GONDWE v BANGAJENA 1988 (1) ZLR 1 (HC)

Court **High Court, Harare**

Mtambanengwe J

Application for summary judgment

17 December 1987 & 20 January 1988

Flynote

Costs - legal practitioner and client scale - appropriate where appearance to defend entered for purpose of delay and without intention of defending proceedings - de bonis propriis - also appropriate in such circumstances.

Headnote

Where the defendant, in an eleventh-hour attempt to postpone the day of reckoning, had entered an appearance to defend an undisputed claim against him, thereby forcing the plaintiff to apply for summary judgment against him, costs were awarded to the plaintiff on a legal practitioner and client scale. Had the plaintiff applied timeously for costs to be awarded against the defendant's legal practitioners *de bonis propriis,* the Court would have been disposed to accede to such an application, as their conduct in opposing the application for summary judgment was quite unjustified.

Cases cited:

Webb v Botha 1980 (3) SA 666 (N)

David v Naggyah & Anor 1961 (3) SA 4 (N)

Reid NO v Royal Insurance Co Ltd 1951 (1) SA 713 (T)

De Goede v Venter 1959 (3) SA 959 (O)

C Mutzuris for the applicant

AM Donagher for the respondent

Judgment

Mtambanengwe J: This is an application for summary judgment in respect of plaintiff's claim for payment of the sum of $3 490,01. The

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plaintiff's cause of action is based on an acknowledgment of debt signed by defendant on 4 August 1987 undertaking to pay the sum claimed on or before 31 August 1987.

The application is opposed on the ground that since defendant entered appearance to defend without intending to do so plaintiff should have taken judgment in default of defendant's plea.

On the hearing of the application the Court was advised that the full sum claimed had been paid, save for the interest claimed (which would be settled), and that the only issue outstanding was the question of the scale of costs.

The facts in this matter were as follows.

Prior to the signing of the acknowledgement of debt defendant had made several promises to pay back to plaintiff the sum of $5 500,00. This arose from an agreement of sale whereby plaintiff purchased a certain property from defendant on 30 April 1984. Subsequently defendant sold the same property to another person for a higher price. Plaintiff accordingly cancelled the agreement of sale.

On defendant's failure to honour the acknowledgement of debt plaintiff issued summons on 30 October 1987. Appearance to defend was entered on 5 November 1987 and thereafter followed correspondence between the parties' legal practitioners. The first of the letters was addressed to plaintiff's legal practitioners by defendant's legal practitioners on 5 November 1987, notifying them that, though appearance to defend had been entered, defendant did not intend to defend the proceedings. A cheque for $1 000,00 was enclosed and defendant promised to pay the balance shortly and also requested plaintiff not to proceed with a writ of execution without first giving him an opportunity to pay the amount due. A reply dated 9 November was addressed to defendant's legal practitioners by plaintiff's legal practitioners, reading in part as follows:

> "We are concerned that your client has entered appearance to defend when he does not intend to defend the proceedings. We can only assume this is to delay proceedings. To secure our client's interest, we must insist that you sign the attached Consent to Judgment, failing which we shall have to make application for summary judgment.
>
> You comment in your letter that your client will 'shortly be in a position

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> to pay further funds with which to be able to meet the amount due to our client.' Please let us know when this will be and that the balance will be paid in full.
>
> Please confirm that your client will pay our client's Legal practitioner and client charges; as well as interest claimed in our summons."

It ends up by saying that the cheque for $1 000 was accepted not as an acceptance of instalments and reserving the right to claim the full balance outstanding. It elicited the reply:

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"The Rules of Court entitle our client to enter an appearance to defend the proceedings when he does not intend to defend them. Your client is at liberty to proceed within the terms of the Rules. A summary judgment application is not necessary, nor is a consent to judgment.

We trust that our client will be able to put us in funds to pay the balance due to your client together with interests and costs shortly."

In reply to the above plaintiff's legal practitioners wrote:

"Your statement that the Rules of Court entitled a defendant to enter appearance to defend a claim when he does not intend to defend the claim is astonishing.

Please let us know which Rule of Court you refer.

The whole purpose of an appearance to defend is to enable a Defendant to **defend** a claim.

It is clear from your letter that your client admits the cause of action and the amount claimed; has no bona fide defence to our client's action and has entered appearance to defend merely to attempt to delay the taking of judgment against him.

You further state that an application by our client for Summary Judgment is unnecessary. What if your client decided not to pay the debt? If he failed to file a Consent to Judgment, our client would be obliged to issue a Notice to Plead, file a Bar and obtain Judgment by default. All this would delay matters and incur unnecessary expense.

MTAMBANENGWE J

In the circumstances, your client has given our client no option but to apply for Summary Judgment claiming payment of costs on a legal practitioner and client scale."

This was now 17 November 1987, appearance to defend having been entered on 5 November 1987.

In opposing the application for summary judgment defendant's legal practitioner swore an affidavit urging the court to dismiss the application for the following reasons:

"(a) The Respondent, as he is entitled has entered appearance to Defend the proceedings for the purpose of registering with the Court an Address for Service with his appointed legal practitioners.

(b) The Respondent has clearly indicated in the High Court Appearance Book that he does not intend to defend the proceedings.

(c) Accordingly the Applicant is entitled to take judgment in default of Respondent's Plea and is therefore at liberty to draw and tax a Bill of Costs after notice to the Respondent's legal practitioners of record and proceed with the normal execution process provided for in the Rules."

He concludes by saying that -

"the summary judgment proceedings are not necessary, and that the Appearance to Defend was not entered solely for the purpose of delay."

I would readily agree with Mr *Mutzuris*, who argued for the applicant that the first two grounds are of a highly technical nature and their purpose could have been achieved by means other than an appearance to defend, and that the procedure urged on the third ground of opposition

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amounts to a cumbersome, lengthy and costly process and circumvents the entire purpose of and intention behind the rules related to summary judgment, as a bill of costs in any event will, in terms of Rule 325 of the High Court Rules, be taxed by the taxing master before a writ of execution is issued. None of the grounds constitute a good *prima facie* defence to the application.

The defendant had no defence whatsoever to the plaintiff's claim. The facts of the matter show a background of broken promises from 1984; worse still, the correspondence between the parties' legal practitioners shows defendant's attitude as very ambiguous, so ambiguous as to justify plaintiff's

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action in bringing this application. Bearing in mind that the objective of the summary judgment procedure is "to enable a plaintiff with a clear case to obtain the swift enforcement of his claim against a defendant who has no real defence to that claim" (see Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed p 302), in this case, where defendant has no defence whatever, a consent to judgment would have been the most logical and least costly option for the defendant. Instead of that, defendant urged plaintiff to adopt a process that by its very nature would entail considerable delay. The only reasonable inference to be drawn, therefore, from his action of entering appearance to defend is that this was made solely for the purpose of delay. There is nothing in the Rules which makes it incumbent upon plaintiff to adopt such a procedure.

Mr *Donagher* for the defendant (respondent) conceded as much.

As regards the question of costs the crux of the matter is that defendant opposed the application and persisted in his opposition, knowing full well that he had no *bona fide* defence to the action. A consent to judgment was still the least costly course to adopt in the circumstances, as, after entering appearance to defend, defendant would be entitled to a notice of taxation in terms of Rule 310 of the High Court Rules. In the correspondence between the parties' legal practitioners, defendant's legal practitioner bluntly states, without giving any reasons, that a consent to judgment is not necessary. That stance left the plaintiff with the only remedy available which was to apply for summary judgment. There is no doubt whatever that on the facts as revealed on the papers before me, defendant would not have succeeded in resisting summary judgment.

In arguing that costs be awarded on a legal practitioner and client scale Mr *Mutzuris* made belated application to amend the draft order so as to include an alternative for costs *de bonis propriis.* This was opposed by Mr *Donagher,* who argued that had this been indicated in the original papers defendant's legal practitioners would have been given an opportunity to deal with the matter in his affidavit. He would in the circumstances apply for an adjournment to allow the legal practitioner to swear a further affidavit in this respect. In the interest of saving further costs I did not feel it necessary to adjourn the matter. I reserved my ruling on Mr *Mutzuris*' application to amend the draft order. My decision on that application is to disallow the amendment. My reasons are that the issue can be determined without the necessity of that

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amendment since I understood Mr *Mutzuris* to argue that the high scale costs he sought could derive from either of two sources, client and

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legal practitioner, or *de bonis propriis,* and in the circumstances of this case I believe they can properly be awarded as originally prayed. I must say however that had plaintiff timeously asked for an order *de bonis propriis* I would have been persuaded to accede to that, seeing that the legal practitioner's conduct in persisting in opposing the application, when he should have known that the application would succeed, was quite unjustified, and so was the refusal to sign a consent to judgment. The arguments advanced were highly technical and of no benefit to anyone. See *Webb v Botha* 1980 (3) SA 666 (N) and *David v Naggyah & Anor* 1961 (3) SA 4 (N).

On the papers it is quite clear that the course taken by the defendant's legal practitioner stems from defendant's own conduct in the matter and amounts to an eleventh hour effort to delay the day of reckoning. I am satisfied that an order that he pay plaintiff's costs on a client and legal practitioner basis is proper : see *Reid NO v Royal Insurance Co Ltd* 1951 (1) SA 713 (T) and *De Goede v Venter* 1959 (3) SA 959 (O), as referred to in Collier's *Law of Costs* 2 ed at p 55.

I accordingly order that defendant pay the costs of the proceedings preceding the application for summary judgment on a party to party basis; thereafter on "the legal practitioner and client basis."

Surgey, Pittman & Kerswell, applicant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

S v MBEWE & ORS 1988 (1) ZLR 7 (HC)

Court **High Court, Harare**

Ebrahim J

Criminal review

27 January 1988

Flynote

Criminal procedure - charge - statutory offence created by enactment which has been amended - charge should refer to principal enactment rather than to amending enactment - statute providing for mandatory sentence unless special circumstances exist- effect of failure by trial court to record such circumstances.

Statutes - Parks and Wild Life Act 1975 - s 115(4a)(b) - mandatory minimum sentence for possessing or

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trading in ivory or rhinoceros horn -"special circumstances" justifying imposition of a lesser penalty - what are.

Headnote

Where a charge alleges a contravention of a statutory provision which has been amended, the charge should allege a contravention of the principal Act or Regulations rather than a contravention of the amending Act or Regulations. It is unnecessary to refer in the charge to the amending Act or Regulations.

Section 115(4a)(b)(i) of the Parks and Wild life Act No. 14 of 1975 provides a mandatory minimum sentence for persons who have been convicted of unlawful possession of or trading in ivory, unless the convicted person satisfies the court that there are special circumstances in the particular case justifying the imposition of a lesser penalty. The section requires the facts constituting the special circumstances to be recorded by the court. Failure by the court to do this amounts to a misdirection rendering the sentence incompetent.

A single isolated act of unlawful possession of unregistered raw ivory, whether or not the possession was for the purposes of trade, could bring

1988 (1) ZLR p8

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into effect the mandatory penalty.

"Special circumstances", as used in s 115(4a)(b)(i), means any extraordinary factor arising out of the commission of the offence or which is peculiar to the offender. A clear distinction must be drawn between special circumstances and mitigating features which are of general application, such as good character or particular hardship. The latter do not constitute special circumstances, nor does contrition or co-operation on the part of the accused. However, where, for example, the accused was forced by circumstances to commit an offence or was *bona fide* ignorant of some statutory provision of the law, such factors could constitute not only mitigating factors but special circumstances.

Cases cited:

S v Zviyenge S-99-87 (unreported)

Attorney-General v Jasi & Nharingo S-2-87 (unreported)

R v da Costa Silva 1956 R & N 369; 1956 (2) SA 173 (SR)

S v Chisiwa 1981 ZLR 666 (H)

S v Rawstron 1982 (2) ZLR 221 (H)

Judgment

Ebrahim J: The accused were convicted by the magistrate, Bindura, and each of the accused was sentenced to pay a fine of $250 or in default to undergo 2 months' imprisonment with labour. I sought the magistrate's comments on why the mandatory sentence stipulated in terms

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of s 115(4a) of the Parking and Wild Life Act, No. 14 of 1975 had not been imposed and he has responded as follows:

> "1. This record was sent to Bindura for my comments when I had moved to Harare hence the delay in responding to it. My apologies please the delay was not of my own making.
>
> 2. I did not impose the mandatory sentence stipulated under s 115(4)(h) of Act 14/1975 because it appeared to me that the three accused persons were not engaged in a trade. It was an isolated case of one elephant tusk.
>
> Although not properly canvassed, it seemed to me that the case did not warrant the application of the mandatory sentence."

Before dealing with his comments there are a number of other issues which require comment. The prosecutor formulated the charge in this manner:

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> "Contravening s 76C(a)(1) of the Parks and Wildlife (General) Amendment Regulations 1986 (No.1) as read with s 116 of the Parks and Wildlife Act 14/75 : In that upon [sic] on the 2nd day of September, 1987, and at or near Ludbury Farm, Bindura, in the said Province the said accused did both and each or other of them did [sic] wrongfully and unlawfully and without licence [sic] possess one elephant tusk ..."

Apart form the inelegant grammar used, the citation is incorrect. Firstly, it is the principal regulations that require to be cited and not the amending regulations. Secondly, the amending regulations cited are in any event outdated. The 1986 amendment regulations which introduced s 76C to the principal regulations were as at 10 April 1987 repealed and substituted by the Parks and Wild Life (General) (Amendment) Regulations, 1987 (No. 2) as published in SI 110/87. These apply to the instant matter. They read as follows:

> "76C. (1) Subject to section 79, no person shall acquire, have in his possession, sell or transfer any raw ivory that has not been registered unless the raw ivory -
>
> (a) was lawfully taken from an animal that was lawfully hunted in terms of the Act; or
>
> (b) was lawfully taken from an animal that died on any land for which that person is the appropriate authority; or
>
> (c) has been lawfully imported into Zimbabwe; and the period within which that person is required to produce the raw ivory for registration in terms of section 73 has not elapsed."

Thirdly, reference to a "licence" is made in the charge sheet. Obviously this is incorrect as the section refers specifically to **unregistered ivory.** Fourthly, where more than one accused is involved the terminology used is "did all and each or one or more of them" and not "did both and each or other of them". Fifthly, the reference to s 116 is incorrect, as the section simply empowers the relevant Minister to make regulations. What should have been inserted is "as read with s 115 (4a) of the Parks and Wild Life Act 14 of 1975". This refers specifically to the penalty provisions. In this regard see the comments of McNALLY J in *S v Zvinyenge & Ors* S-99-87 (not yet reported), at p 5 of the cyclostyled judgment.

The charge sheet for this contravention should have been drafted along the following lines:

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> "Contravening s 76C(1) of the Parks and Wild Life (General) Regulations, 1981, as published in SI 900 of 1981, as read with s 115 (4a) of the Parks and Wild Life Act No. 14/1975: in that on 2 September 1987 and at or near Ludbury Farm, Bindura in the said Province, the accused did all and each or one or more of them wrongfully acquire, have in their possession, sell or transfer any raw ivory that has not been registered, that is to say did possess one elephant tusk weighing 7,5 kg in circumstances where such acquisition was unlawful in terms of the Regulations and which had not been registered within the period as stipulated in terms of s 73 of the Regulations."

I am satisfied that the amendment of the charge along the lines as outlined is permissible in terms of my review powers in that there is no prejudice to the accused persons. The facts as deposed to in the agreed statement of facts and attached affidavit indicate that the accused unlawfully acquired the tusk from another party who has not been located and arrested. It was agreed that the accused persons, at various stages between the months of July 1987 and September 1987, came into possession of the tusk and that the tusk in question had been offered for sale. It was further accepted by the accused that the ivory in question was unregistered and that they did not have authority to possess the ivory. Finally, it was accepted by the accused that the ivory in question was not registered within fifteen days of them acquiring it.

To that extent, all accused were pleading to and accepted the essential elements as laid down in terms of s 76 C (1) of the regulations.

It is however necessary to examine the propriety of the sentence. In terms of s 104 (b) of the regulations a person who has contravened the regulations "involving the unlawful possession of, or trading in ivory ... (is liable to) . . . the penalties set out in subs (4a) of s 115 of the Act."

Under s 115 (4a) (b) (i) of the Act a mandatory minimum penalty for first offenders who have been in unlawful possession of or trading in ivory is set out in the following terms:

> ". . . a fine of not less than fifteen thousand dollars or to imprisonment for a period of not less than five years, or to both such fine and such imprisonment: Provided that where on conviction, the convicted person satisfies the court that there are special circumstances in the particular case justifying the imposition of a lesser penalty, **the facts of which shall be recorded by the court**, the convicted person shall be liable to a fine

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> not exceeding fifteen thousand dollars or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment." (My emphasis.)

From a procedural point of view, a magistrate, having convicted a person for unlawfully possessing or trading in ivory, is obliged to record the special circumstances of the particular case before him. If this is not done this amounts to a misdirection rendering the sentence incompetent. *See Attorney-General v Jasi and Nharingo* S-2-87 (not yet reported).

An examination of the record in the instant matter indicates that the magistrate has not recorded the facts, if any, justifying the imposition of a lesser penalty.

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It is necessary to examine the trial magistrate's comments for not imposing the mandatory penalty. The reasons appear from the minute in response to my query. The justification is that "The three accused persons were not engaged in a trade. It was an isolated case of one elephant tusk." I do not agree with his comments. The mandatory penalty may be imposed in any offence involving **"the unlawful possession of,** or trading in, ivory ...". See s 115 (4a)(b) of Act 14 of 1975. Had the Legislature meant to restrict the ambit of the section to trade only it would have said so in clear and unequivocal terms. It clearly has not done so.

It is my view, therefore, that a single isolated act of possession, whether or not the possession was for the purposes of trade, could bring into effect the mandatory penalty. Thus, a one-off poaching expedition resulting in the unlawful shooting and killing of a rhino or elephant to obtain ivory or horn would warrant the application of the mandatory minimum penalty. Having said that, what in fact constitutes special circumstances in the particular case justifying the imposition of a lesser penalty? The term "special circumstances" as used in s 115 (4a) of Act 14 of 1975 is not defined. Reference to decided cases is required. The first point for consideration is one of terminology. There are a number of enactments which refer to "special reasons" or "special circumstances". Some of these are ss 40 to 46 inclusive and ss 61 and 69 of the Road Traffic Act 1976; s 5 of the Exchange Control Act [*Chapter 170*]; s 3 of the Precious Stones Trade Act, as amended by Act 1 of 1982; s 5 of the Firearms Act [*Chapter 308*] as amended by Act 37 of 1982; s 115 of the Parks and Wild Life Act 1975 as amended by Act 35 of 1985.

EBRAHIM J

Is there a difference between "reasons" and "circumstances" which are special? The answer is no, as is apparent from the observations of BEADLE J (as he then was) in *R v da Costa Silva* 1956 R & N 369 at 372 C and those of SQUIRES J in *S v Chisiwa* 1981 ZLR 666 at 670 which held that there is no difference between a "special reason" and "special circumstances".

As to the meaning of "special", SQUIRES J in *Chisiwa's* case (*supra*) had this to say at p 671 A:

> "The clear intention of the Legislature in using this word is that the reasons have to be out of the ordinary, either in their extent or their nature."

Having said this, what factors may be embraced in considering whether there are facts which constitute special circumstances or reasons? In certain instances, a narrow application is given to the term "special reasons" or "special circumstances". For example : under the Road Traffic Act No. 48 of 1976 and the Law and Order (Maintenance) Act, "special circumstances" are restricted by the definition sections pertaining to those Acts to those "facts which constitute the offence" and NOT those factors which are peculiar to the offender. However, where the Legislature has not prescribed the ambit of factors to be taken into account a wider spectrum of facts may be looked at. BEADLE J in *R v da Costa Silva (supra)* concluded that:

> "To my mind, the only consideration which should weigh with the court in deciding whether a particular circumstance should be taken into account is whether the circumstance is a special one or not. I do not think the court's discretion should be fettered by any rule compelling it to disregard any circumstances simply because it is not related to the offence. "

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That position was affirmed by SQUIRES J in S v *Chisiwa* (*supra*). He had this to say:

> "It should be clear from this that the Court may have regard to factors arising either out of the commission of the offence or peculiar to the offender, as long as they are out of the ordinary. This will involve the making of a value judgment, since the question whether such reasons exist will often be a matter of degree."

I conclude, therefore, that where the Legislature has not placed a restrictive application on the meaning of special reasons or circumstances any

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EBRAHIM J

extraordinary factor arising out of the commission of the offence or which is peculiar to the offender may constitute special reasons or circumstances. It ought, however, to be borne in mind that a distinction must be drawn between mitigating factors of a general nature and "special reasons". DUMBUTSHENA J (as he then was) in *S v Rawstron* 1982 (2) ZLR 221 pointed out at 234 that:

> "[A] clear distinction must be drawn between special reasons or special circumstances and mitigating features which go to the determination of the quantum of sentence."

It is apparent that mitigating factors such as "good character" or "particular hardship", which are of general application, cannot be taken as "special circumstances". Neither, it would seem, would contrition as evidenced by a plea of guilty to the offence or co-operation on the part of the accused constitute special reasons. However, where for example the accused was out of necessity compelled by circumstances to commit an offence, eg forced to drive whilst drunk because of urgent medical necessity, or was *bona fide* ignorant of some statutory provision of the law, such factors could constitute not only mitigating factors but "special circumstances" in the case. The above are offered merely as illustrations and are not intended as a closed list.

What then of the instant case? Regrettably the special circumstances, if any, are not recorded and were not canvassed. It is impossible, therefore, to ascertain whether or not there are special circumstances surrounding the commission of the offence or which are peculiar to the offenders.

In the premises, I set aside the sentence and remit the matter to the magistrates court with the direction that the trial magistrate (1) records, as he is required to do, any circumstances in the case which may or may not constitute special circumstances justifying the imposition of a penalty less than the mandatory minimum and (2) sentence the accused afresh.

Before concluding I would like to place on record my appreciation of the assistance provided to me by the Attorney-General in submitting to me a comprehensive opinion on this matter.

Greenland J: agrees.

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CHODOKUFA v CHODOKUFA 1988 (1) ZLR 14 (HC)

Court **High Court, Harare**

Adam J

Opposed matter

17 December 1987 & 3 February 1988

Flynote

Family law - maintenance order - variation of - what applicant must show - child - custody - rights of custodian parent regarding child's education - when court will interfere with custodian parent's exercise of such rights.

Headnote

In an application for variation of an order for maintenance, the onus is on the applicant to show good cause for a variation. This means that he must establish to the satisfaction of the court that there has been some alteration in the circumstances and means of both parties.

A parent who has by order of court been given custody of the children of a dissolved marriage has the sole right to determine all questions relating to their upbringing and education. This includes the right to select the school or schools to which they are to be sent. The granting to the non-custodian parent of full rights of access and guardianship does not necessarily restrict the custodian parent's rights in this regard. The court has no jurisdiction to interfere with an exercise of discretion by a custodian parent in the choice of schools for the children unless proof is given to the satisfaction of the court that there has been an abuse by the custodian parent of his or her power, in the sense that either no discretion had been exercised at all because the actual decision was capricious or one that no reasonable person could have arrived at, or that the decision was inspired by a motive which was quite foreign to the due and proper regard for the interests of the children.

ADAM J

Cases cited:

Masukusa v National Foods Ltd & Anor 1983 (1) ZLR 232

Marufu v Moyo 1983 (2) ZLR 386

Simleit v Cunliffe 1940 TPD 67

Niemeyer v de Villiers 1951 (4) SA 100 (T)

C C Seddon for the applicant.

E Chatikobo for the respondent.

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Judgment

Adam J: The respondent was granted a divorce against the applicant on 7 August 1985 and custody of their two minor children, V, born 2 July 1976, and D, born 30 March 1978. The applicant was to pay the respondent maintenance for each of the minor children at the rate of $45 per month, and also pay school fees due from time to time. In his judgment REYNOLDS J stated:

> "...It does appear, however, that the children are happily settled at present, and are well cared for, and it is desirable to make an order which is not to be disruptive or upsetting to them. It is my view that it is in their best interests that their custody remain with the plaintiff. The defendant will have full rights of access and guardianship, and will in this way be able to maintain meaningful contact, and will be able to have a full voice in their upbringing.
>
> ...The plaintiff has also claimed the payment of school fees for each child. The defendant has expressed the specific desire to decide on the children's education, and the fees concerned should, I believe, be met by him as a payment in addition to maintenance payments."

The applicant on 12 May 1987 removed the children from the Southerton Primary School. According to the respondent she was not prepared to let the children be sent to a boarding school as D was unwell. Also she felt that the children had been taken out of the Southerton Primary School against the Headmaster's instructions.

The respondent on 4 June 1987 applied to this Court for an order seeking an increase in the maintenance for each minor child. The applicant opposed the increase and asked instead for an order that maintenance be continued at the rate of $45 monthly for each child or that the applicant pay boarding and school fees until the minor children attain the age of 18 years or become self- supporting, whichever occurs sooner, and that the respondent release their

minor children to attend a boarding school as soon as boarding school places are found for them. As against what the applicant sought, this Court on 17 June 1987 found that there had been some alteration in the circumstances and means of the respondent wife and the applicant husband and accordingly increased the maintenance to $75, to be paid by the applicant monthly for each minor child. Thereafter the applicant filed on 8 July 1987 a notice of appeal to the Supreme Court of Zimbabwe, stating that he could only afford to pay an increased amount of $60 monthly for each child.

In this application the applicant seeks an order that the respondent permit the minor children to attend a boarding school, namely, Waddilove Primary School, that the applicant pay the tuition, boarding fees, uniforms and any other charges levied by that boarding school; that the payment of maintenance of $75 monthly for each child be suspended whilst the children are attending the boarding school at Waddilove Primary School; that the maintenance of $75 monthly for each child be resumed if the children are not accepted at Waddilove Primary School, and that the applicant be responsible for the cost of and arranging transport to and from Waddilove Primary School to the respondent's place of residence.

It is clear that there are on the papers factual disputes on a number of important issues. The

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Court has been urged by both parties that, despite this, it should do what it can and take a robust approach so as to determine the matter - *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 at 235.

The onus is on the applicant to show good cause for a variation order. This means that he has to establish to the satisfaction of this Court that there is some alteration in the circumstances and means of the applicant and the respondent, his former wife: *Marufu v Moyo* 1983 (2) ZLR 386 at 387-388.

In his submission the applicant's counsel relied on what REYNOLDS J had stated in the divorce proceedings, namely that the applicant would "have full rights of access and guardianship" and would "in this way be able to maintain meaningful contact" and would "be able to have a full voice in their upbringing" and, since the applicant had "expressed the specific desire to decide on the children's education", the learned trial judge had ordered that school fees should be paid by the applicant. The applicant gave his reasons for wanting their minor children to attend Waddilove Primary School as being that they would have a better education than at Southerton Primary School; that his principal liability for their children's maintenance would be in the form of school fees and any increase in them would be fixed by the

ADAM J

school authorities, which would regulate his commitment and that it would then be less likely to be subject to Court applications. Further, this would be easier for him to manage financially, which would mean that his other children would not be prejudiced financially by the applicant paying a higher proportion of his income on some children than on his other children. Also, the respondent would only be obliged, according to him, to maintain the children during the school holidays, which would reduce her expenditure. In addition the applicant maintained that the children's accommodation at Waddilove Primary School would in some respects be preferable to that presently available with the respondent, where their minor children share a room with the house-girl. Also, the applicant asserts that he would be able to see the children at the beginning of every term instead of the only opportunity of access permitted him by the respondent being to visit their school.

The respondent disputes the applicant's assertions and is opposed to sending their minor children to Waddilove School. She states that when the applicant forcibly took their minor children to Waddilove Primary School he only paid $200 and demanded that she pay the balance. Also, she asserts that the present application is based on a matter which is the subject of an appeal, as is shown by paragraph 3 of the applicant's notice of appeal filed on 8 July 1987 to the Supreme Court of Zimbabwe, which stated that the learned judge *a quo* erred in "failing to take account that if the Respondent had not taken the children out of Waddilove there would have been no immediate requirements for an increase of the maintenance for these children quite apart from the benefit to the children themselves."

The respondent also indicates that some expenses listed by the applicant in his founding affidavit were clearly a luxury and should not be at the expense of his children's maintenance. She attached the children's reports to her replying affidavit, which showed that D's work had

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improved while V was doing exceptionally well and therefore she saw no reason to disturb them now. Further, the respondent maintained that the children were deeply affected by the divorce, which was quite bitter and acrimonious and that the children required constant motherly care and attention to compensate for what they had gone through. The respondent asserts that the applicant is really seeking a method to avoid paying maintenance at all and that is the object of this application.

The applicant in his answering affidavit refutes what the respondent maintains. In the light of the foregoing, I outline the sequence of events as it relates to the issue of their children's maintenance.

ADAM J

[His Lordship reviewed the evidence relating to the parties' financial situations and continued:]

It is clear that although the application is presented on the basis that it is in the best interests of their minor children that they attend the boarding school at Waddilove, what it really is seeking is what the applicant expressed in this Court in June 1987, namely, that as far as his financial obligations were concerned, he was prepared only to expend $1 260 for his children's boarding school fees. The applicant is in fact asking this Court to make just such a variation to the order it granted on 17 June 1987, which order, as mentioned, is presently under appeal to the Supreme Court of Zimbabwe. As stated previously, the draft order sought by the applicant also provides that maintenance of $75 monthly for each child be suspended whilst the children are attending a boarding school but shall be resumed in the event of non-acceptance at a boarding school. I am satisfied that this does not constitute a change in the circumstances as contemplated by the Matrimonial Causes Act 1985. Besides the question office propriety of such an order (whilst pending appeal), this Court would also be deliberately causing doubt as to the validity of the order granted by it on 17 June 1987.

Even if I am wrong in my conclusion, however, it is clear that on an award to a mother of

> "the custody of minor children without limitation or further definition, the father's natural right to control their persons and education is displaced without of course being extinguished ...[By] an order of custody in favour of a mother the Court entrusts to her all that is meant by the nurture and upbringing of the minor children. In this is included all that makes up the ordinary, daily life of the child - shelter, nourishment, and the training of the mind ...But not absolutely, for in the new conditions the Court will interfere at the instance of the father for good cause shown. If 'custody' without further definition meant less than this, and the father's natural rights to control education persisted in spite of the order, the life of the minors might be exposed to dislocation and periodic disturbance. TINDALL JA has recently said (see *Calitz v Calitz* 1939 AD 56 at 63) that ...
>
> ' ...'it certainly gives the mother sole control over the person and education of the minor." This must surely be right. The child by virtue of the order passes into the home of the mother, and there it must find all that is necessary to its growth in mind and body, including of course arrangements for schooling...But when it is said that sole control'

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> is given to the custodian-parent, that means as between the parents, the power of the Court to interfere where the

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> rights of control is not being exercised in the interests of the minors of course continues, and the non-custodian parent has the right to approach the Court and invoke its intervention. Unless therefore the divorced or separated spouses can agree upon a policy for the minors, where a difference of opinion has arisen, the will of the custodian parent must prevail, unless the dispossessed spouse can satisfy the Court that a case for its intervention in the interests of the minors has arisen... It is safer and preferable to say that the Court will not interfere with the custodian parent's choice, unless satisfied that the rights of custody are not properly exercised in the interests of the children and that in all the circumstances the interests of the children make interference necessary or desirable: *per* SOLOMON J in *Simleit v Cunliffe* 1940 TPD 67 at 75, 76 and 79.'"

Similarly, in *Niemeyer v de Villiers* 1951 (4) SA 100 (T) the approach is most adequately summarised in the headnote as follows:

> "A parent who has by order of Court been given custody of the children of a dissolved marriage has the sole right to determine all questions relating to their upbringing and education and this includes the right of selecting the school or schools to which they are to be sent and carries with it also the right, in the discretion of the custodian parent, to change the school from time to time as may seem desirable to him in the exercise of a bona fide discretion. The Court has no jurisdiction to interfere with an exercise of discretion by a custodian parent in the choice of school for the children unless the foundation has first been laid by proof to the satisfaction of the Court that there has been an abuse by the custodian parent of his power; either that no discretion has been exercised at all, ie that the actual decision has been capricious or vitiated by unreason in the sense that no reasonable person could have arrived at it, or that the decision was inspired by a motive which was quite foreign to the due and proper regard for the interests of the children."

It cannot be said that REYNOLDS J had meant to restrict the respondent's right of custody of their children when he accorded the applicant full rights of access and guardianship. I should also stress that the applicant's counsel conceded that Southerton Primary School was not a bad school.

The onus is on the applicant to establish to the satisfaction of this Court that

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in the choice of Southerton Primary School for their children the respondent had either exercised no discretion at all, in the sense that she has acted capriciously, or that the actual decision was such that no reasonable person could have made such a choice, or that in selecting Southerton Primary School the respondent acted from improper motives.

The applicant has not discharged the onus placed upon him. In the circumstances the application is dismissed with costs.

Coghlan, Welsh & Guest, applicant's legal practitioners

Ziumbe & Mtambanengwe, respondent's legal practitioners

AUSTIN & ANOR v CHAIRMAN, DETAINEES' REVIEW TRIBUNAL & ANOR 1988 (1) ZLR 21 (SC)

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Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA, McNally JA, Manyarara JA & Korsah JA

Civil appeal

17 July 1987 & 5 February 1988

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - s 18 - right to fair trial - detainees - evidence withheld from under s 31(3) of Emergency Powers (Maintenance of Law and Order) Regulations 1983 - constitutionality of section.

Administrative law - Detainees' Review tribunal - observance of natural justice by - bias - initial impression of bias created by Regulations should be countered by Tribunal's avoidance of all manifestations of bias - onus of proof - lies on Minister to justify detention.

