and excipient

Judgment

Blackie J: On 7 June 1985, the plaintiff instituted an action against the

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defendant in terms of the Matrimonial Causes Act [*Chapter 39*] (the old Act), claiming a decree of divorce on the grounds of cruelty. She included certain proprietary claims in her declaration.

The defendant took exception to the pleading of the proprietary claims. The plaintiff then filed an application for leave to amend her declaration in respect of those proprietary claims. The exception and the notice of application to amend were heard together. The exception was upheld; the application to amend was refused. It was held that the amendment to the declaration merely restated "the excipiable claims in noticeably more evasive, vague and embarrassing terms than the declaration": see *Nyoni v Nyoni* HB-95-85; judgment handed down on 11 October 1985.

On 2 February 1986, the Matrimonial Causes Act No. 33 of 1985 (the new Act), came into operation. It repealed the old Act. The provisions of the new Act, relevant to this application, are, firstly, that it introduced irretrievable breakdown of marriage as the main ground of divorce and, secondly, it changed, fundamentally, the power of the court to distribute the matrimonial assets of the parties on divorce. However, s 17(2)(a) stated that:

"Any proceedings which were commenced in terms of the repealed Act may, on or after the date of the commencement of this Act, be continued and completed in terms of the repealed Act which shall, for such purposes, be deemed to continue in full force and effect:

Provided that the Court may grant leave to the parties to continue the proceedings, with suitable amendments, relying upon any of the provisions of this Act, which proceedings may then be determined in terms of this Act."

On 16 April 1986, the plaintiff filed a new notice of amendment to the declaration. This

amendment dealt with the proprietary claims only. The defendant wrote objecting to the proposed amendment on the basis that "firstly, it is vague and embarrassing and, secondly, it seeks, without the leave of the court, which has not been granted, to amend (the plaintiff's) claims to bring them into line with the new Matrimonial Causes Act". The defendant then pleaded to the declaration as it stood after the judgment in the exception heard in October 1985 and filed a claim in re-convention. The plaintiff has pleaded to the claim in re-convention.

The plaintiff tried again. On 26 August 1986, the plaintiff filed a further

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notice of amendment to the declaration. In this notice the plaintiff prayed for "the leave of the court to continue the proceedings in terms of the Matrimonial Causes Act, No. 33 of 1985" (para 10); claimed a decree of divorce on the grounds of irretrievable breakdown of the marriage (para 11) and set out another redraft of plaintiff's proprietary claims (para 12 - 16).

The defendant objected to the application for leave to continue the proceedings under the new Act and excepted again to the pleading of the proprietary claims.

The defendant's objection to plaintiff's application for leave to continue the proceedings under the new Act is that, on a proper interpretation of the proviso to s 17(2)(a) of the new Act, the application for such leave must be made by all the parties to the action. It is common cause that the defendant does not consent to the proceedings continuing under the new Act.

The right to continue proceedings under the old Act is specifically preserved under s 17(2)(a) of the new Act. The proviso to that section says that the court may grant the parties leave to continue the proceedings (after the appropriate amendments) under the new Act. It would have been possible to give the court a discretion to grant such leave on the application of one of the parties alone. However, the legislature has decided otherwise. The use of the word "parties" in the proviso clearly indicates that the application for leave to continue the proceedings under the new Act must be a joint application. I therefore uphold the objection taken by the defendant to this part of the proposed amendment.

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

Webb, Low & Barry, defendant's legal practitioners

S K M Sibanda, plaintiff's legal practitioners

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S v NCUBE & ORS 1987 (2) ZLR 246 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

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Dumbutshena CJ, Gubbay JA, McNally JA, Manyarara JA & Korsah JA

Criminal appeal

6 October & 14 December 1987

Flynote

Criminal procedure (sentence) - whipping of an adult - Constitution of Zimbabwe 1980 - s 15(1) - prohibition against inhuman or degrading punishment - whipping of adults proscribed under section.

Headnote

The imposition of a sentence of a whipping upon the person of an adult offender is an inhuman or degrading punishment, which contravenes s 15(1) of the Constitution of Zimbabwe 1980.

Cases cited:

S v Bhumu 1981 ZLR 111 (AD)

R v Baidoni 1955 SR 2

R v Mhika 1956 R & N 46 (SR)

R v Tanyani 1951 SR 145

S v du Chattlier 1973 (2) RLR 339 (GD)

S v Mathe 1983 (2) ZLR 178 (HC)

R v Sameli & Zipi 1943 SR 150

R v Johanasi 1956 R & N 45 (SR)

R v Katonda 1960 R & N 651 (FSC)

S v Ndaba & Ors 1987 (1) SA 237 (T)

S v Muvungani 1977 (2) RLR 1 (AD)

S v Diction 1978 RHEA 19 (AD)

R v Sparing & Anchor 1965 RHEA 43 (AD)

S v MDs & Anchor 1981 ZLR 600 (HC)

R v Du Plesses 1948 SR 94

R v Chapman 1953 SR 28

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R v Tshidu 1957 R & N 800 (SR)

R v Enock 1958 R & N 264 (SR)
R v Tanbiga 1965 (1) SA 257 (SR)
R v Mpandu 1966 RLR 604 (AD)
R v Dematema 1967 RLR 311 (GD)
S v Kumalo & Ors 1965 (4) SA 565 (N)
S v Masondo & Anor 1969 (1) PH H58 (N)
S v Ximba & Ors 1972 (1) PH H66 (N)
S v Maise 1968 (1) SA 271 (T)
S v Kantor 1972 (4) SA 683 (O)
S v Ruiters en 'n Ander 1975 (3) SA 526 (C)
S v Seeland 1982 (4) SA 472 (NC)
S v Nkoana 1985 (2) SA 395 (T)
S v Myute & Ors 1985 (2) SA 61 (CkSC)
S v Machwili 1986 (1) SA 156 (N)
S v Motsoesoana 1986 (3) SA 350 (N)
R v Dick, Penner & Finnigan [1965] 1 CCC 171 (Manitoba, Canada)
R v Smith (1987) 40 DLR (4th) 435 (SCC) (Supreme Court, Canada)
R v Mogg [1948] SASR 37 (Australia)
R v Taylor & O'Meally [1958] VR 285 (Australia)
Talley v Stephens (1965) 247 F Supp 683
Jackson v Bishop (1968) 404 F 2d 571
Nelson v Heyne (1974) 491 F 2d 352
Tyrer v United Kingdom (1978) 2 EHRR 1
S v Petrus [1985] LRC (Const) 699 (Botswana)
Colonial Treasurer v Eastern Collieries Ltd 1904 TS 716
Hayward, Young & Co (Pty) Ltd v Port Elizabeth Municipality 1965 (2) SA 825 (A)
Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board & Ors 1982

(4) SA 427 (A)

Minister of Home Affairs v Dabengwa 1982 (1) ZLR 236 (SC)

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

Weems v United States (1910) 217 US 349; 54 L Ed 793

Gregg v State of Georgia (1976) 428 US 153; 49 L Ed 2d 859

Ingraham v Right (1977) 430 US 651; 51 L Ed 2d 711

Hutto et al v Finney et al (1978) 437 US 678; 57 L Ed 2d 522

Solem v Helm (1983) 463 US 277; 77 L Ed 2d 637

Gundu & Anor v Sheriff of Southern Rhodesia & Anor 1965 RLR 301 (AD)

R v Runyowa 1966 RLR 42 (PC); [1966] 1 All ER 633 (PC)

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Rummel v Estelle (1980) 445 US 263; 63 L Ed 2d 382

Trop v Dulles (1958) 356 US 86; 2 L Ed 2d 630

Furman v State of Georgia (1972) 408 US 238; 33 L Ed 2d 346

Estelle v Gamble (1976) 429 US 97; 50 L Ed 2d 251

S v Chabalala 1986 (3) SA 623 (BAD)

Campbell & Cosans v United Kingdom (1982) 4 EHRR 293

R v Lobi 1942 SR 152

A P de Bourbon SC, with him *R M Fitches*, for the appellants

Y Omerjee for the respondent

Judgment

Gubbay JA: This court is confronted for the first time with the contention that the imposition of a sentence of a whipping upon the person of a male adult offender is an inhuman or degrading punishment in contravention of s 15(1) of the Declaration of Rights contained in the Constitution of Zimbabwe.

THE FACTS

During April and June 1987 the three appellants were convicted and sentenced in separate

proceedings before the regional magistrate sitting at Bulawayo. Stephen Ncube pleaded guilty to the fairly brutal rape of a thirteen-year-old girl. He was sentenced to undergo six years' imprisonment with labour and a whipping of six strokes. Brown Tshuma pleaded guilty to raping, on the same day, two children aged six years and nine years. He was a person who stood in a position of trust to them in that they regarded him as a brother. He was sentenced to five years' imprisonment with labour on each count, and in addition was ordered to receive a whipping of six strokes. Despite his denial, Innocent Ndhlovu was found to have raped his juvenile daughter on a number of unspecified occasions over a period of two-and-a-half years. On the one comprehensive count with which he was charged, he was sentenced to seven years' imprisonment with labour conjoined with a whipping of six strokes.

Each of the appellants applied to a judge of this court for leave to prosecute in person an appeal against conviction and sentence. Their applications were allowed, but only in respect of that part of their sentences ordering them to be whipped. The issue to which it was directed that argument was to be addressed was whether, with effect from 18 April 1985, the power of the regional magistrate to impose a whipping under the authority of ss 54(5)(c) and (8) of the Magistrates Court Act [*Chapter 18*] became unconstitutional and of no force and effect as being in violation of the protection from inhuman

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or degrading punishment provided for in s 15(1) of the Declaration of Human Rights.

The aforementioned date is important because, in terms of s 26(2)(b) as read with s 26(3)(b) of the Constitution, the protection not to be held in contravention of the Declaration of Rights, afforded to any written law which had effect immediately before the appointed date (that is, 18 April 1980 when Zimbabwe became a sovereign republic) and which has continued to have effect as law since that date, ceased to apply after the expiration of a period of five years.

THE POSITION IN ZIMBABWE UP TO THE PRESENT TIME

Corporal punishment has been a feature of the sentencing system in Zimbabwe since the last century. At present it is a punishment authorised for common law offences by s 314(2)(e) of the Criminal Procedure and Evidence Act [*Chapter 59*], save that it is not to be inflicted by any court upon female offenders.

The High Court may impose up to twenty-four strokes in addition to, or in substitution for, any punishment to which the adult offender is otherwise liable. The whipping is to be carried out privately in a prison, in accordance with the regulations made under the law relating to prisons. (See ss 329(1) and 333.)

The jurisdictional limits of magistrates with regard to the whipping of adult offenders are to be found in ss 54(2)(a)(iii), 54(2)(b)(iii), 43(3)(c), 54(4)(c) and 54(5)(c) of the Magistrates Court Act [*Chapter 18*]. Their effect is this: On summary trial a magistrate may not impose a whipping in excess of ten strokes, but on remittal by the Attorney-General of any case for trial or sentence under increased jurisdiction he may impose up to twelve strokes. A senior magistrate, a provincial magistrate and a regional magistrate, whether on summary trial or on remittal by the

Attorney-General, may not impose a whipping of more than twelve strokes.

Section 54(8) of the Magistrates Court Act specifies the common law offences for which the punishment of a whipping can be imposed. These range from convictions for such offences as culpable homicide, attempted murder, arson, rape, robbery, assault of an aggravated or indecent nature or assault with intent to do grievous bodily harm, bestiality, or any act of gross indecency committed by one male person with another, to the theft of a

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bicycle, a motor vehicle or maize on the cob whether green or dry. Any common law offence committed within a period of three years after conviction for a common law offence is also included. In addition the section empowers magistrates to impose a whipping in respect of any statutory offence for which that punishment is prescribed as a penalty, and for any common law offence committed within a period of three years after a conviction for a statutory offence for which whipping is one of the prescribed penalties.

There are six statutes which authorise the imposition of a whipping, but no longer as a mandatory punishment:

The Law and Order (Maintenance) Act [*Chapter 65*] is the most far - reaching, for under s 64 a whipping not exceeding ten strokes may be imposed by any court convicting a person for any offence under the Act, save for that specified in s 38 (where the accused person is liable to be sentenced to death or imprisonment for life). Some of the offences thus covered are fairly trivial in nature, for which fines are provided, such as a prohibition against the use of loudspeakers, and the prohibition against the singing of a song or the uttering of a slogan likely to lead to public disorder.

The Witchcraft Suppression Act [*Chapter 73*] allows a whipping not exceeding thirty-six strokes for four of the offences there specified and a whipping not exceeding twenty strokes for one other offence. The excessive number of strokes that may be imposed under this Act caused LEWIS JP, in *S v Bhumu* 1981 ZLR 111 (AD) at 114B-D to comment that they should not be allowed to remain on the Statute Book as permissible sentences and the Legislature should take action to remedy the position. That plea has gone unanswered.

The Forest Act [*Chapter 125*] permits a whipping not exceeding ten strokes upon a person who without authority has wilfully caused damage in or on a State forest or private forest.

The Dangerous Drugs Act [*Chapter 319*] permits a whipping not exceeding ten strokes upon an adult person convicted of the unlawful supplying of a drug to or procuring of a drug for or offering to supply a drug to or procure a drug for, a person under the age of eighteen years; or the unlawful inciting or influencing of a person under the age of eighteen years to smoke or use any drug; or the unlawful manufacture of a drug; or the unlawful cultivation of a plant from which a drug is derived; or the inciting or influencing of any person to smoke any drug.

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The Road Traffic Act, No. 48 of 1976, allows of the imposition of a whipping not exceeding ten strokes upon a person convicted of: (i) the driving of or riding in a vehicle without the consent of the owner or the person in lawful charge of the vehicle; (ii) throwing an article at a vehicle which is on a road or at a person in such vehicle; and (iii) interfering with the driver of a vehicle without reasonable excuse.

Lastly, under the Prisons Act [*Chapter 21*] a whipping not exceeding twelve strokes is one of the disciplinary measures which may be exacted upon a prisoner found guilty of certain prison offences.

Since the advent of Independence Parliament has repealed the punishment of whipping from the Trapping of Animals (Control) Act [*Chapter 134*], by Act No. 49 of 1981; from the Stock Theft Act [*Chapter 72*], by Act No. 10 of 1982; from the Prevention of Cruelty to Animals Act [*Chapter 71*], by Act No. 22 of 1983; from the Criminal Laws Amendment Act [*Chapter 58*], by Act No. 12 of 1986; and from the Drugs and Allied Substances Control Act [*Chapter 320*], by Act No. 7 of 1987.

Over the last forty years various principles have been developed by the courts in this country concerning the imposition of a whipping. These may be summed up as follows:

- (i) Corporal punishment should not be inflicted on an adult first offender, save in cases of an extremely serious nature, where brutal or other reprehensible features attended the manner of its commission. See *R v Baidoni* 1955 SR 2; *R v Mhika* 1956 R & N 46 (SR)
- (ii) There is a strong need for moderation when punishment by whipping is resorted to. Eight strokes is the practical limit to be observed, for any greater number may degenerate into senseless brutality where the offender ceases to be conscious of any pain so that any further whipping amounts to the beating of inanimate flesh. See *R v Tanyani* 1951 SR 145; *S v du Chattlier* 1973 (2) RLR 339 (GD) at 341B-C; *S v Mathe* 1983 (2) ZLR 178 (HC) at 179E-F.
- (iii) A whipping should not be imposed where it has been shown that previous whippings have had no reformatory effect and will only brutalise the offender. See *R v Sameli and Zipi* 1943 SR 150 at 152; *R v Tanyani, supra*, at 146; *S v Johanasi* 1956 R & N 45 (SR) at 45H.

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- (iv) It is considered undesirable to conjoin a lengthy term of imprisonment with corporal punishment. The reason is that the purpose of corporal punishment generally is to act as a sharp deterrent and so its effect will have faded if conjoined with a lengthy incarceration. See *R v Katonda* 1960 R & N 651 (FSC) at 653B-D (compare *S v Ndaba & Ors* 1987 (1) SA 237 (T) at 243D-F).
- (v) Unless there are exceptional circumstances, a whipping should not be imposed upon

an adult over about the age of thirty years. See *S v Muvungani* 1977 (2) RLR 1 (AD) at 2C-E. But in *S v Dickson* 1978 RLR 19 (AD) the majority of the court considered that the brutal and depraved nature of the offence committed by a 45-year-old man justified the trial court in conjoining a lengthy period of imprisonment with a whipping of six strokes. The dissenting judgment of DAVIES JA is, in my view, to be preferred.

- (vi) There must be as little delay as is reasonably possible in the implementation of the punishment of whipping. Any inordinate delay will justify the deletion of the strokes on appeal or review. See *S v Sparimi & Anor* 1965 RLR 43 (AD) at 44I-45A; *S v Ndhlovu & Anor* 1981 ZLR 600 (HC) at 602H-603A.
- (vii) It is not competent to suspend the award of a whipping. See *R v du Plessis* 1948 SR 94; *R v Chapman* 1953 SR 28; *S v Ndhlovu & Anor supra* at 603B.
- (viii) It is a most unusual form of sentence, to be resorted to only in exceptional circumstances, to impose corporal punishment upon an adult without any accompanying imprisonment. See *S v Baidoni supra* at 2; *R v Tshidu* 1957 R & N 800 (SR) at 807A; *R v Enock* 1958 R & N 264 (SR) at 265F-G; *R v Tanbiga* 1965 (1) SA 257 (SR) at 258F.
- (ix) Before sentencing an offender to corporal punishment the court should pay the closest regard to his physical fitness, and if there is the least doubt as to his fitness to receive it, this punishment should not be imposed. See *R v Mpandu* 1966 RLR 604 (AD) at 606A.

Of the numerous judgments concerning the imposition of a whipping which have issued from our courts, there are surprisingly few in which any disapproval has been voiced about the nature of the punishment itself.

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GUBBAY JA

The first sign of disquiet was expressed by YOUNG J in *R v Tanbiga, supra*, at 258E where whipping is described as "a severe and **degrading** punishment for an adult" (my emphasis). Thereafter in *R v Dematema* 1967 RLR 311 (GD) at 313A the same learned judge said this:

"A scientific study of the prevention and punishment of crime is wanting in this country and is, in my view, long overdue. The need is especially urgent in relation to corporal punishment, since most advanced western countries have abandoned this type of penalty, so that the field of comparison is limited to the Republic of South Africa where, however, as here, the science of penology as a systematic aid to the punishment and prevention of crime is virtually unknown."

Unhappily no heed was taken by Government of this pronouncement.

Many years later in *S v Ndhlovu & Anor supra* at 602A, while recognising a legitimate divergence of opinion, I ventured my personal opposition to whipping "as an inhumane, humiliating and degrading mode of punishment. And in *S v Mathe supra* at 179C I spoke of it as nothing short of "judicial barbarism".

This then is how the law stands pending the decision in these appeals.

THE SOUTH AFRICAN POSITION

Interestingly enough, in South Africa, where whipping is not susceptible to constitutional attack, judges have been outspoken in their condemnation of it as a brutal and degrading form of punishment.

The trend was set by FANNIN J in his powerful dissent in *S v Kumalo & Ors* 1965 (4) SA 565 (N), where he said at 574F-H:

"Within comparatively recent times corporal punishments of quite horrifying severity were inflicted for a great number of offences, and I for one do not believe that the general deterrent effect of such punishments justified the suffering and indignity which were inflicted upon those who were so punished. I am of the opinion that a whipping is a punishment of a particularly severe kind. It is brutal in its nature and constitutes a severe assault upon not only the person of the recipient but upon his dignity as a human being. The severity of the punishment depends, to a very large extent, upon the personality of the officer charged with the

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duty of inflicting it, and over that the court ordering the punishment can have little, if any, control. A great many criminals who are so punished, indeed probably the majority of them, suffer no lasting effects either physical or mental, but the others, who constitute, I am convinced, a not inconsiderable minority, may well suffer physical and mental after-effects out of all proportion to the gravity of the offence for which they have been punished."

And further on at 575C-G:

"So long as whipping is a form of punishment which the courts may inflict, the fact that the criminal has shown vicious tendencies, that his offence has been committed in circumstances of brutality or cruelty, that he is a persistent offender who has not been discouraged by other punishments to refrain from committing offences, or that he is a young person upon whom it is desirable to impose corporal punishment rather than send him to gaol to associate with hardened criminals, are all circumstances which may properly be taken into account in deciding whether, in particular cases, the offender should be whipped. A further consideration may be that the offence is a particularly grave one or one which is of sufficient magnitude to justify special treatment, but I am firmly of the opinion that unless there exists some special circumstance, such as is referred to above, whipping should not be resorted to especially in the case of a first offence. If one accepts that the objects of punishment are to punish the criminal, to reform him (or to deter him from committing further offences) and to deter others from committing similar offences, it seems to me that those objects can in the vast majority of cases, even where the offence is one in which a whipping is especially authorised in the discretion of the trial court, be attained by the imposition of the more usual punishments of fines or imprisonment. In my opinion no court should approach the question of the imposition of a whipping as a punishment for an offence in any other way. I am of the opinion too that too frequent floggings tend to lessen their general deterrent effect."