Headnote

The appellants appealed against a decision of the High Court, in which the judge had dismissed their application for an order reversing the respondent's decision not to recommend their release from detention under the Emergency Powers (maintenance of Law and Order) Regulations 1983 SI 458/83. It was argued on behalf of the appellants that the Detainees' Review Tribunal had failed to observe the rules of natural justice in that (a) it relied on a secret document whose authenticity and reliability was not established; (b) no evidence was led and no information given to apprise the appellants of the case they had to meet; and (c) members of the Tribunal were biased against the appellants. Alternatively, even if the Tribunal's conduct was in accordance with s 31(3) of the Regulations, that provision of the Regulations was *ultra vires* s18 of the Constitution, which sets out the rights of a person charged with an offence, such as the right to be informed in a language that he understands and in detail of the nature of the offence with which he is charged.

Section 18 is not one of those provisions of the Constitution that may be derogated from during a time of public emergency. Section 31(3) of the Regulations allows evidence to be given to the Tribunal in the absence of the detainee and the contents of reports or other information to be withheld from the detainee.

It was also argued that the Tribunal had misdirected itself in that it did not appreciate that the *onus* was on the State to demonstrate that the security of the State would be imperilled by the release of the appellants. Finally, it was alleged, the Tribunal had failed to investigate the veracity of the allegations made against the appellants.

Held, that the provisions of s 31(3) of the Regulations are not unconstitutional. The Tribunal is not established for the purpose of determining the existence or extent of a person's civil rights or obligations, which are determined by the ordinary courts of the land. The personal rights and freedoms provided by s 11 of the Constitution are subject to respect for the rights and freedoms of others and to the public interest. The rights of a detainee are set out in Schedule 2 of the

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Constitution, which creates its own safeguards.

Held, further, that it is in the context of the rights of detainees that the fairness of the Tribunal's proceedings must be looked at. Section 31 of the Regulations must have been drafted in the knowledge that some elements of natural justice were to be excluded because of overriding considerations of national security. For this reason, it was permissible for the Tribunal to rely on information that was not fully divulged to the detainee, provided that they were not prejudiced in the preparation of their defence.

Held, further, that where the needs of national security, as determined by the Executive, result in a denial of information to the detainees, there is a correspondingly greater duty on the Tribunal to carry out an investigation into the authenticity and reliability of the information supplied to it- as searching as one which the detainees or their legal representatives would have made if they had had access to the information. In this instance, the Tribunal had applied its mind to both the contents of the secret document and the document itself.

Held, further, that the rules of natural justice require, *inter alia*, a fair hearing free from the appearance of bias, as perceived by the detainees. If right-minded people in their positions entertain the likelihood of bias or believe that the Tribunal unfairly favoured one party and not the other, its decision should not be sustained. The procedures laid down in s 31(3) create an impression of bias from the outset, because evidence may be led in the absence of the detainee and the contents of reports may be

withheld. While this type of bias is one detainees will have to endure, because it is part of the law of the land, it is bias of a type within which a court of law must work fairly. The Tribunal ought, more than in a normal case, forswear all manifestations of bias and by its deeds and utterances be seen to be fair. In this case, a statement made by the Chairman of the Tribunal gave the impression that the appellants were not being allowed to tell their story in full and one member of the Tribunal persistently asked questions in a manner tending to show hostility towards the appellants.

Held, further, that the standard of proof to be applied by the Tribunal is the same as is generally applied in civil proceedings. Because cases before the Tribunal involve grave issues of personal liberty, the degree of probability required is high. The *onus* rests on the Minister, as it is he who seeks to enforce detention and deprive the subject of his liberty. The detainees need do no more than rebut the Minister's allegations. The Tribunal should also bear in mind, when assessing and weighing the evidence that has not been seen by the detainees, that the detainees have not challenged that evidence.

Cases cited:

Minister of Home Affairs & Ors v *Dabengwa & Anor* 1982 (1) ZLR 236 (SC)

R v *Secretary of State for Home Affairs* ex p *Hosenball*; [1977] 3 All ER 452; [1977] 1 WLR 766 (CA)

Council of Civil Service Unions & Ors v *Minister for the Civil Service* [1984] 3 All ER 935 (HL);

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[1985] LRC (Const) 948

Patriotic Front-ZAPU v *Minister of Justice, Legal & Parliamentary Affairs* 1986 (1) SA 532 (ZS)

Bull v *Minister of Home Affairs* 1986 (3) SA 870 (ZS)

Minister of Home Affairs & Anor v *Dabengwa* 1983 (2) ZLR 346 (SC)

Minister of Home Affairs & Anor v *Austin & Anor* 1986 (4) SA 281 (ZS)

State of Punjab & Ors v *Talwandi* [1985] LRC (Const) 600; AIR 1984 SC 444

Russell v *Duke of Norfolk & Ors* [1949] 1 All ER 109 (CA)

Ridge v *Baldwin & Ors* [1964] AC 40; [1963] 2 All ER 66 (HL)

Olivier & Anor v *Buttigieg* [1967] 1 AC 115; [1966] 2 All ER 459 (PC)

Thornhill v *Attorney-General of Trinidad and Tobago* [1981] AC 61 (PC)

Austin & Anor v *Minister of State (Security) & Anor* S-130-86 (not yet reported)

Trapp v *Mackie* [1979] 1 All ER 489 (HL); [1979] 1 WLR 377

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Metropolitan Properties Co (FGC) Ltd v *Lannon & Ors* [1969] 1 QB 577 (CA); [1968] 3 All ER 304

Hannam v *Bradford City Council* [1970] 2 All ER 690 (CA)

R v *Liverpool City Justices* ex p *Topping* [1983] 1 All ER 490 (QB)

Stadsraad van Vanderbijlpark v *Administrateur Transvaal & Ors* 1982 (3) SA 166 (T)

S v *Herbst* 1980 (3) SA 1026 (E)

S v *Louw; S v Noyila* 1981 (4) SA 939 (E)

The Bribery Commissioner v *Ranasinghe* [1964] 2 All ER 785 (PC)

R v *Home Secretary* ex p *Khawaja* [1984] AC 74 (HL)

Meman & Anor v *Controller of Customs & Excise* S-74-87 (not yet reported)

Furnell v *Whangarei High Schools Boards* [1973] 1 All ER 400 (PC)

Bonnievale Wine & Brandy Co Ltd v *Gordonia Liquor Licensing Board* 1953 (3) SA 500 (C)

Johannesburg City Council v *Administrator Transvaal & Anor* 1969 (2) SA 72 (T)

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Livestock & Meat Industries Control Board v *Garda* 1961 (1) SA 342 (AD)

Re Pergamon Press Ltd [1970] 3 All ER 535 (CA)

Note: the Court was not required to rule on whether the Tribunal should have recommended the release of the appellants because before the Court gave judgment the Tribunal had recommended to the President the release of the appellants.

D T Turner-Samuels QC, with him *E Chatikobo*, for the appellants

A N H Eastwood, with him *C F Dube*, for the respondents

Judgment

Dumbutshena CJ: This is an appeal against the decision of the High Court dismissing the appellants' application for an order that the decision of the Chairman of the Detainees' Review Tribunal (hereafter referred to as the Tribunal) not to recommend the release of the appellants from detention in terms of the Emergency Powers (Maintenance of Law and Order) Regulations 1983 be reversed and the release of the appellants be recommended.

The appellants attack the decision of the learned judge *a quo* on several grounds, as appears from their grounds of appeal. It is said:

> "1. The learned Judge erred in failing to hold that the Detainees' Review Tribunal had failed to observe the rules of natural justice and to act

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> with procedural fairness towards the Appellants in that-
>
> (a) no evidence was placed before the Tribunal to establish the authenticity and reliability of the secret document;
>
> (b) no evidence was led and no information was given to apprise the Appellants of the case they had to meet, and
>
> (c) members of the Tribunal were biased against the Appellants.
>
> Alternatively, if it is held that the conduct of the Tribunal was in accordance with the terms of the provisions of s 31(3) of the Emergency Powers (Maintenance of Law and Order) Regulations, 1983 (SI 458/83) it is contended that s 31(3) of those Regulations is *ultra vires* the provisions of s 18(12) of the Constitution.
>
> 2. The learned Judge erred in failing to hold that the decision of the Tribunal is irrational in that-
>
> (a) the Tribunal misdirected itself in that it did not appreciate that the *onus* was on the State to demonstrate that the security of the State would be imperilled by the release of the Appellants,
>
> (b) the Tribunal failed to investigate the veracity of the allegations levelled against the Appellants.
>
> 3. The learned Judge erred in refusing to award the Appellants the wasted costs of a day's hearing before the

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Tribunal."

At the hearing, Mr *Turner-Samuels*, who appeared for the appellants with Mr *Chatikobo*, applied to amend the notice of appeal by the insertion of a paragraph praying that the appeal be allowed and that the order of the court *a quo* be altered to read:

"(1) That each of the said decisions of the Tribunal is set aside.

(2) It is declared that the Tribunal ought to have recommended the release of each of the Appellants.

(3) That the release of each of the Appellants is hereby recommended."

Mr *Eastwood*, who appeared for the respondents, did not oppose the application and leave to amend the notice of appeal was accordingly granted.

It was at this stage that Mr *Eastwood* informed the Court that at a subsequent hearing the Tribunal had recommended to the President the release of the appellants. The Court felt that that was the end of the appeal, but both counsel expressed the view that our judgment in this appeal would be of importance

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as a guide to future conduct of proceedings of the Tribunal. We therefore allowed counsel to argue the appeal in order to enable us to draw useful guidelines and directions on the future conduct of proceedings of the Tribunal.

In support of the appeal, Mr *Turner-Samuels* raised four issues. It is my intention to follow as briefly as possible the course that he charted. I shall identify the relevant issues outlined in the appellants' heads of argument and consider their merits in relation to the matter before us:

Issue A was whether the Constitution of Zimbabwe required -

"(1) that the Appellants should have been given such information and detail of the nature and content of the document as to enable them wittingly and effectively if they could to meet, answer and destroy any adverse allegation, purport, effect or detail in or inference arising out of the document; and

(2) that the Tribunal enquire into and assess properly and adequately the provenance, genuineness, weight to be attached to and veracity of the content of the document and of the validity of any inferences which could or which were being sought to be drawn therefrom;

and if so whether [the] Tribunal complied with each such requirement."

Mr *Turner-Samuels* submitted that the most important question in this appeal was whether s 31 of the Emergency Powers (Maintenance of Law and Order) Regulations 1983 SI 458 of 1983 (hereinafter referred to as "the Regulations") was constitutional or unconstitutional. He argued that preventive detention was only lawful insofar as such detention satisfied both the requirements of the Constitution and the requirements of any relevant *intra vires* legislation.

Section 31 of the Regulations sets out the procedures to be followed by the Tribunal and gives the Chairman of the Tribunal certain discretions which he can exercise in the conduct of its business. Since the procedures and powers exercisable in terms of s 31 are central to the

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determination of this appeal, it is as well to set out the provisions of the section. It reads:

"31. (1) Subject to the provisions of this Part and of paragraph 2 of Schedule 2 to the Constitution, the chairman shall regulate the

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proceedings and meetings of the Review Tribunal and may adjourn any sitting of the Review Tribunal for such time and to such place as he may think fit.

(2) The proceedings of the Review Tribunal shall be held *in camera* and shall not be published, and the Review Tribunal shall at all times have due regard to the requirements of public security, the protection of individuals and the safeguarding of sources of information.

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

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

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

(4) The Review Tribunal shall not be bound by the rules of evidence or procedure applicable to any legal proceedings, whether civil or criminal, and it shall take due cognizance of any report submitted to the Review Tribunal by the Minister, the Commissioner of Police or the Director-General of the Central Intelligence Organization."

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It was contended for the appellants that it was the legal impact of the preventive detention during a period of public emergency on section 11 of the Constitution that should be considered, always bearing in mind that detention is an evil - albeit a necessary evil. It is for this reason that the Constitution confers only limited legality on preventive detention during a period of public emergency.

Section 11 of the Constitution reads:

"11. Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the

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following, namely -

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation;

and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, the provisions of this Chapter shall have the effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

Mr *Turner-Samuels* contended that the constitutional safeguards in Chapter III of the Constitution remain in force during a period of public emergency, save only those in respect of which s 25 and Sch 2 of the Constitution provide otherwise.

Section 25 of the Constitution allows an Act of Parliament to derogate from certain provisions of the Declaration of Rights in accordance with Sch 2 in respect of a period of public emergency or a period when a resolution of the House of Assembly under s 317(6) is in effect.

Schedule 2 allows for derogation from ss 13, 17, 20, 21, 22 or 23 if the law in question -

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"...provides for the taking, during a period of public emergency, of action for the purpose of dealing with any situation arising during that period, and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions ..."

Of course, if the detaining authority takes any action which exceeds what "could reasonably have been thought to be required for the purpose of dealing with the situation prevailing", derogation will under that circumstance be impermissible and the rights of the individuals subjected to detention or to conditions under a state of public emergency will be restored.

I agree with Mr *Turner-Samuels* that derogation may only be in respect of the provisions of ss 13, 17, 20, 21, 22 and 23 of the Constitution of Zimbabwe.

It is no more than stating the bare truth that detention is an evil but a necessary evil. Within the confines of the restrictions that make detention not ordinary, the Constitution has provided those persons detained with some rights that are protected by the Constitution: under paras 2(1)(a) and (c) of the Second Schedule the detainee has the right to be informed as soon as reasonably practicable after the commencement of his detention and not later than seven days thereafter, and in a language that he understands, of the reasons for his detention; he is also permitted to be represented by a lawyer of his own choice at the hearing of his case. Some of these rights apply to ordinary citizens. An ordinary citizen who is charged with an offence enjoys, in terms of s 18(3)(b), the right to be informed in a language that he understands and in detail of the nature of the offence with which he is charged; and under s 18(3)(d), he has the right to engage a legal representative of his own choice. In terms of s 18(9) an alleged offence

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must be tried within a reasonable time; the case of a detainee should be reviewed within a reasonable time in terms of para 2(1)(b). Section 13(3) also provides that the person arrested or detained be furnished with the reasons for his arrest or detention in a language that he understands. He is permitted to engage a lawyer of his own choice and to communicate with him; that right is also repeated in para 2(1)(a) of the Second Schedule.

Mr *Eastwood* contended that these were certain elements of fairness which are imported into the proceedings of the Tribunal, but these elements do not include the requirement that all evidence or information considered by the Tribunal be revealed to the detainees either by direct evidence or otherwise. In the instant case the appellants were not shown the secret document upon which the Tribunal based its recommendation. The Chairman of the Tribunal

has a discretion to keep certain information from the detainee or his legal representative. That is the effect of s 31(3) of the Regulations.

The framers of the Constitution never intended the Second Schedule to be part of the Declaration of Human Rights. See *Minister of Home Affairs & Ors v Dabengwa & Anor* 1982 (1) ZLR 236 (SC) at 243C-D, where FIELDSEND CJ said:

> "Nor do I think that, by virtue of the inclusion of para 2 of the Schedule in Schedule 5 and its characterisation by s 54(4)(a) as a provision relating to fundamental rights and freedoms of the individual, it becomes part of the Declaration of Rights. The fact that s 11 says that 'the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained herein' does not mean that there are not other rights and freedoms which the Constitution affords. In my view it is clear that para 2 of Schedule 2 affords a separate right which is enforceable in a time of public emergency."

It is for this reason that fairness has to be considered in terms of the provisions of Schedule 2 as read with s 31(3) of the Regulations.

Having considered the rights of the detainees under the Constitution it is as well to consider whether the fundamental rights entrenched in s 11(a) continue to remain in effect during a period of public emergency.

Mr *Turner-Samuels* contended that s 11 (and s 18) of the Constitution, being included in the provisions of the Declaration of Rights, cannot be derogated from during a period of public emergency.

Mr *Turner-Samuels* is right, because para 1(1) of Schedule 2 states so in clear terms. Para 1(1) of Schedule 2 reads:

> "1. (1) Nothing contained in any law, shall be held to be in contravention of section 1, 17, 20, 21, 22 or 23 to the extent that the law in question provides for the taking, during a period of public emergency, of action for the purpose of dealing with any situation arising during that period, and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions ..."

However, if it is shown that the action taken or the emergency declared

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exceeded the situation prevailing at the time or the situation warranting the declaration of a public emergency, or if that situation cannot be said to reasonably have required the declaration of a public emergency, then the law in question will contravene ss 13, 17, 20, 21, 22 or 23. It must always be borne in mind that the Second Schedule is not part of the Declaration of Human Rights.

Therefore, during a period of public emergency the fundamental rights entrenched in s 11(a) are not strictly speaking derogated from. They continue to remain in force. The person continues to have his right to liberty, security of the person and the protection of the law; he continues to have the right to freedom of conscience, of expression and of of assembly and association; he continues to have the right to protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation. The only limitations imposed are that the enjoyment of these rights and freedoms does not prejudice the enjoyment by others of the same rights and freedoms or the public interest.

Mr *Turner-Samuels* submitted that the purposive words of s 11 have a two-fold effect, which he stated as follows:

> "(i) They emphasise that the ascendancy of the substantive rights contained in Section 11 are subject only to the limitations expressed therein;
>
> (ii) They emphasise the intent of and purposive construction to be placed on the derogatory provisions in Section 25 and Schedule 2 of the Constitution."

Having submitted that the only limitations upon the appellants' constitutional rights to "... liberty, security of the person and the protection of the law ..." relevant to this appeal are limitations which satisfy each and all of the requirements in the Constitution (such as the limitations contained in Schedule 2; and the action taken in respect of them under such provision must be an action which does not exceed anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation; and the action taken must be one designed to ensure that the enjoyment of the appellants' rights and freedoms enshrined in the Constitution does not prejudice the rights and freedoms of others or the public interest), Mr *Turner - Samuels* argued that the right to "liberty, security of the person and the protection of the law" enshrined in the Constitution encompasses and

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enshrines the right not to be deprived of personal liberty, save as otherwise authorised by a valid law subject to a fair hearing by a lawfully constituted court or tribunal having lawful jurisdiction to that end and conducting its proceedings according to lawful procedural norms and applying the presumption of innocence.

In this appeal we are concerned with the Tribunal. There is no doubt in my mind that the

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appellants have the right to liberty and security of the person and protection of the law. What is not clear is whether they do have all that fairness connotes when the hearing is in terms of s 31 of the Regulations. Does the Tribunal, in terms of s 31, conduct its proceedings according to lawful procedural norms and applying the presumption of innocence as in a criminal trial? That is the question we have to grapple with.

Mr *Eastwood*, on the other hand, contended that s 18 of the Constitution precludes some rights from the detainees. In the case of a detainee there is no presumption of innocence (s 18(3)(a)) which is afforded to a person facing a criminal trial. The detainee is not given adequate time to prepare his defence (s 18(3)(c)).

In terms of s 13(3) of the Constitution the detainee is to be informed of the reasons for his detention and is permitted to consult and engage a lawyer. This right is also found in para 2(1)(a) of Schedule 2. The detainee is otherwise afforded different procedures and safeguards in Schedule 2. These safeguards differ from those applied by s 18 of the constitution which relates to criminal courts. The Second Schedule creates its own safeguards. See *Minister of Home Affairs & Ors v Dabengwa & Anor, supra* at 243C-D.

It is within this compass of rights relevant to detainees that the concept of the fairness of proceedings conducted by the Tribunal should be looked at. In terms of s 31(2) of the Regulations the proceedings are held *in camera* and are not reported. In terms of s 31(3), if the Minister certifies that, by reason of the pubic interest, the evidence of a witness should be given or received in the absence of the detainee or his representative, it is so given or received. The contents of the report or other information may not be divulged to the detainee or his representative. If the Chairman of the Tribunal agrees with the Minister, he may go along with the wishes of the Minister.

But fairness is seen in the context of s 31 of the Regulations and in terms of those rights afforded to the detainee under the provisions of the Second Schedule. Section 31, governing the proceedings of the Tribunal, must have

been drafted in the knowledge that some elements of the rules of natural justice were to be excluded because considerations of national security override the private rights of detainees. See *R v Secretary of State for Home Affairs,* ex p *Hosenball* [1977] 1 WLR 766 at 778; [1977] 3 All ER 452 at 461; *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HZ); [1985] LRC (Const) 948 at 1028-1029 and 1039; *Patriotic Front - ZAPU v Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC); 1986 (1) SA 532 (ZS) at 548.

Mr *Eastwood* asserted that had the framers of the Constitution intended that notwithstanding considerations of national security the ordinary rules of fairness were to be imported into Schedule 2, they would have included such provisions among the safeguards already set out in Schedule 2. He argued that the more restricted safeguards provided in that Schedule were quite understandable because it was hardly to be expected that the Tribunal, when considering a treasonable plot, would reveal all the information available to the plotters. This was more so

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where the suspicion is one of spying, where knowledge of what the other side knows of your own operations is crucial. The national interest would be defeated by requiring the revelation of what is known to a suspected spy. He suggested that this was one of the considerations why the ordinary trial process and safeguards were not incorporated into the Second Schedule.

Mr *Eastwood* contended in his written heads of argument that:

> "In matters relating to the procedures to be adopted by the tribunal, the courts are ill placed to decide what is fair or unfair, for the consideration of what is fair or unfair requires consideration of the balancing interests of national security and it has frequently been observed that the Executive (and special tribunals in the present instance) is the proper authority for this task."

See *CCSU* v *Minister for the Civil Service, supra*; *Bull* v *Minister of Home Affairs* 1986 (1) ZLR 202 (SC); 1986 (3) SA 870 (ZS) at 884C-D; *Minister of Home Affairs & Anor* v *Dabengwa* 1983 (2) ZLR 346 (SC) at 362A-B.

I see nothing in the submission of Mr *Turner-Samuels* which differs fundamentally from the submissions made by Mr *Eastwood* as these submissions touch on the substance of what is fair in cases pertaining to detainees.

Mr *Turner-Samuels* made general observations on the fundamental requirement

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and norm of any fair system of judicial or quasi-judicial (or administrative) determination that no one shall be deprived of their liberty:

> "(a) without being afforded fair and reasonable opportunity of knowing the detailed case against them;
>
> (b) without being afforded a fair and reasonable opportunity of meeting and destroying such case; and
>
> (c) otherwise than by a Court/Tribunal which discharges its task fairly and after due enquiry,
>
> save insofar as a valid law otherwise provides. Nothing in Schedule 2 of the Constitution provides that or permits of persons detained under a law providing for preventive detention to be deprived of access to and/ or particulars of the evidence upon which they are detained or sought to be continued to be subjected to detention.
>
> Nothing in the Constitution or more particularly in Paragraph 2 of Schedule 2 thereof excludes or permits of the exclusion of the fundamental requirement of natural justice/fairness that a person whose liberty is at stake must be informed properly and sufficiently of the details of the evidence against him."

I agree with these broad submissions.

It will be seen when we come to consider the "secret document", that the appellants were furnished with adequate reasons for their detentions. (See *Minister of Home Affairs & Anor* v *Austin & Anor* 1986 (1) ZLR 240 (SC); 1986 (4) SA 281 (ZS) at 286E-F). They were represented by a legal practitioner when they appeared before the Tribunal. They gave evidence in their own defence. Within the limitations set out in Schedule 2 it appears to me that the hearing was fair. There was, however, an added duty on the Tribunal to make clear to the appellants that the reasons for detention were based on the contents of the secret document. Although I am of the view that they were not prejudiced, they did not know that the reasons for detention were

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extracted from the secret document.

Within the confines of the restrictions outlined above, the distinctions drawn by Mr *Turner-Samuels* in his written heads of argument become pertinent. He said:

> "In this connection it is accepted that a distinction may properly be drawn on the one hand between evidence of the source of evidence (for

> example, the identity of an informer) which may in circumstances properly be 'privileged' and on the other hand evidence emanating from such source which if adduced is not and never has been 'privileged'."

In the instant case there was nothing withheld from the detainees except sight of the secret document and the source of the information therein. The other contents of the secret document, that is, the accusations and allegations made against the appellants, were extracted from the document and supplied to the appellants. This Court has said the detainees ought not to be supplied with the source of the information. (See *Minister of Home Affairs & Another* v *Austin & Another, supra*, at 1986 (1) ZLR 240 at 288G).

Mr *Turner-Samuels* contended that the secret document was the sole evidence against each of the appellants. He said that despite requests the appellants were not informed (whether by themselves or by their counsel) either fully, in précis or at all, of the following: the provenance of the document; the country of origin of the document; the identity of the alleged compiler, addressor, addressee, authenticators or recipients of the document; the language or languages of the words in the document; whether the document was wholly or partly (and if so to what extent) manuscript, typewritten, printed, or otherwise made up; whether there were any and if so what deletions, additions or corrections in the document; the nature of the document; the contents of the document; the character of the document; the date of the document; and the inferences in relation to the appellants which it was said could be drawn from the document.

Mr *Turner-Samuels* then submitted that -

> "...the hearing before the Tribunal was necessarily an exercise in forensic 'blindfold boxing' on the part of the Appellants and their Counsel rather than a 'hearing' of a 'case' as required by Schedule 2, Paragraph 2(c)."

Paragraph 2(1)(c) of the Second Schedule reads:

> "2. (1) Where a person is detained under any law providing for preventive detention-
>
> ...
>
> (c) at the hearing of his case by the tribunal he shall be permitted to appear in person or at his own expense by a legal representative of his own choice ..."

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There is nothing in para 2(1)(c) which was denied to the appellants. The proceedings were conducted in compliance with s 31 of the Regulations.

It appears to me that most of the matters referred to by Mr *Turner-Samuels*, if revealed, would compromise national security. Were the appellants to be informed of the identity of the alleged compiler, addressor, addressee, authenticator or recipients of the document, the nature of the document and the character of the document, the source of the information and the informant would be revealed. It is the Executive which should decide whether such matters should be revealed to the detainees because the Executive is responsible for national security. It alone is the best judge of these matters.

It may be there is little to be gained from hiding the language of the words used, whether the document was wholly or partly manuscript, typewritten, printed or otherwise made up, and whether there were any deletions, additions or corrections in the document. These matters would, in my view, hardly assist the detainees but they may help them identify the source of the document much to the detriment of the security of the State.

There may be cases in which a date is a significant particular which, if not revealed to the detainee, may hinder him from preparing his defence. Such is the case when the wrong committed by the detainee is alleged to have taken place at a meeting addressed by the detainee. In such a case the date and time the meeting was held is a particular of crucial importance to the detainee. It must be given in order to enable him to make representations against the order of detention. See State of *Punjab & Ors v Talwandi* [1985] LRC (Const) 600 at 607d; AIR 1984 SC 444.

I cannot see the use to which the language used in the document, the deletions or corrections in the document, the nature of the document, the character of the document (whatever that means) the inferences in relation to the appellants which it was said could be drawn from the document, will assist the appellants in the preparation of their defence. If these omissions created inadequacies in the particularity of the reasons for detention served on the appellants they did not prejudice them in the preparation of their defence. The appellants were served with reasons for their detention. From these reasons they or their legal representatives must have drawn inferences which were useful to them. They knew the allegations made by the detaining authority. In this case it was not a secret that they were alleged to be spying for South Africa. The inadequacies and omissions particularised by Mr

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Turner-Samuels do not introduce any obscurity in the facts stated in the reasons for detention furnished to the appellants, nor do they detract from the substance of the allegations made in the grounds for detention. See *State of Punjab & Ors v Talwandi, supra*, at 607f.

Mr *Turner-Samuels* further contended as an alternative to his earlier submissions that even if the Tribunal was entitled to withhold from the appellants all information relating to the document, it was not entitled to place any weight upon the document in the absence of any extraneous

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evidence corroborating the genuineness of the document and/or of the truth of its contents. Besides, the appellants' requests to have the document examined by a Government Questioned Document examiner was rejected. It was argued that the lack of extraneous evidence of the genuineness of the document or the reliability of its contents was substantial and impressive. For this reason the inferences sought to be drawn from the document against the appellants were wholly unreliable and/or unworthy of carrying sufficient or any evidential weight against the appellants. I agree that where the needs of national security result in a denial of information to the detainees there is a correspondingly greater duty on the Tribunal to carry out the sort of searching investigations which the detainees or their legal representatives would have done had they had access to the document.

However, Mr *Turner-Samuels*' argument would have been impressive were it directed to criticism against a criminal or civil trial. In this case it appears that the Tribunal satisfied itself on the genuineness of the document. It examined it in the absence of the appellants. It satisfied itself of its contents and relied on it. It must be remembered that these were review proceedings and not a trial. What is more, the document was made available to the judge who heard the detainees' application for the review of the Tribunal's work. It was also made available to members of this Court. I am of the view that the detainees did not suffer any prejudice.

I am fortified in the view I take by what said in *Russell v Duke of Norfolk & Ors* [1949] 1 All ER 109 (CA). By the rules of Racing of the Jockey Club every trainer of a horse running under the Rules was to obtain an annual licence from the stewards of the Jockey Club. A person whose licence to train was withdrawn on the ground of misconduct was declared a disqualified person. One of the rules empowered stewards to grant and withdraw licences at their discretion, to inquire into and deal with any matter relating to racing, to warn off Newmarket Heath, and to authorise publication of their decisions in the Racing Calendar. They were not bound to state their reasons.

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An inquiry was held into the circumstances in which one of the horses trained by the trainer won a race. The stewards of the Jockey Club withdrew the trainer's licence and published, as required by the Rules, the withdrawal of the licence. The trainer brought an action against the stewards. In the course of his judgment Tucker LJ said at 118F-G what seems to me to be relevant to the way the document was dealt with by the Tribunal:

> "The fact that the tribunal for all I know - I am not suggesting it is so - may have arrived at a totally erroneous conclusion, the fact that they may have attached quite a mistaken value to the certificate of the analyst, is altogether beside the point. The mere fact that at the trial it was, as I think it was, necessary to get the plaintiff's case on its legs to call an expert witness to controvert the meaning of this certificate goes to the weight of evidence and the value to be attached to this analyst's certificate. That was a matter for the tribunal to deal with. They may have dealt with it erroneously and in a mistaken manner, but it is not for this court to intervene in a matter of that kind."

In my judgment Mr *Turner-Samuels*' criticisms of the Tribunal's handling of the document goes to the weight of the evidence and the value to be attached to the document. If the Tribunal dealt with it, as TUCKER LJ said, in an "erroneously and in a mistaken manner, ...it is not for this

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court to intervene in a matter of that kind".

In my opinion that is the correct approach to the manner in which the Tribunal dealt with the document. The document is not excluded because it is privileged. See *Ridge v Baldwin & Ors* [1964] AC 40; [1963] 2 All ER 66 (HL), in which a privileged document is not adduced in evidence. In the instant appeal the document was not excluded for purposes of not adducing evidence from it. It was not divulged to the appellants and their representatives in terms of s 31(3).

Mr *Turner-Samuels* argued that, by reason of the fact that the Tribunal can use evidence which the detainee has not seen nor heard to keep the detainee in detention, s 31(3) makes inroads into the fundamental rights of liberty, security of the person and the protection of the law enshrined in s 11 of the Constitution. It was contended on behalf of the appellants that nothing in Schedule 2, para 1(2) or anything else validates such subversion of the Constitution.

Schedule 2, para 1(2) of the Constitution reads:

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> "(2) Nothing contained in any law shall be held to be in contravention of section 13 to the extent that the law in question provides for preventive detention, during a period when a resolution under section 31J(6) is in effect, in the interests of defence, public safety or public order, and nothing done by any person under the authority of any such law shall be held to be in contravention of section 13 unless it is shown that the action taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation."

Mr *Eastwood* disagreed. He submitted that s 11 of the Constitution is not to be interpreted as adding to or detracting from the specific provisions in the remaining sections of Chapter III or of the remaining provisions in the Constitution. He submitted that section 11 specifically contemplates that rights will be subject to the public interest and that the fundamental rights and freedoms to which the people are entitled are subject to the public interest.

In support of his submission Mr Eastwood relied on *Olivier & Anor v Buttigieg* [1967] 1 AC 115; [1966] 2 All ER 459 (PC), a case in which consideration was given to s 5 of the Malta (Constitution) Order in Council 1961, which is in identical words to s 11 of the Constitution of Zimbabwe. In interpreting s 5 of the Malta (Constitution) Order in Council, Lord Morris said at 128E-129G; 461I-462C -

> "It is to be noted that the section begins with the word 'Whereas'. Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement - coupled however with a declaration that though' every person in Malta' is entitled to the 'fundamental rights and freedoms of the individual' as specified, yet such entitlement is 'subject to respect for the rights and freedoms of others and for the public interest'. The section appears to proceed by way of explanation of the scheme of the succeeding sections. The provisions of Part 2 are to have effect for the purpose of protecting the fundamental rights and freedoms, but the section proceeds to explain that, sine even those rights and freedoms must be subject to the rights and freedoms of others and to the public interest, it will be fond that in the particular succeeding sections which give protection for the fundamental rights and freedoms there will be 'such limitations of that protection as are contained in those provisions'.

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> Further words, which again are explanatory, are added. It is explained what the nature of the limitations will be found to be. They will be limitations
>
> > 'designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest'.
>
> The succeeding sections show that the promised scheme was followed. The respective succeeding sections proceed in the first place to give protection for one of the fundamental rights and freedoms (eg, the right to life, the right to personal liberty) and then proceed in the second place to set out certain limitations - ie, the limitations designed to ensure that neither the rights and freedoms of others nor the public interest are prejudiced."

See also *Thornhill v Attorney-General of Trinidad and Tobago* [1981] AC 61 at 69F-70C.

As Mr *Eastwood* pointed out, the right to protection of the law, the right to liberty, the right to freedom of assembly and association, the right to protection for the privacy of his home, and protection of freedom of conscience, which are enshrined in s 11 are also separately dealt with in ss 13, 17, 18, 19 and s 21. The rights in ss 13, 17 and 21 are equally affected. All these sections are separately dealt with and may be infringed during a period of public emergency under para 1(1) of Schedule 2 as read with ss 25 and 31J of the Constitution.

Mr *Eastwood* argued that s 11 should be read together with the rest of the sections in Chapter III and the provisions of Schedule 2. Read in this light, s 11, if purposively interpreted, does not give rights that are distinct and separate from those in the rest of Chapter III. It can be seen that s 11 does have some limitations encapsulated by the words -

> "...subject to such limitations of that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice ...the public interest."

The detainees are no exception to this provision.