LEON J sounded a similar caution in *S v Masondo & Anor* 1969(1) PH H58 (N) in these words:

"And it should be borne in mind that a whipping is not only an assault upon the person of a human being but also upon his dignity as such."

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That sentiment was reaffirmed by FANNIN J (with whom MILNE J concurred) in *S v Ximba &*

Ors 1972 (1) PH H66 (N). His approach has been quoted with approval or adopted in *S v Maise* 1968 (1) SA 271 (T); *S v Kantor* 1972 (4) SA 683 (O) at 684B; *S v Ruiters en 'n Ander*; *S v Beyers en Andere*; *S v Louw en 'n Ander* 1975 (3) SA 526 (C) at 530B; and in *S v Seeland* 1982 (4) SA 472 (NC) at 477A.

The brutality of corporal punishment was recognised by a full Bench of the Transvaal Provincial Division in *S v Nkoana* 1985 (2) SA 395 (T) at 401H-I. And in *S v Myute & Ors*; *S v Baby* 1985 (2) SA 61 (CKSC) at 62H-I, DE WET CJ remarked:

"I have said before, and other Judges have expressed the same view, that the imposition of strokes is a very severe and **humiliating** form of punishment which should only be imposed in the most serious cases where, for instance, a cruel assault has been perpetrated, or the accused is a hardened criminal, or in certain instances of robbery . . . " (my emphasis).

Within the last two years judges of the Natal Provincial Division have once again come out firmly in their disapproval of whipping. In *S v Machwili* 1986 (1) SA 156 (N) DIDCOTT J (with whom FRIEDMAN J concurred) said this at 157H-I:

"When an adult is flogged on the other hand, especially when he is flogged not in lieu of but in addition to being sent to gaol, nothing is achieved but revenge. Such is gained at a cost, what is more. Society's standards suffer. It stoops to the level of the criminal whom it punishes. It behaves with the same sort of barbarism as that which it condemned in him."

In *S v Motsoesoana* 1986 (3) SA 350 (N) PAGE J identified himself with the considerable body of judicial and academic authority in South African which holds the view that this form of punishment serves no useful deterrent purpose and found, further, that it serves no effective rehabilitative function when imposed in conjunction with imprisonment. He considered its likely effect in such cases to be "coarsening and degrading rather than rehabilitative" (at 354F). Without denigrating the retributive function of punishment, he suggested that it could be achieved by other means more compatible with civilised norms. He considered it debatable whether the retention of corporal punishment was favoured by the community as a whole and suggested that the time was ripe for:

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". . . a full investigation of the whole question of whether corporal punishment should not be entirely abolished, save as a means of keeping an offender out of prison" (at 355A).

MILNE JP went even further than PAGE J in expressing his repugnance of corporal punishment. He described it as "a brutal and degrading form of punishment" (at 357I), and went on to say at 358A-C:

"Quite apart from its effect upon the recipient, it must inevitably tend to brutalise and degrade the individual who actually inflicts it. Judges and magistrates must know what a whipping is really like, but I doubt whether this applies to the general public. No doubt many of the general public who would call themselves 'civilised' would, when confronted with a particular cruel or violent crime, express the view that the culprit should be punished with equal violence, including a whipping. For example, cases such as the torture or assault of infants produce this kind of reaction. One suspects, however, that the majority of such people would, if obliged to witness a whipping, be likely to change their minds about its desirability."

Finally, there is the judgment of GOLDSTONE J in *S v Ndaba & Ors supra* in which at 245A-C the learned judge readily accepted the proposition that corporal punishment is a severe punishment that is brutal in nature.

Utterances by South African academics have been to the same effect. Almost thirty years ago Professor Ellison Kahn, in an article on *Crime and Punishment* published in 1960 *Acta Juridica* 191 at 207 pointed out that:

"... the degenerating and brutal punishment of flogging with a whip or cane has been abolished or greatly restricted in operation in almost the whole civilised world."

In more recent times van Zyl-Smith and Offen of the Institute of Criminology of the University of Cape town, in their joint article entitled *Corporal Punishment - Joining Issue* (8 SACC 69), remark that the fact that under certain circumstances judges have sanctioned the imposition of corporal punishment "does not undermine the basic policy consideration of the true nature of this form of punishment. It is degrading and brutal". They go on to say that:

"The use of corporal punishment is based on fear which breeds resentment and hostility towards the society that uses it. Such treatment debases, not

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only the individual, destroying his dignity and self-respect, but also the society that permits it. Hymes, relying heavily on Adlerian psychology, observes that corporal punishment not only brutalises the individual but tends to weaken the sense of shame on which the hope of improvement depends. When that shame is destroyed society has lost an important chance to reclaim that individual."

See further Midgley *Sentencing in the Juvenile Courts* 1964 SALJ 451 at 465; van Niekerk *Administration of Justice* 1967 Annual Survey of South African Law at 476-477; and Burchell and Hunt *South African Criminal Law and Procedure* 2 ed vol 1 at 72.

It is also important to note that in the Report of the Commission of Inquiry into the Penal system (the Viljoen Commission), tabled in the South African Parliament in January 1977, the view is endorsed that the whipping of adults constitutes a brutal assault, not only on the person of the recipient, but also upon his dignity as a human being.

THE POSITION IN OTHER COUNTRIES

(a) THE UNITED KINGDOM

The Report of the Departmental Committee on Corporal Punishment (1938) ("the Cadogan Committee") led to the abolition of corporal punishment in the United Kingdom. This was done by the introduction of the Criminal Justice Act, 1948. Page 59 of the Report contains the following statement:

"In its own interests society should in our view, be slow to authorise a form of punishment which may degrade the brutal man still further and may deprive the less hardened man of the last remaining traces of self-respect. As applied to adults, corporal punishment is certainly more degrading than any of the other punishments recognized by our criminal law."

In 1960 the Advisory Council on the Treatment of Offenders, under the Chairmanship of Mr Justice Barry, considered that the findings of the Cadogan Committee were still valid and unanimously recommended that corporal punishment should not be reintroduced as a judicial penalty in respect of any category of offender. A summation of their recommendations, as set out in paragraphs 87 and 88 of the Report, reads:

"87. . . . the reintroduction of judicial corporal punishment could be justified only if there was a reasonable assurance that it would substan-

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tially reduce crime and afford real protection to potential victims. We think that there cannot be any such assurance. There is no evidence that corporal punishment is an especially effective deterrent either to those who have received it or to others. We recognize that in a limited number of cases a sentence of corporal punishment would deter both the offender who received it and other potential offenders; but the same could be said of many forms of drastic and severe punishment which have long since been abolished as affronting the conscience of a civilised community. We are not satisfied that the numbers likely to be deterred are sufficient to justify the reintroduction of a form of punishment that has the manifold disadvantages discussed elsewhere in this report.

88. Fourthly, judicial corporal punishment is out of line with modern penal methods and would militate against the success of reformatory treatment, such as probation or borstal training."

(b) CANADA

Corporal punishment was abolished in Canada with the enactment of the Criminal Law Amendment Act, 1972. Prior to its abolition it was a sentencing option which could be invoked at the discretion of the trial judge as part of the punishment for a variety of sexual offences, robbery, breaking and entering when armed, or overcoming resistance by attempting choking, suffocating or strangling to facilitate the commission of a crime. But generally it was saved for exemplary cases in which a marked degree of violence had been used upon the victim. Its constitutional validity was never placed in doubt, for the judiciary considered that, as Parliament in its wisdom had seen fit to provide for it, it was up to Parliament and not the courts to determine whether it should remain as a punishment on the statute books.

The closest that any court appears to have come in assessing its validity in any constitutional measure was in *R v Dick, Penner and Finnigan* [1965] 1 CCC 171, a decision of the Manitoba Court of Appeal. It was argued on behalf of the appellants that corporal punishment was a "cruel and unusual punishment" within the meaning of s 2(b) of the Canadian Bill of Rights, and that this clause rendered inoperative s 136 of the Criminal Code, which provided:

"Everyone who commits rape is guilty of an indictable offence and liable to imprisonment for life or to be whipped."

The majority of the court upheld the sentences of four years and ten strokes of the strap on each of the appellants on the basis that the Bill of Rights was

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not presumed to supersede a specific provision of the Criminal code and that, in any event,

corporal punishment was "not unusual to any sense of the word" (*per* SCHULTZ JA at 177). Even FREEDMAN JA, who dissented on the ground that the offence did not fall within the class of cases sufficiently brutal and shocking to make corporal punishment an appropriate sentence, did not dispute its validity as a mode of punishment. He said at 185:

"Parliament, for the present at least, has spoken. It has elected to retain corporal punishment as a penalty for certain offences. It is not for a Judge to veto or negate the decision of Parliament."

This decision must be approached with caution, however, for at that time the Canadian Bill of Rights was a Federal statute applicable only to Federal laws and institutions and did not have constitutional status. Moreover, in *R v Smith* (1987) 40 DLR (4th) 435 (SCC) at 478, LAMER J, in considering s 12 of the Canadian Charter of Rights and Freedoms (the present constitutional equivalent of s 2(b) of the Canadian Bill of Rights), said *obiter*:

"Finally I should add that some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example the infliction of corporal punishment such as the lash, irrespective of the number of lashes imposed . . ."

In his article *Corporal Punishment* (1967-68) 10 Criminal Law Quarterly 320 at 327-328, AM Kirkpatrick spoke out strongly against corporal punishment:

"Corporal punishment debases the recipient and those who administer it. It offends the attitudes and knowledge of today's generation regarding human beings and their behavioural manifestations. The time has come when corporal punishment should not only be abolished as a sentence of the court authorized by the Criminal Code but should be abolished in all correctional institutions for all age of offenders and that its passing will be unmarked, as in previous instances and other jurisdictions, by any added difficulties of institutional management."

See also Parker *Corporal Punishment in Canada* (1960-61) 3 Criminal Law Quarterly 193.

(c) AUSTRALIA

Whipping as a form of punishment has been abolished in all States except Western Australia. It was removed from the Queensland Criminal Code as

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from 29 March 1986. On the information available it appears that although it remains a valid punishment under the Western Australian Criminal Code, it is no longer resorted to, and there are no regulations under the Prison Act facilitating its infliction.

The position in the Territories is that, technically, the punishment of whipping is available under the Penal Code of Singapore which remains in force in the Territories of Christmas Island and of Cocos (Keeling) Islands and under the Crimes Act 1900 of New South Wales in its application to the Territory of Norfolk Island. The punishment has not been imposed, however, since the Territories came under Australian jurisdiction.

Prior to the official abolition of whipping as a penalty, the practice of ordering it was increasingly on the decline. This is exemplified by the observation of NAPIER CJ made forty years ago in *R v Mogg* [1948] SASR 37 at 39:

"... we think that the power to order a whipping is one that ought only to be exercised in a case of real necessity - that it is a power to be used in the last resort - and not as an ordinary weapon of the law."

And, further, at 40:

"The court is given the power to order a whipping, which means that it should do so, if it thinks that there is some sufficient reason for resorting to that form of punishment. The 'good reason', in our opinion, is that the crime is of such an exceptional nature as to call for resort to punishment which savours of '*lex talionis*'."

In *R v Taylor and O'Meally* [1958] VR 285 SMITH J, dissenting, came to the conclusion that the conduct of the two applicants (who were seeking leave from the Supreme Court of Victoria to appeal against their sentences) in shooting a warder at close range and wounding him in the course of escaping from the gaol was not deserving of a whipping being conjoined to long periods of imprisonment. In a closely reasoned judgment he said at 293:

"Whether whipping is to be regarded as a severe punishment or not must, of course, depend on the standards of the time. A few centuries ago, when suspects were interrogated on the rack, and burning at the stake was common, and the ordinary penalty for serious crime was death, whipping was naturally regarded as a minor punishment. But with the growth of feeling against cruelty and the development of modern police systems, and the consequent drastic reduction in the severity of the

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sanctions of criminal law, whipping has come to be regarded, and properly so, as an extremely severe punishment when imposed upon adults. In addition, over the last hundred years or thereabouts, the view has steadily gained ground, and it appears now to be generally accepted by those expert in such matters, that the whipping of adults is a form of punishment the use of which is ordinarily unwise, because it is likely to prove harmful not only to the prisoners so punished, but also to the interests of the gaol staffs and the community as a whole.

Over one hundred years ago the Commissioners on the Criminal Law, in their Seventh Report, expressed the opinion that, with very narrow exceptions confined to cases in which it might be proper to mark the offence with signal reprobation, the punishment of whipping should be rejected. 'It is a punishment', they said, 'which is uncertain in point of severity, which inflicts an ignominious and indelible disgrace on the offender, and tends, we believe, to render him callous and greatly to obstruct his return to any honest course of life'."

Quoted with approval by the learned judge was the view expressed in *Grunhut on Penal Reform* (1948) at 270:

"Corporal punishment brutalises the prisoner and executioner alike. It breeds hatred and bitterness, uproots personal dignity, and frustrates any attempt at social re-adjustment. At the same time it arouses among fellow prisoners a community of interests against the prison regime and a sympathy with its victims."

(d) UNITED STATES OF AMERICA

In 1790 Congress excluded whipping and standing in the pillory from the punishments that might be imposed by Federal Courts for federal offences. Today only Delaware still retains the whipping post, referred to by its victims as "Red Hannah", because it was painted red, (when an offender was whipped, it would be said that he had hugged Red Hannah). However, in some States it continued to be applied as a method of enforcing prison discipline and against juveniles in institutions or reformatories. See, for instance, *Talley v Stephens* (1965) 247 F Supp

683; *Jackson v Bishop* (1968) 404 F 2d 571; *Nelson v Heyne* (1974) 491 F 2d 352.

(e) Zambia, Malawi, Botswana, Lesotho and Swaziland retain whipping as a punishment. But modern conceptions of justice and humanity have led most European and Scandinavian countries totally to deny the utility of

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corporal punishment. And, I believe, the same is true of Argentina, Mexico, India, Ghana, Jamaica and Belize.

THE METHOD AND PROCEDURES UNDER WHICH CORPORAL PUNISHMENT IS ADMINISTERED IN ZIMBABWE

Sections 106 to 109 of the Prisons Act [*Chapter 21*] read as follows:

"106. Corporal punishment shall be inflicted with a case of a type and in a manner approved by the Minister.

107. A sentence of corporal punishment shall not be carried out unless -

- (a) a medical officer has, after examination, certified that in his opinion the prisoner is physically fit to undergo the sentence of corporal punishment about to be inflicted on him; and
- (b) the medical officer who made the examination referred to in paragraph (a) and the officer in charge are present when the corporal punishment is being inflicted on the prisoner.

108. The medical or prison officer mentioned in section *one hundred and seven* may at any time during the carrying out of the sentence of corporal punishment intervene and prohibit the remainder of the sentence from being carried out if, in his opinion, the punishment is likely to cause more serious injury than is contemplated in the sentence.

109. No sentence of corporal punishment shall be carried out by instalments."

The type of cane approved by the Minister, in the case of an adult, is a rattan cane, four feet long (1,2 metres) and not more than half-an-inch (12,5 mm) in diameter. It is commonly referred to as a "heavy cane". The approved manner of the infliction of the strokes is this:

- (a) a blanket or similar form of kidney protector is to be placed across the small of the prisoner's back above the buttocks;
- (b) a small square of thin calico is to be dipped in water, wrung out, and tied over the prisoner's buttocks;
- (c) the strokes are to be administered from one side upon the buttocks and on no account upon the prisoner's back.

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The punishment is administered in private in any section of the prison which is clear of prisoners. Four prison officers must attend, including the officer-in-charge or his deputy. The

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latter must ensure that the prisoner undergoing the corporal punishment is not made aware of the identity of the officer administering it. (See ss 109 to 111 of the Prison Regulations 1956, as amended by ss 180 to 182 of the Director of Prisons Standing Orders.)

The scene is best described thus: Once the prisoner is certified fit to receive the whipping, he is stripped naked. He is blindfolded with a hood and placed face down upon a bench in a prone position. His hands and legs are strapped to the bench, which is then raised to an angle of 45 degrees. The aforementioned calico square is tied over his buttocks and the kidney protector secured above his buttocks at waist level. The prisoner's body is then strapped to the bench. The cane is immersed in water to prevent splitting. The strokes are administered to one side across the whole of the buttocks.

It is within the power of the officer administering the strokes to determine their strength, timing and, to some extent, their placement upon the buttocks. A second stroke upon the same part as an earlier stroke undoubtedly causes greater pain than were it to be placed elsewhere.

THE RELEVANT CONSTITUTIONAL PROVISIONS

Section 24 of the Constitution of Zimbabwe vests in the Supreme Court the power to declare any law, be it written or otherwise, in violation of the Declaration of Rights. The relevant protection is embodied in s 15(1). It reads:

"No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

There is a significant difference between the above provision and its counterparts in the former Constitutions of this country. Section 16(3) of the 1961 constitution, s 69(3) of the 1965 Constitution, para 4(2)(a) of the Second Schedule to the 1969 Constitution, and s 123(3) of the 1979 Constitution all derogated from the protection against torture or inhuman or degrading punishment or treatment, since in effect they permitted the imposition of any punishment or other treatment which could lawfully be imposed at the time each of these Constitutions came into force. And there was no time limit placed upon the derogation. The infliction of judicial whipping could not therefore be impugned as an inhuman or degrading punishment.

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Not so with s 15(1), for since 18 April 1985 the fundamental protection it affords to citizens and non-citizens alike is no longer rendered nugatory by any pre-existing law. Plainly it was the intention of the framers of the Constitution that, after the expiration of a period of five years, this court would be free to determine whether any form of torture, punishment or treatment imposed upon an individual was in contravention of the subsection. The prohibition is now absolute. No exception to its application is provided.

THE CONSTRUCTION OF SECTION 15(1)

While the word "torture" stands alone in the subsection, the nouns "punishment" and "treatment" are qualified by the adjectives "inhuman" and "degrading". The use of the word "or" and not "and", between "inhuman" and "degrading" favours a disjunctive and not a conjunctive

interpretation. Certainly that was the construction applied to the identical protection by both the European Court of Human Rights in *Tyrer v United Kingdom* (1978) 2 EHRR 1 at 9 and by AGUDA JA, a member of the Botswana Court of Appeal, in *S v Petrus & Anor* [1985] LRC (Const) 699 at 725c and I am in respectful agreement with it for two reasons:

In the first place, the word "or" is usually treated as disjunctive unless there is a compelling indication that in its context it means "and". See *Colonial Treasurer v Eastern Collieries Ltd* 1904 TS 716 at 719; *Hayward, Young and Co (Pty) Ltd v Port Elizabeth Municipality* 1965 (2) SA 825 (AD) at 829B; *Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board & Ors* 1982 (4) SA 427 (AD) at 444C-D.

Secondly, it is a well recognised principle that a benevolent interpretation is to be accorded to constitutional rights and freedoms. See *Minister of Home Affairs v Dabengwa* 1982 (1) RLR 236 (SC) at 243G-244F; *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (SC) at 381; 1984 (2) SA 778 (SC) at 782G-783A.

Consequently the subsection placed prohibitions against (i) torture; (ii) inhuman punishment; (iii) degrading punishment; (iv) inhuman treatment; and (v) degrading treatment.

Punishment or treatment which is inhuman will often be degrading as well, but there is a somewhat lesser likelihood of punishment or treatment which is degrading being also inhuman. Treatment has a different connotation from

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punishment. It seems to me what is envisaged is treatment which accompanies the sentence. In other words, the conditions associated with the service of sentences of imprisonment are now subject to the proscription. The frequency and conditions of searches of convicts and remand prisoners, the denial of contact with family and friends outside the prison, crowded and unsanitary prison cells and the deliberate refusal of necessary medical care, might afford examples. But I offer no opinion on the matter, for these appeals are not concerned with either torture or treatment. The issue on which they turn is whether the punishment imposed is inhuman or degrading.

On its face s 15(1) is aimed primarily at the quality or nature of punishment. Certain types of punishments are acknowledged to be inherently inhuman and degrading. Those involving the rack, the thumb screw, the pillory, burning alive or at the stake, prolonged periods of solitary confinement and starvation, fall unquestionably into this category. But s 15(1) is not confined to punishments which are in their **nature** inhuman or degrading. It also extends to punishments which are "grossly disproportionate"; those which are inhuman or degrading in their disproportionality to the seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty - the punishment being so excessive as to shock or outrage contemporary standards of decency.