In view of what I have said above, it appears to me that Mr *Turner-Samuels'* submission to the effect that s 31(3) is unconstitutional and void, or in the alternative unconstitutional and void insofar as it purports to permit of the

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receiving of evidence by a tribunal the contents of which are neither heard nor seen by/nor made known to the detained person, cannot be sustained. His submission cannot be right. In my view, s 31(3) puts into force the limitations to fundamental rights and freedoms during a period of public emergency, which limitations are set out in the Second Schedule to the Constitution.

Section 31(3) is not, in my view, unconstitutional because it is contrary to the requirements of s 11 and s 18(9) of the Constitution, which are, as Mr *Turner - Samuels* contended, nominated sections and cannot be derogated from. In view of Mr *Eastwood's* contentions, which I accept, Mr *Turner-Samuels*' submissions must fail. The fundamental rights enshrined in s 11 appear in

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sections which in terms of Schedule 2 are derogated from during a state of public emergency. Subsection (9) of s 18 relates to a criminal or civil trial and not a hearing before the Tribunal. That that is so is clear from the wording of subs (9). It provides:

> "(9) Every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority **established by law in the determination of the existence or extent of his civil rights or obligations**." (The emphasis is mine.)

The Tribunal is not established for determining the existence or extent of a person's civil rights or obligations. These fall to be determined by the ordinary courts of the land.

Mr *Turner-Samuels* argued that it was not sufficient to look at the secret document and say it is genuine and its contents are therefore true, because that would be tantamount to guilt by denunciation. He argued that a letter saying X is a spy is not evidence of facts contained in it. It, however, puts the Tribunal upon inquiry, inducing it to call the writer to adduce evidence. If there is a holograph saying: "I am a spy" signed by Austin and Harper (the appellants in this appeal), that holograph is not evidence until it is known that it was written by the person whose signature appears on it.

Mr *Turner-Samuels* further contended that until there is evidence before the Detainees' Review Tribunal on the evidential value of the secret document that document has no evidential value in itself. He cited the *dicta in Austin & Anor v Minister of State (Security) & Anor* S-130-86 (not yet reported) at p 16 of the cyclostyled copy of the judgment. The passage reads:

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

In this regard the Tribunal examined the secret document and came to the conclusion that it was a genuine document. I am satisfied that the Tribunal considered the document and its contents. It resolved irreconcilable conflicts between the convincing evidence adduced by the appellants and the evidence for the State, and said in its Report:

> "The strength of the State evidence depends on what credence can be placed upon the secret document. Without that document the memorandum describing the detainees' activities would be totally inadequate to rebut the evidence they adduced. However, the secret document, on the fact of it, appears genuine. It is the view of the tribunal that it would be very difficult to falisfy but not impossible. There would be much easier ways of fabricating fictitious evidence if the intention was falsely to incriminate the detainees. If the document is forged it demonstrates an inventiveness and degree of professionalism which it is hard to credit bearing in mind the lack of resources and experience in this field. And indeed if the document had been forged one would have expected greater detail to have been provided implicating the detainees with all the allegations contained in the memorandum."

That seems to me to show that the Tribunal applied its mind to both the contents of the document and the document itself, and compared them with the evidence adduced by the appellants before coming to its conclusion.

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Mr *Turner-Samuels* further contended that even if s 31(3) of the Regulations was constitutional, the proceedings before the Tribunal required the application of the rules of natural justice because of the draconian power of the Tribunal; the nature of the proceedings and of the lis and quasi-lis between the State and the appellants, namely, as to whether the reasons for detention had been made out and the express provisions of the sections of the Regulations referred to below. For purposes of this judgment it suffices to mention only a few of these provisions. Section 29 spells out the function of the Tribunal. Section 31 lays out the procedures during proceedings of the Tribunal; s 33 the appearance of a detained person at the hearing; and s 34 the

time schedule for submitting the detainee's case for review. In terms of s 35 the Minister of Home Affairs is required to furnish information to the Tribunal and also furnish further information to the detainees if the Chairman so directs. Section 36 provides or the notification of the detainee when his case is set down for hearing. And s 37 gives the Tribunal power to summon witnesses, to cause the oath to be administered, to examine witnesses, to call for the production of books, plans and documents; the secretary to the Tribunal has power to sign subpoenas for the attendance of witnesses, or the production of any book, plan or document. The subpoena is served in the same manner as a subpoena for the attendance of a witness in the High Court. And a person appearing before the Tribunal who is being examined is entitled to the same privileges and immunities as though he were giving evidence at a trial in the High Court.

Mr *Turner-Samuels* submitted that because of these provisions the Tribunal has many trappings of a court of law. See *Trapp v Mackie* [1979] 1 All ER 489 (HL) at 495b-f, [1979] 1 WLR 377 at 383D-G, where LORD DIPLOCK remarked as follows:

> "The result of this examination of the nature of the tribunal before which the respondent gave the evidence on which the appellant seeks to raise his action in the instant case is that it shared with courts of justice the following characteristics. (1) It was authorised by law; it was constituted pursuant to an Act of Parliament. (2) It was inquiring into an issue in dispute between adverse parties of a kind similar to issues that commonly fall to be decided by courts of justice. (3) The inquiry was held in public. (4) Decisions as to what oral evidence should be led and what documents should be tendered or their production called for by the adverse party were left to the contending parties. (5) Witnesses whom either of the adverse parties wished to call were compellable, under penal sanctions, to give oral evidence or to produce documents as havers; and were entitled to the same privilege to refuse to answer a question or to produce a document as would apply if the inquiry were a proceeding in a court of law. (6) The oral evidence was given on oath; if it were false to the knowledge of the witness he would incur criminal liability for the offence of perjury. (7) Witnesses who gave oral testimony were subject to examination-in-chief and re-examination by the party calling them and to cross-examination by the adverse party, in accordance with the normal procedure of courts of law. (8) The adverse parties were entitled to, and were in fact, represented by legally qualified advocates or solicitors and these were given the opportunity of addressing the tribunal

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on the evidence that had been led. (9) The opinion of the tribunal as reported to the Secretary of State, even though not of itself decisive of the issue in dispute between the adverse parties, would have a major influence on his decision either to require the education committee to reconsider its resolution to dismiss the appellant or to let the matter rest."

It appears from the précis of the sections referred to by Mr *Turner-Samuels* that the characteristics of a court of law are to some extent present. The provisions of the above Regulations, to some extent, comply with the rules of natural justice.

It was contended for the appellants that the rules of natural justice require that sufficient and adequate reasons for detention are given to the appellants; and adequate opportunity being given to the appellants to meet the case adduced against them; and, more importantly, a fair hearing free from the appearance of bias. During argument no issue was raised on the adequacy of the reasons furnished to the appellants by the Minister of Home Affairs.

It was, however, submitted on behalf of the appellants that the Tribunal gave the appearance of bias. In support of the allegation of bias, the appellants relied on five points, namely:

"(i) The fact that the Tribunal failed to require State Counsel to cross-examine the Appellants on or to establish the authenticity or veracity of the contents of the document or alternatively require State Counsel to discontinue relying on such document.

(ii) The fact that the Tribunal failed to cause proper or sufficient enquiry to be made into the authenticity or veracity of the contents of the document.

(iii) The Tribunal permitted Counsel for the State to make submissions to the Tribunal in privacy as to the alleged source, authenticity or veracity of the document no part of which submissions were known or made known to the Appellants or their Counsel. If the case of the State was as argued in front of the Tribunal in the presence of the Appellants and their Counsel (namely, that the document spoke for itself) submissions in private were unnecessary and irrelevant even if such a proceeding was fair or in accordance with the requirements of natural justice, which it was not. Permitting Counsel for the State to make submissions in privacy in such circumstances would give a reasonable person the appearance of partiality.

(iv) Such appearance of partiality is reinforced by the contrast between

the suggestion by the Chairman (transcript page 24 lines 3-11) on 19 August 1986 that the matters be dealt with on behalf of the Appellants' as briefly as possible' and the passages at transcript pages 79-85 by the Tribunal that certain matters had not been mentioned or dealt fully with by the Appellant Austin.

(v) Such appearances of partiality further were reinforced by the contrast between the passages in the Report of the Tribunal at pages 4 and 5 respectively in relation to the arguments (1) that the document was fabricated and (2) that there was abundant evidence that the Appellants were loyal

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Government employees ..."

Besides the above, the Tribunal's remarks on various points made in its report seem to suggest the presence of bias. Mr *Turner-Samuels* extracted and listed them as follows:

(a) On the "Forgery of the Document" the Detainees' Review Tribunal said:

"...it would be very difficult to falsify but not impossible. There would be much easier ways of fabricating fictitious evidence ... If the document is forged it demonstrates an inventiveness and degree of professionalism which it is hard to credit bearing in mind the lack of resources and experience in this field. And indeed if the document had been forged one would have expected greater detail to have been provided implicating the detainees with all the allegations contained in the memorandum."

And

(b) The fact that they are efficient customs officers performing their duties very zealously does not rule out the possibility that they were working as agents for the South African regime. History is full of examples of apparently loyal Government employees supplying information to other Governments.

It was submitted that if these matters were considered as a course of conduct they would give rise to a reasonable and justified fear in the mind of a reasonable person that there was a real risk of bias on the part of the Tribunal. It was urged upon us to quash the decision of the Tribunal for this reason.

When considering whether there was bias it is the impression left upon the detainees by the manner the Tribunal conducted its proceedings that is important. If right-minded people entertain the likelihood of bias or believe

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that the Tribunal favoured unfairly one party and not the other, then its decision should not be sustained. Lord Denning MR said in *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors* [1969] 1 QB 577 (CA) at 599A-F, [1968] 3 All ER 304 (CA) at 309I-310D:

"So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr Lannon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear; but I start with the oft-repeated saying of LORD HEWARD CJ, in *R* v *Sussex Justices Ex p McCarthy* [1923] All ER Rep 233 at p 234:

> ...it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done."

In *R v Barnsley County Borough Licensing Justices,* Ex p *Barnsley & District Licensed Victuallers' Assocn.* [1960] 2 All ER 703 at pp 714, 715, DEVLIN LJ appears to have limited that principle considerably, but I would stand by it. It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *R v Huggins* [1895-99] All ER Rep 914; *R* v *Sunderland Justices* [1901] 2 KB 357 at p 373, per VAUGHAN

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> WILLIAMS LJ. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *R v Camborne Justics Ex p Pearce* [1954] 2 All ER 850 at pp 8; *R v Nailsworth Justices Ex p Bird* [1953] 2 All ER 652. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'."

See *Hannam v Bradford City Council* [1970] 2 All ER 690 (CA) at 700g-h;

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R v Liverpool City Justices Ex p Topping [1983] 1 All ER 490 (QB) at 494a-j; *Stadsraad van Vanderbijlpark v Administrateur Transvaal & Ors* 1982 (3)

SA 166 (T) at 186H and 187A-G; *S* v *Herbst* 1980 (3) SA 1026 (E) at 1029G

and 1030A-H; *S v Louw; S* v *Noyila* 1981 (4) SA 939 (E) at 940H-941H.

In applying the principles enunciated in the above persuasive authorities it is important to remember that the procedures laid down in subs (3) of s 31 create in the mind of right-minded people appearing before the Tribunal the impression that there is, right from the start of the proceedings, bias, let alone a real likelihood of bias. The reason for the creation of that impression is that evidence may be led and received by the Tribunal in the absence of the detainee or his representative; the contents of a report or other information may not be divulged to the detainee or his representative or to any other person other than the members of the Tribunal.

I believe that the Chairman of the Tribunal was well-meaning when he said:

> "...I think if you could deal with your matters as briefly as possible. You will be able to pick up the areas which are vital by the way the Tribunal or the State will question your client. Otherwise, if you go into details in all areas, without watching the ones which are likely to be of any interest, we can drag on ...indefinitely."

However, the statement creates the impression that the detainees were being stopped from telling all they knew or from establishing their full defences. A right-thinking detainee would see a likelihood of bias when he is not allowed to tell his story in full.

One member of the Tribunal persistently asked questions of one appellant in a manner that tended to show hostility towards the detainees. Such questioning might have been done in an effort to establish the truth. In this case it was over-done. It is not proper for any member of the Tribunal to show, in his questions or general attitude, that he is for the State and not the detainee. The Tribunal is there to establish the truth. The line of questioning must not be allowed to show bias against the detainees.

All that is required to establish bias is to leave the detainees with the impression that the Tribunal is biased against them and is in favour of the State. The Tribunal is an impartial body and should act as such in the conduct of its business.

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In the circumstances of proceedings before the Tribunal one has to reconcile the provisions of s 3 1(3), which constitute the law enacted by the Legislature, and what is perceived by the detainees as bias. When the Regulations set out procedures which induce right-thinking people to form the impression that there is bias and those regulations are not *ultra vires* the Constitution, they have to be applied as they are because they constitute -

> "Any laws (which) could be made for the 'peace, welfare and good government' (of Zimbabwe) .., the phrase habitually employed to denote the plenitude of sovereign legislative power, even though that power be confined to certain subjects or within certain reservations"

per LORD PEARCE in *The Bribery Commissioner* v *Ranasinghe* [1964] 2 All ER 785 (PC) at 791H. This type of bias the detainees have to endure until the law is changed - in other words, it is the type of bias within which a court of law has to work fairly.

The appellants must have been left with the impression that the Tribunal was biased for the State.

I need not dwell at length on the question of the standard of proof to be applied by the Tribunal. That standard of proof is the same as is generally applied in civil proceedings. it is proof on a balance of probabilities and, as LORD FRASER remarked in *R* v *Home Secretary Ex p Khawaja* [1984] AC 74 (HL) at 97G, "..the degree of probability being proportionate to the nature and gravity of the issue". Because this case "involve(s) grave issues of personal liberty, the degree of probability required (is) high". Who carries that high degree of probability? It is he who seeks to enforce detention and he who deprives the subject of his liberty. In *R v Home Secretary Ex p Khawaja, supra*, at 111D LORD SCARMAN said:

> "Whatever the process, the party seeking relief carries the initial burden of showing he has a case fit to be considered by the court."

In this respect it appears to me that the Tribunal believed that the burden of proof was on the detainees. That that is so is clear from a reading of the Tribunal's report. At p 4 of the report it is said:

> "The strength of the State evidence depends on what credence can be placed upon the secret document. **Without that document the memorandum describing the detainees' activities would be totally inadequate to rebut the evidence they adduced**." (Emphasis added.)

DUMBUTSHENA CJ

The true position is that he who wants to enforce detention carries the burden of proof.

In his written submissions Mr *Eastwood* seemed to suggest that the Tribunal should approach its task on the basis that there is no *onus* on anybody. He stated:

> "(The Tribunal's) task is to do a review and not to conduct a trial on which it decides matters on the basis of any participant in those proceedings bearing an *onus*. The duty of the tribunal is to review all information, to consider

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> the Case presented by the Appellants and to formulate a recommendation as to the expedience or necessity of further detention."

In my view that cannot be right. Before recommending the expediency or necessity of further detention the Tribunal must satisfy itself, on the information before it, whether the Minister of Home Affairs has made out a case against the detainees. The *onus* is on the Minister of Home Affairs to justify detention. The detainees need do no more than rebut the Minister's allegations. The Tribunal's responsibility in this regard is an onerous one because it is required to assess and weigh evidence which has not been seen by the detainees. I agree with Mr *Eastwood* that the Tribunal should bear in mind, when doing this, that the evidence it is assessing has not been challenged by the detainees. It would be wrong for the Tribunal not to appreciate that a case affecting the liberty of the subject requires to be proved. See *Meman & Anor* v *Controller of Customs and Excise* S-74-87 at pp 8-9 of the cyclostyled copy of the judgment (as yet unreported).

In this appeal the relief sought by the appellants is no longer important. As pointed out above, the Tribunal in a subsequent hearing recommended their release. This Court was not supplied with the reasons for so recommending. Because of this, I do not think it is necessary for us in present circumstances to come to the conclusion that the Tribunal ought to have recommended their release. This Court can do no more than state that the Tribunal must have considered the evidence presented to it and must have reassessed it in a way which was different from what it did in the instant case. We understand, however, that the President did not follow its recommendations. That decision is for the Executive and not this Court.

What we have done in this judgment is to lay down - and we can do no more - what we consider to be matters conducive to the doing of justice, bearing in mind as we do the need to preserve the security of the State or the public interest while at the same time safeguarding the liberty of the subject.

DUMBUTSHENA CJ

For these reasons I have laid emphasis on the need for the Tribunal to be fair- in other words, to observe the rules of natural justice. I have in the same breath pointed out those matters which constitute bias that should be avoided by the Tribunal. Bias in this regard is what the detainees perceive it to be and not the outward manifestation of bias as perceived by both the Tribunal and the detainees.

The Tribunal functions within the bounds set down by the Legislature. It is within these bounds that the rules of natural justice have to be applied. In this regard I find support in what Tucker LJ said in *Russell* v *Duke of Norfolk & Ors, supra*, at 118E. He remarked:

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. ...[one] essential is that the person concerned should have a reasonable opportunity of presenting his case."

In *Furnell* v *Whangarei High Schools Board* [1973] 1 All ER 400 (PC) at 412b Lord Morris remarked:

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> "It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules (see the speeches in *Wiseman v Borneman* [1969] 3 All ER 275). Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by TUCKER LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 the requirements of natural justice must depend on the circumstances of each particular case and the subject-matter under consideration."

It is because of the narrow limits within which the Tribunal operates that it ought to observe, more than in a normal case, the rules of natural justice and forswear all manifestations of bias. It is, I believe, more difficult to be seen to be fair in a hearing in which the detainee starts at a considerable disadvantage. It is, however, important that the Tribunal by its deeds and utterances is seen to be fair.

Initially, as I pointed out above, we were urged to set aside the Tribunal's recommendation and to decide whether to remit the matter to the Tribunal or

to substitute this Court's recommendation in place of that of the Detainees' Review Tribunal. We were referred to *Bonnievale Wine and Brandy Co Ltd* v *Gordonia Liquor Licencing Board* 1953 (3) SA 500 (C) at 503C-F; *Johannesburg City Council* v *Administrator, Transvaal & Anor* 1969 (2) SA 72 (T) at 76; and *Livestock and Meat Industries Control Board* v *Garda* 1961 (1) SA 342 (A) at 349G. This issue no longer arises because the Tribunal, unprompted by this Court, has recommended the release of the appellants. I can only assume that they did so recommend on good grounds. Counsel are agreed that it serves no purpose under these circumstances to remit the matter to the Tribunal or to substitute this Court's recommendation for that of the Tribunal. It is fair to say the Tribunal has now come to a decision which is not only fair but which the appellants were seeking. See also *Re Pergamon Press Ltd* [1970] 3 All ER 535 (CA) at 542d-g.

Mr *Turner-Samuels* invited this Court to make an order for costs if there was a prayer for costs in the court below. It appears from the record that there was no prayer for costs in the court below and no award of costs was made. Mr *Eastwood* contended that this was a constitutional matter and because of that even if the respondents were successful they would not have sought costs. He, however, conceded that if the appeal succeeded costs should follow the event. Because of the turn of events occasioned by the subsequent recommendation of the Tribunal neither party can be said to have succeeded. The appeal was argued because both parties wanted the Court to draw guidelines for the future. It appears to me that under these circumstances the proper order to make is that each party bears its own costs.

Accordingly, we are of the view:

(a) that s 31 of the Regulations is not *ultra vires* the Constitution;

(b) that the proceedings of the Tribunal should be conducted having regard to the rules of natural justice, that is, applying the concept of fair play within the confines of the

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procedure set out in s 31 of the Regulations;

(c) that reasonable thinking men would have perceived bias in the conduct of the proceedings; and

(d) that each party should bear its own costs of appeal.

Gubbay JA: I agree.

McNALLY JA

McNally JA: I agree.

Manyarara JA: I agree.

Korsah JA: I agree.

Atherstone & Cook, appellants' legal practitioners

Kantor & Immerman, respondents' legal practitioners

KOMBAYI v BERKHOUT 1988 (1) ZLR 53 (SC)

Court **Supreme Court, Harare**

Korsah JA

Application for condonation of late noting of appeal

9 February 1988

Flynote

Appeal - noting of - condonation of late noting - calculation of period within which appeal must be noted - reluctance of court to condone failure to calculate period correctly - errors of legal practitioner - to what extent an adequate ground for condonation - importance of prospects of success when delay is lengthy.

Headnote

The calculation of time for lodging of appeals to the Supreme Court is based on ordinary days, not court days. In the face of a spate of recent decisions of the Court on this issue, the Court would be less disposed to condone the mistake of a legal practitioner who, by paying no heed to the directives contained in the Court's decisions, errs in his calculation of the time within which an appeal may be lodged.

Although the Court is reluctant to visit the errors of a legal practitioner on his client, to whom no blame attaches, so as to deprive him of a re-hearing, error on the part of a legal practitioner is

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not by itself a sufficient reason for the condonation of a delay in all cases. A duty is cast upon the legal practitioner who is instructed to prosecute an appeal to acquaint himself with the procedure prescribed by the rules of the Court.

The broad principles the Court will follow in determining whether to condone the late noting of an appeal are the extent of the delay; the reasonableness of the explanation for the delay; and the prospects of success. If the tardiness of the applicant is extreme, condonation will be granted only on his showing good grounds for the success of his appeal.

Cases cited:

Ellis & Anor v *Maceys Stores Ltd* 1983 (2) ZLR 17 (SC)

Oak Holdings (Pvt) Ltd v *Chiadzwa* S-136-85 (unreported)

Sithole v *Moyo* S-73-86 (unreported)

Chiadzwa v *Monticolo* S-88-86 (unreported)

RAG (Pvt) Ltd v *Huizenga* NO S-125-86 (not yet reported)

Saloojee & Anor NNO v Minister of Community Development 1965 (2) SA 135 (A)

de Kuszaba-Dabrowski et Uxor v *Steel* NO 1966 RLR 60 (AD); 1966 (2) SA 277 (RAD)

R v *Hlupo* 1969 (2) RLR 344 (AD); 1969 (4) SA 98 (RAD)

HB *Farming Estate (Pty) Ltd & Anor* v *Legal & General Assurance*

Society Ltd 1981 (3) SA 129 (T)

R v *Humanikwa* 1968 (2) RLR 42 (AD)

R v *Dhlumayo & Anor* 1948 (2) SA 677 (A)

Hayes v *Bar Council* 1981 ZLR 183 (AD); 1981 (3) SA 1070 (ZAD)

GC Chirimuuta for the applicant

AP de Bourbon SC for the respondent

Judgment

Korsah JA: (In Chambers in terms of Rule 31(7) of the Supreme Court Rules RGN 380 of 1964):

This is an application for condonation of a late noting of appeal and for leave to appeal out of time.

The chronology of events in this matter is succinctly set out in para 4 of the respondent's heads

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of argument as follows:

"a. The judgment was handed down by the High Court on the 13th May 1987.

b. On the 1st June 1987, the applicant apparently gave instructions that an appeal be noted.

c. The date by which the appeal should have been noted was the 3rd June 1987.

d. Despite having received instructions on the 1st June 1987 to note an appeal, the appeal was actually noted on the 10th June 1987, seven days after the expiry of the time limit set in Rule 30(a).

e. On the 16th June 1987, the respondent's attorney wrote to the Registrar of the Supreme Court pointing out that the Notice of

KORSAH JA

Appeal had been filed late and was invalid. A copy of this letter was sent to and recieved by the applicant's attorney. This letter should have alerted him at least to that his Notice of Appeal was out of time, but in his own words 'I did not pay much attention to this letter'. It is submitted that he adopted this attitude at his own risk.

f. The writ of execution was issued on the 8th July 1987, and served on the 17th July 1987. It would seem that the applicant's attorney was advised of this fact on the same day.

g. On the 20th July 1987, the applicant's attorney contacted the Deputy Registrar of the High Court, not the Supreme Court. He thereafter relied on the advice given by a junior official in the Registry, as opposed to making his own legal researches.

h. On the 23rd July 1987, the applicant's attorney wrote a letter to the Registrar of the High Court setting out his discussions with the Deputy Registrar and the junior official. A copy of this letter was sent to the respondent's attorney.

i. The respondent's attorney replied to the letter of the 23rd July 1987 on the 30th July 1987, with a copy to the applicant's attorney. In this letter, Mr Brighton advised that the Notice of Appeal had been filed out of time and drew attention to rule 30. The applicant's attorney once again did nothing.

j. The next event occurred on the 17th September 1987 when the respondent's attorney wrote to the Registrar of this Honourable Court. That letter set out correctly the legal position in this matter.

k. The following day, the 18th September 1987, the Registrar of the Supreme Court replied to the respondent's attorney, and sent a copy of that letter to the applicant's attorney. That letter made it clear that as far as this Honourable Court was concerned, there was no proper appeal before it. It is to be noted that the Assistant Registrar in that letter says:

> 'Despite requests to have the discrepancy rectified nothing has been done."

l. The applicant's attorney learnt of this letter from the Registrar on the 23rd September 1987. Even that letter did not produce any immediate action.

m. The present application was filed on the 6th October 1987. That was **13 days** after the knowledge of the Registrar's letter of the 18th September 1987, **112 days** after the letter of the 16th June 1987 advising him

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that the Notice of Appeal was out of time, and **125 days**

KORSAH JA

after the expiry of the time limit for noting an appeal. In essence, this application is four months late."

The sole ground given for this application for condonation is that the applicant's legal practitioner erred in his method of computation of time for lodging an appeal to this Court.

This Court has repeated *ad nauseam* that the calculation of time for lodging of appeals was based on ordinary days and not court days: *Ellis & Anor* v *Maceys Stores Ltd* 1983 (2) ZLR 17; *Oak Holdings (Pvt) Ltd* v *Chiadzwa* S-136-85 (unreported); *Sithole* v *Moyo* S-73-86 (unreported);

Chiadzwa v *Monticolo* S-88/-86 (unreported); and

RAG (Pvt) Ltd v *Huizenga NO* S-125-86 (not yet reported).

In the face of such a spate of recent decisions on this issue, the Court should be less disposed to condone the mistake of a legal practitioner who, by paying no heed to the directives contained in the decisions of this Court, errs in his calculation of the time within which an appeal may be lodged.

Although this Court is reluctant to visit the errors of a legal practitioner on his client, to whom no blame attaches, so as to deprive him of a re-hearing, error on the part of a legal practitioner is not by itself a sufficient reason for condonation of a delay in all cases. As STEYN CJ observed in *Saloojee & Anor NNO v Minister of Community Development* 1952 (2) SA 135 (A) at 141C:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of the Court. Considerations *ad misericordium* should not be allowed to become an invitation to laxity."

A duty is cast upon a legal practitioner, who is instructed to prosecute an appeal, to acquaint himself with the procedure prescribed by the Rules of the Court to which a matter is being taken on appeal. That no effort has been made to comply with the Rules of Court in the instant case is further exemplified by the failure of the applicant's attorney to satisfy the requirement of Rule 31(1) of the Supreme Court Rules: that an application for extension of time within which to appeal "shall be accompanied by a copy of the judgment against which it is sought to appeal."

The Notice of Appeal itself is defective, in that it does not comply with the

KORSAH JA

mandatory provisions of Rule 29, sub-rules (a), (c) and (e) which require: (i) that the court by

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which the judgment appealed against was given be stated; (ii) that there be some indication as to whether the whole or part only of the judgment is appealed against; and (iii) that the exact nature of the relief sought be stipulated. There is almost a total disregard of the Rules.

As early as 16 June 1987, in a letter written by the respondent's legal practitioners to the Registrar of the Supreme Court and copied to the applicant's legal practitioner, the applicant's legal practitioner was put on notice that his Notice of Appeal was filed outside the period prescribed by the rules. He admits receiving this warning, but says he ignored it because he was satisfied that his Notice of Appeal had been filed within twenty-one days of the date of judgment, and that he thought the respondent's legal practitioner was the one in error in his calculation of the period. Had he researched the issue, as indeed he should have, he most probably would have discovered his error and applied timeously for condonation of the late noting of appeal.

The applicant's legal practitioner claims that he was confirmed in his view that the respondent's legal practitioner was in error when the letter of 16 June 1987 provoked no reaction from the Registrar. I am unable to fathom the nature of the reaction which he expected from the Registrar. As far at the Registrar was concerned, the applicant's attention had been called to his laches, and it was for the applicant to take whatever steps were necessary to put his house in order. Reliance upon the inaction of the Registrar, in this instance, cannot exonerate the applicant's legal practitioner from the duty of making a seasonable application for condonation of the late noting of an appeal.

As of 17 July 1987 the applicant also became aware that something was remiss. He had given instructions to his legal practitioner to note an appeal, and yet on 17 July 1987 the Deputy Sheriff was at his gate serving him with a writ of execution. There is no affidavit from the applicant himself in explanation of his inaction during the period of nearly three months between the service of the writ of execution and the issue of the present application. It seems that he did nothing to ensure that his appeal was prosecuted with diligence.

In determining whether or not to grant an application for condonation of the late noting of appeal the broad principles of this Court will have regard to are: the extent of the delay, the reasonableness of the explanation for the delay, and the prospects of success of an appeal, should the application be granted.

KORSAH JA

See *de Kuszaba-Dabrowski et Uxor v Steel* NO 1966 RLR 60 (AD) at 62 and 64; 1966 (2) SA 277 (RAD); *R v Hlupo* 1969 (2) RLR 344 (AD); and *HB Farming Estate (Pty) Ltd & Anor v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134A-B.

I fully agree with Mr *de Bourbon's* submission that, in the circumstances of this case, the explanation proffered for the delay in making this application is most unsatisfactory, and that although it revolves in the main around the negligence of the applicant's legal practitioner, there is also evidence of total inaction on the part of of the applicant for which no explanation has been tendered. The lapse of time between the noting of the appeal and the application for

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condonation is also considerable.

All Rules prescribing the time within which a procedural step is to be taken are made for the purpose of the expeditious dispatch of cases. If the tardiness of a party in complying with such Rules is extreme, his application for condonation will be granted only upon showing good grounds for the success of his appeal. As BEADLE CJ pointed out in *R v Humanikwa* 1968 (2) RLR 42 (AD) at 44B:

> "The longer the delay in applying for condonation in the late noting of an appeal the more certain the Court must be that there is a real chance of the appeal succeeding."

I turn to the appeal itself. The respondent sued the applicant in the High Court for the sum of $128 739,86 with interest thereon at the rate of 12% per annum calculated from 1 December 1982 to date of receipt of payment. This was in respect of a debt arising from the non-payment of interest in terms of clause 14 of a mortgage bond made in favour of the respondent, and in which the applicant hypothecated stands 89, 90, 91 and 92 in Gweru Township. Clause 14 stipulates that:

> "Notwithstanding anything to the contrary herein contained but subject to the provision of Section 9 of the Usury Act, Chapter 243, the Mortgagee may at any time or times on one (1) month's written notice to the Mortgagor increase the rate of interest on all amounts owing to or claimable by the Mortgagee in terms of this Bond. The increased interest shall, at the option of the Mortgagee, be recoverable from the Mortgagor, either by way of an increase in the aforesaid monthly instalments, or by way of an extension of the period of repayment of the loan."

On 25 October 1981 the respondent's legal practitioners, in consonance with

KORSAH JA

clause 14, gave written notice to the applicant that the respondent, in the exercise of his right under that clause, was increasing the rate of interest from 8% to 12% and had elected to recover the increased rate by way of an increase in the monthly instalments payable.

[The learned Judge of Appeal analysed the evidence and continued:]

As submitted by Mr *de Bourbon* on behalf of the respondent, in the main the case involved a credibility finding by the learned trial judge, and he gave a well reasoned and extensive explanation as to his findings on the credibility of the witness.

Where the question on an appeal from the decision of a judge is one of credibility, and the interests of the parties cannot but affect their testimonies, even where the story told by either party may be true, or the probabilities do not appear to favour one party more than the other, an appellate court would be loathe to reverse the conclusions arrived at by the trial judge, who had seen and heard the witnesses, unless it is clearly demonstrated that he had fallen into error. See *R v Dhlumayo & Anor* 1948 (2) SA 677 (AD) at 705-6; and *Hayes v Bar Council* 1981 ZLR 183 at 204; 1981 (3) SA 1070 (ZAD).

The applicant alleged that clause 14 had been fraudulently inserted in the Mortgage Bond subsequent to the parties subscribing to the document. The *onus* of proving this allegation clearly fell upon the person alleging subsequent alteration. On the facts set out in the judgment

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the applicant came nowhere near discharging that burden.

I am of the opinion that no sufficient reason has been shown that this appeal has good prospects of success. The application for condonation of the late noting of appeal and for leave to appeal out of time is, in the result, dismissed.

Chirunda, Chihambakwe & Partners, appellant's legal practitioners

Brighton & Cole Bowen, respondent's legal practitioners

ZVOMA v AMALGAMATED MOTOR CORPORATION (PVT) LTD 1988 (1) ZLR 60 (HC)

Court **High Court, Harare**

Adam J

Civil trial

2, 3 & 4 December 1987 & 10 February 1988

Flynote

Contract - of employment - wrongful dismissal of employee - action for reinstatement and order for specific performance - approach of courts in cases where there is no clear statutory right of reinstatement.

Employment - Employment Act 1980 - summary dismissal thereunder - onus and degree of conduct justifying - inconsistency of s 4(1) of the Employment (Conditions of Service) Regulations 1981 with cl 13 of the Industrial Agreement: Motor Industry.

Headnote

The plaintiff was employed by the defendant company until his suspension without pay on 16 December 1982 on an allegation of theft from the defendant. The plaintiff was prosecuted for but acquitted of the alleged theft. By a letter dated 3 August 1983 the defendant advised the plaintiff that he had been summarily dismissed from his employment retrospectively, with effect from 16 December 1982 for acts of misconduct other than the original allegation of theft. The plaintiff in due course sued the defendant for arrears of wages for the period 16 December 1982 to 30 December 1987. It was agreed between the parties that this claim amounted to a claim for specific performance and reinstatement.

The defendant accepted that its purported retrospective dismissal of the plaintiff was incompetent and consented to judgment in respect of remuneration due to the plaintiff up to 28 September 1983, the date with effect from which it alleged that the plaintiff had been lawfully dismissed.