There are many decisions of the Federal Supreme Court of the United States which lay down unequivocally that under the protection afforded the individual by the Eighth Amendment to the Constitution, any punishment imposed upon him by the State must be graduated and

proportionate to the crime he has committed. His constitutional right will have been infringed if, having regard to the nature and quality of the offence committed, the sentence is so unfit as to be grossly disproportionate. In other words, although the State may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate. See for instance, *Weems v United States* (1910) 217 US 349; 54 L Ed 793 at 799; *Gregg v State of Georgia* (1976) 428 US 153; 49 L Ed 2d 859 at 875; *Ingraham v Wright* (1977) 430 US 651; 51 L Ed 2d 711 at 727-728; *Hutto v Finney* (1978) 437 US 678; 57 L Ed 2d 522 at 531; *Solem v Helm* (1983) 463 US 277; 77 L Ed 2d 637 at 645.

In citing these authorities in support of the principle of proportion in punishment, I am aware of its rejection in *Gundu & Anor v Sheriff of Southern Rhodesia & Anor* 1965 RLR 301 (AD) and *R v Runyowa* 1966 RLR 42 (PC); [1966] 1 All ER 633 (PC). In both these cases it was held that the words

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"inhuman or degrading punishment" are to be restricted to modes or types of punishment which are in themselves inhuman or degrading and are not to be construed in the wider sense of including punishment which, though not necessarily inhuman or degrading *per se* may become so when it is excessive in relation to the offence for which it is prescribed.

With due deference, that to me is an unjustifiably narrow interpretation of a fundamental right. I do not regard it as unreasonable to suggest that the inhumanity or degrading nature of a punishment may well depend on the context in which, and the reasons why, it is imposed. Albeit capital punishment is not *per se* unconstitutional (see s 12(1)) it would be inhuman or degrading if arbitrarily imposed for, say, theft, fraud, or indecent assault. A good example of the working of this principle is afforded in the case of *Rummel v Estelle* (1980) 445 US 263, 63 L Ed 2d 382. See also Corwin and Peltason's *Understanding the Constitution* 10 ed at 213-214.

The possibility should always be borne in mind of Parliament decreeing as a punishment for a specific offence a minimum duration of imprisonment which is so obviously draconian as to pass beyond all rational bounds of punishment in the eyes of right-thinking persons. One has only to recall the mandatory minimum punishment of nine years' imprisonment with labour prescribed by the Legislature in 1976 (fortunately repealed in 1982) for the theft or attempted theft of a single bovine or horse. It is in this sense that the disproportionality principle has relevance to what is an inhuman or degrading punishment.

Furthermore, I have not overlooked the *dicta* in *Gundu's* case, *supra*, at 313G and 319 in fine 320B, and in *R v Runyowa supra* at 53F (or at 642C), to the effect that the wording of the Eighth Amendment is so markedly at variance with that in s 16(1) of the 1961 Constitution (now s 15(1)) as to provide no useful interpretative guide. The Eighth Amendment reads:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

While the many and obvious differences between the American constitutional system and our own must be readily acknowledged, it is my belief that to dismiss the attitudes and expressions emanating from the distinguished Justices of the Supreme Court of the United States as entirely

irrelevant to an examination of s 15(1) is not justified. They are, at the very least, helpful in establishing the basic concept against which the protection

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under s 15(1) should be construed. I perceive that concept to be this, and I state it in language borrowed from such decisions as *Jackson v Bishop supra Trop v Dulles* (1958) 356 US 86; 2 L Ed 630; *Furman v State of Georgia* (1972) 408 US 238; 33 L Ed 2d 346; *Gregg v State of Georgia supra*; *Estelle v Gamble* (1976) 429 US 97; 50 L Ed 2d 251; *Hutto v Finney supra*:

"The *raison d'être* underlying section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity, and decency, against which penal measures should be evaluated. It guarantees that the power of the State to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant. Thus a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances."

The precise meaning of the words "inhuman" and "degrading" must now be considered: "Inhuman" is defined in the Oxford English Dictionary as:

"Destitute of natural kindness or pity; brutal, unfeeling, cruel; savage, barbarous."

And to "degrade" as:

"To lower in estimation, to bring into dishonour or contempt; to lower in character or quality; to debase."

Barnett, in *The Constitutional Law of Jamaica* (1977) at 391, deals with s 17(1) of the Jamaica Constitution, which is in similar terms to s 15(1), and sums up its purport as follows:

"It seems that 'inhuman' is limited to such action as by its very nature is barbarous, brutal or cruel and not merely such treatment as results from want of pity or human feeling, and 'degrading' connotes treatment which is calculated to, or in all probability will (not merely might) destroy the human qualities and character of the recipient."

I respectfully agree with the learned author. See too *S v Chabalala* 1986 (3) SA 623 (BAD) at 628D-E. I also have no difficulty in accepting the

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proposition that the words "cruel and unusual punishment" impart the same idea as do inhuman or degrading punishment". See *S v Petrus & Anor supra* at 714f and 725d-f. For the former phraseology, being taken as a "compendious expression of a norm", has been held to mark a punishment which is inhuman or barbarous; one degrading to the dignity of human beings.

IS CORPORAL PUNISHMENT *PER SE* INHUMAN OR DEGRADING?

The answer, so it seems to me, is dependent upon the exercise of a value judgment by this court. That being so, judgments of the courts of other countries would normally be viewed with a certain degree of circumspection. Fortunately on the few occasions where the issue of whether whipping is constitutionally defensible has been judicially considered, it appears to have resulted in little difference of opinion, whether imposed upon an adult person or a juvenile offender the punishment in the main has been branded as both cruel and degrading.

The leading authority in America, and the one most apposite, is *Jackson v Bishop* 404F 2d 571, which was decided in 1968 by the United States Court of Appeal (Eighth Circuit). In that case the three appellants, adult inmates of the Arkansas penitentiary, sought an injunction barring the use of the strap as a disciplinary measure in Arkansas' penal institutions. The claim was that the lower court had erred in refusing to hold that corporal punishment of prisoners was a cruel and unusual punishment within the meaning of the Eighth Amendment and in holding that the whipping of prisoners, so long as it was accompanied by appropriate safeguards, was not unconstitutional *per se*. The appeals were allowed. BLACKMUN, Circuit Judge, (as he then was), delivering the panel opinion, said this at 579:

"... we have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court in the *Carey* and *Lee* cases."

Among the reasons given for that conclusion were that corporal punishment is easily subject to abuse in the hands of the sadistic and unscrupulous, that it generates hate towards the persons who administer it and the system which

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permits it, and that it is degrading to the punisher and the punished alike, frustrating correctional and rehabilitative goals. (See at 579-580.) The decision must be taken to have overruled that of the Arkansas District Court in *Talley v Stephens* 247 F Sup 683 (1965).

In *Nelson v Heyne* 491 F 2d 352 (1974) the United States Court of Appeals (Seventh Circuit) held that, although corporal punishment in juvenile institutions or reformatories is not *per se* cruel and unusual punishment, the disciplinary beatings at issue in the case, namely the use of a wooden "fraternity paddle" two foot long, one-quarter to one-half an inch thick and six inches wide, upon the buttocks of juveniles between the ages of twelve and eighteen years causing painful injuries, constituted cruel and unusual punishment as being disproportionate to the offences, and did not measure up to contemporary standards of decency.

In *Ingraham v Wright supra* the Supreme Court held, by a five to four plurality, that the cruel and unusual punishment clause in the Eighth Amendment applies only to criminal punishments and hence provides no protection against the imposition of "paddling" upon students of public schools as a means of maintaining discipline. In his dissent JUSTICE WHITE, with whom JUSTICES BRENNAN, MARSHALL and STEVENS concurred, said at 692:

"Where corporal punishment becomes so severe as to be unacceptable in a civilised society, I can see no reason

that it should become any more acceptable to us because it is inflicted on children in the public schools."

In the course of his opinion JUSTICE WHITE referred with apparent approval to *Jackson v Bishop supra* noting that while the decision in that case, involving as it did the flogging of persons convicted of crimes and serving prison sentences:

"... may be acceptable in the criminal justice system, ... it has little if any relevance to corporal punishment in the schools, for it can hardly be said that the use of moderate paddling in the discipline of children is inconsistent with the country's evolving standards of decency." (At 684 n1).

See also *Campbell and Cosans v United Kingdom* 4 EHRR 293.

But perhaps the most important decision is that of the European Court of Human Rights in *Tyrer v United Kingdom supra* delivered on 25 April 1978, for it was concerned directly with Article 3 of the European Convention of

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Human Rights - a provision worded virtually identically to s 15(1) of the Constitution of Zimbabwe. The facts were these:

Tyrer, aged fifteen years and a resident of the Isle of Man, pleaded guilty on 7 March 1972 before the local juvenile court to unlawful assault occasioning actual bodily harm to a senior pupil at his school. He was sentenced to three strokes of the birch in accordance with relevant legislation. He appealed against the sentence to the High Court of Justice of the Isle of Man. His appeal was dismissed on 28 April 1972. He was birched later in the afternoon of the same day. He was made to take down his trousers and underpants and bend over a table. He was held by two policemen whilst a third administered the punishment, pieces of the birch breaking at the first stroke. The birching raised, but did not cut, Tyrer's skin and he was sore for about ten days thereafter.

An application was lodged with the European Commission of Human Rights, complaining that the judicial corporal punishment suffered constituted a breach of Article 3. In its Report the Commission expressed the opinion that judicial corporal punishment, being degrading, violated Article 3 and that consequently its infliction upon Tyrer was unconstitutional. It also held, however, that, in order to be classified as an "inhuman" punishment, the suffering occasioned must attain a particular level which on the facts of the case had not been reached.

The European Court of Human Rights agreed with this latter view and concerned itself solely with the question of whether Tyrer had been subjected to "degrading" punishment. It held that he had. Paragraphs 30 and 32 to 35 of the judgment read as follows:

"30. The Court notes first of all that a person may be humiliated by the mere fact of being criminally convicted. However, what is relevant for the purposes of Article 3 is that he should be humiliated not simply by his conviction but by the execution of the punishment which is imposed on him. In fact, in most if not all cases this may be one of the effects of judicial punishment, involving as it does unwilling subjection to the demands of the penal system.

However, as the Court pointed out in its judgment of 18 January 1978 in the case of *Ireland v The United Kingdom*, the prohibition contained in Article 3 of the Convention is absolute: no provision is made for exceptions

and, under Article 15(2), there can be no derogation from

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Article 3. It would be absurd to hold that judicial punishment generally, by reason of its usual and perhaps almost inevitable element of humiliation, is 'degrading' within the meaning of Article 3. Some further criterion must be read into the text. Indeed, Article 3, by expressly prohibiting 'inhuman' and 'degrading' punishment, implies that there is a distinction between such punishment and punishment in general.

In the Court's view, in order for a punishment to be 'degrading' and in breach of Article 3, the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation referred to in the preceding sub-paragraph. The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution.

...

32. As regards the manner and method of execution of the birching inflicted on Mr Tyrer, the Attorney-General for the Isle of Man drew particular attention to the fact that the punishment was carried out in private and without publication of the name of the offender.

Publicity may be a relevant factor in assessing whether a punishment is 'degrading' within the meaning of Article 3, but the Court does not consider that absence of publicity will necessarily prevent a given punishment from falling into that category: it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.

The Court notes that the relevant Isle of Man legislation, as well as giving the offender the right of appeal against sentence, provides for certain safeguards. Thus, there is a prior medical examination; the number of strokes and dimensions of the birch are regulated in detail; a doctor is present and may order the punishment to be stopped; in the case of a child or young person, the parent may attend if he so desires; the birching is carried out by a police constable in the presence of a more senior colleague.

33. Nevertheless, the Court must consider whether the other circumstances of the applicant's punishment were such as to make it 'degrading' within the meaning of Article 3.

The very nature of judicial corporal punishment is that it involves one

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human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. . . . Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.

...

34. In the present case, the Court does not consider it relevant that the sentence of judicial corporal punishment

was imposed on the applicant for an offence of violence. Neither does it consider it relevant that, for Mr Tyrer, birching was an alternative to a period of detention: the fact that one penalty may be preferable to, or have less adverse effects or be less serious than, another penalty does not of itself mean that the first penalty is not 'degrading' within the meaning of Article 3.

35. Accordingly, viewing these circumstances as a whole, the Court finds that the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notice of 'degrading punishment' as explained at paragraph 30 above. The indignity of having the punishment administered over the bare posterior aggravated to some extent the degrading character of the applicant's punishment but it was not the only or determining factor.

The Court therefore concludes that the judicial corporal punishment inflicted on the applicant amounted to degrading punishment within the meaning of Article 3 of the Convention."

The only dissent came from SIR GERALD FITZMAURICE. It was his opinion that corporal punishment, when applied to juvenile and young offenders under proper restrictions and safeguards, did not constitute a breach of Article 3 as "degrading" punishment in the same way as it is considered to be in the case of adults (see para 11).

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GUBBAY JA

The significance of this decision is that it is implicit in both the majority and minority judgments that the infliction of a whipping upon an adult offender would contravene Article 3 as amounting to a "degrading" punishment.

Then there is the case of *S v Petrus & Anor supra*. There the issue was whether repeated and delayed corporal punishment imposed upon an adult offender by virtue of an amendment to the Criminal Procedure and Evidence Act introduced after the coming into operation of the Botswana Constitution on 30 September 1966, was an inhuman or degrading form of punishment in contravention of s 7(1) of the Constitution. It was unanimously held to be so. But in a separate judgment AGUDA JA went further than the other members of the court. There is no doubt that in the absence of the saving clause in that constitution permitting the enactment of a law which:

"... authorises the infliction of any description of punishment that was lawful by 29 September 1966"

the learned Judge of Appeal would have struck down judicial whipping of an adult offender as an inhuman and degrading form of punishment. (See at 724c-725a.) His remarks in this regard are, however, *obiter*.

In the exercise of a value judgment this court must remain uninfluenced by the fact that the demand for humane, civilised and physically painless punishment is made by those guilty of subjecting their victims to inhuman, degrading and violent acts involving mental anguish. Because retribution has no place in the scheme of civilised jurisprudence, one cannot turn a deaf ear to the pleas of the appellants for justice, on the ground that the enormity of their crimes has caused grave injustice to their victims. Humaneness and dignity of human beings is the hallmark of civilised laws, and justice must be done dispassionately and in accordance with Constitutional mandates, no matter the occasion. The question is not whether this court condones the rapes committed by the appellants, for certainly it does not. It is whether the

whipping remains a punishment consistent with one's self-respect.

I am firmly of the opinion, reached, I must confess, with little hesitation, that the whipping each appellant was ordered to receive breaches s 15(1) of the Constitution of Zimbabwe as constituting a punishment which in its very nature is both inhuman and degrading. In coming to this conclusion I have had regard to: (i) the current trend of thinking amongst those distinguished jurists and leading academics to whom reference has been made; (ii) the abolition of whipping in very many countries of the world as being repugnant

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GUBBAY JA

to the consciences of civilised men; (iii) the progressive move of the courts in countries in which whipping is not susceptible to constitutional attack, to restrict its imposition to instances where a serious, cruel, brutal and humiliating crime has been perpetrated; and (iv) the decreasing recourse to the penalty of whipping in this country, especially over the last ten years, and the declining number of laws on the Statute Book in which it remains a permissible penalty; compare *R v Lobi* 1942 SR 152.

But more especially I place reliance upon the following adverse features which are inherent in the infliction of a whipping. They are :

1. The manner in which it is administered, as I have described it, is somewhat reminiscent of flogging at the whipping post, a barbaric occurrence particularly prevalent a century or so past. It is a punishment, not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency.
2. By its very nature it treats members of the human race as non-humans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord him human status.
3. No matter the extent of regulatory safeguards, it is a procedure easily subject to abuse in the hands of a sadistic and unscrupulous prison officer who is called upon to administer it.
4. It is degrading to both the punished and the punisher alike. It causes the executioner, and through him, society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime in particular and the system of justice in general.

CONCLUSION

It was not argued on behalf of the appellants, and perhaps understandably so, that the whippings they were ordered to receive rendered the sentences disproportionate to the crimes for which they have been convicted. Nevertheless I prefer to express no definite view on that point.

GUBBAY JA

Finally this court would like to express its indebtedness to Mr *de Bourbon* and Mr *Fitches*, who appeared for the appellants at its request, and whose industrious research into the authorities proved of invaluable assistance.

The challenge to the constitutionality of a sentence of a whipping upon the person of a male adult is upheld. The appeals are accordingly allowed to the extent that the imposition of the strokes are to be deleted from the sentences.

Dumbutshena CJ: I agree.

McNally JA: I agree.

Manyarara JA: I agree.

Korsah JA: I agree.

Pro Deo

HUIZENGA NO v ZWINOIRA 1987 (2) ZLR 276 (HC)

Court High Court, Harare

Annotations [Link to Case Annotations](#)

Adam J

30 November & 16 December 1987

Civil trial

Flynote

Insolvency Act [Chapter 303] - dispositions without value - onus of proof in seeking to establish such.

Headnote

Section 42 of the Insolvency Act [*Chapter 303*] requires the liquidator of an insolvent estate who is attempting to set aside a disposition of property made by the insolvent before his insolvency to prove, first of all, that the insolvent had made a disposition of his property, which disposition was not made for value. The onus is on the liquidator to make out "some case to answer", in the sense that he has to lead such evidence as would *prima facie* prove his claim. The court has to determine whether there is evidence before it that *prima facie* shows that there was no obligation on the insolvent to make the disposition or that the insolvent made the disposition deliberately and in full awareness of impending insolvency, in order to favour the recipient, or

inadvertently, not appreciating that he was in insolvent circumstances. The plaintiff has to lead evidence to show that there was no lawful obligation to pay the money and that what happened was not part of transactions which are entered into in the ordinary course of business.

Cases cited:

Smith's Trustee v Smith 1927 AD 482

Gascoyne v Paul & Hunter 1917 TPD 170

Myburgh v Kelly 1942 EDL 202

Supreme Service Station (1969)(Pvt) Ltd v Fox & Goodridge 1971 (1) RLR 1 (AD); 1971 (4) SA 90 (RA)

1987 (2) ZLR p277

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Estate Jager v Whittaker 1944 AD 246

Topaz Kitchens (Pvt) Ltd v Naboom Spa (Edms) Bpk 1976 (3) SA 470 (A)

Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd [1941] 2 All ER 165 (HL)

J Sayce for the plaintiff

M J Gillespie for the defendant

Judgment

Adam J: The plaintiff issued out a summons on 17 May 1985, which was amended on 11 March 1987, claiming the sum of \$45 900, being monies lent and advanced by Paweni Corporation (Pvt) Ltd (hereinafter referred to as the "company") to the defendant in July and August 1983, which loans were now due and repayable to the plaintiff, as liquidator of the company now in liquidation, and, alternatively, if it should not be found that the aforesaid monies were advanced on loan as alleged above, the plaintiff claimed payment of the sum of \$900 which was paid to the defendant on 19 July 1983 and the sum of \$45 000 which was paid to his agent, Messrs Gill, Godlonton and Gerrans, on 22 August 1983 on the grounds that the said payments constituted dispositions of the property of the company, which went into liquidation on 30 May 1984 and that the said dispositions were not made for value. The defendant in his plea denied entering into any agreement of loan or receiving any monies by way of loan and, further, denied receiving, or receiving the benefit of, any disposition made by the company without value; but he admitted that the company issued to Gill, Godlonton and Gerrans a cheque dated 22 August 1983 for \$45 000 and that the proceeds of the cheque were applied towards the purchase price of the residence bought by the defendant. The defendant denied that payment to Gill, Godlonton and Gerrans constituted a disposition without value the benefit of which was received by the defendant.

At the commencement of the actual trial, the plaintiff made application to withdraw the claim for \$900, indicating that the claim was now only for \$45 000 as a loan and in the alternative as a payment constituting disposition of the property of the company which disposition was not made for value. Since the plaintiff's summons has a claim and an alternative claim I will deal with each of them.

A Mr Atkinson, representing the liquidator of the company, gave evidence on his behalf. He stated that he had been responsible for the winding up of the company and had consulted the cash books, bank statements and pay

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cheques of the company and that these were the only records available to him. From these, he stated, he was not able to draw a complete picture as to the financial position of the company.

In cross-examination he stated that in the cash book the earliest entry was "June 1982" and as far as the bank statements were concerned they were from April 1983 until May 1984 just before the company went into liquidation. He said the earliest bank statement that he had with himself was July 1983 but there were others which he had not brought along. He did not know what type of business the company was involved in but it was a trading company. He read out from the petition as to what the company was supposed to be doing. He said he did not find any invoices or receipt-books. He said he looked at the cash books since it was usually the source of receipts. He agreed that the records were not complete. He said that he did expect to find invoices and receipt books but did not find any. He repeated that he did not have specific knowledge pertaining to the payment of \$45 000 but he agreed that he identified this on the basis that a payment had been made. He was asked what position was held by Mr Thompson and Mr Lynch and he said that they were directors of the company. He further said that he did not have any other documents that would assist him. He referred to the cash book in his possession and a photocopy of the relevant page was entered by consent of the parties as Exhibit 1. This disclosed an entry for August 1983 under the title "Particulars". In a column below was written "Gill, Godlonton"; while under the title "Bank" - in the same column but across the page - an amount "\$45 000" was written, and under the title "Sundries" in the same column but again across the page an amount "\$45 000" was written. He also tendered a "First Interim Liquidation and Distribution Account" prepared by himself dated 9 May 1987 as Exhibit 3. This revealed that the company's liabilities exceeded its assets. He also said that according to the petition filed by the company, it was unable to pay its debts. He was asked if he had made a search to see if there was any *quid pro quo* for the sum of \$45 000 and he replied that he had done so from the records available to him but could not find an identical payment for such an item. He also stated that he did not have specific knowledge about the circumstances pertaining to this payment. To his knowledge Mr Paweni was not a director of the company and as far as the reference in the defendant's plea to a Mr Thompson and Mr Lynch, he said that Mr Thompson had died and Mr Lynch had left the country. He was asked whether it could be said that the cash book was properly kept and he replied that it appeared to be properly kept. When he was asked that the entry on Exhibit 1 showed that the payment of \$45 000 was clearly dated the "23rd", he replied most candidly that on Exhibit 1 the last entry was on the "29th" but

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on the next page after Exhibit 1 the date indicated on the page was the "23rd" once again.

During re-examination he was shown the petition for the winding up of the company and read out that Joseph Chipudhia, Naboth Chaibva and Gertrude Alice Paweni were the directors as of the date of the petition which was 28 May 1984. He also stated that efforts had been made by him to obtain books and accounts pertaining to the company with the assistance of the police but he had not been successful.

The plaintiff having closed its case, the defendant applied for judgment of absolution from the instance, which meant that this court was being asked to dismiss the plaintiff's claim with costs.

The plaintiff's counsel correctly conceded that the plaintiff had not lead any evidence to show the amount of \$45 000 was lent and advanced to the defendant and which loan was now due and repayable to the plaintiff as the liquidator of the company.

It cannot be said that the plaintiff had adduced sufficient *prima facie* evidence which called for an explanation from the defendant. See *Smith's Trustee v Smith* 1927 AD 482 at 487. It follows that judgment of absolution from the instance must be granted in favour of the defendant on the plaintiff's claim on the loan of \$45 000.

I will now consider the plaintiff's alternative claim for payment of \$45 000 on the ground that such payment constituted a disposition of the property of the company in liquidation which disposition was not made for value.

In *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173 DE VILLIERS JP stated:

"At the close of the case for the plaintiff therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? . . . The question therefore is, at the close of the case for the plaintiff was there a *prima facie* case against the defendant Hunter; in other words was there such evidence before the Court upon which a reasonable man might, not should give judgment against Hunter?"

Also, in *Myburgh v Kelly* 1942 EDL 202 PITTMAN J at 207 observed:

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". . . When absolution is asked for, as here, at the close of the plaintiff's case, the magistrate must bring to bear upon the evidence not his own judgment but the judgment of the reasonable man. Renouncing for the time being any tendency to exercise a judgment of his own, he is bound to speculate on the conclusion at which the reasonable man of his conception not should, but might, or could, arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer."

I would also like to refer to what DE VILLIERS JA in *Smith's Trustee v Smith, supra*, at 485 and 487 stated:

"Now it is clear law that the onus of proof rests upon the person who makes an assertion. . . . There is no shifting of the onus in this case. As was pointed out by INNES CJ in *Frenkel v Ohlssons Cape Breweries* 1909 TS 957 at

961, in most cases the onus is not shifted; it remains upon the plaintiff, but the question always is whether at any stage there is sufficient evidence before the Court to entitle the plaintiff to judgment in the absence of sufficient evidence to the contrary on the part of the defendant."

Further, in *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge* 1971 (1) RLR 1 (GD) at 4-5; 1971 (4) SA 90 (RA) at 92 BEADLE CJ indicated:

". . . The *locus classicus* of the cases dealing with the procedure of absolution from the instance is the old Transvaal case of *Gascoyne v Paul and Hunter* 1917 TPD 120. In that case, it was pointed out that an application for absolution from the instance stands much on the same footing as an application for the discharge of the accused at the close of the evidence for the prosecution, but it is stressed (see p. 173 of the judgment) that it would, indeed, be curious if, in civil cases, we were to apply a more stringent rule of practice than in criminal cases . . .

Gascoyne's case stresses that it is perfectly competent for a court to refuse an application for absolution from the instance when the application is made at the end of the plaintiff's case, but to grant it if the defendant then promptly closes his case and renews the application without calling any evidence at all. There is no inconsistency in two such diametrically opposed orders, though the evidence before the court in each application is identical.

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The reason why there is no inconsistency is because the test to be applied when application is made before the defendant closes his case is 'what might a reasonable court do?'; whereas the test to be applied when the application is made after the defendant has closed its case is 'what ought a reasonable court to do?'. The distinction here between 'might' and 'ought' in this context is an important one. It must be assumed that any judgment which a court 'ought' to give must be the correct judgment, as no court 'ought' to give a judgment which is incorrect. Once it is accepted that a judgment which a court 'might' give may differ from that which it 'ought' to give, it is clear that the judgment which it 'might' give and which differs from the judgment which it 'ought' to give must be an incorrect judgment. As a matter of logic, therefore, in considering what a reasonable court 'might' do, allowance must be made for its making a reasonable mistake and giving an incorrect judgment. It is pure casuistry to say no reasonable court would give an incorrect judgment: if this were so, there would be no need for courts of appeal. . . .

If the only judgment which a reasonable man 'ought' to arrive at is the correct one, there would be no need to speculate on what his judgment would be, because the test would be the usual straightforward, objective one of what is the correct judgment. In speculating, therefore, the judicial officer must take into account the possibility of the reasonable man giving a judgment which is wrong, but not so wrong as to be unreasonably wrong. The test, therefore boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make - a definition which helps not at all.

A feature of application of this sort which must always be borne in mind is that the defendant is giving no evidence. If the defendant closes his case without giving evidence in a proper case, an inference may always be drawn against him from his failure to give evidence contradicting that of the plaintiff and, inasmuch as the onus on a defendant who applies for absolution from instance before closing his case is greater than the onus placed upon him when he applies for absolution from the instance after closing his case, it follows that, in considering applications of this sort, the fact that the defendant has not given evidence at all to refute what appears in the plaintiff's evidence is often a cogent factor to be taken into account.

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ADAM J

Before concluding my remarks on this subject, I might stress the rules of procedure are made to ensure that justice is done between the parties, and, so far as possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance."

I would indicate that I am bound by this decision and accordingly approach this case on that basis. However, I find the reasoning of the learned CHIEF JUSTICE rather strained, particularly going through what I consider to be a most artificial exercise of applying a subjective test and an objective test. If I were allowed a choice on the matter my preference would be a single objective test.

In order to apply the law in this case, it is important to outline what the plaintiff is required to prove in this case in order to obtain a judgment in its favour. Section 42 of the Insolvency Act [Chapter 303] provides as follows:

"42. (1) Subject to the provisions of this Act, every disposition of property not made for value may be set aside by a court if such distribution was made by an insolvent -

- (a) more than two years before the sequestration of his estate and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded the value of his assets;
- (b) within two years of the sequestration of his estate and the person claiming under or benefitted by the disposition is unable to prove that, immediately after the disposition was made, the value of the assets of the insolvent exceeded his liabilities:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside to the extent of such excess."

It is clear that the statute requires the plaintiff to prove first of all that the insolvent had given a disposition of property which disposition was not made for value. The onus is on the plaintiff to "make out some case to answer" in

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the sense that he has to lead such evidence which would *prima facie* support his claim.

The provisions of s 26 of the Insolvency Act No. 24 of 1936 of South Africa is worded similarly to our own s 42. In dealing with s 26 of that Act, WATERMEYER CJ in *Estate Jager v Whittaker* 1944 AD 246 (where payments of interest at a usurious rate were dispositions not for value as the contract providing for such payment was illegal) stated at 25:

"The words 'disposition not made for value' mean, in their ordinary signification a disposition for which no benefit or value is or has been received or promised as a *quid pro quo*. The most obvious example of such a disposition is a donation . . . If a lawful obligation to pay the money in fact exists, then the obvious benefit which the payer receives in return for such payment is a discharge from his liability to pay. Such a payment decreases his assets, but at the same time diminishes his liabilities, and in transactions which are entered into the ordinary course of

business, such discharge from a liability would be value for the payment made."

Further, as most succinctly observed in Catherine Smith's *The Law of Insolvency* (1982) at pp 120, 121 and 122:

"In considering section 26 of the Act which deals with dispositions without value it is important to bear in mind that the distinguishing feature of such dispositions is that there was no obligation on the part of the insolvent to make a disposition. Either the insolvent made the disposition deliberately and in full awareness of impending insolvency, in order to favour the recipient or inadvertently, not appreciating that he was in insolvent circumstances. In either event, provided the debtor's estate is thereafter sequestrated the person who benefitted can be compelled to restore what he has received. The object of section 26 is not to prevent a person in insolvent circumstances from engaging in the ordinary transactions of life, but to prevent a person from impoverishing his estate by giving his assets away without receiving any present or future advantage in return. . . . All the surrounding circumstances, under which the transaction was concluded, must be considered in deciding whether or not the insolvent received value for the disposition

. . .

Dispositions not made for value are clearly not confined to donations or payments under illegal contracts, but extend to any disposition as defined in the Act provided that there is no *quid pro quo*. A sale of assets

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for an entirely inadequate consideration is a disposition not for value. Payments under an invalid guarantee have been held to be dispositions not for value."

The plaintiff's counsel made submissions concerning the difficulty encountered in proving the negative and made reference to Hoffmann and Zefferdt's *South African Law of Evidence* 3 ed (1981) at p 399 where the learned authors said:

"It is submitted, however, the despite this decision, a South African court ought to reach the same conclusion as did the House of Lords in the *Joseph Constantine Steamship Line Ltd* case. Ultimately, the incident of onus depends on consideration of fairness and convenience, and fairness, and convenience require that the onus shall not rest upon a litigant of proving a negative in such circumstances. Or, if the courts would not go so far as this, there should be an evidentiary burden cast upon the defendant, in the circumstances like those in the *Joseph Constantine Steamship Line Ltd* case."

The decision mentioned by the authors was *Topaz Kitchens (Pvt) Ltd v Naboom Spa (Edms) Bpk* 1976 SA 470 (A) at 474 where MULLER JA held:

". . . There is, in my opinion, no justification for the proposition that in cases . . . where the plaintiff seeks to enforce a contract and the onus is on him to prove the term thereof, which would involve his proving a negative, that the burden is alleviated by a duty imposed on the defendant to begin and adduce some evidence in support of his averment that the additional term relied on by him was agreed upon."

The House of Lords decision in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] 2 All ER 165 concerned a claim by charterers against shipowners for damages for failure to load a cargo. The shipowners pleaded that the contract had been frustrated by an explosion, for which no cause was ascertained. The charterers argued that the shipowners had to prove that the explosion had not been caused by their act or default. The House of Lords adjudged that they did not have to do so.

The plaintiff's counsel did not cite any authorities which had approved the learned author's position and the decision in *Topaz Kitchens (Pvt) Ltd v Naboom Spa (Edms) Bpk supra* is a persuasive authority in this court. There is also another factor that this court has to consider, which is dealt with by

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ADAM J

Hoffmann and Zeffertt *op cit* at pp 427 and 432 under the maxim *omnia praesumuntur rite esse acta*. The learned authors observe that the scope of the presumption of regularity is ill-defined and state:

"In some cases it appears to be no more than an ordinary inference, based upon the assumption that what regularly happens is likely to have happened again. In other cases it is treated as a presumption of law, sometimes placing an onus on the other party, and sometimes creating only a duty to adduce contrary evidence. It has been applied in a wide variety of cases which are impossible to catalogue exhaustively . . .

In civil cases, however, the presumption has often been treated as placing an onus upon the opposing party, and in cases where proof of non-compliance with a formality would involve the disturbance of old and vested rights, the onus of rebuttal has been very heavy indeed so much so that the presumption has occasionally shown signs of becoming virtually irrebuttable, and this is a rule of substantive law which prevents technical defects in title from being raised after a considerable lapse of time. Thus in *Worcester Municipality v Colonial Government* (1929) 3 Buch AC 538 the transfer of land from the municipality to the government was impeached after thirty years on the ground that a statutory notice had not been given and the consent of the Governor had not been obtained. DE VILLIERS CJ said that the court were entitled to apply the maxim *omnia praesumuntur rite esse acta*, and added:

'In the present case the evidence points to a strong degree of probability that the requisite notices and consents were not given, but it is not conclusive on this point, in view of the contrary presumption . . . '

Voet says that any transaction is presumed to have been attended by all the necessary formalities, but it is doubtful whether in relation to private transactions this amounts to more than an ordinary inference of probability. In *Wright Executors v Keyser* 1908 EDC 68 at 77 the court was prepared to presume that an attorney had obtained the consent of various co-heirs when buying common property from the other co-heirs but the inference appears to have been justified by the evidence."

I would like to draw attention to Exhibit 1 and as an example refer specifically to the entry which is two below "Gill Godlonton" which indicates an entry "Shell (Cash)" and shows under the title "Bank" and "Sundries" the amount written as "\$50 000". The plaintiff's witness had mentioned that he could not find any invoices or receipt books, this would mean that there was not

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available to the company any invoices or receipts pertaining to the amount of \$50 000. Can it be said that without any invoices or receipts that might relate to the \$50 000 that the presumption of regularity on the basis of the entry in Exhibit 1 of the cash book and the production of a cheque in that amount signed by the authorised signatories of the company and duly presented and honoured by the bank would not apply?

It is clear that the plaintiff has to present evidence, albeit, *prima facie*, that by making the payment of \$45 000 to Gill, Godlonton and Gerrans, the company was not engaged in carrying

out its ordinary transactions, but was impoverishing the assets of the company, deliberately or inadvertently while under insolvent circumstances, without receiving any present or future advantage in return.

What is the evidence before this court? It is common cause that a cheque of \$45 000 was paid by the company to Gill, Godlonton and Gerrans, the defendant's agent. Incidentally, Gill, Godlonton and Gerrans, according to Exhibit 2 were also legal practitioners for the liquidator. The only witness for the plaintiff indicates that he did not have specific knowledge pertaining to the payment of the amount of \$45 000. He candidly admitted that he could not establish a complete picture pertaining to the affairs of the company; that he had access only to two cash books (one of which he brought to court with him), bank statements and pay cheques. It was a search through these that led him to state in evidence that he could not find a *quid pro quo*, in the sense of the company receiving some form of payment for the cheque of \$45 000. He stated that the cash book was usually the source of receipts and this is what he meant when he observed he could not find an identical payment for the cheque of \$45 000. He seemed to concede that the cash books were not being kept in a chronological order but that the entries were being made in what was described by the defendant's counsel in "a haphazard manner". He frankly admitted he expected to find invoices and receipt books but did not find them. The evidence revealed that Exhibit 3, the cheque, was an official cheque issued by the company and signed by Mr Thompson and Mr Lynch, both authorised signatories and that it had been presented and honoured by the bank on 25 August 1983, on which date, according to the bank statement, a balance in excess of \$1 million was in the company's bank account. Further, Exhibit 1 reveals that there were disbursements of various sums of money to different persons for various purposes.

From the foregoing, the plaintiff's counsel submits that a *prima facie* case of disposition without value has been established by the plaintiff. He has to

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contend that, despite the entry in Exhibit 1 concerning the \$45 000 and the purpose being sundries, the court should pay no attention to it and ignore it without indicating why this should be done. Had the plaintiff (to take the previous example of the entry of "Shell") led evidence from the witness that the cash book showed, under what he termed receipts, the sum of \$50 000 or had the plaintiff taken any other entries in Exhibit 1, he would have been in a position to ask this court to disregard the entry in Exhibit 1 pertaining to the amount of \$45 000.

This court has to determine whether there is evidence before it that *prima facie* shows that there was no obligation on the part of the company to make a disposition; or that the company "made the disposition deliberately and in full awareness of impending insolvency, in order to favour the recipient or inadvertently not appreciating" that the company was in insolvent circumstances. Has the plaintiff led evidence before this court which shows that there was no "lawful obligation to pay the money" and that what happened here was not part of "transactions which are entered into in the ordinary course of business"? Taking all the circumstances into account, I find that the plaintiff has not established a *prima facie* case. It follows that the defendant's application for

absolution from the instance succeeds also on the alternative claim.

Accordingly, on both the main and the alternative claim, the defendant's application for judgment of absolution from the instance is granted with costs.

Atherstone & Cook, plaintiff's legal practitioners

Granger & Harvey, defendant's legal practitioners

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S v DE BRUYN 1987 (2) ZLR 288 (SC)

Court **Supreme Court, Harare**

Gubbay JA, Manyarara JA & Korsah JA

Criminal appeal

17 December 1987

Flynote

Criminal law - statutory offences - Emergency Powers (Prohibition of Objectionable Souvenirs) Order 1981 - s 3(b) - keeping souvenir of UDI period in a public place - private office not such a place.

Headnote

The appellant had been convicted of using a souvenir ashtray inscribed "Ian Smith UDI 11th November 1965" in a public place, namely, his office, in contravention of s 3(b) of the Emergency Powers (Prohibition of Objectionable Souvenirs) Order, contained in GN 785/1987. The office was the appellant's private, self-contained office, with its own door, partitioned off in a corner of a showroom for motor cars in a garage and service station complex. It was set aside for private use; the public entered it on invitation only, but had no general access to it.

Held, allowing the appeal against conviction, that the office was not a "public place" within the meaning of the definition in s 2 of the Emergency Powers (Maintenance of Law and Order) Regulations 1980, in terms of which the Order was made.

Held, further, that the object of the Order was not, as the magistrate had said, to ensure that reminders of the UDI era were destroyed. Having regard to the enabling provision in s 57 of the Regulations, an order prohibiting *inter alia* "the use of an article" could only be made if such use was "likely to prejudice the maintenance of public safety or public order". Prejudice of this nature was hardly likely to result from the use of such a souvenir in a private office in a building.

1987 (2) ZLR p289

GUBBAY JA

Cases cited:

R v Innes 1925 CPD 161

R v Holthausen 1947 (3) SA 358 (E)

J B Colegrave for the appellant

A O Agyemang for the respondent

Judgment

Gubbay JA: The appellant was found guilty in a magistrates court of contravening s 3(b) of the Emergency Powers (Prohibition of Objectionable Souvenirs) Order (GN 785 of 1987), it being averred in the charge sheet that:

" . . . on 26 June 1986, and at De Bruyn's Motors, Gweru (he) did wrongfully and unlawfully in a public place, to wit his office, use an article purporting to be a souvenir or memento of the UDI period, that is to say, an ashtray upon which was inscribed 'Ian Smith UDI 11th Nov. 1965'."

He was sentenced to a fine of \$150 or, in default of payment, one month's imprisonment with labour.

At the time of the alleged offence the appellant, then 63 years of age, was the managing director of the company known as De Bruyn's Motors (Pvt) Ltd, which carried on the business of a garage and service station on premises situated in Lobengula Street, Gweru.

The premises comprised an open forecourt, a reception area and service bay, a workshop and showroom. There was an interleading door between the workshop and the showroom. One corner of the showroom was partitioned off into a self-contained office with its own door. It was furnished with a desk and chairs. It was this office that the appellant occupied, and on the desk he kept the ashtray described in the charge sheet.

It was the appellant's evidence, which was not put in contention, that for several years past he had ceased to be actively engaged in the daily administration and affairs of the company's business, having delegated that function to his son. He had little contact with customers, but occasionally dealt with them in his office, if they requested his personal attention. He regarded the office as private and anyone who wished to see him would knock on the door, as is common courtesy, and be invited to enter. Indeed, that is exactly what the members of the Criminal Investigation Department did in pursuance of their investigations on 26 June 1986.

1987 (2) ZLR p290

GUBBAY JA

Unquestionably the validity of the appellant's conviction turns upon whether the office he occupied, and in which admittedly he was using a souvenir or memento of the UDI period, came within the definition of "public place" as worded in para (b) of s 2 of the Emergency Powers (Prohibition of Objectionable Souvenirs) Order. The paragraph reads:

"2. In this order -

'public place' includes any -

- (a) . . .
- (b) building, part of a building, police station, police camp, stream, river, lake, dam, swimming-pool, garden, park, racecourse, open space, open-air theatre, drive-in theatre, aerodrome, sports-ground, recreation-ground, show-ground, parade-ground, or other ground, whether enclosed or not, to which the public or any section of the public has access, or is permitted to have access, whether on payment or otherwise, and whether or not the right of admission thereto is reserved."