Held, that the (since repealed) Employment Act 1980 (No. 13 of 1980) embodied the common law right of an employer summarily to dismiss

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an employee in the circumstances set out in s 8(1) of the Act, except as provided in the contract concerned or any relevant enactment, including any regulation made under the Act or in any agreement or determination made or given effect to under any enactment. This meant that any regulation could only widen the grounds on which an employer may dismiss; it may not limit those grounds.

Held, further, that the wording of s 5(2) of the Employment Act made it clear that cl 13(1) of the Industrial Agreement (Motor Industry) (published in SI 106 of 1982), which incorporated the employer's common law right of summary dismissal, was inconsistent with and therefore overrode s 4(1) of the Employment (Conditions of Service) Regulations 1981 (SI 894 of 1981), which precluded dismissal from

employment without ministerial approval;

Held, further, that the onus is on the employer to justify any summary dismissal, although there are no fixed rules in common law defining the degree of misconduct which will justify summary dismissal: this is a question of fact to be decided in each case;

Held, further, that unless there is a clear and express statutory right of reinstatement the courts will usually decline to order specific performance in contracts of a personal nature, such as contracts of employment, although there is no rule of law preventing such an order; Held, further, that the present case was not a proper one for the grant of an order of specific performance.

Cases cited:

S v Jovner 1982 (2) ZLR 252 (SC)

Rashayi v *Bakasa African Council* 1978 RLR 389 (AD)

Wallace v *Rand Daily Mails Ltd* 1917 AD 479

Tobacco Sales Floor Ltd v *Chimwala* S-138-87 (not yet reported)

National Union of Textile Workers v *Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T)

Schierhout v *Minister of Justice* 1926 AD 99

Myers v *Abrahamson* 1952 (3) SA 121 (C)

R v *Milne and Erleigh* (7) 1951 (1) SA 791 (A)

Haynes v *King Williamstown Municipality* 1951 (2) SA 371 (A)

Gumede v *Mapumulo Bantu School Board & Anor* 1961 (4) SA 639 (D)

Grundling v *Beyers & Ors* 1967 (2) SA 131 (W)

Rogers v *Durban Corporation* 1950 (1) SA 65 (D)

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Bramdaw v *Union Government* 1931 NPD 57

S Lynch for the plaintiff.

D Brighton for the defendant.

ADAM J

Judgment

Adam J: The plaintiff commenced his action on 3 June 1985 in *forma pauperis*. In his summons, as later amended, he claimed the sum of $32 675 in respect of arrears of salary due to him from 16 December 1982 to 30 December 1987, interest a *tempore morae* and costs of suit.

The plaintiff's declaration stated that he was employed as a parts supervisor by the defendant company and that in December 1982 he was suspended without pay on the ground that he had stolen goods from the defendant; that on 21 June 1983 the plaintiff was found not guilty of theft from the defendant and that thereafter, the defendant without just cause has refused to either pay him any arrear wages or to allow him to continue to work for the defendant. The plaintiff states that he has continually tendered his services to the defendant and, further, that he has failed to secure any other employment whatsoever. Before his suspension the plaintiff was paid at the rate of $550 per month by the defendant.

The defendant's plea states that with effect from 16 December 1982 the plaintiff's employment was terminated and that his right to wages and to work thereafter ceased and no wages were due to the plaintiff. The defendant denies that the plaintiff had continually tendered his services to the defendant and the plaintiff was put to the proof thereof.

In his replication, the plaintiff maintains that his employment with the defendant had not been justifiably or lawfully terminated and further that the defendant did not inform him of the summary dismissal until its letter of 3 August 1983, which summary dismissal was not lawful as it was alleged to have retrospective effect to 16 December 1982. The plaintiff also maintains that the defendant could not have terminated his employment with effect from 16 December 1982, since the defendant reinstated him as a fully paid employee until 20 February 1983.

On 1 July 1985 the defendant filed an exception whereby it excepted to the plaintiff's claim as disclosing no cause of action in that, the plaintiff having been summarily dismissed with effect from 16 December 1982, he had no legal right to claim payment of wages. In its heads of arguments on the defendant's exception reliance was placed by the defendant on the argument that the plaintiff's remedy, in a situation where the grounds for summary dismissal were inadequate, was a claim for damages for wrongful dismissal, as a court will not order specific performance. On 4 November 1985 this court dismissed the defendant's exception and indicated that costs in respect of the defendant's exception were to be determined at the main trial.

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ADAM J

At the commencement of this trial, the defendant indicated that it had filed a consent to judgment in the amount of $3 754,12 only, which amount was calculated in accordance with Annexure "A" to the consent to judgment and was as follows:

Plaintiff's monthly salary	$550 gross
Plaintiff's daily pay rate	$21,15 gross
Number of working days from 17.12.1982 to 28.9.1983	
(excluding 42 days leave taken in January/	
February 1983)	158
Total pay allowable for 158 days	$3341,70
Number of days leave accumulating from	
1.1.1983 to 30.9.1983	19.5
(Leave for balance of December 1982	
already paid to Plaintiff)	
Total leave pay allowable	$412,42
Total Offered	$3754,12

The defendant's counsel raised a point *in limine* which was similar to the defendant's exception. Both the plaintiff's and the defendant's counsel were agreed that the plaintiff's claim was for specific performance. After having heard arguments on the law from both parties I ruled that the point *in limine* had already been argued during the defendant's exception and dismissed. Accordingly I would in fact be sitting on appeal from that dismissal of the 4 November 1985. Further, it was always open to the plaintiff, if he so chose, at an appropriate moment in the trial to seek this court's leave to amend his claim. Also, the defendant could at the conclusion raise once again the submissions on the law made in the point *in limine* and this court would be required to consider the matter as presented by the parties. Accordingly, the trial commenced with the plaintiff as the only witness called to give evidence.

[His Lordship reviewed the evidence and continued:]

I am satisfied on the evidence that the plaintiff's dismissal was wrongful.

I am satisfied on the facts that the true position was that the plaintiff's last actual working day with the defendant was prior to 16 December 1982.

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There are certain statutory provisions which are most pertinent and which I will outline below.

ADAM J

The Employment Act No. 13 of 1980 (which was repealed by the Labour Relations Act No. 16 of 1985) provided under ss 3, 5 and 8 as follows:

> "3. ...
>
> 'contract' means a contract of employment, whether oral or in writing and whether expressed or implied, by which an employee enters the service of an employer.
>
> 5. (1) Subject to the provisions of subsection (2), the Minister may make regulations relating to or connected with the employment of employees or any class of employees.
>
> (2) In the event of any inconsistency between the provisions of any regulation made in terms of subsection (1) and -
>
> (a) the provisions of any enactment or of any agreement ...the provisions of the latter shall prevail
>
> ...
>
> (3) The Minister may make regulations in terms of subsection (1) providing for -
>
> (a) the rights of employees;
>
> ...
>
> 8. (1) Except where it has otherwise been provided for in the contract concerned or in any relevant enactment, including any regulation made in terms of this Act, or any agreement or determination made or given effect to in terms of any enactment, 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 this contract;
>
> (b) for wilful disobedience to a lawful order given by his employer;
>
> (c) for lack of skill which the employee expressly or by implication holds himself out to possess;
>
> (d) for habitual or substantial neglect of his duties;
>
> (e) for absence from work without the permission of the employer or without reasonable excuse;
>
> (2) Where an employee is summarily dismissed for lawful cause, he shall be entitled on dismissal to the wages due to him up to the time of his dismissal."

The Employment (Conditions of Service) Regulations, 1981 (SI 894 of 1981) provided as follows:

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"4. (1) No employer shall -

...

(b) dismiss any employee from employment without the prior written approval of the Minister, who may approve the same, with or without conditions, if he is satisfied that such dismissal is not in any way a retrenchment or lay off or an attempt to retrench or lay off.

(2) No retrenchment, lay off or dismissal in breach of the provisions of subsection (1) shall have any effect unless approved by the Minister in writing:

Provided that in the event of such approval the retrenchment, lay off or dismissal shall only take effect from the date of such approval."

The Industrial Conciliation Act [*Chapter 267*] provides as follows:

"113. (1) Whenever an industrial council or conciliation board transmits to the Minister any agreement entered into between any or all the parties of the council or of the employers and employees represented on the board, such council or board may request the Minister to declare the agreement to be binding upon the parties hereto.

(2) On receipt of the request made in terms of subsection 91), the Minister may, if he deems it expedient, by notice in the *Gazette*, publish the agreement and declare that, from such date ...the terms of the agreement shall be binding upon the employers and employees who ...entered into the agreement.

The Industrial Agreement : Motor Industry, published in SI 106 of 1092, as amended by SI 161 of 1983 provided as follows:

"13. (1) An equal period of notice shall be given by an employer or an employee to terminate the contract of service ...

Provided that -

(i) nothing contained in this clause shall affect the right of the employer to dismiss an employee, or of the employee to terminate his employment, without notice for any good cause recognized by law as sufficient.

It is most clear to me that what the Employment Act 1980 had done was to incorporate the common law as to summary dismissal. Confirmation of this

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can be gleaned from the remarks of FIELDSEND CJ in *S v Jovuer* 1982 (2) ZLR 252 (SC) at 258 when he stated:

"Section 8(1) of the Employment Act provides . . . [here his Lordship quoted the subsection] and then follow the grounds upon which an employer may rely.

It must be noted that the section does not seek to give the right to dismiss summarily: this is assumed to exist. The wording of the subsection is that, except as provided in any regulations, an employer shall not summarily dismiss save in the circumstances provided. It follows that a regulation may only widen the grounds upon which an

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employer may dismiss, it may not limit the grounds."

The next matter to consider is s 49(1)(b) of the Employment (Conditions of Service) Regulations 1981 (SI 894 of 1981) which was enacted pursuant to the provisions of s 5 of the Employment Act 1980. In his examination of this provision in *S v Jovner (supra)* FIELDSEND CJ observed at 253-257 and 259:

"For many years now labour relations . . . have been governed by Industrial agreements negotiated by industrial councils in terms of the Industrial Conciliation Act [*Chapter 267*] ...

Once an agreement is in force it becomes an offence in terms of s 129 to contravene any provision of the agreement.

It is therefore not surprising to find that section 5 of the Employment Act 13 of 1980, which empowers the Minister to 'make regulations relating to or connected with the employment of employees', provides in subsection (2):

'(2) In the event of any inconsistency between the provisions of any regulations made in terms of subsection (1) and -

(a) the provisions of any enactment or of any agreement . . . the provisions of the latter prevail;'

Indeed Mr *Gillespie* could not argue that if there was conflict between the Regulations and the Industrial Agreement that the Regulations should prevail.

...

The Agreement deals comprehensively with the conditions of employment of anyone falling under it.

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...

Clause 27 is important. The relevant subclauses are:

'...

(6) Nothing contained in this clause shall affect the right of the employer to dismiss an employee summarily on grounds recognized by the law justifying instant termination of a contract of employment.'

...

It is . . . equally clear that Clause 27(6) gives an employer the right summarily to dismiss an employee for misconduct.

The next point for consideration is whether section 4(1) of the Regulations is inconsistent with the Agreement.

...

The effect of this section is clear. It purports to deprive an employer of his right to terminate an employee's employment without Ministerial approval .... in the case of employees guilty of misconduct justifying summary dismissal. This creates an obvious inconsistency between clause[s] . . . 27(6) of the Agreement and the Regulations.

. . . It is clear from the form of Clause 27. . . that the Agreement specifically incorporates the common law as to termination . . .

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In my view the appeal must be allowed on the basis that section 5(2)(a) of the Employment Act specifically provides that the terms of an Industrial Agreement prevail over a regulation inconsistent with it and that section 4(1)(b) of the Regulations is inconsistent with the Agreement."

It follows similarly that s 4(1(b) of the Employment (Conditions of Service) Regulations 1981 is inconsistent with Clause 13(1)(i) of the Industrial Agreement: Motor Industry, SI 106 of 1982 as amended by SI 161 of 1983.

At present the position at common law is that the *onus* is on the employer to justify summary dismissal. As LEWIS JP stated in *Rashayi* v *Bakasa African Council* 1978 RLR 389 (AD) at 393:

". . . The *onus* is on the master to justify the summary dismissal of his servant at common law, the principle being that the servant normally has a right to receive reasonable notice of the termination of his services, and

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it is for the master to prove circumstances disentitling the servant to that reasonable notice. However, it is equally clear that it is a shifting *onus* and once the master proves conduct which *prima facie*, and without any reasonable explanation from the servant, would amount to dishonesty or gross negligence or incompetence on the servant's part, the *onus* then switches to the servant to prove that his conduct was honest, or was not negligent or did not reflect incompetence on his part, as the case may be."

Further, there is no fixed rule at common law defining the degree of misconduct which will justify dismissal. In *Wallace* v *Rand Daily Mails Ltd* 1917 AD 479 at 491 SOLOMAN JA observed:

"...the further question to be determined is whether the negligence was such as to justify the defendant in peremptorily dismissing him from his service. That, as I have already had occasion to point out, is a question of fact and not of law. In the case of *Clouston & Co v Corry* [1906] AC ...it was laid down by the Privy Council that' in such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts, and is a question of fact ...The sufficiency of the justification depended upon the extent of the misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal.'

These observations are equally applicable to a case like the present."

Recently in *Tobacco Sales Floor Ltd* v *Chimwala* S-138-87 (not yet reported) McNALLY JA considered the effect of summary dismissal under the Employment Act 1980 (No. 13 of 1980). He observed that -

"I consider that there is an *onus* on an employer to justify summary dismissal ...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.'

...

I cannot accept that the *onus* can be said to be on the employee ...particularly in the light of the wording of the section in the 1980 Act. ... 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

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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 ...

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 dismissal. (It seems clear that the wording of our Act is modelled on the words from *Clouston's case supra*.)"

The case law suggests that normally no order for specific performance of a contract of employment will be granted where an employee has been wrongfully dismissed since such a contract is for personal services of a continuing nature and because of the close personal relationship between persons who have lost trust in each other, which makes it difficult for the court to provide constant supervision for the enforcement of its order: *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (T) at 154-158.

In *Schierhout v Minister of Justice* 1926 AD 99 at 107-109 INNES CJ stated:

"Now, it is a well established rule of English Law that the only remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages. The Courts will not decree specific performance against the employee, nor will they order the payment of the servant's wages for the remainder of the term ...Equity Courts did at one time issue decrees for specific performance. But the practice has long been abandoned, and for two reasons; the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship, and the absence of mutuality, for no Court could by its order compel a servant to perform his work faithfully and diligently. The same practice has been adopted by South African Courts, and probably for the same reasons ...Whether this was so in the civil law it is not necessary to decide ...However ...it may be taken that South African practice in regard to the remedy of an ordinary servant for wrongful dismissal is the same as the practice of the Courts in England.

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But the position of an officer in the civil service of the Union differs widely from that of a servant in the ordinary sense. Broadly speaking, the former contracts at his appointment that he will serve the State in accordance with statutes and the statutory regulations from time to time operative. These laws regulate in great detail the conditions and the term of his service. Once upon the fixed establishment he retains his position until duly removed or superannuated. He occupies a position midway between that of a Crown employee subject to dismissal at pleasure, and that of an ordinary servant whose period of service depends upon the terms of his contract. It has been pointed out by this Court on more than one occasion that the effect of the South African statutes which deal with the removal of civil servants is to cut down the power of the Crown to dismiss its servants at pleasure ...

The Acts and the regulations which deal with the Union Civil Service contain elaborate provisions regarding the removal of civil servants from which it follows that they can only be removed in accordance with those provisions

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...

It is this entrenchment against arbitrary dismissal which differentiates the position of a civil servant from that of an ordinary employee. And the question is whether the protection afforded by the statute in this instance entitles the plaintiff to maintain the position that his dismissal was of no effect ...And in regard to removal to facilitate re-organization it has imposed a prohibition as plain and clear as the English language could make it ...That statutory prohibition has in this case been disregarded ...It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect ...So that what is done contrary to that prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act ..."

In *Meyers* v *Abrahamson* 1952 (3) SA 121 (C) at 123-125 VAN WINSEN J correctly observed:

"As a general rule a contract cannot be rescinded except by consent of both parties thereto or by order of a competent Court, on a ground recognized by law as one on which rescission can be claimed ...Where one party to the contract had unjustifiably repudiated it the injured party has, as a general rule, the right to elect to accept the repudiation - and so by

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consent to put an end to the contract and sue for damages, or he is entitled to ignore the repudiation and hold the other party to the contract and claim specific performance.

It is difficult to see why this general rule should not be equally applicable to contracts of employment. Whether the Courts would be prepared to grant specific performance in contracts of this nature is another matter ...But from the fact that the Courts are unwilling to do so in the case of such contracts, it does not necessarily follow that they are taken out of the operation of the general rule and must be treated as contracts which can be completely terminated by unilateral action.

It may be that ...since the Court is not prepared to grant specific performance, the repudiation by the employer of the contract of employment, *de facto*, if not *de jure*, put an end to the contract. Thus while not necessarily recognising that the employer could competently put an end to the contract, nevertheless the refusal by the Court to hold him to the contract by decreeing specific performance was to put an end to the contract. It is, however, not necessary for me to take this particular aspect any further. I merely wish to say that I doubt whether the practice of the Court in allowing only the particular remedy of damages to the wrongfully dismissed employee can rightly be elevated to a rule of law to the effect that such contracts can be unilaterally terminated so that under no circumstances whatsoever can they be specifically enforced ...

Now the judgment in ...[*Schierhout's* case] makes no distinction in terms between the case where the employee sues during the currency of the contract for wages for the remainder of his term or where he sues after that period has expired. On the contrary, the rule is stated in the most comprehensive fashion, viz:

> 'the only remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages. The remedy has always been damages.'

His Lordship relies specifically upon the English practice which he states to be the same as the practice of our Courts."

In *R* v *Milne and Erleigh* (7) 1951 (1) SA 791 (A) at 873-874 SCHREINER JA stated:

"In our law a grant of specific performance does not rest upon any special jurisdiction; it is an ordinary remedy to which in a proper case the

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> plaintiff is entitled. But the Court has a discretion whether to grant the order or not ...More generally, specific performance will be refused where it would be 'inequitable in all the circumstances' ...or where 'from a change of circumstances' or otherwise it 'would be unconscientious to enforce the contract specifically."

Similarly in *Haynes* v *King Williamstown Municipality* 1951 (2) SA 371 (A) at 378-380 DE VILLIERS AJA most clearly outlined the ambit of specific performance when he stated:

> "It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance ...The discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.
>
> As examples of the grounds on which the Courts have exercised their discretion in refusing to order specific performance, although performance was not impossible, may be mentioned: (a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the Court to enforce its decree; (c) where the thing claimed can readily be bought anywhere; (d) where specific performance entails the rendering of services of a personal nature... (e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to claim is unreasonable hardly on the defendant, or where the decree would produce injustice, or would be inequitable under all the circumstances...
>
> The matter is so well put by Story (EQUITY JURISPRUDENCE sec. 742) that I give the whole paragraph:
>
> > 'In truth the exercise of this whole branch of Equity Jurispudence respecting the rescission and specific performance of contracts is not a matter of right in either party, but it is a matter of discretion in the Court: not indeed of arbitrary or capricious discretion dependent upon the mere pleasure of the Judge, but of that sound and reasonable discretion which governs itself as far as it may by general rules and principles, but which at the same time withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice

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> between the parties. On this account it is not possible to lay down any rules and principles which are of absolute obligation and authority in all cases; and therefore it would be a waste of time to attempt to limit the principles or the exceptions which the complicated transactions of the parties and the ever-changing habits of society may at different times and under different circumstances require the Court to recognise or consider. The most that can be done is to bring under review some of the leading principles and exceptions which the past times have furnished as guides to direct and aid our future inquiries.'
>
> On the Court's discretion to refuse specific performance because the decree would bear hardly... Where the cost to the defendant on being compelled to perform is out of proportion to the corresponding benefit to the plaintiff and the latter can equally well be compensated by an award of damages I cannot agree that the statement . . . that the time at which the contract is concluded is decisive of the matter, is in accordance with our law. In my judgment the matter may also be judged of at the time performance is claimed."

Relying on the foregoing VAN DIJKHORST J in *National Union of Textile Workers* v *Stag Packings (Pty) Ltd (supra)* at 156 posed this question:

> "Is there a rule of law that a party's wrongful cancellation of a contract of personal service puts an end to the contract despite the fact that the other party does not accept this repudiation? If the answer is affirmative no order for specific performance can be granted as there is no contract to enforce."

He then proceeded to review the case law on the matter, including *Schierhout's* case *(supra)*,

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which differentiated between the positions of ordinary employees and "statutory" employees, and came to the conclusion at 1158 that -

> "The *dictum* in *Schierhout's* case which was a pronouncement of a general approach to matters of this nature was treated as a legal principle which precluded further investigation of other relevant considerations. In my view this is erroneous . . . In my view the approach to the application of the discretion in respect of specific performance laid down in *Haynes'* case is equally applicable to the case of the wrongful dismissal of an ordinary servant
>
> This does not mean that the considerations mentioned in *Schierhout's*

> case, why in such a case an order for specific performance should generally speaking not be granted, should be disregarded. They are weighty indeed and in the normal case they might well be conclusive. But that is a far cry from saying that the Court should therefore close its eyes to other material factors and refuse to evaluate them."

It is clear from the foregoing that VAN DIJKHORST J was in fact laying down a single principle that applied to both ordinary servants and other servants governed by statute.

The plaintiff's contention is that the defendant's plea clearly asserted that the plaintiff's employment was terminated from 16 December 1982. This position was altered by consent to judgment filed by the defendant on 26 November 1987, whereby the defendant proposed to pay the plaintiff until the 28 September 1983. Prior to this consent to judgement, according to the plaintiff, the defendant could not have succeeded, since they sought dismissal with retrospective effect. In *Gumede* v *Mapumulo Bantu School Board and Another* 1961(4) S A 639 (D) at 645-646 HENOCHSBERG J held that suspension was very different from dismissal and a subsequent communication terminating employment from the date of suspension did not deprive the employee of the right to claim wages for the intervening period. By the consent to judgment the defendant, asserts plaintiff's counsel, has cured a defect in his case. Further, plaintiff's counsel argues that his client sought specific performance, and that by the defendant filing his consent to judgment, the defendant was in fact acquiescing to specific performance. This was a tactic admission on part of the defendant that the plaintiff was entitled to the relief sought by him. With having been partially successful, it was submitted, in his relief the plaintiff persisted in his claim for specific performance. The grounds on which the defendant relied did not constitute justifiable grounds which satisfied the requirements of s 8 of the Employment Act 1980 and did not amount to lawful cause for dismissal.

Defendant's counsel argued that, by filing the consent to judgment, the defendant did not concede that the plaintiff was entitled to the relief of specific performance he sought. The defendant acknowledged that in law it could not dismiss the plaintiff with retrospective effect. Defendant's counsel submitted that an employer's act in wrongfully dismissing an employee constituted a breach of the contract of employment which gave the employee a claim to damages for wrongful dismissal: *Schierhout* v *Minister of Justice (supra)* and v *Beyers & Ors* 1967 (2) SA 131 (W). Further, the defendant asserts that the plaintiff accepted his termination of employment by cashing

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his pension cheque, by seeking other jobs, and points out that in his evidence the plaintiff said that he was employed from 14 September 1971 to 16 December 1982, but did not state that he was still employed.

Insofar as the plaintiff's relief is for specific performance, the *onus* is on him to convince this court that it should exercise its discretion and grant the order sought, bearing in mind that in exercising "their discretion in refusing to order specific performance, although performance was not impossible" the courts have refused specific performance where damages were an adequate remedy or where it was difficult for the court to enforce its decree in contracts of employment where the rendering of services was of a personal nature.

It is true that when a civil servant has been wrongfully dismissed contrary to statutory provisions governing his employment, the courts have declared such dismissal a nullity: *Rogers* v *Durban Corporation* 1950 (1) SA 65 (D) at 70. However, in *Bramdaw* v *Union Government* 1931 NPD 57 at 78 HATHORN AJ stated:

> "I understand reinstatement to mean the replacement of the dismissed officer in his post so that he can perform the work attaching to that post. In other words the proposition is that the Court will not grant against the defendant an order of specific performance *ad faciendum*. That is certainly the position in ordinary master and servant cases (see the remarks of INNES CJ in *Schierhout's* case 1962 AD 99 at 107) and in my opinion it is also the position in cases where the Crown dismisses a public servant unlawfully, for I can see no difference in principle in this respect between the two types of cases."

But the foregoing must now be understood in the light of what was stated by VAN DIJKHORST J in *National Union of Textile Workers* v *Stag Packings (Pty) Ltd (supra)* as being the correct "approach to the application of the discretion in respect of specific performance laid down in *Haynes's* case" to that applicable to matters of wrongful dismissal in contracts of employment. It follows that when any employer wrongfully dismisses his employee or without justification terminates his employment, unless there is a clear and express statutory right of reinstatement, generally the considerations outlined in *Schierhout's* case by INNES CJ would normally weigh heavily against the grant of specific performance.

In all the circumstances I am not satisfied that this is a proper case for the exercise of my discretion in granting an order for specific performance. The

defendant has filed a consent to judgment in the sum of $3 754,12 which the plaintiff is at liberty to accept if he so desires. Otherwise the plaintiff's claim for specific performance is dismissed with costs.

Honey & Blanckenberg, plaintiff's legal practitioners

Brighton & Cole Bowen, defendant's legal practitioners

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LAMB v BEAZLEY NO 1988 (1) ZLR 77 (HC)

Court **High Court, Harare**

Sandura JP

Application for amendment of declaration

27, 28 January & 10 February 1988

Flynote

Practice and procedure - pleadings - amendment of - when permissible - not permitted where effect of amendment is to introduce a new cause of action or alter the foundation of the action.

Headnote

On the opening day of the trial, plaintiff's counsel applied for leave to withdraw the plaintiff's declaration (which had been filed six months earlier) as well as the further particulars thereto and to substitute a new declaration. In his plea to the original declaration, the defendant raised the defence that the agreement which gave rise to the action was illegal. In his proposed amendment, the plaintiff would allege different facts, which would remove the illegality raised by the defendant and thus destroy one of the defendant's main defences. No explanation was given as to why the plaintiff's declaration was filed in its original form, if the allegations made in the amended declaration were accurate.

Held, that the general rule is that amendments to pleadings will always be allowed unless the application to amend is made *mala fide* or unless the amendment would prejudice the other party in a manner which cannot be compensated by costs. However, the application must be made timeously and an explanation given as to why the allegation was not made when the pleadings were originally drafted. Neither criterion applied in the present case.

Held, further, that the proposed amendments would introduce a new cause of action or alter the foundation of the original action, either of which would call for a fresh plea from the defendant and thereby lead to a substantial delay. To grant the application would be prejudicial to the defendant, and the application should accordingly be refused.

SANDURA JP

Held, further, that as the proposed amendments would render the new declaration excipiable, they should on these grounds also not be allowed.

Cases cited:

Moolman v *Estate Moolman & Anor* 1927 CPD 27

Krogman v *van Reenen* 1926 OPD 191

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ITC (SA) Ltd v *United Tobacco Co (South) Ltd* (5) 1955 (2) SA 42 (W)

Cross v Ferreira 1950 (3) SA 443 (C)

AP de Bourbon SC for the plaintiff

J Sayce for the defendant

Judgment

Sandura JP: Just before the trial of this action commenced on 27 January 1988 Mr *de Bourbon* who appeared for the plaintiff applied for leave to withdraw the plaintiff's declaration filed on 27 August 1985 as well as the further particulars thereto filed on 7 October 1985 and to substitute in place thereof a new declaration. Mr *Sayce*, who appeared for the defendant, opposed the application. After hearing counsel's submissions I dismissed the application and indicated that the reasons for that decision would be given in my judgment at the conclusion of the trial. However, Mr *de Bourbon* indicated that he could not continue with the trial until I had given my reasons for the dismissal of his application and he had decided whether or not to appeal against that decision. Consequently, the trial was postponed *sine die* by consent to enable me to prepare my reasons for the dismissal of the plaintiff's application. Those reasons now follow.

The facts relevant to this application are as follows. On 25 August 1985 the plaintiff issued a summons against the defendant claiming the following:

> "a) An order directing defendant to render to Plaintiff an account of the sale of the 1984-1985 virginia flue cured tobacco crop grown by the insolvent under Growers Numbers 4265 and 127 and to pay to Plaintiff half the proceeds of such sale.
>
> b) Costs of suit."

The declaration which accompanied the summons sought the same relief. Paragraph 3 of that declaration stated the basis of the plaintiff's claim as follows:

> "3. At the time of the sequestration of the insolvent's estate, Plaintiff was the owner of and the insolvent was in possession of one half of

> the 1984-1985 virginia flue cured tobacco crop grown by the insolvent under Growers Numbers 4265 and 127, the value of which is not known to Plaintiff but is within Defendant's knowledge."

Before filing his plea, the defendant sought further particulars of the plaintiff's declaration. One of the particulars sought was the basis on which it was alleged that the plaintiff was the owner of one half of the insolvent's tobacco crop. In reply the plaintiff furnished a number of further particulars including the following:

> "2. Plaintiff paid to the insolvent the sum of $28 000,00 for half the tobacco crop produced, which the insolvent represented would be 50 000 kg."

The plaintiff went on to say that although the sale agreement had been a verbal one, it had been reduced to writing though the document in question had not been signed by the parties. A

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copy of the unsigned written agreement was supplied to the defendant. Paragraph 2 of that document reads as follows:

> "2. **Cession**
>
> In consideration of the payment of TWENTY EIGHT THOUSAND DOLLARS ($28 000,00) by the Cessionary, the Cedent hereby sells, cedes, transfers and makes over to the Cessionary, his right, title and interest in and to FIFTY THOUSAND (50 000) KILOGRAMS of Virginia Flue Cured Tobacco (called the "tobacco") from his crop, grown under Growers Numbers 4265 and 127."

One of the defences raised by the defendant in his plea reads as follows:

> "3.1. Defendant denies that Plaintiff owned the tobacco crop, averring the Insolvent was prevented from selling it to Plaintiff and Plaintiff from buying it from the Insolvent by section 44(1) and 36(1) of the Tobacco Marketing and Levy Act 1977 respectively. In the circumstances, if there was an agreement in the form alleged, it is an illegal agreement."

The amended declaration which the plaintiff now seeks to introduce alleges that the sale agreement was in respect of tobacco which was either still growing on the farm or had been reaped but not yet cured. In other words, the plaintiff now denies that the sale agreement was in respect of 50 000 kg

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SANDURA JP

of flue-cured tobacco. In addition, he now denies that the sale agreement was ever reduced to writing and seeks to withdraw the document which he originally put forward as containing the terms of the sale agreement. In brief, the effect of the amendments sought by the plaintiff is to remove the illegality raised by the defendant in his plea. In fact, the amendments are designed to destroy one of the main defences raised by the defendant in his plea. No explanation was given as to why the plaintiff's declaration was filed in its original form, if what the plaintiff now alleges accurately reflects the plaintiff's case.

It is clear from decided cases that the court has a very wide discretion in determining whether or not an application for the amendment of pleadings should be allowed. As WATERMEYER J said in *Moolman v Estate Moolman & Anor* 1927 CPD 27, the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless the amendment would prejudice the other party in a manner which cannot be compensated by costs. However, in each case the application must be made timeously and the applicant must be given some explanation as to why the allegation was not made when the pleadings were originally drafted. Herbstein and Van Winsen put it thus at p 356 of *The Civil Practice of the Superior Courts in South Africa* 3 ed:

> "It would be incorrect to conclude from this liberal attitude of the court towards amendments to pleadings that an amendment can be had merely for the asking. The litigant asking for an amendment is in fact craving an indulgence and he must offer some explanation as to why he requires the amendment and more especially if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay."

DE VILLIERS JP put it thus in *Krogman* v *van Reenen* 1926 OPD 191 at 194:

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"...even if the party applying for an amendment tenders to pay wasted costs and to consent to a postponement and to other conditions and terms which will avoid all direct prejudice to the other party as regards his prospects of succeeding in the action, that will not entitle him to claim an amendment as of right, but he will still have to show reasonable grounds; he must show, for instance, that the matter involved in the amendment is of sufficient importance to justify him in putting the Court and the other party to the manifold inconveniences of a postponement, and that the necessity for the amendment has risen through some reasonable cause ..."

SANDURA JP

More recently, CLAYDEN J (as he then was) put it thus in *ITC (SA) Ltd v United Tobacco Co (South) Ltd* (5) 1955(2) SA 42 (W) at 43G-H:

"Now the courts will allow amendments, but they do require that there should be some explanation as to why the amendment is sought, as to why the allegation was not made when the pleadings were originally drafted or before the trial commenced."

In the present case, the plaintiff has given no explanation as to why the allegations sought to be made were not part of the original declaration; nor is there any explanation as to why the amendments were only sought on the day on which the trial was to commence.

Mr *Sayce* opposed the plaintiff's application on two grounds. One of them was that the proposed amendments would cause prejudice to the defendant. He submitted that the proposed amendments would introduce a new cause of action which would call for a fresh plea from the defendant and thereby lead to a substantial delay. I agree with defence counsel's submission that the amendments sought by the plaintiff would in fact introduce a new cause of action. As to whether the introduction of a new cause of action would prejudice the defendant, a passage on p 189 of Beck's *Theory and Principles of Pleading in Civil Actions* 5 ed is relevant. It reads as follows:

"It is not easy to say what constitutes prejudice to the defendant. In one sense there can be no prejudice whatever if the amendment is timeously applied for, because the alternative procedure is always open to the plaintiff, that namely of withdrawing his summons and starting *de novo.* The fact that the court can and does order a plaintiff who applies for such an amendment to pay any costs which may have been occasioned to the other side puts the matter still more upon an equality and reduces the risk of prejudice to a nullity. Nevertheless this consideration does not appear to determine the matter. It is said that a new cause of action cannot be introduced by an amendment of the summons and that where a new cause of action is thus sought to be introduced there must in general be prejudice to the opposite party, so that the proposed amendment cannot be permitted. And just as a new cause of action cannot be imported by amendment into a summons so it is not possible by amendment to alter the foundation of the action."