In reaching an affirmative answer the trial magistrate expressed the opinion that the definition of "public place" was wide enough to include a private residence; *a fortiori* it embraced the appellant's office, to which individual customers and other persons were afforded entry.

That the office was "part of a building" cannot be gainsaid. Was it, however, "part of a building . . . to which the public or any section of the public has access, or is permitted to have access"? I think not.

Access is the criterion, for the essence of a place being a "public place" is that everyone has **general** access to it. See *R v Innes* 1925 CPD 161 at 164; *R v Holthausen* 1947 (3) SA 358 (E) at 362. Access in this sense may be either totally unrestricted, being a right exercisable by the public or any section of it at any time of the day or night; or it may be qualified, as envisaged by the phrase "or permitted to have access" where, for instance, with respect to such places as theatres, cinemas, museums, art galleries and churches, it is an entitlement allowed only within certain hours of the day.

It is here that I consider the magistrate fell into error, for he failed to appreciate that the word "access" limits the scope of the preceding words in the definition of "public place". In fact, his reference to a private residence affords the best illustration of a place which is not caught by the definition.

1987 (2) ZLR p291

GUBBAY JA

Neither the public nor any section thereof has access to a private residence. Individual members of the public have no right of entry, save only if invited to do so by the lawful occupier.

The same is true, in my opinion, of the office occupied by the appellant. It was an office set aside for private use. Members of the public entered upon invitation. But their admittance did not serve to constitute the office a public place, for they enjoyed no general access to it. Their right of entry was dependent upon the particular whim of the appellant. He was quite at liberty to refuse entry to his office at any time of the day and for any reason, whether rational or not.

The concluding words of the definition "whether or not the right of admission thereto is reserved" do not affect this construction, for they have no relevance to private residences and offices. Plainly they are intended to relate to premises such as restaurants, or certain parts of hotels, such as cocktail bars and dining-rooms, where the management reserves unto itself the right of admission. Frequently in such establishments male patrons are only admitted if they are

suitably attired with jacket and tie.

My view that the appellant's office cannot be held to be a "public" place" is borne out if account be taken of the evil which the lawmaker aimed to prevent in empowering the Minister of Home Affairs to make the Emergency Powers (Prohibition of Objectionable Souvenirs) Order. Once again I disagree with the magistrate. It was not to ensure "that any reminders of UDI are virtually destroyed".

Under the enabling provision, which at the time was s 57 of the Emergency Powers (Maintenance of Law and Order) Regulations 1980 (SI 441 of 1980), an order prohibiting *inter alia* the use of an article, could only be made if such use was "likely to prejudice the maintenance of public safety or public order". Since that was the conduct it was aimed to prevent, it is obvious to me that it cannot have been intended that a private office in a building would be included in the definition of "public place", for the use of such a souvenir or memento therein would hardly be likely to endanger public safety or public order.

It was for these reasons that, at the conclusion of the arguments addressed to us by counsel, the appeal was allowed and the conviction and sentence set aside.

1987 (2) ZLR p292

GUBBAY JA

Manyarara JA: I agree.

Korsah JA: I agree.

Danziger & Partners, appellant's legal representatives

1987 (2) ZLR p293

MAFARA v LAW SOCIETY OF ZIMBABWE 1987 (2) ZLR 293 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Dumbutshena CJ, McNally JA & Manyarara JA

Appeal against order striking appellant's name off roll of legal practitioners

1 & 29 December 1987

Flynote

Legal practitioner - discipline - practitioner convicted *inter alia* of defeating and obstructing the course of justice - no appeal lodged - disciplinary proceedings before Legal Practitioners Disciplinary Tribunal - whether Tribunal entitled to treat proceedings as an appeal against conviction - order deleting practitioner's name from Register - nature of order - not a "sentence" - whether order justified.

Headnote

The appellant had been convicted by a magistrate of drunken driving (a second offence), of driving without a licence (2 counts) and of defeating or obstructing the course of justice by falsely pretending, in an earlier case against him, that he was a licensed driver, by relying on a namesake's driver's licence. He did not appeal against the magistrate's judgment.

The Law Society, on becoming aware of the conviction for defeating or obstructing the course of justice, referred the matter to the Legal Practitioners Disciplinary Tribunal in terms of s 26 of the Legal Practitioners Act No. 15 of 1981. The Tribunal ordered the appellant's name to be deleted from the Register of Legal Practitioners.

Against that order, the appellant appealed, on two grounds:

- (1) the Tribunal erred in refusing to allow him to adduce evidence which would have shown that he was wrongly convicted, on the basis that the Tribunal was not a court of appeal; and
- (2) the sentence passed by the Tribunal was so severe as to cause a sense of shock.

Held, dismissing the appeal, that the Tribunal was right to refuse to allow the

1987 (2) ZLR p294

McNALLY JA

appellant to treat the proceedings as an appeal against conviction, the correctness of which was, on the facts, in any event beyond doubt. The appellant had contented himself with the bare assertion that the State witnesses had lied.

Held, further, that the order of the Tribunal was not a "sentence", since he had already been punished by the magistrate's sentence. It was a disciplinary measure designed to protect the integrity of the legal profession. The order striking the appellant off the Register was the proper remedy. By seeking to defeat the course of justice, the appellant had offended against the very thing he was sworn to uphold, and he had persistently demonstrated a lack of that integrity which the legal profession demands of its members.

Cases cited:

Incorporated Law Society, Natal v Hassim 1978 (2) SA 285 (N)

Law Society v du Toit 1938 OPD 103

Incorporated Law Society v Behrman 1957 (3) SA 221 (T)

Appellant in person

B D Brighton for the respondent

Judgment

McNally JA: The appellant was brought before the Legal Practitioners Disciplinary Tribunal (the

Tribunal) by the Council of the Law Society of Zimbabwe (the Society) in terms of s 26(2) of the Legal Practitioners Act No. 15 of 1981 (the Act).

The procedure of the Tribunal is regulated by the provisions of SI 580 of 1981. The Tribunal itself, consisting of a judge of appeal as chairman and two senior legal practitioners, sat on 3 September 1987 and, after hearing the parties, made the following order:

- "(a) In terms of s 28(1)(i) of the Legal Practitioners Act, No. 15 of 1981, the respondent's name be deleted from the Register of Legal Practitioners; and
- (b) The respondent pay the applicant's expenses in connection with these proceedings in terms of the High Court Tariff."

The reasons for this judgment, which was unanimous, were handed down later under reference LPDT 1/87.

1987 (2) ZLR p295

McNALLY JA

The facts of the matter were very adequately set out by the chairman of the Tribunal in his judgment and I propose to restate them in brief outline merely so that what follows may be comprehensible to a reader unfamiliar with what has gone before.

Briefly, the appellant, a legal practitioner, had a car accident on 4 April 1985. As a result he was charged with driving under the influence of alcohol. A statement of agreed facts was put before the magistrate, who was a provincial magistrate. One of the facts in that agreed statement was that the appellant held a driver's licence. He himself was alleged to have given his licence number to the investigating officer. Moreover, he argued that there were special circumstances why the licence should not be suspended, and he admitted a previous conviction recorded against the holder of that licence.

He was fined. He was prohibited from driving for six months. His licence was ordered to be cancelled. He failed however to surrender his licence for cancellation.

The appellant then had another car accident on 8 February 1986. He was charged again with driving under the influence of alcohol. But investigations revealed that he did not have, and never had had, a driver's licence (save for two provisional licences, the latter of them in January 1971). The licence referred to in the earlier case was that of a relative of his.

As a result of these discoveries he was charged additionally with three other offences - driving without a licence both on 4 April 1985 and on 8 February 1986; and defeating or obstructing or attempting to defeat or obstruct the course of justice by relying on someone else's driver's licence in the earlier proceedings.

He pleaded guilty to the two charges of driving without a licence, but not guilty to the other two charges. He was found guilty on all four counts. His evidence was disbelieved.

The Council of the Society, on becoming aware of the conviction for defeating or obstructing or attempting to defeat or obstruct the course of justice, instituted action in terms of s 28(3) of the Act. That action took the form of referring the matter to the Tribunal in terms of s 26 of the Act.

The Tribunal, as I have already indicated, struck him off the Register of Legal Practitioners. Against that ruling he appeals:

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McNALLY JA

The appellant took two points on appeal. They were:

1. the Tribunal had erred in refusing to allow him to adduce evidence which would have shown that he was wrongly convicted, on the basis that it (the Tribunal) was not a court of appeal; and
2. in any event, the sentence was so severe as to cause a sense of shock.

The essence of the appellant's argument on the first point was this. He wanted to show the Tribunal that his conviction (on the relevant count) was wrong. He assumed that the whole record of the hearing and the evidence in the magistrate's court would be before the Tribunal. He intended to demonstrate, by reference to the record, that no reasonable magistrate could possibly convict him on that evidence. But in the event the record was not before the Tribunal. His attempts to demonstrate the unsoundness of the decision were thus frustrated and he was told he was not arguing an appeal. As a result justice was not done to him.

The appellant's contentions, thus stated, are not without force in a broad and general sense, but one has to relate them to the facts and the realities of the case. It seems to me that when one does so, those facts and realities are so overwhelming that the apparent force of the contentions simply dissolves and disappears.

In the first place, and as pointed out by the learned chairman of the Tribunal, it is well established that proof of a man's conviction is regarded as *prima facie* evidence that he had in fact committed an offence. Proof of the conviction was before the Tribunal as was the summons, the judgment and the reasons for sentence. The fact of the conviction was admitted by the appellant in his own handwriting and in his statement in writing before the Tribunal. He conceded that he had not appealed against the conviction, but asserted that it was wrong. He has not at any stage sought leave to appeal out of time against the conviction.

Before the Tribunal he did not seek to lead evidence to show that the witnesses at his trial had lied or been mistaken. He sought simply to argue, as if on appeal, that the magistrate's decision was wrong.

It was stated, and rightly stated, in *Incorporated Law Society, Natal v Hassim* 1978 (2) SA 285 (N) at 288 that:

"The weight to be attached to a conviction will differ from case to case."

1987 (2) ZLR p297

McNALLY JA

The facts of this case are such that one can say they are overwhelmingly self-evident. The

appellant stands convicted by his own actions.

Thus, it cannot be doubted or disputed that a driver's licence was referred to in the first trial. Who could have given its number but the appellant? It is common cause now that that licence belonged to another man called Mafara, a relative of the appellant. What explanation can there be but that the appellant relied on the licence of another person in order to conceal the fact that he did not have a licence himself. Obviously that is why he did not produce the licence for cancellation.

If that were not enough, we have the fact that the appellant agreed a statement of facts in which it was said he held a driver's licence. Why would a policeman lie about this? He would have charged the appellant with driving without a licence unless the appellant had told him he had one. Again the probabilities are overwhelming.

If that were not enough, we have the evidence of the presiding magistrate at the first trial, summarised in the judgment of the magistrate at the second trial. That magistrate said (according to the second magistrate) that the appellant had actually advanced reasons why he should not be prohibited from driving and why his licence should not be cancelled. Such an argument, put up by the appellant, must have been based on the assumption that he had a licence. There is no other explanation. The appellant must have asserted that he had a licence. We know that he did not have one. He knew that he did not have one. He must be guilty unless both magistrates as well as the police sergeant are lying. There is nothing to suggest that they are. There was no reason for them to lie. If they had a grudge against him why would they have credited him, in the first proceedings, with a licence which he did not have? Indeed, he does not accuse the magistrates of lying in his documents, but attacks only the policeman.

I am satisfied that there is no question of law involved here, no difficult problem of where the *onus* lies, or when the evidential burden shifts. We are concerned with a series of facts which point beyond question to the fact that the appellant lied to the court in 1985 when he claimed to have a driver's licence well knowing that he did not.

The unhappy fact is that when caught out in his attempt to defeat the course of justice the appellant has plunged further and further into untruthfulness, seeking to suggest, without a shred of evidence, that the witnesses and his

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McNALLY JA

former employers are all lying and plotting against him.

I do not therefore take refuge in the rather technical argument (and nor, I may say, did Mr *Brighton* for the respondent advance it) that it was for the appellant to place before the Tribunal the record of the trial, so that he could demonstrate whatever it was he wanted to demonstrate by reference to that record. In other words, I do not dismiss his appeal on this aspect simply because by a procedural mistake he has failed to discharge the *onus* upon him. I am completely satisfied that the nature of the facts relied upon by the State was such that no reference to the record of evidence could have made a difference to the outcome.

The Tribunal, in my view, was right, at least on the facts of this particular case, to refuse to allow the appellant to treat the hearing as some sort of appeal against the finding of the magistrate. It is indeed of significance that the appellant did not appeal against his conviction, and he has blown hot and cold over his reasons for not doing so.

In his letter of 22 January 1987 to the Society he said he did not appeal against the conviction "simply because of the publicity the matter has attracted and further the bad working relationship it was having between me and the Attorney-General which was becoming somewhat personal". He dismissed the conviction as "more technical than material". Yet when he gave evidence in mitigation before the magistrate he was questioned by his own legal representative and the following passages occur:

- "Q. Will you please tell the Court what is the likely effect on your position in the Civil Service and on your position as a legal practitioner of these convictions?
- A. Your Worship I am not quite sure as to what attitude the Public Service Commission will adopt and I am not quite sure as well what the Law Society's attitude will be, but should they feel they want to take action it could mean facing disciplinary charges . . . ;
- Q In regard to the conviction for attempting to defeat or obstruct the course of justice do you consider it is likely that will lead to disciplinary proceedings by the Law Society?
- A. I think it is likely, yes."

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McNALLY JA

He was therefore well aware of the likely consequences of not appealing. And if, as he claimed in argument, he did not appeal because of difficulties in his employment, he could have applied for leave to appeal out of time after leaving Government employment in March 1987. He did not do so.

Another factor relied upon by Mr *Brighton* was the absence of any significant assertions in the counter-statement filed by the appellant before the Tribunal in terms of s 5 of SI 580 of 1981. The section provides that:

"The respondent may make a counter-statement in writing, setting forth his replies to the allegations contained in the application, which counter-statement shall be accompanied, where appropriate, by a list of witnesses whom the respondent proposes should be called by the Disciplinary Tribunal, should the Disciplinary Tribunal decide to hold an enquiry, together with a brief summary of the evidence of each witness."

The appellant gave no list of witnesses, nor any summary of their evidence. He contented himself with an assertion that the police witness had lied. He made no effort to deal with the allegation in the judgment (which was annexed to the Society's application) that he had in the 1985 case tried to argue that there were special circumstances why he should not be prohibited from driving. This, as I have earlier indicated, was a most damning piece of evidence. He also sought to contend that when he admitted a previous conviction, which of course was a conviction of his relative recorded against his relative's driver's licence, he was really admitting another conviction which he had sustained in or about 1974.

He has sought to argue this very peripheral point further before us. His heads of argument aver

that he can prove this other conviction by reference to the clerk of the court, Mbare. Yet before us he produced a letter from the clerk of the court saying that the records for 1974 are missing. This, says the appellant, is further proof that there is a plot against him. In fact, of course, it is of no particular significance whether he sustained a conviction for negligent driving in 1974 or not, save that one wonders why he was not also convicted of driving without a licence on that occasion.

I have not set out the law to any great extent because I consider, with respect, that it is adequately set out in the judgment of the Tribunal.

I am satisfied that the appellant's first point must fail.

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McNALLY JA

The second and final point taken by the appellant is as to the severity of his "sentence". The order of the Tribunal is not strictly a sentence, since the appellant has already been punished for his offences by the criminal court. As was said by BOTHA JP in *Law Society v Du Toit* 1938 OPD 103 at 104:

"We are not concerned here to-day with any theory of punishment. The proceedings are instituted by the Law Society for the definite purpose of maintaining the integrity, dignity and respect the public must have for officers of this Court. The proceedings are of a purely disciplinary nature; they are not intended to act as a punishment of the respondent. He has received his sentence for the offence he committed and it is no longer a matter that will influence us in dealing with this case. It is for the Courts in cases of this nature to be careful to distinguish between justice and mercy. An attorney fulfils a very important function in the word of the Court. The public are entitled to demand that a Court should see to it that officers of the Court do their work in a manner above suspicion. If we were to overlook misconduct on the part of officers of the Court, if we were to allow our desire to be merciful to overrule our sense of duty to the public and our sense of the importance attaching to the integrity of the profession, we should soon get into a position where the profession would be prejudiced and brought into discredit."

It is true that s 28(1) of the Act provides six forms of penalty, ranging from the deletion of the name of the offender from the Register, to a censure or a caution and the postponing of further action. The appellant claims that one or other of the latter alternatives would have been appropriate.

The Tribunal gave considerable thought to the question whether striking off was the proper remedy, and came to the conclusion that it was. I have studied its reasons carefully and I can find no fault with them. The unhappy fact is that the appellant has persisted throughout in his quite hopeless claim that his predicament is everybody's fault but his own. One can understand, and to an extent sympathise with, his obvious inability to face up to reality. But at the same time it is impossible to avoid the conclusion that the appellant has demonstrated and continues to demonstrate a lack of that integrity which the legal profession demands of its members.

The case of *Incorporated Law Society v Behrman* 1957 (3) SA 221 (T) was a case involving an attorney who sought to defeat the course of justice. The court noted that he offended "against the very thing that he was sworn to uphold". It held, *per* RAMSBOTTOM J, that "this Court would not be doing its

McNALLY JA

duty if, in the present case, it did not grant the application of the Law Society and strike the respondent off the Roll".

I can see no basis for interfering with the decision of the Tribunal. I would dismiss the appeal with costs.

Dumbutshena CJ: I agree.

Manyarara JA: I agree.

Brighton & Cole Bowen, respondents' legal practitioners

POLI v MINISTER OF FINANCE & ECONOMIC DEVELOPMENT & ANOR 1987 (2) ZLR 302 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA, McNally JA, Manyarara JA & Korsah JA

Application for redress in terms of s 24(1) of the Constitution

9 November 1987 & 2 February 1988

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - s 18(8) - protection against self-incrimination - whether a person can before his trial be forced to give evidence which might incriminate him - "trial" - meaning - directive from Minister under s 33(1) of Exchange Control Regulations 1977 requiring person to produce information etc - not ultra vires s 18(8) of the Constitution.

Headnote

The Declaration of Rights in the Constitution of Zimbabwe 1980 provides, in s 18(8), that -

"No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

This provision is limited in its application. The use of the words "trial" and "tried" indicate that the protection is limited to a person who is appearing before a court at a judicial investigation or determination of his case. The subsection does not protect someone against self-incrimination outside the time covered by the trial. There is thus nothing to prevent the police from investigating a case, by taking fingerprints, handwriting samples, blood samples and the like. There is nothing in the subsection either to prevent a person from being compelled by law to provide information which might later be used in evidence against him.

The appellant, who was being investigated for alleged contraventions of the Exchange Control

Regulations, was served with an directive from the Minister in terms of s 33(1) of the Regulations, requiring him to provide certain documents and furnish written information regarding certain

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DUMBUTSHENA CJ

funds that had been deposited to a bank account he held in Luxembourg. He applied to the Supreme Court in terms of s 24(1) of the Constitution for redress, on the grounds that s 18(8) of the Constitution was being contravened in relation to him.

Held, that s 33(1) of the Regulations was *intra vires* s 18(8) of the Constitution and the application could not succeed.

Cases cited:

Wozniak v Wozniak [1953] 1 All ER 1192 (CA)

S v Perskorporasie van SA Bpk 1979 (4) SA 476 (T)

Catherwood v Thompson [1958] QR 326 (Canada)

R v Altseimer (1982) 2 CRR 119; 1 CCC (3d) 7 (Ontario, Canada)

R v Rolbin (1982) 1 CRR 186 (Quebec, Canada)

R v Esposito (1985) OR (2d) 356 (CA); 24 CCC (3d) 83 (Ontario, Canada)

Fisher v United States (1976) 425 US 391; 48 L Ed 2d 39

Simataa & Anor v Attorney-General 1986/HP/448 (Zambia)

United States v Doe (1984) 465 US 605; 79 L Ed 2d 552

Magor & St Mellons Rural District Council v Newport Corporation [1952] AC 189 (HL)

Commissioners of Customs & Excise v Ingram & Ors [1948] 1 All ER 927 (CA)

Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328; 57 ALJR 236; 45 ALR 609 (Australia)

S v Makandhla 1981 ZLR 423 (SC)

E Chatikobo for the appellant

A Chikumira for the respondent

Judgment

Dumbutshena CJ: This is an application in terms of s 24(1) of the Constitution of Zimbabwe, which reads:

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

Subsection (3) of s 24, referred to in subs (1), does not apply in this case.