As I am of the view that the proposed amendments would either introduce a new cause of action or alter the foundation of the original action, I agree with

SANDURA JP

the submission made by Mr *Sayce* that the proposed amendments would prejudice the defendant and should not be allowed. Looking at the problem from a different angle, since I am of the opinion that the proposed amendments are designed to destroy one of the defences raised by the defendant in his plea, I am satisfied that granting the plaintiff's application would

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be prejudicial to the defendant.

Because of the above conclusion, it is not necessary for me to deal with the second ground relied upon by Mr *Sayce* in detail. That ground was that the proposed amendments would render the new declaration excipiable and should not be allowed: *Cross v Ferreira* 1950 (3) SA 443 (C). I think that there is some merit in this submission; the plaintiff could not have become co-owner of the tobacco which had not yet been reaped because there is no evidence to show that he was registered as co-owner of the farm in question.

It was for these reasons that the plaintiff's application was dismissed.

Scott & Associates, plaintiff's legal practitioners

Scanlen & Holderness, defendant's legal practitioners.

SHIELD OF ZIMBABWE INSURANCE CO LTD v SHUBARA RANCH (PVT) LTD 1988 (1) ZLR 83 (HC)

Court **High Court, Harare**

Gibson J

Opposed matter

28 January & 10 February 1988

Flynote

Practice and procedure - High Court Rules - Order 29 Rule 199 - parties in a civil action or suit concurring in a special case -"suit"- meaning of - procedure applies to motion proceedings as well as actions.

Insurance - exclusionary clause in motor insurance policy - requirement for driver of insured vehicle to be "duly and fully licensed" - covers otherwise unlicensed driver who holds a permit issued in terms of s 8 of Road Traffic Act 1976.

Headnote

Rule 199(1) of the High Court Rules allows the parties to "a civil action or suit" to concur in a statement of the questions of law arising therefrom in the form of a special case for the opinion of the court. This procedure may be adopted in all legal proceedings of a civil nature, including proceedings on notice of motion, and is not confined to trial actions. The special case may be raised in motion proceedings before any affidavits are filed.

The term "duly and fully licensed" in a clause of a motor insurance policy requiring the insured vehicle to be driven by a licensed driver covers an otherwise unlicensed driver who is the holder of a tractor drivers permit issued in terms of s 8 of the Road Traffic Act, No. 48 of 1976, provided that the tractor is being driven in compliance with the requirements of the section.

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GIBSON J

Cases cited:

Zihumbga v Harper NO & Ors 1965 RLR 382 (GD)

Hay v African Gold Recovery Co Ltd 1902 TS 232

MJ Gillespie for the applicant

DP Carter for the respondent

Judgment

Gibson J: The applicant is an insurance company duly licensed and incorporated and carries on business in Harare. The respondent is an incorporated company duly licensed to carry on business as farmers in Zimbabwe.

On 31 May 1985 there was a collision in which a tractor and trailer belonging to the respondent and insured with the applicant, was involved in an accident between a private vehicle, whose driver was killed, and an army lorry, in which a passenger lost his leg. Following upon an action instituted by the dependants of the deceased motorist, it was agreed by counsel acting for all the parties that damages in the sum of $77 000, to include the sum of $23 000 should be paid, the latter figure being in full and final settlement of the damages payable for Capt Ngwenya, the passenger in the army lorry, leaving the net figure to be paid to the dependants of the deceased motorist.

In this application on notice of motion, although the respondent's affidavit in answer to that of the applicant was already filed and on record, the parties by consent agreed that the respondent's affidavit be struck off the record, and, in its place there be substituted a special case for decision by me, namely whether the applicant in this notice of motion is entitled to repudiate its obligations under the contract of insurance and thus to recover the sums paid by the applicant to the third parties from the respondent.

As authority for this method of approach both counsel have referred me to Rule 199 of the High Court Rules. It is necessary only to cite subs (1) of the Rule. This states that -

> "The parties to a civil action or suit may, after summons has been issued, concur in a statement of the questions of law arising therein in the form of a special case for the opinion of the court."

Although the Rule talks of the "civil action or suit" Mr *Gillespie*, with the concurrence of Mr *Carter*, for the respondent, argued that this method of proceeding is equally appropriate in motion proceedings. Mr *Gillespie* cited

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GIBSON J

the cases of *Zihumbga* v *Harper NO & Ors* 1965 RLR 382 (GD) and *Hay* v *African Gold Recovery Co Ltd* 1902 TS 232. This last case is cited with approval in the *Zihumbga* case. In the *Zihumbga* case the respondents did not file any affidavits but filed a notice of objection and exception with listed grounds. The notice and objection were entertained on the return day of the rule nisi. In approving of the procedure adopted, DAVIES J, expressed the view, after referring to the *Hay* case, that the procedure has obvious merit. I respectfully agree; in my view, for two reasons.

Firstly, because it seems to me that the wording of the Rule, including as it does, the words, "civil action or **suit**", (the emphasis is mine) envisages that the procedure may properly be adopted in all legal proceedings of a civil nature, and that it is not to be limited to trial actions. I am fortified in this view by the definition of the word "suit" in Jowitt's *Dictionary of English Law* 2 ed vol 2, which is as follows:

> "any legal proceeding of a civil kind brought by one person against another ...The term (suit) is used in opposition to the word civil action."

It is undoubted that civil proceedings are of two kinds. This is made clear by Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed p 59, where the authors state:

> "The two fundamental forms of procedure in the Superior Courts are applications and actions."

The other reason I feel the manner of proceeding in this way is proper is that there does not appear to be any rhyme or reason for preventing the adoption of a method of procedure that appears to have economy in time and costs of proceedings. The Courts are always concerned with the need to expedite and save time. In a proper case a great deal of time and money could be saved where it is possible to proceed in this way because the rule allows the filing of the special case any time after the issue of summons and, on my interpretation, if I am right, notice of motion, thus making it possible to raise the special case before any pleadings are filed, including affidavits (in this particular case). However that is not necessarily the position in the instant case because the election to proceed in this manner was not made until after the respondent's affidavits had been filed. However, notwithstanding the stage which the instant proceedings have reached, I still feel that there is no sensible reason for not adopting the particular method of procedure.

GIBSON J

The question to be considered, as set out in the special case, is as follows:

> "Whether the applicant is entitled in law to repudiate its obligations under the policy of insurance issued by it in respect of the respondents on the grounds of the breach by the respondent of special condition B (11) subclauses B-E of section 14 of the Policy in the circumstances given below."

The clause under consideration states (commencing with A, so as to make sense of the provisions under consideration):

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"The Company shall not be liable in respect of: -

A any accident injury loss damage and/or liability caused sustained or incurred outside Zimbabwe except as provided under the territorial limits extension hereof;

B any accident injury loss damage and/or liability caused sustained or incurred while any vehicle in respect of or in connection with which insurance is granted is: -

(i) . . .

(ii) being driven by the insured or by any other person with the general knowledge and consent of the insured unless duly and fully licensed to drive such vehicle in the terms of the legislation applying to any territory within the territorial limits to which this section applies or where such a licence be subject to renewal he has held and is not disqualified from holding or obtaining such a licence provided that this exception shall not apply when the insured or any such person is driving such vehicle whilst learning to drive if at such time he is complying with the laws and regulations in force relating to learners;"

The salient facts, as taken from the special case, are that the applicant had been obliged to defend the proceedings brought by the dependants of the deceased killed during the collision involving the insured vehicle and the two other vehicles previously mentioned. In the result a settlement was reached and the insurer paid all the claims made by the victims of the accident. But the insurance policy had been subject to the condition above, and by virtue of this clause the applicant now seeks to have recourse to the respondent, the insured, in order to be reimbursed the sums paid out on the grounds that the respondent was in breach of the above clause.

GIBSON J

I now quote the facts as set out in the special case.

"6. The respondent's tractor was being driven for the respondent's business purposes by an employee of the respondent with its general knowledge and consent.

7 The respondent's driver was not the holder of a driver's licence in terms of s 6, nor of a tractor driver's permit in terms of s 8 of the Act.

8. The respondent employs a farmer or farm manager who holds a driver's licence and who permitted the respondent's driver to drive the said tractor.

9. The tractor was being driven on Chinhoyi-Karoi road within a belt ten kilometres wide outside the boundaries of the respondent's farm when the collision giving rise to the third party claim occurred."

Regarding the respective merits, Mr *Gillespie*, for the applicant, argues that his client is entitled to have recourse to the respondent in order to be reimbursed the monies paid out because the respondent cannot bring himself within any of the situations which would preclude the applicant from repudiating his liability - ie within the terms of s 14 clause B(ii) of the contract of insurance. Mr *Gillespie's* argument is that the matter is one simply of interpretation of the English words, "duly and fully licensed". Consequently, he argued, the Court need not read the policy document beyond those words that deal with categories of drivers other than the driver who is fully and duly licensed to drive within the territorial limits of this country. In other words the question will be decided by settling the question whether the respondent's driver could be said to have been

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"duly and fully licensed" within the meaning of the opening words of clause B(ii) of s 14 of the policy. Mr *Gillespie* pointed out that, from his own admissions, the respondent was clearly in breach of s 8 of the Road Traffic Act No. 48 of 1976. Consequently the respondent's driver could not be said to have been a duly and fully licensed driver.

I quite agree with Mr *Gillespie's* contention.

Section 8 of the Road Traffic Act lays down the requirements to be satisfied before a tractor driver can be authorised to drive his employer's tractor on the public roads. Before the farmer or his manager gives such authority he must first satisfy himself, as a licensed driver, that the would-be driver has a practical working knowledge of the rules of the road, that the driver is competent and can control the vehicle on the road competently, and that he does not suffer from a disease or disability which renders him a danger to the

public road user. The section further requires the farmer to take steps to obtain a driving permit for the purpose. This is obtainable upon the completion of a prescribed form, to be sent to a prescribed officer with the requisite fee. Once all these preliminaries are satisfied the tractor driver, thus furnished with the permit, may drive the tractor on a public road - but only within the prescribed limits.

This discretion or power, which is given to the farmer or his manager, is strictly to be exercised as defined by the statute; the farm manager cannot vary the power or depart from its terms. This statement does not need authority, it is a well settled principle.

The clear intention behind s 8 of the Road Traffic Act is, it seems, to ensure that farm activity may not be unduly restricted by confining the driving of vehicles to duly and fully licensed drivers - but the activity is to be permitted within a very limited area outside the farm boundaries. However, in order to balance the needs of the farmer against the public interest in ensuring a basic standard of safety, the section requires that the farmer or his manager who allows a tractor to be driven by a farm hand must first ensure that the farm hand knows the ordinary rules of the Highway Code and is able to control the vehicle. To that extent, the tractor driver can be said to be duly licensed, if he is driving in compliance with this section. I think the words "duly and fully licensed" ordinarily mean that properly licensed in terms of the law. The expression encompasses the situation of the tractor driver when driving in terms of s 8 of the Road Traffic Act only.

Mr *Carter*, for the respondents, did not accept that the only material provisions of clause B(ii) to be looked at for the purposes of resolving the present issue were those indicated by Mr *Gillespie*. He argued that the whole of the Clause ought to be considered. He also argued that the fact that the Clause mentions "duly and fully licensed drivers" and makes further reference to learner drivers and drivers whose licences have expired and are awaiting a renewal and are not disqualified from holding licences makes it quite clear that the insurer's intention was to provide for different types of drivers and vehicles as listed. He argued further that the exclusion clause did not preclude an employee driving a tractor with the consent of the farmer or the

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manager. I do not agree, for the reasons previously stated in this judgment. There would have been merit in this argument, if s 8 had not gone out of its way to list the guidelines which ought to be followed before the tractor driver could lawfully drive within the terms of the section. The requirement for a personal vetting of the would be driver by the farmer or his

GIBSON J

manager before permitting the driver to take control of the tractor is quite strict, for the reasons I have previously mentioned. The need to ensure and enhance safety for the public road user remains uppermost in the minds of all road users.

For the reasons above I also reject the argument that there is a *casus omissus* in the instant case.

In conclusion, the question is answered in the affirmative.

It is ordered that:

1. the applicant be and is hereby entitled to repudiate liability in terms of the insurance policy;
2. the respondent pay to the applicant the sum of $77 500 as well as the taxed or agreed costs of the applicant in Case No. HD 2261/86;
3. the respondent pay the costs of this application.

Winterton Holmes & Hill, applicant's legal practitioners

Morris Beale and Collins, respondent's legal practitioners

S v CHIMBANI & ANOR 1988 (1) ZLR 90 (SC)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ, McNally JA & Manyarara JA

Criminal Appeal

18 January & 12 February 1988

Flynote

Criminal law - degrees of participation in a crime - accessory after the fact - "association" with crime - more than mere ratification or approval of offence is required - receiving stolen property knowing it to have been stolen - requisite intent - when intent must be formed - relevance of intent or knowledge at a later stage - conduct amounting to receiving.

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Headnote

Although it is not uncommon to speak of an accessory after the fact as being one who "associates" himself with an already committed crime, the use of the word "associates" tends to obscure the fact that something more than mere ratification or approval of an offence is required before criminal liability will exist. Where the appellant, having innocently received stolen property from a thief, helped another man return the property to the thief's house, his action was one of dissociation rather than association with the crime, even assuming that he might at that stage have suspected that the property might have been stolen.

On a charge of receiving stolen property, it is sufficient for the State to show that the accused, when he received the stolen goods, must have foreseen the real possibility that the goods had been stolen and did not care whether they had been stolen or not. It is the accused's state of mind at the time of the receiving that is relevant; his state of mind at a later stage is only relevant to the extent that it casts light on his state of mind earlier.

As to what constitutes "receiving", the accused must be shown to have obtained custody and control of the stolen property. To assume custody or control, it is not necessary that he handle the property physically; if,

on his orders, it is locked in his cellar or car or in his minion's cellar or car, it makes no difference that he has not even seen it, let alone touched it.

Cases cited:

S v *Augustine* 1986 (3) SA 294 (C)

R v *Nkau Majara* [1954] AC 235 (PC)

S v *D* 1966 (4) SA 267 (N)

S v *Ushewokunze* 1971 (1) RLR 107 (AD); 1971 (2) SA 360 (RAD)

AM Donagher for the appellants

KA Esat for the respondent

Judgment

McNally JA : At the conclusion of the hearing of this matter we announced that the appeal of the second appellant was allowed, and his conviction and sentence were then and there set aside.

We reserved our judgment in respect of the first appellant.

The facts of the case are briefly as follows. The first appellant's brother was a senior employee of a major supermarket in Bulawayo. He, the brother, stole very large quantities of goods from his employers. The thefts involved goods worth something in the region of $49 000. The goods were stolen on two separate occasions. Many of these goods were in cartons or containers

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clearly marked with the name of the supermarket chain in question. The brother pleaded guilty at his trial and was sentenced to nine years' imprisonment with labour, two of which were suspended.

The goods were apparently stolen on 22 and 30 January 1985. Something in the region of $30 000 worth of these goods were recovered. Some were found in the first appellant's shop. Others were found in a storeroom or outbuilding at the second appellant's home. The property was recovered at the end of March 1985.

The question is whether the circumstances were such that it could properly be said that the first appellant was guilty of receiving stolen property well knowing it to be stolen, and that the second appellant was guilty as an accessory after the fact to the crime of theft.

It is perhaps easier to dispose first of the case against the second appellant. He was a friend of the first appellant and helped him from time to time in his supermarket. He owned a house at No. 11 Bamboo Road, Newton West,

McNALLY JA

Bulawayo. His wife worked on a regular basis for the first appellant at his shop, Jock's Supermarket.

The second appellant said that in January 1985 he was approached by the thief, who asked if he could rent an outhouse at his Bamboo Road property in order to store some goods. He explained that he was planning to open a store in Chivhu and wanted a place to store his stock before opening.

The second appellant agreed to this, at a charge of $50 per month, and handed over the key of the outbuilding to the thief whom he knew as the brother of his friend.

He did not see the goods being put in the outbuilding, because both he and his wife work. His children were at school. He did not look inside the building at any later stage because it was not his business and anyway he did not have the key.

Later the first appellant told him his brother (the thief) had written to say that the property should be moved to his (the thief's) house at Fourwinds. The two of them and some labourers moved the goods to Fourwinds and took some of the property which could not fit there to the premises of another friend, Don Nyatito.

That is all he had to do with the property. The magistrate hearing the case acknowledged that the evidence against the second appellant was not as strong as that against the first appellant. The magistrate was, however, satisfied that the second appellant was untruthful when he played down his relationship with the first appellant's supermarket business. He noted also that when the property was removed from the second appellant's storeroom he (the second appellant) must have known of the thief's arrest. These two factors satisfied the magistrate "that your knowledge of the property must have amounted to a certainty that it was stolen".

He concluded "Your conduct in assisting and in removing and indeed the attempted

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concealment of this property make you, to my mind, a *socius*, and you are found guilty on the alternative charge".

However suspicious the circumstances may seem, the fact is that, as the magistrate noted, there is no evidence to gainsay the second appellant's claim that he did not see the property at any stage until he was asked to help remove it from his storeroom.

McNALLY JA

At that stage two points must be noted. First, even if he did know of the thief's arrest, the fact is that the thief was arrested initially for fraud involving a lesser amount, and not for theft. But more importantly, the property was moved, not into a safe hiding place, which might have indicated a criminal intent, but back to the house of the thief. Only when all of it could not be fitted there was some of it dumped at another friend's house.

At worst for the second appellant this indicates a suspicion that it would be better for him to have nothing to do with the property of an arrested man. Assuming that he may have suspected then that it could be stolen property, his action in returning it to the house of the "owner", who was then already under arrest, was an act of dissociation rather than an act of association.

He was distancing himself from the crime rather than involving himself in it.

There is an interesting and, with respect, perceptive discussion of the concept of "association" in the judgment of MARIAS J in *S v Augustine* 1986 (3) SA 294 (C) at 297 *in fine*, where he says:

> "I am aware that it is not uncommon for judges and writers on the law to speak of an accessory after the fact as being one who 'associates' himself with an already committed crime, and that it may be suggested that one who knowingly takes a benefit from the commission of a crime 'associates' himself with it.
>
> The use of the word 'associates' in this context is perhaps unfortunate, because it tends to obscure the fact that something more that mere ratification or approval of an offence is required before criminal liability will exist."

The judgment goes on to refer to *R v Nkau Majara* [1954] AC 235 (PC) and *S* v *D* 1966 (4) SA 267 (N).

The present case, it seems to me, is *a fortiori*. There is no proof of approval or ratification on the part of the second appellant, as proof of assistance of the thief. Indeed it seems *per contra* that if anything he was seeking to put the potentially incriminating evidence back where it belonged.

I am satisfied therefore that the magistrate was wrong to convict the second appellant on the evidence before him.

McNALLY JA

I return then to the case of the first appellant. The point for determination in his case is whether

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the State has proved the state of mind described by BEADLE CJ in *S v Ushewokunze* 1971 (1) RLR 107 at 112; 1971 (2) SA 360 at 364 as follows:

> "I would consider therefore that if the State shows that an accused, when he received that stolen goods, must have foreseen the real possibility that the goods had been stolen and did not care whether the goods had been stolen or not, that is sufficient to prove guilty knowledge.
>
> It is not necessary to go further and decide why the accused did not make enquiries as to the ownership of the goods."

The facts are these:

1. The first appellant was himself the owner of a supermarket and thus aware in general terms of how such businesses are run, financed and stocked.

2. He knew his brother was a senior employee of a well known supermarket which was part of a nation-wide chain.

3. His statement (Exhibit 8) reveals that he was taken aback at the size and value of the load of goods brought to his store by Clan Transport (in fact it seems to have been DD Transport). His statement reads in part as follows:

> "To my surprise he brought the goods in a hired Clan Transport truck and by looking at the size of the load I refused the goods."

And later:

> "Roughly estimating the value of the goods I queried where he had got the money. He said I should keep quiet as he knew what he was doing."

These facts alone seem to me to point very strongly indeed to the conclusion that the first appellant, when he received these goods "must have foreseen the real possibility that the goods had been stolen". He admits both surprise and suspicion at the time the goods arrived and one can fully understand both reactions.

It is true that the magistrate seems to have addressed his mind to the first appellant's *mens rea* at a different stage of the proceedings. He said:

McNALLY JA

> "Now dealing with Accused 1 first. Right at the onset the evidence shows, and I am talking here of the evidence of Nyatito, that accused 1 entertained suspicions about these goods. Your reluctance to discuss the matter with Mr Nyatito over the phone as you said to him that your brother had been arrested and you couldn't discuss it with him, makes it clear right at the onset that you smelt a rat with this property."

Mr Nyatito did not become in any way involved with this property until about 6.30 pm on 27 March 1985 when he was telephoned by the first appellant, who asked whether he could store some goods. Certainly the evidence indicates that at that stage the first appellant was aware that the goods were such that possession of them was likely to lead to trouble with the police. But we are not really concerned with the first appellant's state of mind on 27 March 1985, save to the limited extent that it casts light on his state of mind earlier. The discussion with Mr Nyatito

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was not the "onset". What we are really concerned with is the state of the first appellant's mind at the end of January 1985 when he was first faced with a truck load of goods, many of them marked with the mark of the supermarket where his brother worked.

I agree that the first appellant's conduct at the end of March is more consistent with his guilt than with his innocence, in general sense. But it it equally consistent with the hypothesis that he received the goods innocently and only later began to wonder about whether they had been lawfully obtained. The information that his brother had been arrested would then have confirmed that the goods were stolen.

In short, I do not think the first appellant's behaviour at the end of March 1985 is particularly helpful in coming to a conclusion that he was guilty of receiving at the end of January. It is consistent with that hypothesis. That is all one can safely say.

It is his state of mind at the end of January 1985 that is relevant:

> "X must know (in the above sense, ie foresee the real possibility) at the time when he received the goods that they are stolen. If he discovers this later, and decided to keep the goods, he is not guilty of receiving but only of theft, provided all the requirements for theft are satisfied."

Hunt, SA *Criminal Law and Procedure* Vol II 2 ed p 737.

I am satisfied that, on the evidence as to what happened at the end of January/ beginning of February, the first appellant must have known that his brother

McNALLY JA

could not have come by the goods brought to his shop in any lawful manner. He must at the very least have suspected strongly that they were stolen. His own warned and cautioned statement confirms that he had such a suspicion. His brother's explanation was patently unacceptable. He must have known that one does not buy goods from a retailer in order to stock a shop. Nor does an apparently impoverished person buy vast quantities of goods several months before opening the store where they are to be sold. Nor is a supermarket likely to assist one of its own employees to open up in competition with it.

The only remaining question is whether the first appellant "received" the property, and, if so, what property?

As to the receiving, it is the law (Hunt *op cit* pp 732-3) that "before X can be said to have received the stolen property into his possession he must have obtained the custody and control of it. In addition to this physical requirement, X must have acted intentionally in assuming custody and control, but it is not required that he should have *animus domini*, whether in the sense of an intention to hold as owner or to extract some personal benefit from his *detentio*".

It is further said by the same author, based on authority, that "X does not need to handle the property physically in order to assume custody and control. If on his orders it is locked in his cellar or car or in his minion's cellar or car it makes no difference that he has not even seen it,

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let alone touched it".

It is quite clear from the first appellant's own evidence that he, along with his brother whom he must have known was a thief, took possession and control of the goods when he assisted his brother in removing them from Jocks Supermarket to the home of the second appellant. He says in his evidence "We took the property to Mr Chaendera's house ... We put the property in the storeroom".

I am satisfied therefore that there was a "receiving" sufficient to bring the first appellant within the framework of the offence.

His late conduct of course indicates a continuation of that custody and control in that he took charge of the moving of the property at the end of March.

The evidence as to quantum is not altogether satisfactory. It is clear that the

McNALLY JA

thief stole goods on two occasions and it would seem that the evidence relates only to one of these two occasions. The receiving by the first appellant seems therefore to relate to one consignment out of two. The total value of both consignments is said to be about $49 000. It may be that some other stolen property was put in the first appellant's shop by his brother, the thief, on some other occasions, but the evidence on this was very vague. It is completely clear that the goods recovered by the police from Jocks Supermarket - beer and rice - were proved to be goods stolen from the other supermarket.

However, the magistrate said, and I agree with him, that the sentence is appropriate whatever the true figure is. The probability is that the consignment about which evidence was given was the subject of the second theft on 30 January 1985. That property was valued at $33 668,88 (wholesale value). A sentence of six years' imprisonment with labour, of which two years were suspended does not induce a sense of shock. I do not find any misdirection as to sentence. The magistrate found that the appellant may well have benefited from the sale of some of the goods through his supermarket. In all the circumstances I do not see this as an unfair or improper comment.

Accordingly, having allowed the appeal of the second appellant, I would dismiss the appeal of the first appellant against both conviction and sentence.

Dumbutshena CJ: I agree.

Manyarara JA: I agree.

James, Moyo - Majwabu & Nyoni, appellant's legal practitioners

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MOYO v SIFELANI 1988 (1) ZLR 98 (SC)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ, McNally JA & Manyarara JA

Civil Appeal

18 January & 12 February 1988

Flynote

Family law - paternity - proof of where intercourse is admitted - where onus lies - evidence - judicial notice - Court taking judicial notice of historical facts.

Headnote

Where a woman claims maintenance for her illegitimate child, an admission of intercourse by the man indicated by the woman as being the father of the child creates a presumption that he is the father and it places an *onus* on him to prove that he cannot be the father. Proof by the man on a balance of probabilities will suffice to rebut the presumption. The proof must relate to a total impossibility that he could be the father of the child. Even if there is no admission by the man of intercourse, as a matter of law the evidence of the mother does not require corroboration in paternity or seduction cases.

A court may take judicial notice of historical facts. In this case, the Court took judicial notice of the fact that the Geneva Conference for the independence of what was then Rhodesia started at the end of October 1976 and ended long before 1978.

Cases cited:

S v *Swart* 1965 (3) SA 454 (AD)

Pisarkiewicz v *Campbell* AD-44-78 (unreported)

Mayer v *Williams* 1981 (3) SA 348 (A)

Vlahakis v *Alwan-Arab* S-94-84 (unreported)

Mahomed v *Shaik* 1978 (4) SA 523

Green v *Shirto* 1974 (2) RLR 13

K A Esat for the appellant

The respondent in person

Judgment

McNally JA: The appellant in this case sued the respondent in the Maintenance Court in Bulawayo for maintenance for her child born on 8 November 1979. The date of birth was

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accepted by the respondent during the appeal hearing, although in the lower court he claimed the child was born in February 1980.

The respondent admitted intercourse with the appellant but swore that their relationship ended in 1978 and that therefore he could not be the father of the child. He was unfortunately not legally represented either in the court below or on appeal, and was thus not well placed to argue the important legal question as to the *onus* of proof in a case where the alleged father admits intercourse but denies paternity.

Mr *Esat*, who appeared in both courts for the appellant, submitted that the law was clear. He relied on S v Swart 1965 (3) SA 454 (AD). The headnote in that case, which accurately reflects the judgment of POTGIETER AJA, with whom BEYERS JA and OGILVIE-THOMPSON JA agreed, reads as follows:

> "In terms of the Roman-Dutch law, where a woman claims maintenance for her illegitimate child, an admission of intercourse, no matter when it occurred, by the man indicated by the mother, creates a presumption that the man is the father and it places an *onus* on him to prove that he cannot be the father."

That judgment has stood unchallenged for over twenty years. See, for example, *Pisarkiewicz* v *Campbell* AD-44-78, not reported.

The magistrate noted this submission, but then circumvented its inescapable consequence by a process of reasoning which was manifestly incorrect.

He began by saying that the respondent, while appreciating this proposition of law, disagreed with it. In his view "she must prove not only the distant sexual act but also one at the relevant period of gestation; the earlier sex being a factor strengthening allegations of a subsequent one".

To resolve what he apparently saw as a conflict of opinion on the law between, on the one hand, the Appellate Division and, on the other, the respondent appearing in person, the magistrate turned to a later decision of

McNALLY JA

the Appellate Division. He cited TRENGOVE JA in *Mayer v Williams* 1981 (3) SA 348 (AD) at 351A for the proposition that:

> "...in the instant case it was incumbent upon the appellant (the woman) to prove on a balance of probabilities that the respondent was the father.".

(Compare *Vlahakis v Alwan-Arab* SC-94-84, not reported).

What the magistrate overlooked was the fact that in *Mayer's* case *supra* there was no admission of intercourse.

Mayer's case is authority for the proposition that a woman's evidence no longer needs corroboration as a matter of law in paternity or seduction cases. It has nothing to do with the

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question of *onus* where intercourse is admitted.

The magistrate's conclusion on the law was thus a wrong one. He concluded:

> "The woman must therefore prove on a balance not only that sexual intercourse did take place in some remote past but also that it occurred within the relevant time when the woman biologically must have been conceived of the child."

This is precisely the opposite of what POTGIETER JA ruled in *Swart's* case *supra* in 1965. The whole matter is summed up in the Spiro's *Law of Parent and Child* 4 ed pp 461-2 as follows :

> "...the courts still distinguish the case where intercourse is admitted and the case where intercourse is denied. The admission of intercourse is said to create a legal presumption as to paternity, which may, however, be rebutted by the defendant proving that it was impossible for him to have been the father of the child.
>
> ...In *Mayer* v *Williams* the Appellate Division has now decided that on a denial of a relevant intercourse the evidence of the mother in any paternity or seduction case does not require corroboration in the present law as a matter of law."

The only two words in that passage from Spiro which may be misleading are the words "a relevant". Nowhere in his reported judgment in *Mayer's* case, *supra*, does TRENGOVE JA refer to "relevant" intercourse. If "relevant" intercourse is intended to mean "intercourse at a time when, given the date

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of birth, conception might have taken place", then with respect, the words should be omitted. The whole point of *Swart's* case *supra* is that even the admission of "irrelevant" intercourse ie intercourse at a time long before or long after the time at which conception must have taken place) casts the *onus* on the alleged father. In *Mayer's* case there was no admission by the man of intercourse between the parties at any stage, whether relevant or irrelevant.

The magistrate, having wrongly concluded that the *onus* was on the woman, went on to rely on a dictum of KRIEK J in *Mohamed v Shaik* 1978 (4) SA 523 (W) at 525C-D. The dictum does not support the magistrate's view. In fact some lines lower, at 525E, KRIEK J sets out the law with complete clarity as follows:

> "In any event it is clear that, even if the admission made on appellant's behalf ...is to be qualified to the extent that it only related to sexual intercourse ...some months after the probable period of conception, that admission created a presumption that appellant was the father of respondent's child, and placed upon him an *onus* of proving that he could not have been the father. See *S v Swart* 1965 (3) SA 454 (A) a 549H."

I am satisfied therefore that Mr *Esat's* submission is right and that the magistrate approached the vital question of *onus* entirely wrongly. The true position on the facts of this case is that the *onus* was on the respondent, the alleged father, to prove on a balance of probabilities that he could not possibly have been the father.

There is some apparent contradiction in that statement as to the *onus*, which requires consideration. How can it be said that he can discharge the *onus* on a balance of probabilities, and in the same breath that he must establish the impossibility (not merely improbability) that he

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could be the father?

KRIEK J in *Mahomed's* case *supra* put it this way:

> "It is to be emphasised however ...that although proof on a balance of probabilities will suffice in order to rebut the presumption, such proof must relate to a total impossibility that the person bearing the *onus* could be the father of the child in question."

A few illustrations will demonstrate that this is more than mere playing with words. Suppose a man proves, on a balance of probabilities, that he first met the girl and had intercourse with her a week before the birth of the child. Once

that is accepted, then it must follow that he could not possibly be the father. He has proved impossibility on a balance of probabilities. Similarly with the defence of sterility, as in *Mahomed's* case, *supra*. He need only prove on a balance of probabilities that he suffers from the medical condition known as sterility, but he must prove absolute sterility. In *Mahomed's* case he led evidence that "the chances of his being sterile two years ago are highly likely". The court found this evidence unreliable for various reasons and thus found that he had failed to prove on a balance of probabilities that he was sterile at the time. I venture to think, however, that even if the medical evidence had been accepted as correct on a balance of probabilities he would still have failed because that evidence did not prove absolute sterility. See also *Green* v *Shirto* 1974 (2) RLR 13.

Given, then, that the *onus* is on the respondent to prove, on a balance of probabilities, that he could not possibly be father of the appellant's child, I turn to consider the evidence.

The appellant's evidence was that she and the respondent fell in love in 1978 and planned to marry. They had an intimate relationship but he stopped seeing her when she revealed the pregnancy to the respondent in February or March 1979. They had intercourse again as late as 1980, after the child was born and he continued to send money for the child for about a year.

The respondent's evidence was that they had intercourse during 1978 but that it ceased before the end of 1978, largely because of her involvement with other men. He admitted to seeing the child three times after it was born. He said the child looked like one of the men with whom she was associated. Moreover, although he denied he had started to pay lobola, he clearly admits a formal courtship. He asserts that when they broke up he went and reported to her aunt (who has since died). At another point he said:

> "Further, when the applicant came to see me with the baby and her relatives I told the applicant and her late aunt that much as I loved applicant before, but because of her involvement with other men we parted and couldn't under any circumstances have had sexual relations after the episode at the Hotel."

It is strange that she should have come to him at that stage if it was obvious, from the length of time they had been apart, that he could not be the father of the child.

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McNALLY JA

It must be remarked also that the respondent seems to have been very careless and casual about dates in the course of his evidence. I have already noted that he first claimed that the baby was born in February 1980, but later conceded it was born on 8 November 1979. He also argued on appeal that the record was wrong as far as his evidence was concerned in that it spoke of an incident at the Hotel as occurring in September 1977 when he had said September 1978. Similarly he is recorded as saying he met her in July 1978 when she was pregnant. This, he says, should read "July 1979".

The fact is, however, that in his evidence there are many other references to events in 1977 involving other men, and it would be strange if all those references were wrongly transcribed. The more probable explanation is that he was not accurate in what he said, and the dates he gives are therefore unreliable. Another instance of this is in his reference to the "Rhodesia Geneva Independence Conference". He says he last had sexual relations with her during the time when preparations were being made for that Conference in 1978. Yet as a matter of historical fact, of which judicial notice may be taken (Hoffmann and Zeffertt *South African Law of Evidence* 3 ed p 325), the Geneva Conference started at the end of October 1976, and ended long before 1978.

It does not seem to me that this kind of vague evidence is anything like sufficient to discharge the *onus* on the respondent.

In the first place, even if he last had intercourse with her "in 1978", my calculation shows that between the end of 1978 and 8 November 1979 there are 312 days. It is necessary only to quote BEADLE CJ in *Green* v *Shirto supra*, where he said, at p 15H:

> "It must be found against the appellant (the man), therefore, (a) that he did have intercourse with the respondent and (b) that he has shown no more than that completed act of intercourse 'may' have occurred somewhere between 300 and 320 days before the birth of the child. In the case of *R v Sewgoolam*, 1961 (3) SA 79 (N), the court was not prepared to say that a child could not have been conceived 310 days before the date of birth. No medical evidence was led in this case, there was no expert evidence to show what the extreme periods of gestation may be. In the circumstances I do not consider that the appellant discharged the *onus* of showing that he could not have been the father of this child."

Secondly, however, one must bear in mind that the authorities speak of his proving that "he cannot be the father". The judgment in *S* v *Swart supra* on

this point reads (I quote from an unofficial translation which seems to me to be accurate):

> "He can do this in various ways: eg by showing that he could not have had intercourse with the woman during the time of conception because he was abroad or for any other valid reason; or even if he had intercourse with her but can prove he was sterile and consequently she could not have conceived; or that by means of a blood test it can be proved that he cannot be the father."

(Compare van den Heever *Breach of Promise and Seduction* p62 n 26, where the *onus* is stated to be far heavier - conclusive proof is required).

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Now, it is quite clear even on his own account that the respondent saw the appellant several times after the end of 1978. If one assumes that the "relevant" intercourse probably took place in February 1979 there is no suggestion that he was out of the country then. He admits meeting her while she was pregnant and again after the birth of the child. So he certainly could have had intercourse with her at the relevant time as she claims he did.

He has sought to make something of the appellant's refusal to have a blood test. The evidence reveals however that she had earlier been willing to have such a test. For various reasons it had not been done. And he only raised the matter again at the opening of the hearing. At that stage her attitude was, quite understandably, that she wanted to get on with the hearing and was not prepared to agree to further delays.

Nor does it seem to me, with respect, that the magistrate's other criticisms of the appellant are of any substance. He criticises her, for example, for not remembering whether she first missed her period in February or March 1979. I do not think any significance whatever attaches to such a lapse of memory at a hearing in 1986 (the magistrate does not put the date on his record or on his judgment, but it seems the hearing was in 1986, some time in July).

The respondent, on the other hand, was, as I have shown, vague and inaccurate about dates. I do not see how he can be said to have discharged an *onus* in a dispute which is all about dates, when his own references to dates are patently wrong or at best confused. I am satisfied that the magistrate misdirected himself on the law on the question of onus. I am further satisfied that, had he directed himself correctly, he could only have come to the conclusion that the respondent had failed to discharge the *onus* on him.

McNALLY JA

The issue as to paternity should therefore have been decided in favour of the appellant.

I turn, finally, to the question of the amount of maintenance to be awarded. Unfortunately the evidence on this aspect was cut short by the respondent who announced that in his view such matters were irrelevant because the only issue was paternity. In this, as in his opinion about the *onus*, he was wrong. But the result of his statement was that he was not extensively questioned about his income and assets.

The appellant herself produced a payslip and a list of expenses for herself and the child and for another older child. This showed her net salary to be $417,24 per month and her expenses to be $492,18 per month, a shortfall of approximately $75 per month. It seems, although the original application is for some reason not part of the record, that she originally asked for $100 per month, but at the hearing raised that request to $200.

As far as the respondent is concerned, we are told he earns $2 300 per month gross and he says he is left with $836 per month net, after deductions which include his mortgage bond. He is married but we do not know what family he supports.

I have considered remitting the matter to the magistrate for an assessment by him of an appropriate figure, but on reflection I believe it is better that this Court makes a decision. Further

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delay is undesirable. The child is already seven years old.

I propose therefore to make an order of $100 per month effective from the end of July 1986, since it seems that the magistrate sent a copy of his undated judgment to the appellant's legal representative on 25 July 1986. The figure is sufficient to cover the shortfall revealed by the appellant's evidence and uncontroverted in cross examination, and must be well within the respondent's capacity to pay. I pause here to observe that I do not intend to lay down any general principle that the shortfall shown by the mother's calculations is necessarily a measure of the amount of maintenance to be paid. However, on the facts of this matter, the appellant did not make out a case for any higher figure. On the other hand, the general level of inflation suggests some increase is necessary over the $75 shown by her evidence to be needed in mid 1986.

Accordingly the order of this Court is as follows:

McNALLY JA

1. The appeal is allowed with costs.

2. The order of the court *a quo* is altered to read:

"The application is allowed with costs. The respondent is to pay to the application the sum of $100 per month as maintenance for the child *M* (born on 8 November 1979). The first payment is to be made on or before 31 July 1986 and subsequent payments on or before the last day of each succeeding month, through the Clerk of Court, Bulawayo, until the said child reaches the age of eighteen years or is self-supporting, whichever is the earlier."

Dumbutshena CJ: I agree.

Manyarara JA: I agree.

Calderwood, Bryce Hendrie & Partners, appellant's legal practitioners

BOKA ENTERPRISES (PVT) LTD v JOOWALAY & ANOR 1988 (1) ZLR 107 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil Appeal

4 & 12 February 1988

Flynote

Landlord and tenant - tenant - eviction of - Commercial Premises (Rent) Regulations 1983-s 22(2) - lessor to have "good and sufficient" grounds for seeking recovery of commercial premises - meaning of - viva voce evidence - necessity of.

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Headnote

The appellant leased premises in 1982 for three years, with an option to renew the lease for a further two years. The option was not exercised, but the appellant remained in occupation and continued to pay rent. In 1986 the respondents jointly purchased the premises. In April 1987 they gave the appellant two months' written notice to vacate the premises, it being indicated that they intended to take occupation in July of that year. The appellant refused to comply and proceedings were instituted on notice of motion for the appellant's eviction. An order of eviction was granted as prayed.

It was argued on the appellant's behalf that there was a genuine dispute of fact as to the terms of the lease governing the appellant's occupation of the premises and that the matter should have been stood down for trial. It was also argued that the respondents had failed to show that they had "good and sufficient grounds" for the appellant's eviction, as required by s 22(2) of the Commercial Premises (Rent) Regulations 1983.

Held, in the first instance, that in cases such as this care must be taken not to elevate every alleged dispute of fact into a real issue which necessitates the taking of oral evidence, for to do so might well encourage a lessee against whom ejectment is sought to raise fictitious issues of fact, thereby delaying the resolution of the matter, to the detriment of the lessor.

1988 (1) ZLR p108

GUBBAY JA

Held, further, that under s 22(2) of the Regulations, no order of ejectment may be granted unless the court is satisfied that the lessor has good and sufficient grounds for requiring such an order. It is the position of the lessor that must be looked at; if he has good and sufficient grounds, that is the end of the matter. No regard need be paid to the position of the lessee. As to what constitutes "good and sufficient grounds", it is hardly possible, and certainly is undesirable, to attempt to itemise grounds which might be considered good and sufficient. The court is enjoined to exercise a value judgement. The court would want to know the precise use to which it was intended to put the premises. The use to which the respondents intended to put the premises was perfectly proper and reasonable, and one no less laudable than that of the appellant.

Cases cited:

Hoosaien v *Parker* 1944 AD 481

Patel & Ors v *Davaljee T/A Goodwill Stores* 1979 (4) SA 866 (D)

Rose's Car Hire Co (Pty) Ltd v *Harris & Co* 1944 WLD 159

Newman v *Biggs* 1945 EDL 51

Checkers Motors (Pvt) Ltd v *Karoi Farmtech (Pvt) Ltd* SC-146-86 (not yet reported)

Moffat Outfitters (Pvt) Ltd v *Hossein Brothers* S-117-86 (not yet reported)

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Trustees in Mashonaland of the Church of the Province of Central Africa v *Timms* 1973 (1) RLR 307 (GD)

A M Donagher for the appellant

D M Campbell for the respondents

Judgment

Gubbay JA: The appellant is a limited liability company which carries on business in the major centres of the country as a wholesale and retail bookstore and a supplier of educational, office and domestic requirements.

In March 1982, wishing to expand its operations further in Bulawayo, the appellant made an approach to Sagit Trust (Bulawayo) Limited ("Sagit"), which had been appointed as a letting agent, to lease premises situate on Stand 1091 Bulawayo Township, then in the ownership of David Ogilvie and Son (Pvt) Ltd Following upon negotiations with Sagit's Letting Manager, Mrs McTiernan, the appellant submitted a signed *pro forma* application together with a covering letter, both dated 17 March 1982. The *pro forma* application, where relevant, read:

> "We hereby make application to rent the above property from 1st April 1982 on the following terms and conditions:

GUBBAY JA

1. Rentals $ as per attached letter per month, payable in advance.
2. Lease to be for three years, with an option to renew for a further period of two years at a rental of $ as per letter attached.
3. All terms and conditions as are shown in your standard commercial lease agreement and any addendums contained therein which you will send to us in due course."

It was stated in the attached letter that:

> "As the company will be involved in capital expenditure of not less than $10 000 which will be required to fit and equip these premises, Mr Boka is most anxious to secure a long lease to avoid any doubt as to security of tenure. In Salisbury, the company last year leased premises on a five year lease basis with a further five year option. In the event that the Landlord is prepared to consider a longer lease than that applied for, the company would certainly be keen to negotiate this.
>
> ...
>
> In view of the substantial expenditure required of our client since the premises are not in any manner suitably fitted, the Directors suggest that consideration be given to a reduced rental and that the tenancy be established on the basis of a rental of $600 per month applicable to the first year, increasing to $700 per month for the remaining two years of the lease. In relation to the rental which would apply to the period thereafter, it is suggested that an escalation clause be built into the lease which would determine the rental on renewal after the third year. The usual escalation clause in regard to the increase in rates will of course apply."

Sagit's Standard Commercial Lease Agreement, referred to in the *pro forma* application,

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specifically provided that:

(a) Should the lessee wish to exercise his option to renew the lease he was to give the lessor three months' prior notice in writing of his intention to do so (clause 3);

(b) If the lessee did not exercise his option to renew the lease in the manner required by the lease, but remained in occupation of the premises then the lease was to remain in force as a monthly tenancy, terminable by either party giving the other one month's notice in writing (clause 2);

(c) The lease constituted the whole of the agreement between the parties and any verbal or collateral agreements, unless in writing and signed by the parties, were to be of no force and effect (clause 32).

GUBBAY JA

The written offer, as amplified by the covering letter, was accepted by Mrs McTiernan on behalf of the owner of the Stand. The acceptance was endorsed on the *pro forma* application and communicated telephonically to the appellant's representative.

The appellant took occupation of the premises in April 1982, but shortly thereafter wrote to Sagit requesting an abatement of that month's rental by reason of the owner's delay in removing certain fixtures and fittings from the premises. On 17 May 1982 Sagit replied, confirming that it had been agreed to allow the appellant an abatement of $300 in respect of the April rental. Dispatched with that letter were two copies of the Standard Commercial Lease Agreement for signature on behalf of the appellant.

On 27 May 1982 the appellant's Managing Director wrote to Mr Fernandes, Sagit's General Manager, in these terms:

> "We refer to your letter to us on the 17th of May 1982 and our telephone conversations with you.
>
> You have stated that you are prepared to allow us a fixed period of 3 years with an option to renew for a further two years thereafter. We repeat that we have very long term plans for our Bulawayo branch. We do not regard an effective five year lease agreement as being adequate and we wish to secure ourselves for an even longer period.
>
> We await receipt from you of a suitably drafted lease agreement incorporating the above agreed provisions regarding one year's notice after the five year period and we hope that you will also incorporate the right to renew after the first five year period for a further five years.
>
> We trust you will find this in order."

The copies of the lease agreement were not returned, and subsequent requests for that to be done were ignored by the appellant.

The letter of 27 May 1982 was never answered by Sagit, for Mr Fernandes, in his affidavit, professed no recollection of its receipt and a search of Sagit's records failed to unearth it. He firmly disputed any agreement to allow the appellant one year's notice to vacate the premises at

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the end of five years occupation.

The appellant did not seek to renew the lease prior to 31 March 1985, but remained in occupation of the premises and continued to pay rent.

GUBBAY JA

During July 1986 the respondent's jointly purchased Stand 1091 from David Ogilvie and Son (Pvt) Ltd. Upon obtaining title on 13 April 1987, two calendar months' written notice to vacate the premises was given to the appellant on 28 April 1987, it being indicated that the respondents intended to take occupation on 1 July 1987. The appellant refused to comply, and on 30 July 1987 the respondents instituted proceedings in the High Court on notice of motion for its eviction. It is against the grant of that order by BLACKIE J that this appeal now lies.

The first argument advanced on the appellant's behalf by Mr *Donagher* was that there was a genuine dispute of fact as to the terms of the lease governing the appellant's occupation of the premises, and that the learned judge had erred in deciding the issue on the affidavits and documents instead of standing it down for trial. Reliance was placed on the allegations contained in the affidavit of the appellant's Managing Director, which were to this effect: The letter of 27 May 1982, written in response to Sagit's letter of 17 May 1982, spelt out clearly that the correspondence which passed between the parties prior to that date comprised nothing more than negotiations over the precise details of a lease agreement, which fact was borne out by the appellant's refusal to take heed of the repeated requests to sign Sagit's Standard Commercial Lease Agreement; but what had been expressly agreed with Mr Fernandes in the telephone conversation referred to in the letter of 27 May 1982 was that at the end of a five year period of occupation of the premises such a lease would not be capable of being terminated without the appellant being given at least one year's notice. That from 27 May 1982 the appellant awaited receipt of a new lease reflecting the agreed notice period of one year; and it was hopeful that that lease would provide an option to renew for a further period of five years. Sagit did not reply to the letter of 27 May 1982 and the appellant never received a written lease drafted in the manner agreed to. Accordingly, there was no written record of the true agreement reached with Sagit.

In my judgment the stance taken up by the appellant, and maintained by Mr *Donagher*, is simply not tenable. I agree with Mr *Campbell*, who appeared for the respondents, that the documents speak for themselves: the appellant submitted a signed *pro forma* application to lease the premises. It expressly stated that the monthly rental was to be "as per letter attached" and requested the incorporation of the conditions contained in Sagit's Standard Commercial Lease Agreement. And it was not denied by the appellant that the offer was accepted by Sagit on behalf of the owner of Stand 1091.

GUBBAY JA

It is true that in the letter of 17 March 1982 the appellant indicated a preference for a longer lease than that applied for and to that end stressed the magnitude of its business operations

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and its high reputation for creditworthiness and financial stability. Nonetheless it put the period at which it offered to lease the premises at three years, with the option to renew for a further two years. That is what it bargained for and no more, and it took occupation in April 1982 upon the terms referred to in the *pro forma* application, subject however to an abatement of rental arising from the owner's delay.

Against this background, the repeated requests made to the appellant by Sagit to sign the Standard Commercial Lease Agreement are consistent only with commercial common sense - a desire to obtain good orderliness - and do not detract from the existence of an agreement.

It seems to me the furthest the appellant's evidence went was to suggest an attempt to negotiate a fresh lease after the agreed lease had been entered upon. Even the letter of 27 May 1982 contemplated, not an amendment to the existing lease, but "a suitably drafted lease agreement" on substantially new terms.

Notwithstanding the denial by Mr Fernandes, I am prepared to assume in the appellant's favour that it obtained oral agreement to amend the lease then existing by providing for the giving of one year's notice on the termination of a five year period of occupancy. But since such agreement was not reduced to writing and signed by the parties, as required by clause 32 of the Standard Commercial Lease Agreement, it was of no force or effect.

In the result, therefore, I am not persuaded that the conclusion of the learned judge *a quo*, that there was no genuine dispute of fact as to the terms of the lease, was incorrect. It follows that as the appellant failed to renew the lease at the end of March 1985, it became a monthly tenant under clause 2 of the Standard Commercial Lease Agreement subject to one month's notice only.

It was next argued by Mr *Donagher* that BLACKIE J had erred in finding that the respondents were *bona fide* in seeking to evict the appellant in order to obtain the use of the premises for themselves; or, at best for the respondents, it ought to have been held that the issue of their *bona fides* raised a genuine dispute of fact incapable of satisfactory determination without the aid of *viva voce* evidence.

The objective facts are these: within two weeks of obtaining title to Stand

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1091 the respondents jointly addressed a letter to Sagit, requesting that the appellant be given two calendar months notice to vacate "as this premises will now be occupied for personal use of its new owners". Thereafter an application for the grant of a new general dealer's licence in the name of the second respondent, with the business to be known as "Buy Quick", was prepared by the respondents' legal practitioners. It bears the date 30 July 1987. The requisite statutory advertisement was also prepared, notifying that the application was to come before the Bulawayo City Council on 16 September 1987. It was published in the daily newspaper on 10 and 21 August 1987.

The suggestion made by the appellant's Managing Director in his affidavit was that the

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respondents were motivated to seek an eviction order because they were aware that the previous owner had unsuccessfully requested the appellant to agree to an increase in rent. That suggestion was conjectural, but the deponent attempted to support it by emphasising that the trading licence was only applied for at the end of July 1987. He claimed that if the respondents genuinely required the premises for their personal use the application would have been made at the same time as the purported notice to vacate.

I am unable to accept that the delay in making the application for the licence warrants the sinister inference placed upon it by the appellant. It seems to me that the point is effectively destroyed by the respondents' written intimation to Sagit prior to notice being given. In any event, the reason for the delay in processing the application was explained by the respondents' legal practitioners as being due to the failure and refusal of the appellant to vacate the premisis. Nor does any adverse significance attach to the fact that the application for a trading licence was not submitted in the names of both the respondents. Reference to clause 2 note (c) of the application form indicates that the licensing authority is only interested in "the active or administering partner", so the first respondent's name may have been omitted advisedly. In other words, it may have been decided that the first respondent was to be an inactive partner in the proposed general dealer's business, which was to be managed and conducted by the second respondent. Or it may have been appreciated, and correctly so, that in order to constitute "owner's use" it is sufficient for joint owners of a property to agree that one of them is to occupy. See *Hoosaien* v *Parker* 1944 AD 481 at 487; *Patel & Ors v Davaljee T/A Goodwill Stores* 1979 (4) SA 866 (D) at 868C.

I agree with Mr *Campbell* that it is difficult to envisage what more the respondents could have said or done in order to have demonstrated the

GUBBAY JA

genuineness of their assertion. They even reached the decision to call the business "Buy Quick". And no facts or circumstances raised by the appellant cast doubt on their veracity. See *Rose's Car Hire Co (Pty) Ltd* v *Harris & Co* 1944 WLD 159 at 168; *Newman* v *Biggs* 1945 EDL 51 at 54.

In conclusion on this aspect, I do not think it out of place to repeat what I said in *Checkers Motors (Pvt) Ltd* v *Karoi Farmtech (Pvt) Ltd* S-146-86:

> "In cases such as this care must be taken not to elevate every alleged dispute of fact into a real issue which necessitates the taking of oral evidence, for to do so might well encourage a lessee against whom ejectment is sought to raise fictitious issues of fact thereby delaying the resolution of the matter to the detriment of the lessor."

Mr *Donagher's* final argument was that, accepting that the respondents were to be taken as *bona fide* in their desire to establish and operate a general dealer's business at Stand 1091, they had nonetheless failed to discharge the *onus* cast upon them by s 22(2) of the Commercial Premises (Rent) Regulations 1983, of showing that they had "good and sufficient grounds" for requiring the appellant's eviction.

The phrase "good and sufficient grounds" is not defined in the Regulations. Save for providing

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that such grounds exclude the refusal of the lessee to agree to an increase in rent and the wish of the lessor to lease the premises to someone other than the lessee, no guidance is given to the court as to the factors to be taken into account in making its determination.

In the nature of things, it is hardly possible, and certainly undesirable, for this court to attempt to itemise the grounds which would be regarded as good and sufficient. And no general rule would be likely to cover all the varying circumstances which may arise in determinations of this type. What is clear, however, is that the court is enjoined to exercise a value judgment.

In the *Checkers Motors* case, *supra*, the view was expressed that if an owner is able to prove that he reasonably requires the use of the leased premises for the operation of his business, a court would be justified in attaching substantial weight to such factor in determining whether there are good and sufficient grounds for an eviction order. That decision did not, however, lay down that it is incumbent upon the owner to establish that he "requires" the premises for his personal use, in the sense of "needs", though on the particular facts Karoi Farmtech did so require them.

GUBBAY JA

Each case of an owner genuinely seeking the use of leased premises for himself must be assessed on its own merits. It will not be enough for him somewhat naively to proclaim: "The premises belong to me and I now desire to use them for my own purposes". That would not constitute good and sufficient grounds. The court would want to know the precise use to which it was intended to put the premises. If that use were found to be illegal or frivolous or, having regard to the owner's circumstances, unreasonable, the eviction of the lessee would be refused.

In the present case the learned judge placed considerable weight upon the *bona fide* intention of the respondents to utilize the premises in order to conduct a general dealer's business thereon - a perfectly proper and reasonable use, and one no less laudable than that of the appellant. He was right to do so.

But apart from that important factor, there were others of relevance. These were that to afford the respondents their common law rights as owners would be in accordance with the prime purpose of the Regulations, which is to prevent unscrupulous landlords from taking advantage of the shortage of commercial premises by increasing rents unjustifiably - see *Moffat Outfitters (Pvt) Ltd* v *Hossein Brothers* S-117-86 (not yet reported); that the appellant had been given longer notice than it was strictly entitled to; and that its alleged predicament was to a fair measure of its own making, for it had made no effort to either obtain agreement **in writing** to one year's notice of termination, or to enter into another lease subsequent to the expiration of the original one. Taking all these features together, I fail to perceive how the value judgment of the court *a quo* as to the existence of good and sufficient grounds may be disturbed.

In coming to this conclusion, I have not overlooked the further submission of Mr *Donagher* that in determining the existence of good and sufficient grounds it is not only the needs and circumstances of the lessor that are to be considered; regard must also be paid to those of the lessee; and depending upon which are the most telling and persuasive, the eviction of the

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lessee be either granted or refused. The point was left open in *Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd supra* and it is now opportune to decide it.

Section 22(2) of the Regulations provides that no order for the recovery of possession of commercial premises or for the ejectment of the lessee therefrom shall be made "unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order" (my emphasis). I share the

GUBBAY JA

view of the learned judge that the wording is clear and unambiguous. It is the position of the lessor that is to be looked to. If he has good and sufficient grounds that is the end of the matter. Nothing is said about the lessee, his needs or any other circumstance. That this is the meaning intended by the law-maker is fortified by reference to paras (i) and (ii) of subs (2) of s 22, both of which relate solely to grounds for requiring the order.

I am also in agreement with the learned judge that s 24(2)(e) of the Rent Regulations, 1970, which was considered by BEADLE CJ in *The Trustees in Mashonaland of the Church of the Province of Central Africa v Timms* 1973 (1) RLR 307 (GD), differs markedly from the provision now under consideration, for it empowered the court to order the ejectment of the lessee "if the court is satisfied that, **regard being had to all the circumstances**, some other sufficient ground therefor has been established by the lessor" (my emphasis). The enquiry envisaged was thus much wider than under s 22(2) of the present Regulations. It clearly enjoined the court to have regard to the circumstances affecting both the lessor and the lessee. Accordingly, the remarks of the learned Chief Justice at p 314H of the Report are not germane to the interpretation of s 22(2).

Mr *Donagher* asked that if the appeal should be dismissed, the appellant be permitted time within which to vacate Stand 1091. Mr *Campbell* suggested that four weeks be allowed it for that purpose. It seems to me that such a period ought to be adequate.

In the result, I would dismiss the appeal with costs, such order to include the costs incurred in the interlocutory applications for the reinstatement of the appeal and for an early date of hearing. The order to vacate Stand 1091, Bulawayo Township, is to take effect four weeks from the date of this judgment.

Dumbutshena CJ: I agree.

Korsah JA: I agree

Gollop & Blank, appellant's legal practitioners

Calderwood, Bryce Hendrie & Partners, respondents' legal practitioners

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S v DAVIDSON 1988 (1) ZLR 117 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ & Gubbay JA & Korsah JA

Criminal appeal

16 February 1988

Flynote

Criminal law - Law and Order (Maintenance) Act [Chapter 65] - s 36 - "public place" - meaning of - statutes - interpretation of - to what extent preamble may be used as aid to construction.

Headnote

While the preamble to a statute is a legitimate aid in construing the enacting parts of that statute, its office in interpretation is limited to areas where the enacting clause is unclear or ambiguous. It cannot be used to extend the meaning of the enacting words, though it may limit the generality of those words. The phrase in the preamble to the Law and Order (Maintenance) Act [*Chapter 65*] -"to make *further* provision for the maintenance of law and order" - does not extend the definition of the phrase "public place".

Section 36 of the Act prohibits certain conduct "in any public place". "Public place" is defined in s 2 of the Act as meaning "any street, road, passage, square, park or recreation ground or any open space to which for the time being the public or any section thereof have or permitted to have access..." Where the law-giver employs in a definition the word "means" rather than the word "includes", he indicates that what follows is in the nature of a precise definition. Because all the places mentioned, other than the word "passage", are open spaces, that word must take its hue from the other words with which it has been used in association; it does not include such enclosed areas in a building as a corridor, lobby, hall or foyer.

KORSAH JA

Cases cited:

Law Union & Rock v Insurance Co Ltd v *Carmichael's Executor* 1917 AD 593

S v *Kola* 1966 (4) SA 322 (AD)

Attorney-General v *HRH Prince Ernest Augustus of Hanover* [1957] AC 436; [1957] 1 All ER 49

Warwick Investment (Pty) Ltd v *Maharaj* 1954 (2) SA 470 (N)

Re Wykes' Will Trusts [1961] 1 All ER 470 (ChD)

Cooper v *Shield* [1971] 2 All ER 917 (QBD)

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J Sayce for the appellant

Mrs SC Mavangira for the respondent

Judgment

Korsah JA: We allowed this appeal, quashed the conviction and set aside the sentence imposed, but reserved our reasons for doing so. The reasons now follow.

The appellant was convicted of contravening s 36 of the Law and Order (Maintenance) Act [*Chapter* 65] and given a custodial sentence of six months' imprisonment with labour, of which three months' imprisonment with labour was suspended on the usual condition of good behaviour.

At the hearing of the appeal, Mr *Sayce*, for the appellant, applied in terms of Rule 6, as read with Rule 7, of SI 504 of 1979 for leave to amend his notice of appeal by the deletion of the existing grounds and the substitution of new grounds. As there was no difference of substance between the new and existing grounds, and as Mrs *Mavangira*, for the respondent, conceded that the respondent would not be prejudiced if the application was granted, we allowed the application.

The brief facts giving rise to the prosecution are that the appellant was a lecturer at Belvedere Teachers' Training College. His office in the administration block opens into the foyer of the building. At about 1.45 pm on 20 October 1986 about ten lecturers of the College were gathered in the foyer of the administration block mourning President Samora Machel, news of whose untimely death in a plane crash in South Africa had just reached them. The gathering was discussing the circumstances of the plane crash and expressing their grief when the appellant opened the door of his office and came out into the foyer and uttered words to the effect that the late President Samora Machel was on a Christmas shopping trip to Durban when his plane crashed.

KORSAH JA

The appellant admitted uttering the words complained of, but denied that they were intended for the general consumption of the lecturers gathered in the foyer. He asserted that the words were directed to one particular person in response to the general question: "What was he doing over South Africa?"

Section 36 of the Law and Order (Maintenance) Act recites that -

> "Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence and liable to a fine not exceeding two hundred dollars or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment."

It was contended on behalf of the appellant, both in the court below and before us, that the words complained of were not uttered in a "public place" as defined by the Act. This argument found no favour with the trial magistrate, because he was of the view that the preamble to the

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Act, by stating that it was "To make **further** provision for the maintenance of law and order in Zimbabwe ...", expanded the meaning to be given to the term "public place" at common law.

Under the definition section of the Act (s 2), "public place" means:

> "(a) any street, road, passage, square, park or recreation ground or any open space to which for the time being the public or any section thereof have or are permitted to have access, whether on payment or otherwise ..."

While a preamble is a legitimate aid in construing the enacting parts of a statute, its office in interpretation is limited to areas where the enacting clause is unclear or ambiguous. As INNES CJ said in *Law Union and Rock Insurance Co Ltd* v *Carmichael's Executor* 1917 AD 593 at 597:

> "A preamble has been described by an old English Judge as a key to open the minds of the makers of the Act and the mischief which they intended to redress'. But the key cannot be used if the meaning of the enacting clauses is clear and plain. In cases however where the wording is ambiguous, and in cases where the Court is satisfied that the Legislature must have intended to limit in some way the wide language used, then it is proper to have recourse to the preamble."

KORSAH JA

This principle was applied in *S* v *Kola* 1966 (4) SA 322 (AD) at 366G. And in the English case of *AG* v *HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49 (HL) the limits of the use of a preamble as an aid to construction were clearly stated by LORD NORMAND at pp 57-58 of the report as follows:

> "Where there is a preamble, it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is, therefore, clearly permissible to have recourse to it as an aid to construing the enacting provisions. The preamble is not, however, of the same weight as an aid in construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act, or even in related Acts. There may be no exact correspondence between preamble and enactment, and the enactment may go beyond, or it may fall short of, the indications that may be gathered from the preamble. Again, the preamble cannot be of much, or any, assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may prevail. The courts are concerned with the practical business of deciding a *lis*, and when the plaintiff puts forward one construction of an enactment and the defendant another, it is the court's business in any case of some difficulty, after informing itself of what I have called the legal and factual context including the preamble, to consider in the light of it's knowledge whether the enacting words admit of both the rival constructions put forward. **If they admit of only one construction, that construction will receive effect, even if it is inconsistent with the preamble**, but, if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred (the emphasis is mine)."

Now, s 2 states in clear and unambiguous terms what the Act "means" by the phrase "public place". It makes specific mention of particular types of area which are designated as "public places". All the particular types of area so designated are, with the exception of the word "passage", without a doubt, open spaces. A passage, of course, may, according to the Oxford English Dictionary, be a corridor, gallery, lobby, or hall, but it may also mean the open space between buildings along which people pass to gain access to roads. So that notwithstanding the definition of the word in the dictionary, the context in which the word is used in the particular enactment must determine the meaning which the law-maker assigned to the term. In other

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words, if a word is capable of two or more meanings, and it is found in an

KORSAH JA

enactment in association with words, all of which have only one meaning out of the various meanings which that one word bears, then that one word, like a chameleon, takes its hue from the other words with which it has been used in association, and falls to be interpreted in accordance with the restricted character that the other words bear.

As LORD NORMAND pointed out in the passage above quoted, "the preamble is not of the same weight as an aid in construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act, or even in related Acts". It is, therefore, "to other relevant enacting words to be found elsewhere in the Act" to which we must first turn for assistance in the resolution of what the Legislature intended by the use of the word "passage".

The definition clause under consideration stipulates that a "public place" means "any street, road, passage, square, park or recreation ground or any open space ..." Except for the word "passage" all the places mentioned are clearly open spaces. All the places mentioned must be *ejusdem generis*. Thus when the law-giver included the word "passage" in the definition of a "public place" under this enactment, it must have had in its contemplation an open space, and not a corridor, lobby, hall or foyer. I am fortified in this view by the general words - "or any open space" - which follow the particular words designating areas which the law-giver deems to be public places for the purposes of this enactment, and all of which are open spaces.

It seems to me that both INNES CJ and LORD NORMAND are of a mind that, while one may pray in aid a preamble to limit the generality of the enacting words, a preamble cannot be used to extend the meaning of the enacting words. The trial magistrate fell into error when he ruled that the clause: "To make further provision for the maintenance of law and order" appearing in the preamble extends the definition of "public place".

In the interpretation of the definition section of a statute where the law-giver employs the word "means" instead of the word "includes", he indicates that what follows is in the nature of a precise definition: *Warwick Investment* (*Pty*) *Ltd* v *Maharaj* 1954 (2) SA 470 (N) at 472B. It was not, therefore, permissible to interpret the word "passage" in any other sense than in the sense of the words with which it was associated. As BUCKLEY J observed in *Re Wykes' Will Trusts* [1961] 1 All ER 470 (ChD) at 472D:

> "The intention of the Legislature, like the intention of a testator, is primarily to be ascertained by reading the language employed, and it is

KORSAH JA

> not for this court to corset that intention, if it be clearly expressed, into some shape which accords better with the fashion of professional legal thought than the natural meaning of the language employed. More particularly, I think this must be so when one is concerned with a definition section, where one must presume that Parliament would be specially precise and careful in its choice of language."

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The issue whether a railway station was a "public place" fell for consideration in the English case of *Cooper* v *Shield* [1971] 2 All ER 917 (QBD). Section 5 of the Public Order Act 1963 of the United Kingdom provided that -

> "Any person who in any public place or at any public meeting - (a) uses threatening, abusive or insulting words or behaviour ...with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned shall be guilty of an offence."

Under the definition section (s 9) it was provided that -

> "Public place' means any highway, public park or garden, any sea, beach, and any public bridge, road, lane, footway, square court alley or passage, whether a thoroughfare or not; and includes any open space to which, for the time being, the public have or are permitted to have access, whether on payment or otherwise."