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DUMBUTSHENA CJ

Subsection (3) states:

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

The facts of this case are as follows.

The applicant is a businessman resident in Harare and employed by the Nedlaw Group of Companies. In May 1987 he was arrested on an information alleging that he had defrauded his employers. The case was not prosecuted.

Subsequently, he was charged with contravening s 5(1)(a)(i) of the Exchange Control Act [*Chapter 170*], as read with s 6 (3) (a) of the Exchange Control Regulations (SI 399 of 1977) hereafter referred to as the "Regulations".

Section 5(1)(a)(i) reads:

- " (1) Subject to the provisions of subsection (2), a person who, either within or outside Zimbabwe -
- (a) contravenes or fails to comply with -
 - (i) any provision of this Act other than section *eight*;
 - (ii) . . .
 - (b) . . .

shall be guilty of an offence."

This is read with s 6 (3)(a) of the Regulations, which reads as follows:

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

- (a) a Zimbabwean resident; . . .
- (b) . . .

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 of the case."

DUMBUTSHENA CJ

The State alleged that some time between January 1986 and March 1987 the applicant did work in this country promoting the products of Portenseigne, a French company. He was alleged to have instructed Portenseigne to bank the money paid to him for his services in a Luxembourg bank. According to the law of Zimbabwe, the money ought to have been paid in or brought to Zimbabwe. The allegation was that there was a single payment made in the sum of 150 000,00 francs, the equivalent of about Z\$30 000,00. This is the amount said to have been deposited in the applicant's bank account in Luxembourg.

The applicant denied that he had done work for Portenseigne and denied making arrangements for money to be paid into his account in a bank in Luxembourg. He, however, admitted having a bank account there.

The applicant was remanded in custody. A Ministerial certificate was issued in terms of s 106 of the Criminal Procedure and Evidence Act [Chapter 59]. In terms of s 106(2) of that Act, when application for bail is made, the Minister of Home Affairs may issue a certificate prohibiting the granting of bail for the reasons stated in the subsection. The applicant was refused bail and remanded in custody.

We are informed by the applicant that an investigating team was sent to Europe and returned. By the end of July the team had no evidence implicating him in the crime charged. This was followed by repeated remands in custody because the State did not fix a date for trial.

On 27 July 1987 the applicant was served with a directive issued in terms of s 33 of the Regulations. Section 33(1) of the Regulations states:

"The Minister may give any person directions requiring him, in such manner and within such time as may be specified in the direction -

- (a) to furnish to the Minister or to a designated person any information in his possession or control or to which he has access;
- (b) to produce to the Minister or to a designated person any books, accounts, documents or other records which are in his possession or under his control or to which he has access;

which, in the opinion of the Minister, is required for the purpose of securing compliance with or detecting any contravention of these regulations or the repealed regulations."

The directive issued in terms of s 33(1) is contained in a letter written by the

DUMBUTSHENA CJ

Deputy General Manager, Exchange Control Department, Reserve Bank of Zimbabwe. It reads as follows:

"I write to say that it has come to our notice that you conduct a bank account with Banque Paribas, Luxembourg,

Account Number 13240320 - JL details of which are now required.

In regard to this account you are hereby directed to provide, in terms of section 33 of the Exchange Control Regulations, 1977, original statements, or certified copies of ledger sheets, detailing all transactions passed over the account since it was established, together with copies of all deposit slips for the same period, relative to deposits of \$100 or more.

You are also directed to advise Detective Inspector Chinyan'anya, a designated person for the purposes of this enquiry, in writing, of the source of the funds credited to the above-mentioned account and the circumstances in which these funds accrued to you.

You are furthermore directed to furnish all the above information and documentation within fourteen days of the receipt by you of this directive.

In this regard we would draw to your attention the provisions of Section 5(1)(a)(ii) of the Exchange Control Act, Chapter 170."

It can be seen that the applicant is directed to do a number of things. He is directed to supply original statements, or certified copies of ledger sheets, giving details of all transactions since the account was opened and all copies of deposit slips of amounts of \$100 or over. He is directed to write to Detective Inspector Chinyan'anya, telling him the source of the funds credited to his account and the circumstances in which they accrued to him. All this information was to be supplied within fourteen days of the receipt of the Directive. If the account was opened fifteen years ago he would have to supply all the documents directed to be produced and covering the whole of that period. It is proper to mention here that the respondents have in their possession the applicant's Account Number 13240320 - JL with Banque Paribas, Luxembourg.

Because the investigations took a long time, during which time the applicant continued to be remanded in custody, the magistrates court granted him bail on conditions. Subsequently the court reduced the amount of bail. He applied to the High Court. The High Court set aside the bail provisions. The applicant is now out of custody without bail, but his passport has not been handed back

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to him by the police. He cannot understand why the police are still holding his passport. However, this has nothing to do with this court.

The applicant says in para 9 of his affidavit:

"9. I am perfectly willing to secure information from the bank in Luxembourg to show that I have had no dealings with the company Portenseigne and to show that there has been no criminal activity on my part in respect of the 150 000 franc transaction that is one of the central features of the investigations against me. I am however advised and I verily believe that the Exchange Control Directive annexure 'A' hereto may well be unlawful for various reasons. These reasons are:

(a) That the provisions of subsection 1 of section 33 of the Exchange Control Regulations, 1977 are no longer lawful in that they are now inconsistent with the provisions of subsection 8 of section 18 of the Constitution.

(b) Even if section 33 of the Exchange Control Regulations is not unconstitutional, the directive

Annexure 'A' is framed in terms which are so wide as to make this particular directive *ultra vires* the powers granted to the Minister in section 33 of the Regulations; and

- (c) Even if the Regulations are constitutional and even if the directive is not framed too widely, the terms of this particular directive are so onerous, particularly insofar as they required me, while in prison, to produce documents and information from a bank in Luxembourg and to produce that information in Zimbabwe within fourteen days of the Order, that there was an unreasonable and therefore unlawful exercise of the Minister's powers."

The questions to be answered in this case are: (1) whether s 33 of the Exchange Control Regulations is *ultra vires* s 18(8) of the Constitution; and (2) whether the directive, Annexure A, is *ultra vires* the powers granted to the Minister in terms of s 33.

Section 33(1) of the Regulations is in clear and unambiguous words. It seems to me the object of s 33 is to give to the Minister power to direct a person who is being investigated to furnish any information in his possession or control or to which he has access and to produce any books, accounts, documents or other records which are in his possession or under his control or to which he

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has access. In other words, the section gives power to the Minister to investigate any contravention of the Regulations, in the manner specified.

The applicant says he is willing to supply the information required by the Minister from his bank in Luxembourg, in order to show that he has had no dealings with the company Portenseigne and to show that he is innocent of any criminal activity in respect of the 150 000 francs, the central point in the investigations. If the applicant supplies the information required, that would meet the object of the section, which is to see whether the person concerned is keeping out of the country money he earned outside Zimbabwe as a resident of Zimbabwe in contravention of s 5(1)(a)(i) of the Exchange Control Act [*Chapter 170*] as read with s 6(3)(a) of the Exchange Control Regulations, 1977 (SI 399 of 1977). This, as pointed out above, the applicant denies. He says he had no dealings with Portenseigne at all and he has not arranged for that company to pay any money into his account in his bank in Luxembourg.

It is contended by Mr *Chatikobo*, who appeared for the applicant, that the Reserve Bank directive, Annexure A, is *ultra vires* the powers granted to the Minister in terms of s 33, and that s 33 of the Regulations is *ultra vires* s 18(8) of the Constitution of Zimbabwe.

Mr *Chatikobo* framed the question for decision in these words:

"... whether s 18(8) of the Constitution which was enacted after s 33 [of the Regulations] can be read to mean that no person can be forced to give information that may incriminate him before his trial."

For his contention Mr *Chatikobo* relied on s 3 of the Constitution, which reads:

"This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

It is trite that the Constitution of Zimbabwe is the supreme law of the land. It goes without

saying. What is important in this case is whether s 18(8) of the Constitution protects the applicant from self-incrimination by rendering s 3 of the Regulations *ultra vires*.

Subsection (8) reads:

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"No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

In construing s 18(8), assistance will be had from determining the meaning of the word "trial" or the phrase "at the trial". It appears to me that "at the trial" should be read together with the phrase "who is tried" appearing in the same sentence. Read as such, there can be no other meaning to the phrase "at the trial" other than that the person or the accused is appearing before the court at a judicial investigation or determination of his case. That this is so becomes clear when reference is made to a few cases.

In *Wozniak v Wozniak* [1953] 1 All ER 1192 (CA) at 1193A DENNING LJ (as he then was) defined the phrase "at the trial or hearing" as meaning the final determination. He said:

"I see no point whatever in the words 'at the trial or hearing' unless they mean the final determination of the matter. They do not include preliminary applications."

ELOFF J said in *S v Press Corporation of SA Ltd* 1979 (4) SA 476 (T) at 478 that:

". . . the general meaning of the word 'trial' in the context of criminal proceedings is reasonably well established in respect of the commencing stage thereof; that is when the judicial investigation by the court commences."

Trial would mean the stage from the commencement up to the conclusion of the judicial enquiry.

In *Catherwood v Thompson* [1958] QR 326, a Canadian case, SCHROEDER J said at 331:

"In general sense, the term 'trial' denotes the investigation and determination of a matter in issue between parties before a competent tribunal, advancing through progressive stages from its submission to the court or jury to the pronouncement of judgment. When a trial may be said actually to have commenced is often a difficult question but, generally speaking, this stage is reached when all preliminary questions have been determined and the jury, or a judge in a non-jury trial, enter upon the hearing and examination of the facts for the purpose of determining the questions of controversy in the litigation."

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In my judgment, the protection afforded to a person against self-incrimination by s 18(8) of the Constitution is effective only when that person is being tried at the trial, that is, when judicial investigations by the court or tribunal are being conducted. The section does not protect someone against self-incrimination outside the time covered by the trial. Within the trial, one can refuse to testify because of the fear of self-incrimination.

There is nothing encompassed by s 18(8) which forbids the police from investigating a case. There is nothing stopping the police before the trial from taking fingerprints, samples of handwriting or voice identification. In terms of s 61 of the Road Traffic Act No. 48 of 1976, a

police officer above the rank of section officer may require a person driving a motor vehicle to submit to a breath analysis. He may also require the driver in terms of s 68 of the Act to permit a specimen of blood to be taken from him. This is not forbidden by s 18(8) of the Constitution.

There is no doubt in my mind that the information requested by the Minister in terms of s 33 of the Regulations falls into the same category as the information required by a police officer in terms of ss 67 and 68 of the Road Traffic Act 1976. But this is not the issue for determination. The self-incrimination prohibited by s 18(8) of the Constitution is self-incrimination which extends only to testimonial evidence at the trial. That is the sort of self-incrimination which falls within the ambit of the subsection.

Support for this conclusion can be found in *R v Altseimer* (1982) 2 CRR 119; 1 CCC (3d) 7, a Canadian case heard in the Ontario Court of Appeal. In that case one of the points raised by the defence was the unconstitutionality of the prosecution. The accused was stopped at a motor vehicle checkpoint and given a roadside breath test. He was subsequently taken to a police station for breathalyser tests. He was acquitted at this trial. On appeal it was held, among other things, that the Canadian Charter of Rights and Freedoms did not confer a broad privilege against self-incrimination but, as prescribed prior to the enactment of the Charter, a specific protection in ss 11(c) and 13 against testimonial compulsion and nothing else. ZUBER JA said in his judgment at 122 (p 12 of the CCC report):

"The Charter does not confer a broad privilege against self-incrimination (it does not even use the phrase) but confers specific protection as follows:

11. Any person charged with an offence has the right

...

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- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

...

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

It is plain that the protection continues to be protection against testimonial compulsion and nothing else. The protection afforded to the witness (s 13) is enhanced since the witness need no longer claim protection as he had to do pursuant to s 5 of the Canada Evidence Act RSC 1970, c E-10. Section 11(c) continues to protect an accused from being compelled to enter a witness-box. The protection against testimonial compulsion, in my view, simply has nothing to do with compulsory breath tests pursuant to the Criminal Code."

Although, as can be seen above, s 18(8) is differently worded from the provision of the Canadian Charter then under consideration, the type of protection, as appears from ZUBER JA's judgment, is the same. The principles embodied in the two sections are the same as those in s 18(8).

In another Canadian case, *R v Rolbin* (1982) 1 CRR 186, the accused was tried in a summary

trial on a charge of failing to provide information requested under ss 231(3) and 238(2) of the Income Tax Act, 1970-71-72 (Can), c 63. Among other things, the defence argued that the demand for information contemplated by the Income Tax Act violated s 7 of the Canadian Charter of Rights and Freedoms, in that it forced the accused to incriminate himself, thereby infringing on his right to liberty, guaranteed in s 7 of the Charter. Section 7 reads:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

This provision is different from s 18(8) of our Constitution.

What is important in the case for our purposes is the Canadian Income Tax Act. Section 231(3) of that Act reads:

"231. (3) The Minister may, for any purposes related to the administration

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or enforcement of this Act, by registered letter or by a demand served personally, require from any person

- (a) any information or additional information, including a return of income or a supplementary return, or
- (b) production, or production on oath, of any books, letters, accounts, invoices, statements (financial or otherwise) or other documents,

within such reasonable time as may be stipulated therein".

These provisions, although different from the provisions of our Exchange Control Act, have the same effect.

In *R v Rolbin supra*, it was held that:

"A person does not incriminate himself by filing his income tax return or providing additional information. These are mere administrative acts required by law."

The more relevant Canadian case is *R v Esposito* (1985) OR (2d) 356 (CA), another decision of the Ontario Court of Appeal (1985) 24 CCC (3d) 88. The Canadian Charter of Rights and Freedoms, 1982 has a provision similar to s 18(8) of our Constitution, albeit differently worded. Section 11(c) of the Canadian Charter reads:

"11. Any person charged with an offence has the right

...

- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence."

MARTIN JA said of para (c) of s 11 at 96-97 (365 of the Ontario report):

"Section 11(c) enshrines the concept of the non-compellability of an accused at his trial or at his preliminary hearing as a constitutional right: see 'The Role of the Accused In The Criminal Process' by Ed Ratushny in *Canadian Charter of Rights and Freedoms* (1982), edited by Walter S Tarnopolsky and Gerald-A Beaudoin, at pp 354 and 356-7. It protects an accused from being compelled to **testify**: see *Dubois v The Queen*, a judgment of the Supreme Court of Canada, released November 21, 1985, not yet reported [since reported 22 CCC (3d) 513,

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I am of the view that s 11(c) of the Charter has no application to the admissibility of the appellant's answers in response to police questioning."

The headnote to this case states the above clearly at 357:

"Section 11(c) of the Charter provides that any person charged with an offence has the right 'not to be compelled to be a witness in proceedings against that person in respect of the offence'. Section 11(c) thus protects an accused from being compelled to testify and has no application to the admissibility of the accused's answers in response to police questioning."

Again what is important in this case is that a person cannot be compelled to incriminate himself at his trial. An accused person is protected against testifying at his trial.

The United States Constitution has a somewhat similar provision in its Fifth Amendment. It is, however, very wide. The relevant part reads as follows:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

This clause refers only to testimonial evidence. There are many United States authorities to this effect. I shall refer only to *Fisher v United States* (1976) 425 US 391; 48 L Ed 2d 39. In that case MR JUSTICE WHITE, who delivered the opinion of the court, said at 54:

"It is also clear that the Fifth Amendment does not independently prescribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a **testimonial** communication that is incriminating. We have, accordingly, declined to extend the protection of the privilege to the giving of blood samples, *Schmerber v California* (1966) 384 US 757, 763-764; 16 L Ed 2d 908, 86 S Ct 1826; to the giving of handwriting exemplars, *Gilbert v California* 388 US 263, 265-267; 18 L Ed 2d 1178; 87 S Ct 1951; voice exemplars, *United States v Wade* (1967) 388 US 218, 222-223; 18 L Ed 2d 1149; 87 S Ct 1926; or the donning of a blouse worn by the perpetrator, *Holt v United States* (1910) 218 US 245; 54 L Ed 1021; 31 S Ct 2. Furthermore, despite *Boyd*, neither a partnership nor the individual partners are shielded from compelled production of part-

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nership records on self-incrimination grounds. *Bellis v United States* (1974) 417 US 85; 40 L Ed 2d 678; 94 S Ct 2179."

I think United States authorities on this subject are aptly summarised in a passage in Corwin & Peltason's *Understanding the Constitution* 10 ed at 187, where the learned authors say:

"The protection against self-incrimination extends only to testimonial evidence. One cannot claim the right in order to refuse to submit handwriting samples, to give voice samples, to be fingerprinted, to appear in a police lineup, to submit to a breathalyzer test, or even to give a blood sample. Moreover, the mere fact that one refused to give fingerprints, or submit to a breathalyzer, or give blood samples could be used as incriminating evidence in a court.

The self-incrimination clause, at least for the moment, also protects against subpoenas for one's **personal** books and papers in one's **own** possession. The important condition is that the material be personal and in one's possession. Tax records in the hands of one's accountant are not protected, for example, nor are books or papers

that one might have as a union officer, or that belong to a corporation of which one is an officer, or that belong to a partnership, or even the papers of a one-person business firm. However, in this latter example the act of producing incriminating documents may be protected, since the mere act of producing them may amount to testifying against oneself. But even this minimal protection for business records should not be read too generously, for the Supreme Court, although not there yet, appears to be moving towards Justice O'Connor's position 'that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind'."

The Zambian case of *Simataa & Anor v Attorney-General Judgment* 1986/HP/448 is appropriate insofar as the Zambian Constitution in article 20 (7) has an identical provision to s 18(8) of the Constitution of Zimbabwe. However, the case is not helpful because the court did not define the meaning of: "No person who is being tried for a criminal offence shall be compelled to give evidence at the trial".

In the United States the phrase "No person shall be compelled in any criminal case to be a witness against himself" has, with the passage of time, been broadened. It has been construed to mean much more than that no person

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shall be compelled to testify against himself. It has been broadened to mean, among other things, that no person can be compelled to answer questions incriminating him put to him by any government agency before the trial. It also provides protection from complying with certain laws, for instance tax laws, when compliance would expose one to self-incrimination by furnishing evidence of illegal activities. But in *Fisher v United States supra* the Supreme Court declined to decide whether the Fifth Amendment privilege protects the contents of an individual's tax records in his possession. The court went on to say:

"... the Fifth Amendment only protects the person asserting the privilege only from **compelled** self-incrimination. 425 US, at 396, 48 L Ed 2d 39, 96 S Ct 1569",

quoted in *United States v Doe* (1984) 465 US 605 at 610; 79 L Ed 2d 552; 104 S Ct 1237.

However, it was also stated that:

"... where the preparation of business records is voluntary, no compulsion is present. A subpoena that demands production of documents 'does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought'."

See *Fisher v United States supra* at 409; 48 L Ed 2d 39; 96 S Ct 1569.

The above was made more clear in the opinion of MR JUSTICE POWELL in *United States v Doe supra* where he said:

"Applying this reasoning in *Fisher*, we stated:

'[T]he Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications. *Schmerber v California* (1966) 384 US 757; 16 L Ed 2d 908; 86 S Ct 1826; *United States v Wade* (1967) 388 US 218; 18 L Ed 1149; 87 S Ct 1926; and *Gilbert v California*, (1967) 388 US 263; 18 L Ed 2d 1178; 87 S Ct 1951. The accountant's workpapers are not the taxpayer's.

They were not prepared by the taxpayer, and they contain no testimonial declarations by him. Furthermore, as far as this record demonstrates, the prepara-

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tion of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else. The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.' *Idem* at 409-410; 48 L Ed 2d 39; 96 S Ct 1569.

This reasoning applies with equal force here. Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged."

In the instant case this court is not required to go beyond the interpretation of s 18(8) of the Constitution of Zimbabwe.

It is, however, salutary to mention that the documents required by the Reserve Bank of Zimbabwe were not prepared by the applicant. The original statements, or certified copies of ledger sheets detailing all transactions, are documents made and prepared by the bank and in the custody of the bank. It can be said that these documents contain no "testimonial declarations" by the applicant. They may have no compelled testimony. The deposit slips may be in a class of their own, that is, if they were prepared by the applicant. It is difficult to say whether the deposit slips contain any evidence which would incriminate the applicant.

In any event the production and admissibility of these documents, were they to be obtained, would be matters for the decision of the trial court. In saying this, I do not mean to imply that the breadth and width of interpretation accorded to the Fifth Amendment does apply to s 18(8) of our Constitution.

Mr *Chatikobo* submitted that s 18(8) of the Constitution enacts the common law right against self-incrimination. Because of that, he argued, s 18(8) must be interpreted to mean that no person can be forced to give information before or during his trial. He asserted that to give the section any other meaning would be absurd, because the section then could be easily circumvented by Parliament.