In a resolution of the issues LORD PARKER CJ said at p 919e of the Report:

> "For my part it seems to me when one reads this legislation as a whole that the object here for dealing with these several matters is clearly to exclude buildings and what happens in buildings. When one comes to the definition of 'public place' it seems to me quite clear that the opening words are not referring in any sense to buildings. None of the items there specified can in the ordinary sense of the word be referred to as buildings, and accordingly when one comes to the second part 'and includes any open space' it seems to me that that is referring to a place at any rate however you decide it which does not constitute a building, or is not an integral part of a building. Approached in that way as it seems to me the platform here which formed an integral part of the station, the complex of the station itself, is a building and remains a building notwithstanding that some parts of it are open to the air. In those circumstances it seems to me quite impossible to say that this was an open space."

KORSAH JA

The provisions of the English Public Order Act under consideration in *Cooper* v *Shield supra* are not in character essentially different from the provisions which fell for interpretation under our Act in the instant case. By parity of reasoning then, I am of the view that the definition of "public place" in s 2 of the Law and Order (Maintenance) Act has reference only to open spaces and not enclosed places. The foyer at Belvedere Teachers' Training College, not being an open space, is not covered by the definition. The appellant did not utter the words in a public place and was therefore not guilty of the offence charged.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Byron Venturas & Partners, appellant's legal practitioners

S v MAPURANGA 1988 (1) ZLR 124 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

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Criminal appeal

22 February 1988

Flynote

Criminal procedure (sentence) - mandatory minimum sentences for particular statutory offences - attempts to commit such offences -whether minimum penalty applies - Precious Stones Trade Act No. 8 of 1978 - s 3(1) - attempted contravention of.

Headnote

Unless the wording of a particular statutory provision carrying a mandatory minimum sentence specifically provides that an attempt to contravene the provision also attracts the minimum sentence, the mandatory penalty does not apply to attempts. Attempts to contravene s 3(1) of the Precious Stones Trade Act No. 8 of 1978 are absent from the mandatory penalty provisions of the Act, so the mandatory penal provision of s 3(2) cannot apply to attempts. The general penalty section applies to attempts.

Cases cited:

S v Nkomo & Ors 1976 (4) SA 800 (RAD)

S v Mabhena 1982 (1) ZLR 6 (GD)

S v Kufahakufemberwi & Ors 1978 (1) SA 327 (R)

S v Nyathi 1981 ZLR 108 (GD)

S v Kadungure HH-62-82 (unreported)

S v Nhongo HH-104-86 (unreported)

S v Ngwenya HH-180-86 (unreported)

A M Donagher for the appellant

Miss E F Ndewere for the respondent

KORSAH JA

Judgment

Korsah JA: The appellant was convicted on his plea of guilty to a count charging him with a contravention of s 3(1) of the Precious Stones Trade Act No. 8 of 1978, and sentenced to the term of three years' imprisonment with hard labour which is mandatory in terms of s 3(2) of the Act. He appeals against both conviction and sentence.

The facts agreed on were that on 30 July 1986, one Patrick approached the appellant and informed him that he had emeralds for sale. The appellant expressed an interest in the

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merchandise but asked Patrick to return the following day as he did not have the sum of $15 000, which was the selling price of the emeralds. At about midday the following day, Patrick called at the appellant's work place and was told by the appellant that he had managed to raise only $6 000 of the purchase price. Patrick took the appellant to see one Jonathan Mpofu, who was supposed to be the real vendor of the gems. The appellant was shown three pieces of emerald and Mpofu agreed to accept the appellant's $6 000 as part-payment of the purchase price of $15 000. Having received the sum of $6 000 Mpofu instructed the appellant to drive Patrick in his vehicle to a bush near the Sakubva River, where Patrick would finally give the emeralds to the appellant. On arrival at the designated place, Patrick asked the appellant to wait for him while he went to collect the emeralds from the bush. That was the last the appellant saw of Patrick, and he received no emeralds.

Mpofu was arrested by the Police later that afternoon on suspicion that the vehicle he was driving was a stolen vehicle. When the vehicle was searched the Police found $10 000 in cash. Upon being questioned, Mpofu admitted selling fake emeralds to the appellant.

On these facts the State conceded that the appellant's conviction on a charge of dealing in precious stones could not be sustained. It was evident from the statement of agreed facts that the sale transaction had not been concluded. The appellant had passed $6 000 over to Mpofu without receiving anything. And from Mpofu's statement to the Police, the appellant, if he was lucky, was going to receive fake emeralds for the money he had paid. The assertion that the emeralds, the subject matter of the sale transaction, were fake was accepted by the State. And the concession by the State that, even if the fake emeralds had been delivered to the appellant, the charge on which he should have been prosecuted was one of an attempt to deal in precious stones, was well made.

As BEADLE ACJ said *obiter* in *S* v *Nkomo & Ors* 1976 (4) SA 800 (RAD) at 802F:

KORSAH JA

> "Cases are quite common where the accused believes apatite, a worthless mineral, to be an emerald and sells it in the *bona fide* belief that it is an emerald. In such a case the accused is convicted of an attempt, ..."

See also *S* v *Mabhena* 1982 (1) ZLR 6, where this very section of the Act fell for consideration in a case where the accused person was found in possession of a stone which he erroneously believed to be an emerald. It was held that the general principle is that "impossibility of attainment" does not prevent an attempt to contravene a statute from being an offence, unless there is something in the language of the particular statute which indicates that the Legislature intended to depart from the general rule, and that such attempts should not be offences. The Legislature's intention was that persons who deal in stones erroneously believing them to be precious should be punished, and persons who possess stones in similar circumstances are guilty of an attempt to possess the stone.

Thus, even though there was no transfer of the stones, real or fake, to the appellant, the appellant was nonetheless guilty of an attempt to deal in precious stones on the basis of the facts agreed upon.

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In *S* v *Kufahakufemberwi & Ors* 1978 (1) SA 327 (R), cited with approval by GUBBAY JA in S v *Nyathi* 1981 ZLR 108, LEWIS JP is reported as saying at p328C that under ss 339(1) and (2) of the Criminal Procedure and Evidence Act [*Chapter 59*] -

> "...persons who attempt to commit an offence, or conspire to commit or incite persons to commit an offence shall be **liable** on conviction to the punishment to which a person convicted of actually committing the offence would be liable. The section does not say they shall receive the same punishment."

Attempts at contravening s 3(1) are absent from the provisions of the Act, and so the mandatory penal provision in s 3(2) cannot apply to attempts. Thus a conviction for attempting to contravene s 3(1) does not attract the mandatory sentence sanctioned in terms of s 3(2).

However, as Miss *Ndewere* pointed out, a conviction for attempted dealing in precious stones is still a conviction of an offence in terms of the Precious Stones Trade Act because, without the Act, the attempt would not be an offence. No. special penalty is specified for attempts, but s 15(2) of the Act provides that -

KORSAH JA

> "Any person who is guilty of an offence in terms of this Act for which no special penalty has been fixed shall be liable to a fine not exceeding two thousand dollars or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

In cases of a similar nature, where the culprit has been convicted of an attempt to contravene s 3(1) of the Act, the effective sentences imposed have ranged from two months' imprisonment with labour to nine months' imprisonment with labour, depending of course on the moral culpability of the culprit. See *S* v *Kadungure* HH-62-82 (unreported); *S* v *Nhongo* HH-104-86 (un-reported); *S* v *Ngwenya* HH-180-86 (unreported).

In the instant appeal, it was conceded on behalf of the State that while a custodial sentence may have been called for, the sentence of three years' imprisonment with labour imposed by the trial court was manifestly excessive and could not be supported.

There were several mitigatory features in the appellant's favour. He was a first offender; he yielded to temptation; he was the victim of fraud; he received nothing and lost a large sum of money.

The appellant, it would appear, served five months of the sentence imposed before being released on bail pending the determination of this appeal.

In the circumstances, by virtue of the powers reposed in this Court by s 12(2) of the Supreme Court of Zimbabwe Act No. 28 of 1981, a verdict of guilty of an attempt to contravene s 3(1) of the Precious Stones Trade Act No. 8 of 1978 is substituted for the verdict of the trial court. The appeal against sentence succeeds to this extent: the sentence of three years' imprisonment with labour is set aside and in its place is substituted a sentence of five months' imprisonment with labour.

As the appellant has already served this period of imprisonment, he has atoned for his sins and

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does not have to serve any further period of imprisonment.

McNally JA: I agree.

Manyarara JA: I agree.

Gargan Brothers & Chadder, appellant's legal practitioners

GILLESPIE & ANOR v CITY OF HARARE 1988 (1) ZLR 128 (SC)

Court **Supreme Court, Harare**

Gubbay, McNally & Manyarara JA

Civil Appeal

2 & 23 February 1988

Flynote

Town and country planning - property situated within area zoned as residential area - pre-existing right to continue a non-conforming use of land - use subsequent to material date -whether intensification of use can amount to "development" entitling City Council to issue enforcement order - Regional, Town and Country Planning Act 1976 - s 22(1)(b)(i) - applicability of when existing and proposed use are prohibited.

Headnote

The appellants were respectively owner and occupier of a property in Hatfield, Harare, an area which had been zoned as a residential area under the Salisbury South Town Planning Scheme. Industrial use of the property was prohibited. However, the first appellant's family had, long before the town planning scheme was introduced, carried out quarrying and stone masonry operations on the property. This gave them a pre-existing right to continue with a "non-conforming" use of the property. On the other hand, if, since the date of commencement of the Regional, Town and Country Planning Act 1976, there had been "development" on the property (as defined in s 22(1) of the Act), the City Council was entitled to issue an enforcement order. One of the meanings given in that section to the word "development" is "altering the character of the use of [the land]". It was argued, for the appellants, that an extension of the use to which the land was being put could not amount to an alteration in the character of the use. Alternatively, it was argued, this was a situation where the existing and proposed use fell within the same prescribed group of land or building uses, under s 22(1)(b)(i) of the Act.

McNALLY JA

Held, that in the context of town planning, with its concern for amenities and harmonious development, the extent of a use may well be its essential peculiarity and that intensification of use can be a material change of use. That this had occurred was a factual decision by the

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Administrative Court, a decision which was not appealable.

Held, further, that existing and proposed uses of the land, being general industrial use, were prohibited under the Town Planning Scheme, and were therefore, by virtue of the proviso to s 3 of the Regional, Town and Country Planning (Use Groups) Regulations 1976 (RGN 926/1976), not "prescribed uses" for the purposes of s 22 of the Act.

Case cited:

Brooks & Burton v *Secretary of State for the Environment & Anor* [1978] 1 All ER 733

A P de Bourbon SC for the appellants

M T O'Meara for the respondent

Judgment

McNally JA: This is an appeal from a decision of the Administrative Court made in terms of the Regional Town and Country Planning Act No 22 of 1976. Under s 63 of the Act the appeal is in respect of a matter of law which has arisen for decision.

The relevant facts are as follows. Mrs Gillespie is the owner and Circlepave (Pvt) Ltd are the occupiers, under an agreement of lease, of a certain property in Hatfield, Harare. The area in which the property is situated has been zoned as a residential area in terms of the Salisbury South Town Planning Scheme, s 4. In terms of the Scheme, which was produced as Exhibit 7 in the Administrative Court, industrial use of the properties in the area is prohibited. So also are surface mineral workings, which term includes quarrying (see p 10 of Ex 7).

Long before the scheme was introduced the Gillespie family carried out quarrying and stone-masonry operations on the property in question. They had therefore a pre-existing right to continue what used to be described as a non-conforming use of the property, that is to say, a use which does not conform with the provisions of the Scheme. In general terms, that is not disputed.

What is in dispute is whether the use to which the property is now being put is such as to constitute "development" as that word is defined in the Act. If it is, then the Municipality has a right to control it, as it has sought to do, by

the issuing of an "Enforcement Order". If it is not, as the appellants contend, then the Municipality may not interfere and control the exercise of a pre-existing right to a non-conforming use.

It is necessary at the outset to say a word as to the date at which the industrial and quarrying use of the property became a non-conforming use. Although the Act and certain relevant regulations to which I shall refer came into operation only on 1 November 1976, the Scheme predated the Act and was prepared and introduced under the old Act, Chapter 133 of the 1963

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Revised Edition of the Statutes. It is in terms of s 47 of that Act that the phrase "non-conforming use" is used. That section read, in parts:

> "Although an existing building, work or use is not in conformity with or contravenes any provisions of the approved scheme, then, until action is taken in terms of section *forty-two*:
>
> (a) existing buildings may be maintained and their existing use continued;
>
> (b) existing works may be maintained and their existing use continued;
>
> (c) existing uses of land may be continued."

The scheme (Ex 7) is dated February 1970, and is the First Re-Submission (in terms of s 49(2) of Cap 133) of the initial scheme which must have been approved some five years before that. However it is clear from the wording of the Scheme itself that there was an even longer history of Town Planning control of the area in question because the phrase "the material date" was defined in the Scheme as being 9 July 1948. In the Act, Chapter 133, "material date" was used to define the phrase "existing use" which was defined as follows:

> "existing use' means , in relation to any building or land, a use of that building or land for any purpose of the same character as that for which it was last used before the material date..."

It is clear therefore that insofar as the Municipality accepted that there was an existing non-conforming use of the land, they were accepting that that use had continued since before 9 July 1948.

In argument before the Administrative Court it seems to have been accepted that the base date for determining whether there had been subsequent "development" was 9 July 1948. Thus Mr *de Bourbon*, who appeared for the appellants, said in his opening address to the Administrative Court:

McNALLY JA

> "Two issues arise, as we will submit. Firstly, whether in fact the manufacture of pre-cast concrete products was taking place before the effective date which was mid- 1948 ..."

Then, in the judgment, the learned President said:

> "It is common cause that the scale, nature and scope of the operations now being carried on on the Stand are far in excess of those carried on prior to 9 July 1948 ..."

I do not think this was a correct assumption. Indeed in argument before us Mr *de Bourbon*, correctly I think, contended that the appropriate date was 1 November 1976, the date upon which the new Act and Regulations came into force. The reason why this must be so is that s 23(1) of the Act speaks of "existing development" as development which:

> "was commenced before the appointed day (1.11.76) and was not commenced in contravention of the provisions of the repealed Act ..."

The Act then goes on, in s 25, to speak of the control of development, and "development" here

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clearly means "development other than existing development".

I conclude therefore that the essential question of law before this Court is whether there has been, on the property in question and since 1 November 1976, "development" which is subject to the control of the Municipality (this is also, of course, a question of fact, but the factual aspects are not appealable).

If there has been development, then the Municipality had the right to issue an Enforcement Order (see s 33 of the Act). If there has not been, and if the facts reveal that what has happened on the property is all to be included within the definition of "existing development" then the Municipality has no authority to control it. The Enforcement Order would then be invalid.

The argument on this issue before us centred on s 22 of the Act (22 of 1976) and s 3 of the Regional, Town and Country Planning (Use Groups) Regulations (RGN 926 of 1976). Although counsel concentrated on s 22(1)(b) of the Act, s 22(1)(a) is also relevant. I will set out the significant parts of the section and of the Regulations:

McNALLY JA

"22 (1). Any reference in this part to development, in relation to any land

or building, means any of the following -

(a) the carrying out in, on, over and under the land of any building or mining operations other than ... (irrelevant exceptions);

(b) the altering of the character of the use of any land or building, other than -

(i) where the existing use and the proposed use both fall within the same prescribed group of land or building uses;

(ii) ..."

When one seeks to find what are the "prescribed groups" one turns to s 3 of the Regulations. It reads as follows:

"3. The groups of land or building uses specified in the Schedule are prescribed for the purposes of subparagraph (i) of paragraph (b) of subsection (1) of section 22 and paragraph (c) of subsection (2) of section 25 of the Act:

Provided that if, in relation to any particular area, a use specified in any particular group is, in terms of an approved scheme applicable to that area, prohibited, either completely or unless the local planning authority grants special consent thereto, such use shall be excluded from the group concerned."

Section 22(1)(a) of the Act is relevant in two respects. First, it provides that building is development. This is presumably why the appellants withdrew their appeal against para (d) of the Enforcement Order which requires the demolition of certain buildings. Second, it provides that mining is development, but since there is nothing in the Enforcement Order about mining operations (bearing in mind that quarrying falls within the definition of mining see s 2 of the Act) the issue does not arise in this appeal.

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I move on then to s 22(1)(b), about which there were numerous submissions. Basically these submissions were addressed to two points, as follows:

1. Can it ever be said that the character of the use of a piece of land has altered simply by virtue of an increase in the extent of that use?

2. If the answer to the first question is "Yes", are the appellants protected by the words of sub-para (i) of para (b) of s 22(1) or is that protection nullified by the words of the proviso to s 3 of the Regulations?

McNALLY JA

CAN AN EXTENSION OF A USE AMOUNT TO AN ALTERATION IN THE CHARACTER OF THE USE?

Mr *de Bourbon* submitted that it could not. He said "it would not alter the character of the use of land to change from a factory producing 200 units a day to that same factory producing 10 000 units a day". He referred to the Oxford English Dictionary definition of "character" as:

> "a. The aggregate of the distinctive features of anything; essential peculiarity; nature; style; sort, kind, description."

I cannot accept that the extent of a use (bearing in mind that we are considering an habitual use) may not be the distinctive feature of it. The use may be characterised as regular or intermittent, slight or intensive, obtrusive or unobtrusive, ancillary or overriding. In the context of town planning, with its concern for amenities and harmonious development, it seems to me that in proper case the extent of a use may well be its "essential peculiarity".

Mr *de Bourbon* referred us to a decision of the Court of Appeal in England which is surprisingly similar on the facts and on the law. In *Brooks & Burton* v *Secretary of State* for the Environment & Anor [1978] 1 All ER 733 (CA) the question was raised whether intensification of use was capable of constituting a material change of use.

Although the wording of our Act and Regulations differ from the English equivalents, the general framework seems the same, at least in relation to the sections under consideration. I do not see any significant difference between the English "material change of use" and our "altering of the character of the use." See Halsbury's *Laws of England*, 4 ed vol 46 para 89, pp 102-103. "In considering and determining whether there has been a material change ...the matter to be considered is the character of the use".

In *Brooks'* case, *supra,* LAWTON LJ said:

> "We have no doubt that intensification of use can be material change of use. Whether it is or not depends on the degree of intensification. Matters of degree are for the Secretary of State to decide. He did so in this case. There

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was ample evidence to support his decision on this point. It cannot be upset in this Court."

The same reasoning must apply here. Thus I am satisfied that, in principle,

McNALLY JA

intensification of use can amount to an alteration in the character of the use. Whether it does or not is a question of fact for decision by the Administrative Court. Once that court makes its decision, and there is evidence to support it, that decision is not appealable. It is a decision of fact.

The question is, however - has the Administrative Court made the factual decision? If it has asked itself the wrong question, it is unlikely to have come to the right answer. If it has used the base date of 9 July 1948 to determine what is "existing development", when it should have used the base date of 1 November 1976, then, on the face of it the determination is likely to be invalid.

But this is not necessarily so. As LAWTON LJ said in *Brooks'* case *supra*:

"The planning authority had overstated their case; but that did not mean they had no case at all."

It is necessary to look at the findings of the Administrative Court. At p 5 of the learned President's judgment, one finds this passage:

"It is common cause the large scale production of pre-cast concrete products for commercial purposes was commenced on the Stand only after September 1983 when the Stand was leased to Civilstructure (Private) Limited.

Therefore, to the extent that the making and marketing of pre-cast concrete products by the second appellant was not actually commenced on the Stand before the commencement of the Scheme, and it is a new development, I hold that it is not existing development."

This is in effect a finding that the alteration in the character of the use of the land took place in September 1983. It must follow that if it was an alteration of the character of the use as compared with the use in 1948, it was equally an alteration of the character of the use as compared with the use on 1 November 1976. Accordingly, it seems to me, the Administrative Court must be deemed to have made a finding of fact which is unappealable based on a finding of law which is correct. It has found, as a matter of law, that a change in the intensity of the use can amount to a change in the character of the use; and it has found that there was such a change in the intensity of the use in September 1983.

Accordingly I am unable to accept the validity of the first leg of Mr *de Bourbon's* submissions.

McNALLY JA

IS THE APPELLANT SAVED BY THE FACT THAT THE "PROPOSED USE" FALLS WITHIN THE SAME PRESCRIBED GROUP OF LAND USES AS THE "EXISTING USE"?

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The second leg of the argument assumes that the first leg has been lost. Assuming that there has been an alteration in the character of the use of the land, Mr *de Bourbon* contends that this is a case where "the existing use and the proposed use both fall within the same prescribed group of land or building uses" (s 22(1)(b)(i) of the Act).

If that is so, then what has taken place is not "development" because those words exclude it from the definition of "development".

In order to determine the validity of this argument one has to look closely at the meaning of s 3 of the Regulations, which I have set out earlier. In particular it is necessary to look at the proviso.

The argument is a simple one. The existing use of the property (ignoring for the moment the quarrying aspect) was "general industrial use" in Group 9. The new use falls withing the same use group. Therefore the situation is covered by the terms of s 22 (1)(b)(i) and the "proposed" use cannot be termed "development".

This argument, in my view, falls foul of the proviso to s 3 of the Regulations. For the sake of convenience I set out that proviso again:

> "Provided that if, in relation to any particular area, a use specified in any particular group is, in terms of an approved scheme applicable to the area, prohibited, either completely or unless the local planning authority grants special consent thereto, such use shall be excluded from the group concerned."

I have not found it easy to understand what this proviso means. It is perhaps important to remember that it qualifies a section of the Act dealing with development in the form of change of use.

Let me begin with an easier example, referring to a prescribed use group which has several separately specified sub-heads. Use Group 5, for example, is headed "office use", but within that group are collected:

(a) an office

McNALLY JA

(b) a bank of building society

(c) a stock exchange, etc.

Let us suppose a particular building was used as a bank, and the owner wished to use it as a stock exchange. The change of use would be an alteration in the character of the use, and would thus amount to "development". But because the existing use (as a bank) and the proposed use (as a stock exchange) both fall within the same prescribed group of land or building uses (ie Group 5), the alteration is removed from the category of "development", by the wording of the Act.

The complication arises if the building is situated in a scheme area where stock exchanges are,

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in terms of the Scheme, prohibited.

In that event the proviso clearly means that for the purpose of dealing with that particular situation the words "(c) a stock exchange" must be deemed to be excluded from Group 5. Consequently it is no longer possible to say that the existing use (as a bank) and the proposed use (as a stock exchange) both fall within Group 5. And because that is no longer possible, the proposed change of use is no longer saved from being regarded as "development". The change of use cannot be effected.

The difference between Group 5, which I used for purposes of illustration, and Group 9, with which we are here concerned, is that Group 9 has no specified sub-heads. Thus the effect of excluding "Industrial use" from Group 9 is not to reduce the scope of the group but to eliminate it entirely. There is nothing left. This, however, does not make any difference to the principle involved. The fact remains, as the learned President succinctly put it in his judgment, that prohibited uses are not prescribed.

It is not disputed that in terms of the Scheme Ex 7, "industrial use" is prohibited. See Clause 18 at p 8, as read with Table C at p 9, of the Exhibit. This prohibition applies to the area of the scheme within which the disputed property falls. Thus in effect Group 9 is eliminated from the list of prescribed use groups. In consequence neither the existing use (industrial) nor the proposed use (industrial) fall within a prescribed group of land uses for the purposes of applying s 22(1)(b) to the facts of this case. Nor, may I add, does "quarrying" which under the Act falls under "mining operations" which in turn is specifically excluded from the definition of "industrial use" in s 2 of the Regulations. So there is no prescribed use group for "quarrying".

McNALLY JA

I am satisfied therefore that the plain meaning of the proviso to s 3 of the Regulations is such as to negative the reliance which Mr *de Bourbon* could otherwise have placed upon the provisions of the sub-paragraph of the Act.

He fails therefore on his alternative argument as well as on his main argument, and the appeal must consequently be dismissed with costs.

Gubbay JA: I agree.

Manyarara JA: I agree.

Winterton, Holmes & Hill, appellants' legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

MADONDO v FYFE & ORS 1988 (1) ZLR 138 (HC)

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Court **High Court, Harare**

Annotations Link to Case Annotations

Reynolds J

Opposed motion

4 & 24 February 1988

Flynote

Practice and procedure - plea of res judicata - essentials for - judgment in rem-meaning of - judgment between same parties or their privies - who are privies.

Headnote

The applicant had contracted to buy a residential property from the first respondent. Because the applicant had defaulted in his obligations under the contract, the first respondent obtained a default judgment declaring the sale to have been cancelled. The property was resold to the second and third respondents, who took occupation. The applicant, although he took no steps to rescind or appeal against the default judgment, sought an order that the second and third respondents "be bound by such rights as the applicant may have in the property" and that they vacate the premises. It was argued for them *in limine* that the matter was *res judicata* and that the applicant had no *locus standi*.

Held, that for the special plea of *res judicata* to succeed, it must be established that the judgment given in the earlier action concerned the same subject-matter; was founded on the same grounds; and was either a judgment *in rem* or was between the same parties or their privies.

Held, further, that the default judgment was not one *in rem*, since it did not determine the status of the property or its disposition.

Held, further, that although the second and third respondents were not parties to the action in which the default judgement was obtained, they were privies of the first respondent, for they derived successors' rights and title to the property through the first respondent at a time when they knew of the applicant's suit against the first respondent and knowing full well

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REYNOLDS J

that there was a risk that their title to the property would be challenged. Accordingly, the plea of *res judicata* should be upheld.

Cases cited:

Mvaami (Pvt) Ltd v *Standard Finance Ltd* 1976 (2) RLR 257; 1977 (1) SA 861 (R)

Boshoff v *Union Government* 1932 TPD 345

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Bantu Reformed Apostolic Church v *Ninow & Anor* 1947 (1) SA 187 (N)

Tredoux v *Taylor NO & Anor* 1981 (1) SA 310 (W)

Chiloane v *Maduenyane* 1980 (4) SA 19 (W)

Buchholtz v *Buchholtz* 1980 (3) SA 424 (W)

Sorec Properties Hillbrow (Pty) Ltd & Anor v *van Rooyen* 1981 (3) SA 650 (W)

J Sayce for the applicant

S Lynch for the first respondent

CT Dube for the second and third respondents

Judgment

Reynolds J : In April 1982, the applicant purchased a residential property from the first respondent under an agreement of sale. After some time the applicant was alleged to have defaulted in his obligations under the agreement, and on 3 February 1986 the first respondent obtained default judgment against the applicant, granting him the cancellation of the agreement and the eviction of the applicant from the premises. At the instance of the applicant, however, this judgment was later rescinded, and the applicant resumed occupation of the property.

On 13 August 1986 the first respondent again applied for and was granted a second default judgment against the applicant, this time for different reasons, and once again the agreement was cancelled and the applicant evicted from the residence. The first respondent shortly thereafter sold the property to the second and third respondents, who took occupation on 16 October 1986 and received transfer on 23 January 1987.

Following an application made in December 1986, on 26 January 1987, the second default judgment was rescinded, but the second and third respondents remained in occupation of the property. The present action which call for an order that the second and third respondents "be bound by such rights as the applicant may have in the property", and that they vacate the premises, was instituted on 2 April 1987.

REYNOLDS J

In the interim, and continuing the Magistrates Court action which was reinstated on 26 January 1987, the applicant was requested to furnish further particulars in respect of his plea, and these he allegedly failed to supply. He also failed to appear in court on due date. In the result a third application for judgment was made and granted by default on 26 May 1987.

The applicant has taken no steps to rescind or to appeal against that judgment to date, but has now alleged, in the present action, and by affidavit filed on 24 June 1987 that he filed the further particulars requested on 22 May 1987, and he believed, in consequence, that it was not necessary for him to appear at the Court hearing of 16 may 1987.

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At the outset of the present hearing Mr *Lynch* for the first respondent, applied for and was granted a ruling that the first respondent was now improperly joined in the proceedings. He was awarded his wasted costs for the day of the present hearing, when an amended draft order was produced.

Mr *Dube*, for the second and third respondents, took the point *in limine* that the applicant has no *locus standi* to bring the present application before the Court. The basis of this submission is that the default judgment of 26 May 1987 was a final and definitive order of a competent court, which the applicant has taken no valid legal steps to set aside. It is contended by Mr *Dube* that the matter is, therefore, *res judicata*, and the applicant cannot raise the question of the rights of the parties now.

It is trite that, in order for the special plea of *res judicata* to succeed, it must be established that the judgment given in the prior action concerned the same subject-matter; was founded on the same grounds, and was either a judgment *in rem*, or was between the same parties or their privies. As I understand Mr *Sayce*, for the applicant, while he concedes that a default judgment can sustain a plea of *res judicata*, he contends that it must be clearly established exactly what the issues were that were determined in the earlier judgment, for it is only in respect of those points that the defence applies (*Mvaami (Pvt) Ltd* v *Standard Finance Ltd* 1976 (2) RLR 257 at 267). The argument was that as it was not clear on the papers what the basis of the decision was, it could not be said that the same subject matter was involved in both cases. I cannot accept this submission. Whereas the reason for granting the judgment was the applicant's failure to supply further particulars timeously, the judgment itself effectively cancelled the agreement of sale between the parties, and ordered the eviction of the present application from the premises: see *Boshoff* v *Union Government* 1932 TPD 345. Thus the subject matter and the grounds

REYNOLDS J

for the claims in both actions related to the same contract of sale.

Mr *Sayce* also submitted that the judgment was *in personam*, and not *in rem* as had been suggested by Mr *Dube*. I would agree with Mr *Sayce* on this point. A judgment *in rem* has been defined as -

> "the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation. Apart from the application of the term to persons, it must affect the *'res'* in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer."

(*Halsbury's Laws of England* 4 ed (Hailsham) vol 16 para 1522).

It seems to me that the judgment delivered by the magistrate did not determine the status of the property or any of the other matter included in this definition. Indeed, no real rights were affected by the judgment at all, and it was only the personal rights of the parties that were affected. (See Spencer-Bower and Turner *Res Judicata* 2 ed p 213 *et seq*). In the result, I would hold that the judgment was *in personam* or *inter partes.*

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This finding requires a further examination as to the parties involved, for, as already stated, a judgment *in personam* raises an estoppel against only the parties to it and their privies.

It is obvious that the second and third respondents in the present matter were not parties to the Magistrates Court action : they had not come into the picture at all at that stage. It seems to me, however, that the second and third respondents are privies of the first respondent, for they derived successors' rights and title to this property through the first respondent at a time when they knew of the applicant's suit against the first respondent. See Hoffmann and *Zeffertt South African Law of Evidence* 3 ed p 260; *Halsbury*, op cit para 1543; "Successive Sales" in 1974 SALJ 40; Spencer - Bower op cit at p 209 *et seq, Bantu Reformed Apostolic Church* v *Ninow & Anor* 1947 (1) SA 187 (N); *Boshoff* v *Union Government, supra.*

They may not have known of the action when they negotiated the sale with the first respondent, but at the time transfer was effected, they were certainly aware that the applicant was making efforts to have the original contract reinstated. They purchased this property, therefore, knowing full well that

there was a risk that their title to it was being challenged. They were very much concerned in both actions accordingly.

On this basis, therefore, I hold that the requirements of the defence of *res judicata* has been established, and I find that the applicant has no *locus standi* to make the present application.

Even if I am not correct in this ruling, however, I am of the view that Mr *Dube* would also succeed on the second contention he has advanced. This is that the applicant has no valid cause of action at all, as he has no right or title to the property in question.

More than eight months have passed between entry of the default judgment in the Magistrates Court and the commencement of the present hearing, and the applicant has not noted an appeal against that judgment, nor has he taken steps to apply for its rescission within that period. Furthermore, and as stated by Mr *Dube*, there is nothing in the papers to indicate that the applicant intends to avail himself of these remedies, or to apply for condonation of the delay in filing papers for relief.

In these circumstances, it is my view that the applicant has no right of action against the second and third respondents, who have long before received transfer of title to the property. The applicant is not in possession of the property, and has no title to it. He does not hold a cession of any right of action from the owner, past or present. The contract he had entered into in respect of this property has been legally cancelled by a judgment which is still in force. In all these circumstances the only right the applicant had, in my view, was *in personam* against the first respondent, and it appears to be almost certain that even this right has been lost to the applicant now. Furthermore, any contractual right he may have had to evict a trespasser has long since been extinguished. See *Tredoux* v *Taylor NO & Anor* 1981 (1) SA 310 (W) at 312 A & B; *Chiloane* v *Maduenyane* 1980 (4) SA 19 (W) at 21A; *Buchholtz* v *Buchholtz* 1980 (3) SA 424(W) at 425A to D; and *Sorec Properties Hillbrow (Pty) Ltd & Anor* v *Van Rooyn* 1981 (3) SA

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650(W) at 653A to 654C.

In the result I uphold Mr *Dube*'s submission *in limine,* and the application in this matter is dismissed with costs.

Sawyer & Mkushi, applicant's legal practitioners

Kantor & Immerman, second and third respondents' legal practitioners

ZIMBABWE SUN HOTELS (PVT) LTD v LAWN 1988 (1) ZLR 143 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Korsah JA

Civil Appeal

29 January & 26 February 1988

Flynote

Employment - employee - suspension of - wages - entitlement to - requirement for employee to hold himself available to perform duties - pay - whether includes bonus.

Headnote

The respondent was a croupier employed by the appellant at one of its hotels. In addition to his salary, the respondent was entitled to free food and accommodation at the hotel. It was also made clear to him that he would share in the total amount of gratuities received each month by the hotel's casino personnel from patrons of the casino.

In February 1985 he was suspended from work without pay, it being alleged by the appellant that he had concealed gambling chips for his own use. The respondent was obliged to seek other work to support himself. In May 1985 he obtained employment at a casino in Bophuthatswana, but was discharged from that job a month later on receipt of an adverse report from the appellant. He finally obtained a job in a clothing store. In October 1985 he learned that the police officer who had investigated the appellant's allegations against him had concluded that there was no evidence to support the allegations, so returned to Zimbabwe. In January 1986 his legal practitioners wrote to the appellant, stating that the respondent had suffered some $10 449 damages because of the appellant's actions, but also suggesting that the appellant resume employment, resign immediately, and received "back pay" for the period since the suspension. The respondent calculated that he would receive some $11 712, which would include pay in lieu of accommodation and food and a share of the casino gratuities for the period. The appellant offered

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only the basic salary for the period from the date of suspension until the date the respondent started work with the casino in Bophuthatswana, on the grounds that the respondent, by taking that employment, had terminated his employment with the appellant.