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I do not think so. It is true that s 18(8) enacts the common law right to silence, but it has enacted that right only during judicial proceedings, that is, when the accused is being tried. The words in s 18(8) are clear and unequivocal. They mean what they say. To interpret these words in the manner suggested by Mr *Chatikobo* would do injustice to their plain and unambiguous meaning:

"The duty of the court is to interpret the words that the Legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly

limited" *per* LORD SIMONDS in *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189 (HL).

Although there is no written Constitution in the United Kingdom and no written Bill of Rights, there are laws protecting the revenue of the land, such as the Finance Act, which require persons to produce books, accounts and other documents. The Acts fall into the same category as our Exchange Control Act and s 33 of the Regulations. There is a common law right of protection against self-incrimination. Yet people are required to give information before the trial or before any prosecution is contemplated.

It is in this respect that I refer to *Commissioners of Customs and Excise v Ingram & Ors* [1948] 1 All ER 927 (CA). It will suffice to cite part of the headnote:

"The Crown Proceedings Act, 1947, s 14, provides: '(2) Subject to and in accordance with rules of court, the Crown may apply in a summary manner to the High Court . . . (d) for the delivery of any accounts, the production of any books, or the furnishing of any information, required to be delivered, produced or furnished under the enactments relating to purchase tax.' In connection with the levying of purchase tax, the Commissioners of Customs and Excise issued summonses under s 14 for orders to the defendants 'to produce pursuant to the Finance Act, 1946, s 20, all their books, accounts, records and documents in connection with any business carried on by them' at a given address.

HELD: (i) it was within the power of the court under s 14 to order the production of accounts and books, but, while the word 'accounts' therein extended to sales and purchase invoices, it did not extend to 'records and documents', and in proceedings under s 14 the court could not order their production.

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(ii) it was no defence to a claim for the production of the accounts and books that such production would incriminate the defendant because the whole purpose of ordering production was to facilitate investigation to prevent the defrauding of the Revenue and knowledge of his position with regard to payment of the tax was specially within the knowledge of the defendant."

When considering the effect of s 33 of the Regulations on the person directed to produce documents, accounts, or any other information, the words said by LORD GODDARD CJ in *Customs Commissioners v Ingram supra* at 929F-H apply:

"It is said that this is compelling a man to incriminate himself or putting an onus on a man to show that he has not been committing an offence, but, it is quite a commonplace of legislation designed to protect the revenue of the Crown, as it is realised that all the information must generally be within the knowledge of the taxpayer or the subject, to put an onus on him or to oblige him to do certain things which may have the effect of incriminating him. During the course of the argument I suggested a comparison with the procedure under the Customs Consolidation Act, 1876, which enables the customs to seize any goods if they are goods of a dutiable character and to call on the subject to show that he has paid duty on them. He can show whether he has paid duty or not, and, therefore, the onus is put on him. Here, it is not a question so much of onus. It is said that when a man is called on under s 20 to produce his documents, his books, invoices or accounts, or whatever they may be, he is entitled to take objection and say: 'I will not produce this one or that one because it may incriminate me'. It seems to me that that would be stultifying the whole purpose of the section, and the claim for privilege, which, as between subject and subject in an action, may be made, has no application to this class of discovery or production."

The above words can be used to equal effect in the instant case: It may be said, perhaps with some justification, that the directive issued is necessary for the protection of the revenues of the land, and if the person so directed was protected by s 18(8) "that would", in the words of LORD

GODDARD CJ, "be stultifying the whole purpose of" s 5(1)(a)(i) of the Exchange Control Act.

It is interesting to note that the same reasoning was adopted in an Australian case, *Mortimer v Brown* (1970) 122 CLR 493, in which the court held that s 250 of the Companies Act 1961 (Qld) excluded the availability of the

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privilege (against self-incrimination) on the public examination by a judge of directors of a company in a voluntary liquidation. KITTO J said at 496:

"... the evident purpose of the section ... is to enable a suggestion of fraud or concealment of a material fact to be fully investigated ...";

and that such a question must frequently involve consideration of evidence tending to incriminate individuals. He went on to say:

"To read down the wide terms of the section so as to allow a danger of self-incrimination as a valid ground for refusing to answer a question would render the provision relatively valueless in the very cases which call most loudly for investigation."

In another Australian case, *Pyneboard Pty Ltd v Trade Practices Commission & Anor* (1983) 57 ALJR 236; 45 ALR 609, the High Court was determining whether the privilege against exposure to a penalty had been abrogated by the provisions of s 155 of the Trade Practices Act 1974 (Cth). Section 155 of that Act authorises a member of the Commission where he has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter which constitutes or may constitute a contravention of the Act, to require that person to furnish to the Commission any information or documents which relate to the contravention or suspected contravention. MASON ACJ (as he then was), WILSON and DAWSON JJ said at 341-2, 239 and 613 respectively:

"In deciding whether a statute impliedly excludes the privilege much depends on the language and character of the provision and the purpose which it is designed to achieve. The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. In such cases it will be so, notwithstanding that the answers given may be used in subsequent legal proceedings.

Thus in *Mortimer v Brown* (1970) 122 CLR 493, the court held that s 250 of The Companies Act 1961 (Qld) excluded the availability of the

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privilege on the public examination by a judge of directors of a company in a voluntary liquidation. KITTO J (at p 496), after noting 'that the evident purpose of the section, primarily even if not wholly, is to enable a suggestion of fraud or concealment of a material fact to be fully investigated' and that such a question must frequently involve

consideration of evidence tending to incriminate individuals, went on to say:

'To read down the wide terms of the section so as to allow a danger of self-incrimination as a valid ground for refusing to answer a question would render the provision relatively valueless in the very cases which call most loudly for investigation. By providing in subs (7)(c) that notes of a person's examination may thereafter be used in evidence in any legal proceedings against him, the section shows that the possibility of self-incrimination is contemplated as being inherent in the kind of examination that is authorized.'

WALSH J (at p 498) said:

'The argument for the applicants is that the provision should be construed in a way which restricts its operation so as to preserve the traditional right or privilege against compulsory self-incrimination, which has commonly been recognised as available to witnesses in judicial proceedings. It is said that in the absence of an abrogation in express terms of this privilege, the provision should be construed as not disclosing an intention to take it away from persons who are required to submit themselves to examination. In my opinion the character and purpose of the provision are such that a construction which would curtail its operation in the manner and for the reason suggested ought not to be adopted.'

I have cited these cases to show that the Legislature intended in s 5 of the Exchange Control Act, as read with s 6(3)(a) of the Regulations, to render unavailable the common law privilege against self-incrimination in order to enable the State to prevent the contravention of the Act. The Legislature must have intended to prevent those with external accounts from abusing their privilege by depositing in them money which according to law should be brought into Zimbabwe.

The Australian cases are relevant only insofar as they establish the necessity for having laws which require an individual to produce documents or other information for the purposes expressed in the Act. Furthermore, they show in clear terms that where such legislation exists the privilege against self-incrimination is, under the common law, impliedly excluded if there is an

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obligation to answer, to provide information or to produce documents.

From the above persuasive authorities, Mr *Chatikobo's* contention, that since s 18(8) enacts the common law right against self-incrimination it must be interpreted to mean that no person can be forced to give information before or during his trial for a criminal offence, finds no support either under the common law or in a jurisdiction in which the right to self-incrimination is protected by a provision in the Constitution. His contention cannot be sound in a country where the Constitution, in terms of s 18(13)(e), reinforces the provision in s 188A of the Criminal Procedure and Evidence Act [*Chapter 59*], which empowers the court to draw inferences from a refusal to answer questions. And where, if an accused person declines to give evidence or refuses to answer questions put to him without just cause, his very refusal may be used in evidence against him. See JG Storry *Rhodesian Criminal Practice* at 134.

In terms of s 188A of the Criminal Procedure and Evidence Act an accused person can refuse to answer questions only on the ground "that he had just cause for persisting" in his refusal to answer questions. In order to satisfy the court that he has just cause:

"It is necessary for an accused person who wishes to maintain silence and avoid an adverse inference being

drawn therefrom to set out sufficient reasons which would constitute just cause,"

(per GOLDIN JA in *S v Makandhla* 1981 ZLR 423 (SC) at 425H; 1981 (4) SA 743 (ZA) at 745 F-G). For purposes of this judgment, it is not necessary to decide whether s 188A of Chapter 59 is inconsistent with s 18(8) of the Constitution or, for that matter, whether s 18(13) derogates from the right to silence or legitimises s 188A of the Act.

Section 188A reads:

"188A. (1) If an accused who gives evidence or is questioned in terms of subsection (5) or (6), as the case may be, of section *one hundred and eighty-eight* refuses to answer any question, he shall be asked to give his reasons for so refusing and, if he persists in his refusal, the court, in determining whether the accused is guilty of the offences charged or any offence of which he may be convicted on that charge, may, unless satisfied that he had just cause for so persisting, draw such inferences from the refusal as appear proper and the refusal may, on the basis of such

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inferences, be treated as evidence corroborating any other evidence given against the accused.

(2) For the purposes of subsection (1), an accused who refuses to answer any questions shall be deemed to do so without just cause -

- (a) in the case of an accused giving evidence in terms of subsection (5) of section *one hundred and eighty-eight*, unless he is entitled in terms of this Act to refuse to answer the question on the ground of privilege;
- (b) in the case of an accused who is questioned in terms of subsection (6) of section *one hundred and eighty-eight*, unless he would be entitled in terms of this Act to refuse to answer the question on the ground of privilege if he were giving evidence on his own behalf."

Section 18(13)(e) of the Constitution reads:

"(13) Nothing contained in or done under the authority of any law shall be held to be in contravention of -

. . .

- (e) subsection (8) to the extent that the law in question authorizes a court, where the person who is being tried refuses without just cause to answer any questions put to him, to draw such inferences from that refusal as are proper and to treat that refusal, on the basis of such inferences, as evidence corroborating any other evidence given against that person."

In my judgment, s 33(1) of the Exchange Control Regulations 1977 is not inconsistent with s 18(8) of the Constitution of Zimbabwe. Section 33 of the Regulations is not *ultra vires* the Constitution.

The applicant has an account, no 13240320-JL, with Banque Paribas, Luxembourg. The Minister alleges that he worked for a French company and that he was paid 150 000 francs which was deposited in his bank account in Luxembourg. The information required by the Reserve Bank is, in as far as it pertains to the deposit or paying of 150 000 francs into his account, within the applicant's knowledge. That knowledge may be a confirmation of the Reserve Bank's fears or it may not be.

What matters in this judgment is that s 33 of the Regulations is *intra vires* s 18(8) of the Constitution. The application cannot succeed.

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As far as costs are concerned, counsel are agreed that costs should follow the event. The applicant has failed in his prayer.

In the result the application is dismissed with costs.

Gubbay JA: I agree.

McNally JA: I agree.

Manyarara JA: I agree.

Korsah JA: I agree.

Gill Godlonton & Gerrans, applicant's legal representatives

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NOORMOHAMED v PATEL 1987 (2) ZLR 324 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil appeal

10 December 1987 & 11 February 1988

Flynote

Practice and procedure - payment into court pendente lite - no interdict sought - no legal or factual basis put forward justifying order - order incompetent.

Headnote

The respondent had commenced an action in the High Court against the appellant's son, the defendant in the court *a quo*, to recover a BMW motor car from him. He alleged that by agreement with the defendant he had exchanged his BMW car for two other vehicles, a television and \$10 500 in cash, but that those two vehicles had been seized by the police on the grounds that they were stolen. He applied for an order restraining the defendant from disposing of the BMW.

The defendant denied possession of the BMW and averred that his mother, the appellant, had bought the car from one Rohit Patel for cash. The respondent then applied to join the appellant as a defendant in the case and for an order that she pay into court the sum of \$40 000 pending

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the outcome of the case. Both the defendant and the appellant deposed in affidavits, supported by a written agreement of sale, that the appellant had bought the car from Rohit Patel. However, Rohit Patel denied in an affidavit ever having had any dealings with the appellant. The High Court ordered that the appellant be joined as a defendant in the case and that she pay \$40 000 into court *pendente lite*. She appealed against the latter order.

Held, that there was no factual or legal basis for the grant of the order and it must be set aside.

Held, further, that those authorities which lay down the proposition that

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where the rules of court are deficient the court has jurisdiction to grant orders which will serve to further the administration of justice were not applicable in this case. It was not alleged that the appellant was in contempt of court, no interdict was sought against her and no facts were put forward from which it could be suggested that she would not be in a position to satisfy a judgment if it were given against her. The respondent simply wanted advance security for a judgment against the appellant before he had obtained it, and he was not entitled to this.

Cases cited:

Utterton v Utterton 1969 (2) RLR 404 (GD)

Candler v Crane Christmas & Co [1951] 1 All ER 426 (CA)

Packer v Packer [1953] 2 All ER 127 (CA)

Herbert v Isaacs & Anor 1973 (1) RLR 316 (AD); 1973 (4) SA 106 (RA)

Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 91) SA 773 (A)

Ncoweni v Bezuidenhout 1927 CPD 130

Stiebel v Horn & Ors 1971 (3) SA 643 (W)

Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG [1984] 1 All ER 398 (QBD)

S C F Finance Co Ltd v Masri & Anor [1985] 2 All ER 747 (CA)

Prince Abdul Rahman Bin Turki al Sudairy v Abu-Taha & Anor [1980] 3 All ER 409 (CA)

Sherras v van der Byl (1909) 26 SC 508

Konz v van Delden 1947 (2) SA 286 (T)

Ex parte Schultz 1917 TPD 214

Bricktec (Pty) Ltd v Pantland 1977 (2) SA 489 (T)

Television & Electrical Distributors (Pty) Ltd v Goodwin & Anor 1956 (1) SA 514 (W)

Fred P Ackerman's Properties (Pty) Ltd & Ors v Estate Agents Board 1980 (3) SA 451 (C)

Mareva Compania Naviera SA v International Bulk Carriers SA ("The Mareva") [1980] 1 All ER 213 (CA)

Z Ltd v A & Ors [1982] 1 All ER 556 (CA)

M T O'Meara for the appellant

A P de Bourbon SC for the respondent

Judgment

Dumbutshena CJ: This appeal is concerned only with an order of the High Court directing the appellant to pay into the court the sum of \$40 000, pending the outcome of case No. HC 1221/85.

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Stated briefly the facts of this case are as follows: Sometime in December 1984 Dakshesh Hasmukhlal Patel, the respondent in this appeal, verbally agreed with Farouk Noormahomed (the appellant's son) to exchange a motor vehicle, BMW 733i series, for the following items:

- a) one green Datsun Sunny motor vehicle;
- b) one green Datsun SDX motor vehicle;
- c) one colour television set, valued at \$3 500,00; and
- d) payment of \$10 500,00.

Subsequent to this agreement, the police collected the two Datsun motor vehicles on the allegation that they were stolen. Because of this Patel commenced an action in the High Court claiming, among other things, the return of the BMW motor vehicle. This action was against Farouk Noormahomed. Patel applied for an order restraining Farouk Noormahomed from disposing or selling the BMW 733i which was, as I understand, still in Farouk Noormahomed's possession.

By letter dated 3 October, 1985 written by Patel's legal practitioners and addressed to Farouk Noormahomed's legal practitioners (annexure H to Patel's affidavit), payment into court was demanded. Part of the letter reads as follows:

"We refer to the above matter and to recent correspondence with yourselves regarding the High Court Order by Consent in respect of the BMW motor vehicle and the colour television sets and video recorders.

We recall that we indicated to you that the BMW motor vehicle had been sold in contravention of the said order.

Similarly it appears as if the colour television sets and video recorders have also been disposed of in breach of the said order.

We hereby demand that the purchase price for the motor vehicle and for the television sets and video recorders be paid into court or into a trust account pending the determination of the cases between our respective clients. Unless we hear from you within the next 48 hours we shall be making application to the high court for an order to the above effect.

...

In the light of your clients plea regarding the sale of the motor vehicle, namely that the motor vehicle was purchased by Mrs Noormahomed, we are of the view that Mrs Noormahomed will have to be joined as a third defendant in case number HC 1221/85. We have written to Messrs

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Surgey, Pittman & Kerswell in this regard and also in respect of our suggestion that the purchase price for the BMW motor vehicle be paid into court."

In his first replying affidavit Farouk Noormahomed denied that the motor vehicle was in his possession. He stated that his mother, the appellant in this case, had purchased the BMW motor vehicle. He stated that the vehicle was not in his possession at the time the order was made. In her answering affidavit the appellant averred:

"That as has already been made clear from Annexures B, C and D to the Applicant's Founding Affidavit, I purchased the vehicle in question namely a BMW 733i, registration number 424-440X direct from Mr Rohit Patel."

In support of her averment the appellant produced Annexure "A" to her affidavit. The document is entitled: AGREEMENT OF SALE and reads as follows:

"This is to certify that I Mr Rohit H Patel has sold BMW 733i Registration Number 424-440X Engine Number 5 755114 to Mrs Joobida Noormahomed of 35 Dakota Drive Ridgeview, Harare Zimbabwe for the sum of \$34 000/- (thirty four thousand dollars).

I have received full payment in cash. The vehicle is fully customs cleared and Mrs Joobida Noormahomed shall not be responsible for payment of repairs which are done to the vehicle at present.

However the vehicle will only be delivered after all the repairs are completed to the purchaser's satisfaction.

This vehicle has been fully paid for by myself in April 1984, purchased in the United Kingdom Registration Number MWL 365 S This vehicle had one previous owner in the United Kingdom."

However the court *a quo* joined her as the third defendant in case no. HC 1221/85 and ordered her to pay the sum of \$40 000 into court pending the outcome of the litigation in that case.

Mr O'Meara, who appeared for the appellant, argued that the order made by the learned judge *a quo* directing the appellant to pay the sum of \$40 000 into court *pendente lite* was erroneous in law and was without authoritative precedent and had no factual basis.

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Mr *O'Meara* contended that the learned judge *a quo* did not give any reasons for making the order to pay into court. He argued that there was no allegation that the respondent feared irreparable loss because the appellant would dissipate the \$40 000 paid to her when she sold the motor vehicle. Besides the respondent never alleged that the appellant had no funds and would be unable to pay to satisfy judgment. There is, so it seems to me, no basis set out in the notice of motion for granting the order to pay into court. See *Utterton v Utterton* 1969 (2) RLR 404 (GD) at 409. Mr *O'Meara* argued that the only basis upon which the learned judge could have found the appellant in contempt of court was that he did not believe Farouk Noormahomed. The learned judge *a quo* said of Farouk Noormahomed's evidence: ". . . I find it hard to believe his account when he says that he denied infringing the Court Order. He is the son of the Second Respondent."

Mr *O'Meara* submitted that the order for payment into court was not competent because it was not a punishment for contempt of court. If the order for payment into court was not a punishment for contempt it could only be explained as being an interdict or attachment which did not have a basis in law. There was no prayer for an interdict. The court *a quo* simply directed the appellant to pay \$40 000 into court.

Mr *de Bourbon*, who appeared for the respondent, submitted in his heads of argument that the respondent sought in the court below an order requiring the proceeds of the sale of the motor vehicle which was the subject of the litigation to be paid into court. He argued that what the respondent sought to do was to preserve the proceeds of the sale of the motor vehicle pending the outcome of the litigation. It was the respondent's contention that such an order was within the jurisdiction of the High Court.

In reply to the appellant's assertion that there was no authoritative precedent and no basis in law for directing the paying of \$40 000 into court, Mr *de Bourbon* relied on what was said in *Candler v Crane Christmas & Co* [1951] 1 All ER 426 (CA) and *Packer v Packer* [1953] 2 All ER 127 (CA) at 129H. In *Candler v Crane Christmas & Co supra* at 432C-G, DENNING LJ (as he then was) in a dissenting judgment said:

"The first submission put forward by counsel for the defendants was that a duty to be careful in making statements arose only out of a contractual duty to the plaintiff or a fiduciary relationship to him. Apart from such cases no action, he said, had ever been allowed for negligent statements, and he urged that this want of authority was a reason against it being

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allowed now. This argument about the novelty of the action does not appeal to me. It has been put forward in all the grant cases which have been milestones of progress in our law, and it has nearly always been rejected. If one reads *Ashby v White* (1703) 92 ER 126; (1704) 1 ER 417, *Pasley v Freeman* (1789) 100 ER 450 and *Donoghue v Stevenson* [1932] AC 562 one finds that in each of them the judges were divided in opinion. On the one side of them there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed. Whenever this argument of novelty is put forward I call to mind the emphatic answer given by PRATT CJ nearly two hundred years ago in *Chapman v Pickersgill* (762) 2 Wils 145; 95 ER 734 when he said (2 Wils 146)

'I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or

confined, for there is nothing in nature but may be an instrument of mischief . . . '

The same answer was given by MacMILLAN in *Donoghue v Stevenson* [1932] AC 562 at 691 when he said:

'The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.'

Packer v Packer supra was a case in which a woman who had had a child born out of wedlock with a married man was subsequently married to that man after he had divorced his wife. They later divorced. She applied for the custody and maintenance of the child. It was held, *per* DENNING LJ, that the test of jurisdiction under s 26(1) of the Matrimonial Causes Act, 1950, was the parenthood and not the legitimacy of the child and therefore the court could make the provision sought by the woman. MORRIS LJ held that the expression 'the children of the marriage of whose parents is the subject of the proceedings' in s 26(1) referred to the children of a 'marriage' union, including a case where the 'marriage' was declared to be null and void, but it did not include a child born out of wedlock in circumstances which, in view of the provision s 1(2) of the Legitimacy Act, 1926, prevented his being legitimated by the subsequent marriage of the parents, and, accordingly, on the dissolution of the wife's marriage, no order for the custody or maintenance of the child could be made under s 26(1)". [See the headnote to the case.]

It was in these circumstances that LORD DENNING LJ used the *obiter dictum* at 129H relied upon by counsel for the respondent. He remarked as follows:

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"What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both. There is no decision of this court that an order cannot be made for custody of an illegitimate child, and, in the absence of direct decision preventing us, I think we should follow the course which is permitted by statute and prescribed by good sense. I realise that there is a dictum of the Divisional Court in 1948 in *C v C* [1947] 2 All ER 50 and a rule of court, first made in 1950 (R 54(1) of the Matrimonial Causes rules, 1950 (SI 1950 No. 1940)) which assume that s 26 is confined to legitimate children, but the present case is brought to test the validity of this assumption. If it is shown to be wrong, we should not hesitate to say so."

The result of the appeal was that the trial judge's decision was allowed to stand because the two Lord Justices of appeal differed in their views.

Mr *de Bourbon* seeks support for his contention in the above passages cited from the judgments of DENNING LJ. He argued that the fact that the Rules of Court do not specifically provide for such an order, nor for such an application, does not prevent the court making an order applied for. In *Herbert v Isaacs & Anor* 1973 (1) RLR 316 (AD) at 320G-321E; 1973 (4) SA 106 (RA) at 109E-110A BEADLE CJ remarked:

"Furthermore, Rules of Court are matters of procedure and it is axiomatic that these Rules are designed to see that justice is done in the use of court process and the court will not allow its process to be employed to produce what is an obvious injustice. This is trite law, but I might usefully perhaps refer to the case of *Brown Bros Ltd v Doise* 1955 (1) SA 74 (W), a case also dealing with the service of notice. In that case WILLIAMSON J, at p 77

said:

'In my view this is a case where the Rules of Court as framed do not provide for one particular set of circumstances which can arise, and I think that the Court has inherent power to read the rules applicable to the procedure of the Court in a manner which would enable practical justice to be administered and a matter to be handled along practical lines. I propose to apply the remarks of GARDINER JP, in the case of *Ncoweni v Bezuidenhout* 1927 CPD 130, where he said:

"The Rules of procedure of this Court are devised for the purpose of administering justice and not to hamper it, and where the rules

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are deficient I shall go as far as I can to grant orders which would help to further the administration of justice."

Where I am satisfied, as I am in this case, that notice cannot be given, where I am satisfied that the Rule cannot be complied with in the terms in which it is framed, I feel that I am entitled to make an order which will entitle the party to have his bill taxed as is contemplated by the Rules.'

There is no Rule of Court which specifically applies the contractual doctrine of fictional fulfilment to Rules of Court. But applying the *dicta* which I have just read out, I cannot see why this doctrine should not be applied to Rules of Court where not to do so would, because of an obvious injustice, allow the Rules of the Court to be invoked for a purpose for which they were never intended. If I may paraphrase the words of WILLIAMSON, J which I have just quoted, 'Where I am satisfied that the Rule cannot be complied with, because a defendant is deliberately preventing the plaintiff from complying with that Rule, then I think I am entitled to say that *vis-à-vis* the defendant, the court can assume that the plaintiff has complied with that Rule'."

I do not see how this case assists the respondent. The principle of this case, as summarised in the headnote, is that where the court is satisfied that a Rule of Court could not be complied with because the defendant was deliberately preventing the plaintiff from complying with that Rule, then the court can assume that the plaintiff has complied with the Rules; the court is then entitled to apply the doctrine of fictional fulfilment. In *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 713 (A), RUMPFF JA (as he then was) said at 783A-B:

"In connection with the question what precisely the appellant should have done after the respondent had stopped his application, it is desirable to repeat the general principles applicable, viz. that the Court is not there for the Rules but the Rules for the Court" (official translation).

He went on to cite the passage from *Ncoweni v Bezuidenhout* 1927 CPD 130 referred to above.

It is true that a superior court has inherent jurisdiction to grant an interdict. But that is not the problem the High Court was faced with in this matter. The High Court was never asked to grant an interdict. It was asked to make an order *simpliciter* directing the appellant to pay money into court. The

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appellant now says there was no basis in fact or in law upon which the court ordered her to pay money into court. In his judgment the learned judge, if I am correct, laid down the reason for ordering the appellant to pay the \$40 000 into court in this passage:

"Furthermore the applicant's brother, Rohit H Patel, the owner of the BMW has made an affidavit, in which he emphatically denied ever having any dealings with the second respondent. Therefore, she is not being truthful when she says in her replying affidavit that she bought the BMW 733i 'direct from Mr Rohit Patel'. In the result I find that the second respondent acquired possession of the BMW motor vehicle from the first respondent. The first respondent disposed of the BMW in breach of the court order. The second respondent knew or ought to have known that the BMW was subject to a court order at the time when she sold or disposed of it for \$40 000. This amount represents the BMW. Therefore, I order that this amount be paid into court pending the determination of Case No. HC 1221/85."

From the above passage it seems to me that the parties did not agree on the circumstances under which the motor vehicle was purchased. Their differing versions could only be resolved at the trial of this matter.

As there was no prayer for an interim interdict the court did not purport to grant an interdict, it simply directed the appellant to pay money into court. The foundation for making this order for payment into court could not solidly be laid on the ground that the appellant was in contempt of court. We have not been referred to any case in which a respondent was directed to pay money into court without an interdict, albeit temporarily granted, and with the applicant satisfying the court that there was a dispute between the parties and that the dispute should be resolved in his favour. See *Stiebel v Horn & Ors* 1971 (3) SA 643 (W) at 646A. In that case, though, COLMAN J did say at 645B:

"When an action is pending in which the existence or the validity of a contract of sale is in dispute, the court will, in appropriate circumstances, grant an order for the preservation or protection of the subject matter of the alleged sale, pending a decision in the action. But it has never, in my experience, gone so far as to direct a person who denies having sold property to deliver that property, *pendente lite*, to the person who claims to have bought it."

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"'A good arguable case' is no doubt the minimum which the plaintiff must show in order to cross what the judge rightly described as the 'threshold' of the jurisdiction" (*per* KERR LJ in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH Co KG* [1984] 1 All ER 398 at 415d-e).

This Court has been urged to accept that the order for payment into court was within the inherent jurisdiction of the court. I agree that the jurisdiction should be kept flexible so that the courts can continue to do what is just and convenient and that the jurisdiction of the court should not be hedged with rules. See *SCF Finance Co Ltd v Masri & Anor* [1985] 2 All ER 747 (CA) at 75C.

This does not mean that the rules of procedure laid down over the years should be disregarded in order to accommodate litigants who do not follow them. Flexibility of the jurisdiction can only be done within set procedure. If it were a proper order it would have been within the jurisdiction of the court. It, however, is not a good order. It was granted without any good reason. It is not just and convenient to grant such an order. I think that the general principle that Rules are made for courts and not courts for the rules is not applicable here. In this case the respondent

failed to apply for an interdict. He failed to justify the making of an order directing the appellant to pay money into court. I associate myself with what was said by COLMAN J in *Stiebel v Horn & Others, supra*, at 646C-D:

"I do not think that a precedent for the grant of such relief as is now claimed would be in accordance with principle, nor do I think that the administration of justice would benefit from such an extension of our practice. Although such an extension might relieve hardship in some cases, it would swell the volume of interim litigation, to the benefit of the legal profession, but not necessarily of the public. Chattels would be shuttled back and forth; rights of occupation would be granted and withdrawn; and in many instances, it seems to me, the end-result would be confusion, or injustice to the litigant who ultimately succeeded, or both."

However, Mr *de Bourbon* sought to anchor his argument on the principles upon which a Mareva injunction is granted. He argued that the power to order money to be seized pending litigation was now well recognised in England. That is true. There must, however, be a foundation. The kind of foundation required in these cases was laid down by LORD DENNING MR in *Prince Abdul Rahman Bin Turki al Sudairy v Abu-Taha & Anor* [All ER 409 (CA)] at 412a where he said:

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"So I would hold that a Mareva injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied."

However, in this case the respondent did not allege that the defendant was about to abscond or that there was a danger that the assets would be removed out of the jurisdiction or disposed of within the jurisdiction. Such assertions may be sufficient for the purposes of an applicant who wants to succeed in getting a Mareva injunction. Even if they are sufficient assertions they may not be enough in themselves and other considerations may have to apply. See *Ninemia Maritime Corp v Trave Schiffahrts, supra*, at 417c-e.

The totality of the evidence considered was insufficient to justify an interim interdict. There was no fear that the appellant wanted to remove the money from the jurisdiction; or that she was going to dissipate the assets or deal with the money with the object of putting it beyond the reach of the respondent. In *Ninemia Corp v Trave Schiffahrts, supra*, at 419h KERR LJ stated the appropriate test in these matters as follows:

"In our view the test is whether, on the assumption that the plaintiff has shown at least 'a good arguable case', the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied."

See also at 419j-420f.

It appears to me that the same requirements for the granting of a Mareva injunction have been used in South Africa and in this country to prevent a debtor from disposing of his assets before the creditor obtains a judgment against him. The important thing to remember is that the creditor's application is for an interdict or an injunction. And in each case, as we have seen above, the applicant must show good cause. Inevitably relief has always been granted by way

of an interim interdict where it has been shown that the respondent was about to leave the jurisdiction of the court and where he was trying to dispose of his assets in order to defeat the plaintiff. See *Sherras v Van der Byl* (1909) 26 SC 508; *Konz v Van Delden* 1947 (2) SA 286 (T); Ex parte *Schultz* 1917 TPD 214; *Bricktec (Pty) Ltd v Pantland* 1972 (2) SA 489

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(T); *Television and Electrical Distributors (Pty) Ltd v Goodwin & Anor* 1956 (1) SA 514 (W); *Fred P Ackerman's Properties (Pty) Ltd & Ors v Estate Agents Board* 1980 (3) SA 451 (C).

Some of the above cases illustrate in sequence the long history of the use of interdicts in Zimbabwean and South African courts in restraining debtors from removing or disposing of their assets or monies to the detriment of the creditors. In England the first instances in the use of Mareva injunctions was in 1975 in the case of *Mareva Compania Naviera SA v International Bulk Carriers SA* ('The Mareva') [1980] 1 All ER 213; [1975] 2 Lloyd's Rep 509, where the Court of Appeal approved of the making of an injunction restraining the defendants from removing or disposing out of the jurisdiction monies standing to the credit of the defendants at a London bank until trial of the action or further order. The plaintiffs were shipowners and the defendants voyage charterers; they had received payment for the freight into that account but had not paid the hire due to the plaintiffs. It is from this case that Mareva injunctions get their name.

The practice sanctioned by this decision has grown rapidly and been widened. It is no longer restricted to cases where a foreign defendant may transfer assets abroad. An injunction may be granted to a plaintiff with a proper claim in any case where there are grounds for fearing that the defendant may defeat justice by transferring assets abroad or by concealing them in this country. The procedure has received the recognition and approval of Parliament in England. Section 37(3) of the Supreme Court Act, 1981 provides as follows:

"(3) The power of the High Court . . . to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction."

See *The Supreme Court Practice* 1985 29/1/5 at 547.

In all the jurisdictions I have mentioned above to obtain an interim interdict or a Mareva injunction in order to recover money or property from a defendant, the plaintiff must have reasons to believe that the defendant has assets within the jurisdiction to meet the judgment but might deal with the assets whether by removal out of the jurisdiction or disposing of them within

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the jurisdiction so that they are not available to satisfy the plaintiff's judgment given against the defendant. See *Prince Abdul Rahman v Abu-Taha supra* at 412a; *The Supreme Court Practice* at 458.

If the court *a quo* had applied its mind to all the evidence it would have realised that the respondent had failed to meet the minimum requirement in this respect, that is, a "good arguable case" which the plaintiff must show in order for the judge to exercise the jurisdiction. But as was said in *Ninemia Corp v Trave Schiffahrts supra* at 415d:

"... at the end of the day the court must consider the evidence as a whole in deciding whether or not to exercise this statutory jurisdiction."

McEWAN J in *Bricktec (Pty) Ltd v Pantland supra* at 493E remarked:

"It is by no means clear that the applicant is entitled to such an interdict if he can show no more than a fear that the respondent may so dispose of the property."

In this case the totality of the evidence on the papers does not entitle the respondent to an interim interdict. Much that is required is lacking. There was no allegation that the appellant intended to dispose of the \$40 000 or to deal with it in a manner prejudicial to the respondent. It was not shown that the appellant was unable to meet her obligations if she disposed of the money before judgment. There was no evidence to suggest that she had no money of her own with which to pay the \$40 000 to meet the judgment. From the evidence on the papers it seems to me that the appellant's family has established businesses in Harare. She was not said to be short of money. It appears therefore that the respondent wants the appellant to pay money into court as security before he obtains judgment. The court *a quo* seems to have obliged him in his desire.

In *Z Ltd v A & Ors* [1982] 1 All ER 556 (CA) KERR LJ stated two conditions under which a Mareva injunction, in our case an interim interdict, should be granted. He said at 572d:

"It follows that in my view Mareva injunctions should be granted, but granted only, when it appears to the court that there is a combination of two circumstances. First, when it appears likely that the plaintiff will recover judgment against the defendant for a certain approximate sum. Second, when there are also reasons to believe that the defendant has

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DUMBUTSHENA CJ

assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him."

In the instant case there was no basis in law or in fact justifying the directing of the appellant to pay \$40 000. The appellant must succeed in her appeal.

The question of costs in the court below was reserved for the main action. It would be improper for this court to interfere with the order made by the learned judge *a quo*. Costs on appeal present no problem. Both counsel say costs should follow the event.

Accordingly the appeal is allowed. The order for payment of \$40 000 into court is set aside. Costs of appeal are awarded to the appellant.

The order of the court below in paragraph 2 is altered to read:

"The application for the payment of \$40 000 into court is dismissed."

Gubbay JA: I agree.

Korsah JA: I agree.

Scott & Associates, appellant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

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ZIMBABWE BONDED FIBREGLASS (PVT) LTD v PEECH 1987 (2) ZLR 338 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Gubbay JA, McNally JA & Manyarara JA

Civil appeal

3 March 1987

Flynote

Procedure - motion proceedings - disputes of fact on affidavits - approach of court to resolution of such disputes.

Headnote

The respondent instituted notice of motion proceedings in the High Court against the appellant. The relief sought was granted. The appellant claimed that there was such a dispute of fact on the affidavits that the matter should not have been resolved on the papers.

Held, a court should endeavour to resolve disputes of fact raised in affidavits. It must take a robust and common sense approach, provided it is convinced that there will be no injustice to the other party. The onus rests on the party seeking to have the dispute of fact resolved.

Cases cited:

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

Soffiantini v Mould 1956 (4) SA 150 (E)

Joosab & Ors v Shah 1972 (1) RLR 137 (G); 1972 (4) SA 298 (R)

Lalla v Spafford NO & Ors 1973 (2) RLR 241 (G); 1974 (1) SA 191 (R)

Masukusa v National Foods Ltd & Anor 1983 (1) ZLR 232 (HC)

J S Sayce for the appellant

J B Colegrave for the respondent

Judgment

Gubbay JA: On 3 June 1986 the respondent instituted proceedings by way of notice of motion in the High Court against the appellant claiming: (i) the return of certain pieces of machinery and equipment belonging to him and

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GUBBAY JA

held by the appellant for the purpose of building a 27 foot Oceanmaster boat; (ii) the return forthwith of the sum of \$20 000; and (iii) the costs of the application. Subsequent to an interim order made with the consent of the parties, pursuant to which the machinery and equipment specified by the respondent were identified and thereafter removed into the custody of an independent third party, EBRAHIM J, in a cryptic *ex tempore* judgment, swept aside the opposition and granted the relief sought in full. His decision is now appealed against on the ground that a dispute of fact was disclosed in the affidavits filed by the parties which could not be resolved in the absence of *viva voce* evidence, without doing an injustice to the appellant.

It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently there is a heavy *onus* upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact. See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165; *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154; *Joosab & Ors v Shah* 1972 (1) RLR 137 (G) at 138G-H; *Lalla v Spafford NO & Ors* 1973 (2) RLR 241 (G) at 243B; *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (HC).

The learned judge appreciated that the substantive conflict on the papers related to whether the contract the parties had entered into had been properly cancelled by the respondent. He considered he was able to resolve that issue without causing an injustice. The question is whether he was right in that view. What are the facts?

On 5 November 1980 the respondent concluded a contract with the appellant in terms of which the appellant was to build for him a 27 foot Oceanmaster boat at a cost of \$25 000. Almost immediately thereafter the appellant offered to reduce the contract price to \$20 000 if the respondent were to pay that sum forthwith. This the respondent did. The contract provided that the respondent was to be responsible for the acquisition of the motors and driving components (the power units), and these were supplied during the course of 1982. The respondent also assisted the appellant to acquire certain other accessories for the boat, particularly fridges and freezers, from monies lawfully held outside Zimbabwe. These too were delivered to the appellant after it had cleared them through customs and paid the charges levied thereon.

GUBBAY JA

Thereafter followed three years of almost total inaction by the appellant. At some stage the respondent was shown a fibreglass hull, but nothing was done to commence the fitting out of the hull as contemplated in the contract. Delivery dates were constantly extended.

Eventually on 4 September 1985 the respondent met with the appellant's directors Mr and Mrs Hillerer and the date 30 June 1986 was agreed upon. The respondent maintained that was the date by which the boat was to be completed, but according to the Hillerers all that was agreed was that the boat would be ready for a test or initial launching by 30 June 1986. They claimed that it was by no means surprising that the respondent should have been willing to wait a further ten months for a test launch, for at the time the appellant was in the course of constructing a new factory premises and was unable to fit the engines on the boat until the building had been completed.

Herein lies the material dispute. If the respondent's version was correct then he was justified in cancelling the contract, as he did, on the afternoon of 30 May 1986, because the appellant, by its conduct and the statements of its directors, had repudiated its obligations. There was no way in which the boat could have been completed by 30 June 1986, and this was acknowledged by Mrs Hillerer. On the other hand, if the appellant's version was correct, the respondent, by his action in purporting to cancel the contract, was in breach of his obligation.

[After setting out and analysing the evidence relating to the disputed facts, the learned Judge of Appeal held that the dispute could and should be resolved on the papers, and concluded:]

It was for these reasons that we were satisfied that the learned judge *a quo* was correct in resolving the dispute on the affidavits. Consequently at the conclusion of the argument addressed by Mr Sayce on behalf of the appellant, and without hearing Mr Colegrave, the appeal was dismissed with costs.

McNally JA: I agree.

Manyarara JA: I agree.

Stumbles & Rowe, appellants' legal practitioners

Coghlan, Welsh & Guest, respondents' legal practitioners

Endnotes

1 (Popup - Popup)

Not Miss *Mukonoweshuro*, who appeared at the appeal - *Editor*.

2 (Popup - Popup)

portions of this judgment have been omitted

3 (Popup - Popup)

See 1987 (1) ZLR 179 - *Editor*.

4 (Popup - Popup)

See also the judgment of McNALLY J (as he then was) in *S v Hartlebury & Anor* [1985 \(1\) ZLR 1 \(HC\)](#) - *Editor*.

5 (Popup - Popup)

Reported under the name *R v Pedzesayi* in the SALR - *Editor*.

6 (Popup - Popup)

Editor's note: this judgment should be read in conjunction with that of SMITH J in *Mutambara & Ors v Minister of Home Affairs* HH-231-89, where the learned judge held that (a) the Minister was obliged to act reasonably in issuing a certificate in terms of s 106(2)(b) of the Act; (b) the Minister was obliged to afford an applicant for bail the right to be heard before issuing a certificate, the Act not clearly excluding such a right; and (c) the petitioners were entitled to their costs, the application not being an ordinary bail application, but a determination of the petitioner's rights.

7 (Popup - Popup)

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 (HL) at 951

8 (Popup - Popup)

See above in this volume at p 66 - *Editor*.