The respondent instituted proceedings in the High Court and succeeded in full before BLACKIE J On appeal,

Held, in the first instance, that both under the common law and under s 5 of the Employment (Conditions of Service) Regulations, it was not lawful for the appellant to suspend the respondent without pay.

Held, further, however that where an employee is suspended he still remains bound to his employer under his contract of service and is obliged to hold himself available to perform his duties if called upon to do so. A breach by the employer of the obligation to pay the employee's wages does not rid the employee of his obligation to hold himself available to perform his duties; it serves only to vest the employee with an election either to stand by the contract and enforce his right to payment of his salary, or to accept the repudiation, terminate the contract and sue for damages.

Held, further, that the burden of establishing that the respondent held himself available and willing to perform his duties rested on him; and that the evidence in this case indicated that not only did he fail to discharge that *onus* but that he elected to terminate his contract of service. *Held*, further, with regard to the question of "back-pay", that the distribution of the patrons' gratuities to the casino staff did not amount to pay and that even a "bonus", being something given *ex gratia*, would fall outside the meaning of "pay".

Decision of BLACKIE J reversed.

Cases cited:

Norton v *Mosenthal & Co* 1920 EDL 115

Myers v *SA Railways & Harbours* 1924 AD 85

Gladstone v *Thornton's Garage* 1929 TPD 116

Gumede v *Mapumulo Bantu School Board & Anor* 1961 (4) SA 639 (D)

Government GM Areas Sick Benefit Society v *van Rensburg* 1921 TPD 176

Blackburn v *Blackburn* 1920 CPD 13

Crossley v *Union Government* 1921 NPD 114

van der Merwe v *Colonial Government* (1904) 14 CTR 732

Boston Deep Sea Fishing & Ice Co v *Ansell* (1888) 39 ChD 339

Myers v *Abramson* 1952 (3) SA 121 (C)

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Stewart Wrightson (Pty) Ltd v *Thorpe* 1977 (2) SA 943 (A)

GUBBAY JA

M J Gillespie for the appellant

A M Donagher for the respondent

Judgment

Gubbay JA: David Lawn, the respondent in this appeal, is a professional croupier. On 22 December 1984 he commenced employment in that capacity at the Caribbea Bay Resort, a prestigious hotel in Kariba at which a casino is conducted, and one of the chain of hotels operated by the appellant in this country. The terms of his contract of service with the appellant were that he was to be paid a salary of $400 per month "live-in", that is, inclusive of free food and accommodation, and be entitled to take 22 working days' leave *per annum,* of which five days, at his option, could be accumulated. The employment was terminable on one calendar month's notice by either party. Although not a term of the contract, it was made clear to the respondent that as a croupier he would also share in the total amount of gratuities received each month by the hotel's casino personnel from patrons of the casino and that the distribution of such monies was administered by the appellant and paid together with salaries at the month's end.

On 8 February 1985 the respondent was accused by the manager of the casino of having concealed gaming chips for his own use. He denied such dishonest activity and, having consulted a firm of legal practitioners in Harare, on 14 February 1985 a letter was addressed to the appellant on his behalf. After alluding to the respondent's distress at the allegations levelled against him, the letter went on to state:

> "Mr Lawn has asked us to point out to you that he is skilled only as a croupier, and that should he lose his employment with yourselves he will be obliged to leave the country in order to seek suitable employment.
>
> Our client has accordingly asked us to request that you either investigate his alleged misdemeanours and continue to employ him, or accept his resignation and compensate him adequately for the damages which he will suffer on his loss of employment. He states that the equivalent of three months' salary would be necessary to meet his present commitments, his living costs and the cost of travel while seeking employment with a foreign casino.
>
> In conclusion we remind you of the necessity to obtain ministerial approval before giving notice to any employee. We trust that an amicable settlement will be reached and that there will be no need to take further action in this matter."

GUBBAY JA

On the same day, and obviously prior to the receipt of the letter, the respondent was informed in writing that with immediate effect he was suspended from work without pay, pending the completion of a criminal investigation against him; and that during such period he was

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prohibited from entering the hotel's premises.

Such action by the appellant was contrary to s 5 of the Employment (Conditions of Service) Regulations 1981 (SI 894 of 1981), in that it had failed to advise the Minister of Labour, Manpower Planning and Social Welfare of its intention to suspend the respondent, and in the absence of ministerial approval it was not lawful for it to suspend him from employment **without pay**. Even under the common law a servant who is suspended from employment-in contra-distinction to being dismissed where his services are dispensed with unequivocally-is entitled to his wages. See *Norton v Mosenthal & Co* 1920 EDL 115 at 118; *Myers v SA Railways and Harbours* 1924 AD 85 at 90; *Gladstone v Thornton's Garage* 1929 TPD 116 at 118; *Gumede v Mapumulo Bantu School Board & Anor* 1961 (4) SA 639 (D) at 646.

The consequences to the respondent of being placed under suspension are best described in his own words:

> "As a result of my suspension, I was unable to obtain employment in any casino in Zimbabwe, and, as I have no skill other than that of a croupier, I was obliged to travel to the Republic of South Africa in order to look for employment. I was obliged to borrow heavily from friends and relatives in order to feed and clothe myself until such time as I obtained further employment.
>
> On 1st May, 1985, I obtained employment at Sun City, Bophuthatswana. This employment was terminated on 14th June, 1985, upon receipt of an adverse report from Respondent. Further attempts to find casino employment in South Africa were fruitless and I was once again obliged to borrow heavily from friends and relatives in order to feed and clothe myself and to pay for travel expenses incurred while seeking employment. I eventually obtained a temporary position with a clothing store at the beginning of October 1985."

Towards the end of October 1985 the respondent learned that the police officer who had been assigned to investigate the appellant's complaint had decided that there was no evidence to support it. He therefore terminated his

employment with the clothing store and returned to this country in December 1985. Thereafter, on 6 January 1986, his legal practitioner wrote to the appellant:

> "We have asked our client for an assessment of the damages suffered by himself in this matter. The damages are considerable, particularly in view of the fact that our client obtained employment at Sun City, but was requested to leave after the Security Manager received a telephone call from the Manager of the Kariba Casino. Consequently, our client has been unable to obtain Casino employment anywhere, and has incurred considerable accommodation and travelling expenses in his search for employment. He has been unable to obtain suitable alternative employment elsewhere, as he is skilled only as a croupier. His estimate of the total damages suffered to date is $10 449,14.
>
> Our client is anxious to clear this matter up as soon as possible, and to restore his good name. However, in view of the manner in which he has been treated, he is not particularly anxious to resume full time employment with yourselves. In an effort to settle this matter with the minimum inconvenience to both parties, he would be prepared to resume employment at Kariba, resign immediately and work one month's notice. He would, of course, be entitled to back-pay from the date of his suspension. Such an arrangement would obviously cost your company a great deal less than the abovementioned damages claim."

The letter was replied to by the appellant's managing director, Mr Slater, on 14 January 1986.

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The relevant paragraphs read:

> "Turning to the question of the alternatives offered regarding your client, I am also anxious to clear the matter up. I would, therefore, advise that we are willing to accept your second alternative. However, I see little point in Mr Lawn working for one month and therefore would suggest that he submits his resignation immediately to leave on 28th February, 1986 and he will be paid up to that date from the date of suspension.
>
> I trust that this is in order and look forward to receiving Mr Lawn's resignation before 31 January, 1986."

On 17 January 1986 the respondent proceeded to Mr Slater's office with the object of receiving payment in terms of the settlement. In the course of the discussion which there ensued, it emerged that the respondent's understand-

ing of what it had been agreed he was to receive as "back-pay from the date of his suspension" differed substantially from that of Mr Slater; for the latter offered payment of only $5 000, calculated at $400 per month for the twelve-and-a-half month period. The respondent on the other hand considered that he was due $11 712,68 (less income tax to be deducted), calculated as follows:

Basic pay (twelve-and-a-half months at $400 per month)	$5 000,00
Leave pay (26 days at $18,18 per day)	$472,68
Accommodation and food benefits (thirteen months at $60 per month)	$780,00
Casino bonus (thirteen months at an average of $420 per month)	$5 460,00

On 20 January 1986 the respondent tendered one month's notice in writing of his intention to terminate his employment on 28 February 1986, stipulating that "the sum due to me by way of salary and back-pay is to be negotiated with you by my legal practitioners". The appellant's attitude then hardened. It claimed that the respondent had terminated the contract of service on 1 May 1985 by taking up employment with the Sun City Hotel in Bophuthatswana, and accordingly was only entitled to be paid his salary for the two-and-a-half months, that is, from 14 February 1985 to 30 April 1985, while under suspension.

Faced with that impasse the respondent instituted proceedings in the High Court on notice of motion for an order that the appellant comply with its obligations in terms of its letter dated 14 January 1986 and pay him the sum of $11 712,68. He succeeded in full before BLACKIE J

The learned judge expressed the view that although the parties may not have been *ad idem* as to what the respondent was to be paid for the period he was under suspension, the mistake arose from Mr Slater's carelessness in failing to qualify his use of the word "paid" in the letter of 14 January 1986 and in the manner in which he expressed acceptance of the offer made by the respondent's legal practitioners. He added that even if the appellant were not so bound, it was liable nonetheless to pay the respondent his basic pay and other benefits up to 28 February

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1986, because the assumption of other employment by the respondent on 1 May 1985 did not constitute termination of his contract of service.

I turn then to the first ground upon which the appellant was found to be ac-

countable. The starting point is to examine whether the offer of settlement contained in the letter of 6 January 1986 was so clear and unambiguous as to be susceptible of no reasonable misunderstanding by the offeree.

If regard is had, as it must be, to the paragraph which immediately preceded that containing the offer, it becomes apparent that what was intimated was a claim for damages flowing from the appellant's alleged wrongful action in achieving the termination of the respondent's employment with the Sun City Hotel in Bophuthatswana and from its breach of the contract of service, the total damages from both causes being assessed at $10 449,14. But it was said in the following paragraph that the proposed settlement would cost the appellant "a great deal less" than the aforementioned damages claim. How, one asks, can this be so when, once reduced to figures, the respondent's understanding of what the settlement would cost the appellant was $11 712,68? Whatever the true meaning of the offer, it cannot have been that the appellant would pay to the respondent as much as $11 712,68.

I am in agreement with Mr *Gillespie*, who appeared for the appellant, that the use of the expression "back-pay" was potentially confusing. According to the respondent the words must be taken to embrace the "casino bonus"; but that was not Mr Slater's understanding, for the payment he offered on 17 January 1986 was exclusive of such bonus.

In *Government GM Areas Sick Benefit Society* v *van Rensberg* 1921 TPD 176 at 178 MASON J, in dealing with the meaning to be ascribed to the word "pay" in the context of a master and servant situation, remarked that in legal phraseology the word is connected with the discharge of some obligation and is not applicable to the making of a gift, though in popular language it has a wider meaning. On the fact of it, a "bonus", being something given *ex gratia* to which the employee has no contractual right to obtain-something which is not part of his regular permanent remuneration-would appear to fall outside the meaning of "pay". See *Blackburn* v *Blackburn* 1920 CPD 13 at 17; *Crossley* v *Union Government* 1921 NPD 114 at 123.

For this reason alone I would have thought that there would be some doubt, at the very least, as to whether the casino bonus fell within the expression "back-pay". But the matter goes further than that. The term "casino bonus" was in reality a misnomer, for it was not a bonus emanating from the appellant as an incentive to the casino personnel to perform their duties to the highest standards of proficiency. Its source derived from the generosity of satisfied patrons of the casino and not from the appellant. All the appellant did was

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to distribute at the end of the month the total amount of the gratuities collected amongst the casino personnel.

In my view, therefore, the learned judge *a quo*, albeit correct in stating that it was open to question as to whether the parties were *ad idem* as to what was to be paid to the respondent, was wrong to attribute such lack of consensus to an unreasonable mistake on the part of the appellant. The cause of the misunderstanding stemmed essentially from the uncertainty attaching to the expression "back-pay" and from the intimation that the proposed settlement would cost the appellant less than the sum of $10 449,14.

Although the respondent's application was founded specifically on the alleged settlement, Mr *Gillespie* accepted that it would not be improper to adopt an indulgent approach and treat it (as did the court *a quo*) as one claiming alternative relief in the form of payment of basic salary and other benefits due for the period 14 February 1985 to 28 February 1986.

It was not disputed by the appellant that it was obliged to pay the respondent his basic salary and the value to him of certain other benefits in respect of the two-and-a-half months subsequent to the date of his suspension. The issue was whether liability in that regard extended beyond 30 April 1985, for the appellant's defence was that the respondent had terminated his employment with it by taking other employment in Bophuthatswana, thus bringing the period of suspension to an end.

The learned judge rejected that contention. He reasoned that there was no express term in the respondent's contract of service prohibiting him from taking other employment when under suspension; nor had the appellant alleged any facts which gave rise to an implied term that he would not do so. By suspending him without pay the appellant had created a difficult situation for the respondent. He could not be expected to remain in the country the whole time that the appellant's complaint was under investigation without being permitted to support himself. Furthermore, the appellant's interests had not been prejudiced by the respondent's action in obtaining employment.

The effect of informing an employee that he is suspended was considered by FEETMAN J in *Gladstone v Thornton's Garage supra* at 119. This is what was said:

> "When an employee is 'suspended' it appears to me that apart from any express instructions he must hold himself available to perform his duties

> if called upon; though for the time being he is debarred from doing his work. It appears to me that that is distinct from dismissal-the use of the term 'suspended' is an indication that, while he is not to perform his duties, he must still remain bound to his employer under his contract of service."

See also *van der Merwe* v *Colonial Government* (1904) 14 CTR 732 at 737; *Boston Deep Sea Fishing and Ice Company* v *Ansell* (1888) 39 ChD 339 at 352.

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Plainly the obligation of an employee who is placed under suspension to hold himself available to performing his duties if called upon to do so, is one which arises by operation of law. It is of no consequence therefore that no provision in that regard is contained in the contract of service; and it is not necessary for the employer at the time of suspension to so inform the employee.

But does the fact that the employee is suspended without pay in fundamental breach of both the common law and s 5 of the Employment (Conditions of Service) Regulations, rid him of the obligation to hold himself at the disposal of his employer? I think not. Such a breach by the employer will not automatically end the contract. It will serve only to vest the employee with an election either to stand by the contract and enforce his rights to the payment of his salary, or to accept the repudiation, terminate the contract and sue for damages. See *Myers* v *Abramson* 1952 (3) SA 121 (C) at 123F-H; *Stewart Wrightson (Pty) Ltd* v *Thorpe* 1977 (2) SA 943 (AD) at 952A. Such an option was open to the respondent.

Mr *Gillespie* submitted that the burden of establishing that the respondent held himself available and was willing and able to perform his duties at all material times rested upon him. In other words, it was for him to prove on a preponderance of probability that he had not terminated his contract of service with the appellant. I agree with that submission, which is afforded direct support from the remarks of FEETMAN J in *Gladstone* v *Thornton's Garage, supra*, at 118 (see also the plaintiff's pleading in *Norton* v *Mosenthal & Company supra* at 116).

To my mind the significant features which point to the respondent having elected to terminate are these:

(1) It is apparent from the earliest letter of 14 February 1985, written to the appellant, that the respondent must have received advice that any action

taken which had the effect of depriving him of his pay required the prior sanction of the Minister and would be unlawful without it. And it was specifically intimated in the letter that the respondent's attitude was that in the event of the appellant ceasing to employ him, in the sense of refusing to pay his salary, he would be compelled to leave the country in pursuit of other suitable employment, and sue for damages.

(2) Subsequent to his suspension without pay, which to his knowledge was unlawful, the respondent left Zimbabwe, and on 1 May 1985 commenced employment in Bophuthatswana. He remained out of the country until some time in December 1985, only to return when he learned that the police did not intend to pursue the complaint laid against him.

(3) The claim addressed to the appellant on 6 January 1986 was one of damages and not for the payment of arrear salary and other benefits. It was solely in an effort to settle that claim that it was proposed on the respondent's behalf that he resume employment, resign immediately on one month's notice and receive "back-pay from the date of his suspension". There is no suggestion in the letter that this was the true basis of the

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appellant's liability. It was put forward purely as a formula for a compromise.

As against these features stands the resignation of the respondent, notice of which was submitted despite an appreciation that the appellant's understanding of the expression "back-pay" differed materially from his. Looked at in isolation, that act is certainly inconsistent with a prior election to terminate but I do not consider that it can be divorced from the context of the settlement. It seems to me that, having given an undertaking to resign, the respondent may well have felt it incumbent upon him to abide by that part of the arrangement.

It is perhaps necessary to add that the fact that the nature of the respondent's employment in Bophuthatswana did not work against the interest of the appellant is irrelevant to the enquiry whether he held himself at the disposal of the appellant.

Taking full account of the whole picture emerging from the correspondence and affidavits placed before the court below, I am of the firm opinion that, putting it at its most favourable for the respondent, he failed to discharge the *onus* of proving that subsequent to 1 May 1985 he continued to hold himself

GUBBAY JA

available to perform his duties if called upon to do so. But I am inclined to go further and hold positively that the respondent was shown on the probabilities to have elected to terminate his contract of service in reliance upon the appellant's breach in suspending him without pay. His remedy therefore lay in delict and not in contract, but I express no view as to whether or not he might succeed in a claim for damages, since altogether different considerations will apply.

Accordingly I would allow the appeal with costs and alter the order of the court *a quo* to read:

> "The application is dismissed with costs."

McNally JA: I agree.

Korsah JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

S v MPOFU 1988 (1) ZLR 154 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Manyarara JA & Korsah JA

Criminal appeal

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7 March 1988

Flynote

Evidence - doctrine of res ipsa loquitur - application to criminal cases in which negligence is an element.

Headnote

While the doctrine of res ipsa loquitur may be applied in criminal cases, it is important to define the limits of its application. Two conditions must exist for it to become operable: (a) the object which caused the damage must be shown to be under the management of the accused or his servants; and (b) the accident in question is such as in the ordinary course of events does not happen if those who have the management of the object use proper care. In such a case, the mere fact of the accident is *prima facie* evidence of negligence, which places on the accused a duty to give an explanation as to how the accident could have happened without negligence on his part. Strictly speaking, there is no application of the doctrine of *res ipsa loquitur*, as such; it is nothing more than the application of the rule of evidence requiring sufficiency of proof, that is to say, the prosecution must prove all the elements in the offence necessary to establish guilt. If after that the accused fails to give a reasonable explanation of how the accident could have occurred without fault on his part, then he may be found guilty as charged.

Cases cited:

R v *Ndhlovu* 1945 AD 369

Cole v *De Trafford* (No 2) [1918] 2 KB 523

R v *Koen* 1937 AD 211

S v *Tovakepi* 1972 (2) RLR 372; 1973 (1) SA 694 (RAD)

S v *Mudoti* 1986 (4) SA 278 (ZS)

KORSAH JA

M J Gillespie for the appellant

Y Omerjee for the respondent

Judgment

Korsah JA: On Monday 7 March we quashed the conviction of the appellant for culpable homicide and set aside the sentence to pay a fine of $400 or, in default of payment, serve a term of two months' imprisonment with labour, together with the consequential order that his driver's licence be endorsed with the particulars of the offence.

After giving the matter careful consideration Mr *Omerjee* conceded that the conviction could not be supported because of the perfunctory nature of the evidence adduced and the want of

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certainty as to how the accident occurred.

For the purpose of this decision the facts may be restated very shortly. At about seven on the morning of 6 April 1984 the appellant was driving his vehicle along Machingura Street, Mbare, when a collision occurred between the vehicle and a seven year old schoolgirl, Tsitsi Chiguvare, who was attempting to cross the road. Tsitsi died instantly from the impact, and the skid marks of the appellant's vehicle from the point of impact to where the vehicle came to rest measured 21 metres.

The only witness called by the State was the police detail who attended the scene after the accident. He was not an eye-witness to the accident. He was about one hundred metres away from the scene when he heard the screech of brakes and decided to stop the appellant, who, in fear of being assaulted by an angry mob if he got out of his car, was on his way to report the accident at the police station. He testified that there was no mark on the appellant's vehicle to indicate which part of it had come into collision with the deceased. Of this witness, the trial court rightly remarked that his evidence did not help the court at all. He could not testify to the manner in which the appellant was driving at the time of the accident.

To my mind, as there was no evidence before the court to establish any negligence on the part of the appellant at the conclusion of the State case, that should have been an end of the matter, for there was also no evidence to support a lesser charge for which the appellant could have been convicted instead of the offence charged. Culpable homicide is a common law crime, and as stated by DAVIS AJA in R v *Ndhlovu* 1945 AD 369 at 386:

> "In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The *onus* is on the Crown to prove all averments necessary to establish his guilt."

KORSAH JA

Apart from the evidence led by the State establishing that an accident had occurred, which unfortunately had resulted in the death of a child, nothing else was proved.

The trial court appreciated this much and after dismissing the evidence proffered by the State in support of the charge said:

> "This case will have to be decided on the evidence of the accused himself."

It seems to me that this was an invitation to the appellant to convict himself out of his own mouth.

The appellant testified that at the time of the accident there were children walking by the road side. He was travelling at about twenty miles an hour. No child crossed the path of his vehicle. He heard an impact to the rear of the vehicle and thought a ball had been thrown at this vehicle. An examination of the vehicle disclosed that there was no dent either in front or anywhere else on the vehicle to indicate with which part of the vehicle the deceased had come into contact. This last piece of evidence received support from the testimony of the sole prosecution witness.

Turning first to the approach by the trial court to the evidence led by the State, it would appear

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that the court was of the view that it was justified to invoke the doctrine of *res ipsa loquitur*, merely because a collision had occurred between a vehicle and a person.

I will not take issue with the application of the doctrine in a criminal matter, but it is important to define the limits of its application. What the maxim means is that: "an accident may **by its nature** be more consistent with its being caused by negligence for which the defendant is responsible than by other causes, and that in such a case the mere fact of the accident is prima facie evidence of such negligence": *per* PICKFORD LJ in *Cole* v *De Trafford* (No 2) [1981] 2 KB 523 at 528.

For the doctrine to become operable two conditions, at least, must exist: (a) the object which caused the damage must be shown to be under the management of the defendant or his servants, and (b) that the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. Clearly, bags of flour do not, by themselves, and in the ordinary course of things, have the mobility to jump

KORSAH JA

out of windows. So that, if a bag of flour fell from a top floor window on to the head of a pedestrian, the irresistible inference is that the bag of flour would not have behaved in that manner without negligence on the part of the owner or his servants. On the other hand, if the nature of the accident itself is not any more inconsistent with the defendant's personal negligence, or where from the nature of the accident the negligence of either party could have been the cause, the doctrine has no application.

A collision between two cars or a collision between a vehicle and a pedestrian could occur without the nature of the accident suggesting fault to lie with one or the other party.

In criminal law, except for certain statutory offences, nothing relieves the State of the burden of proving the negligence upon which the charge is based. Where a *prima facie* case of negligence is made out at the conclusion of the State's case, there devolves a duty on the accused to give an explanation as to how the accident could have happened without negligence on his part: *R* v *Koen* 1937 AD 211. Strictly speaking, there is no application of the doctrine of *res ipsa loquitur*, as such. It is nothing more than the application of the rule of evidence requiring sufficiency of proof; that is to say, the prosecution must prove all the elements in the offence necessary to establish guilt. If after that, the accused fails to give a reasonable explanation of how the accident could have occurred without fault on his part, then he may be found guilty as charged.

To my mind, evidence that a vehicle left the road for no apparent reason and knocked down and killed a pedestrian on a foot path, or swerved onto its incorrect side of the road and collided with an approaching vehicle, for no apparent reason, is sufficient to establish a *prima facie* case of negligence which demands rebuttal, just as in any criminal trial the prosecution must establish a prima facie case to warrant the accused being called upon to make his defence to the charge. Howsoever one looks at it, the prosecution is not relieved of the *onus* of proof and it matters not the name given to the process by which such proof is established.

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In the instant appeal all that the State managed to prove was that while the appellant was proceeding on his proper side of the road a collision occurred between his vehicle and the deceased. There was no evidence led regarding the nature of the accident which suggested that it could not have happened without negligence on the part of the appellant. Even in a civil case, where the proof demanded is lower than that required in criminal cases, these facts

KORSAH JA

would have been insufficient for the invocation of the doctrine of *res ipsa loquitur*. And in a criminal case the appellant should have been acquitted at the close of the State case.

I turn now to the evidence adduced by the appellant. His evidence was that he was travelling at a reasonable speed of twenty miles an hour. He was keeping a proper look out and no child crossed the path of his vehicle. He heard something hit the side of his vehicle towards the rear. He thought it was a ball and stopped to question the child who had thrown it. He saw the body of a child lying on the road behind him and heard people shouting repeatedly: "Beat him up". He therefore decided to report the accident at the police station. On his way to report he was stopped by Elliot Muhoya, who is a member of the Municipal Police, and taken back to the scene. There was no dent to the front or on any part of his vehicle.

The trial court found that the road on which the accident occurred was a busy road thronged by adults and children at the relevant time; that the appellant failed to appreciate that the behaviour of young children was unpredictable and thus did not exercise the care required of a driver in the circumstances and that the hand brake of the vehicle was not sufficiently effective. He rejected the appellant's testimony that he kept a proper look out and that he was travelling at a moderate speed.

Even in civil cases, where the doctrine shifts the *onus* of proof onto the defendant, it is adequately met by showing that the defendant was not in fact negligent and he cannot be held liable merely because he cannot prove exactly how the accident happened.

Mr *Gillespie* rightly pointed out in his Heads of Argument that in dealing with the evidence of the appellant, the trial court accepted only that portion of his evidence which it thought to be incriminatory and rejected the exculpatory thrust of the appellant's defence. He submitted that although this approach was not wrong in principle - see *S* v *Tovakepi* 1972 (2) RLR 372; 1973 (1) SA 694 (RAD) - in the circumstances of this case it was not justified because an admission of guilt could not be inferred from the incriminatory portion, and there was no reason to hold that the exculpatory portion - that the child hit herself against the side of the vehicle - was false, particularly in the light of the fact that there was no visible damage to the vehicle.

The law is clear that merely to disbelieve an explanation, whether it be for the purpose of verdict or for the purpose of sentence, is not sufficient where the

KORSAH JA

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matter is one of inference; the court must be able to say that the explanation is one which cannot reasonably be true. In the instant appeal, the facts are as consistent with the child running into the side of the vehicle as they are with the vehicle hitting the child. One cannot say that the facts speak for themselves, and that an accident in the particular circumstances of this case does not ordinarily occur without some negligence on the part of the driver. There was, as was submitted by Mr *Gillespie*, a reasonably possible explanation of the affair which excludes negligence: *S* v *Mudoti* 1986 (4) SA 278 (ZS).

The State failed to prove its case beyond a reasonable doubt.

Dumbutshena CJ: I agree.

Manyarara JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

S v NYIRENDA 1988 (1) ZLR 160 (HC)

Court **High Court, Harare**

Greenland J

Criminal review

9 March 1988

Flynote

Criminal procedure (sentence) - fine - time to pay - where Court decides to impose a fine, it should always investigate accused's ability to pay - imprisonment in default of payment - quantum - relationship of period to accused's means or income.

Headnote

It is trite that where a court decides to impose a fine, the fine should represent a real option to the accused. Every effort should be made to afford the accused time to pay, and the court should fully investigate the accused's ability to pay.

As to the quantum of any period of imprisonment to be served in default of payment of the fine, just as the fine should be related to the accused's means, so the alternative period of imprisonment should be related to the fine. The alternative period of imprisonment should generally be roughly the period the accused would take to earn the fine.

Cases cited:

S v Mutendwa HH-35-88 (unreported)

S v Gwarada 1981 ZLR 17 (AD); 1981 (2) SA 531 (ZAD)

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S v Nyati GB-50-72 (unreported)

S v Jackson HH-268-82 (unreported)

Judgment

Greenland J : In this case the accused was convicted of fraud involving $200 and sentenced to a fine of $400 or in default 4 months' imprisonment with labour. Also a compensation order in terms of s 341 of the Code was made.

GREENLAND J

No problem would have been occasioned had the trial magistrate given the accused time to pay the fine. The record shows that this aspect was not investigated as the accused made no application.

It is trite that a fine should represent a real option to an accused person. See *S v Mutendwa* HH-35-88 (unreported); *S v Gwarada* 1981 ZLR 17 (AD); 1981 (2) SA 531 (ZAD). It follows, therefore, that every effort should be made to afford the accused time to pay. What was said by BEADLE CJ, in *S v Nyati* G-B-50-72 is relevant:

> "The magistrate appears to have paid no regard to the principle laid down in such cases as *R v Frans* 1924 TPD 419, R v *Nhlapo* 1954 (4) SA 56 (T), R v *Chirombo* 1962 R & N 54, *R* v *Taurayi* 1963 (3) SA 109 (SR) and *R* v *Keevy* 1965 (4) SA 202 (SR).
>
> The principle outlined in these cases is well expressed in the headnote to *Nhlapo's* case (supra), which says, *inter alia:*
>
> ' ...where the Court decided to impose a fine, the intention being to keep a person out of prison, the Court should not stultify itself by imposing a fine which it has no reason to suppose the accused can pay.'"

It follows that, even in the absence of an application by the accused, the sentencing court should investigate this aspect where an accused is not represented. In the present case this was not done and the accused, having served almost half the sentence, has now requested time to pay. To attempt now to investigate the question of time to pay presents self evident difficulties. This is yet a further reason why the exercise should be performed by the sentencing court.

Fortunately there is another basis on which the matter can be satisfactorily dealt with. The starting point is:

> "The case of *R* v *Frans (supra)* also emphasises that where it is likely that the accused will not be able to pay the fine the period of imprisonment must be a realistic one in relation to the gravity of the offence."
>
> (Per BEADLE CJ, *supra.*)

The facts of the present case are that the accused cashed a cheque for $200 which was due to a fellow employee. He is a family man and a contrite first offender. Two months' imprisonment with labour would certainly meet the justice of the case.

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KORSAH JA

Of assistance also is the approach of McNALLY J (as he then was) in *S* v *Jackson* HH-268-82:

> "In view of the fact that there has been no authoritative statement, as far as I am aware, on the question of how to assess the period of imprisonment to be served in default of payment of a fine, and in view of the wide variation in practice, even at the higher level, one hesitates to make any general statement about the problem, particularly without the assistance of argument on the subject. But it does seem to me that there is merit in the opposite approach to that adopted by the Magistrate. If an accused is to be given the option of a fine, that fine must, it is axiomatic, bear a distinct relationship to his means. And if the fine must be related to his means then I think the alternative period of imprisonment should equally be related to the fine, otherwise if he cannot pay the fine he will suffer a disproportionate punishment. Accordingly, if the fine is assessed as one month's earnings, then the alternative imprisonment should generally be roughly the period he takes to earn the fine."

In terms of this approach the accused should have sentenced to an alternative of approximately two months' imprisonment with labour as he was earning $225 per month.

In the circumstances the sentence is set aside, except for the compensation order, and substituted as follows:

> "fined $400 or in default of payment two months imprisonment with labour."

As the accused has already served almost two months he will be released shortly.

Sandura JP agrees.

S v MAGOGE 1988 (1) ZLR 163 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Korsah JA

Criminal appeal

18 February & 11 March 1988

Flynote

Criminal procedure - questioning of witness by magistrate - undesirability of prolonged questioning.

Headnote

In a case of assault, there was only one State witness, apart from the complainant. His examination in chief by the prosecutor covered four pages of the record, cross-examination by the accused less than a page and re-examination by the prosecutor about one-third of a page. The trial magistrate then took over and asked 136 questions, spanning 14 pages of the record.

Held, that it was most irregular to treat the witness as hostile without declaring him as such,

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simply because his evidence did not go all the way in supporting the State case. In any event, it is the prosecutor, not the adjudicator, who should ask the questions. For an adjudicator to step in because the testimony of a witness does not wholly support the State case amounts to exhibiting partiality towards the State. It is clearly undesirable that a judge should appear to be throwing his weight on the side of the prosecution.

Cases cited:

R v *Roopsingh* 1956 (4) SA 509 (A)

Yuill v *Yuill* [1945] P 15

S v *Muchazivepi* 1973 (2) RLR 163 (AD)

M T N Chingore for the appellant

Mrs B Mtetwa for the respondent

KORSAH JA

Judgment

Korsah JA: At the hearing of this appeal Mr *Chingore*, for the appellant, applied to amend his grounds of appeal. Mrs *Mtetwa*, for the State, resisted the application on the ground that the new grounds were filed twenty-one months after the filing of the original grounds and did not comply with the regulation twenty-eight days. We turned down the application because of non-compliance with the rules and the fact that there was no serious defect in the original grounds.

The appellant was convicted on a charge of assault with intent to cause grievous bodily harm and sentenced to pay a fine of $500 or, in default of payment, serve a term of five months' imprisonment with labour. He originally appealed against both conviction and sentence, but upon reflection, Mr *Chingore* very wisely withdrew the appeal against sentence.

The assault on the complainant is not denied. Putting the appellant's case at its best, this is what he and his witnesses say occurred. On the evening of 7 June 1985, the appellant parked his car outside Zairimwe Restaurant. He left his wife in the car and entered the restaurant to go and speak to one Bernard Charumbira. While engaged in conversation with Bernard the complainant arrived and grabbed him by the throat and attempted to choke him with his neck-tie. The complainant told him that in five or ten minutes he (the appellant) would be dead.

The complainant, who was not armed, then held the appellant by the jacket and dragged him out of the restaurant. Once outside the appellant took out his car keys with the intention of driving away, and the complainant attempted unsuccessfully to wrest the car keys from him. The complainant then felled the appellant with a punch to the cheek. A gentleman, by name Kumbula, appeared at the scene and prevented the complainant from further assaulting the appellant.

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The appellant opened the door of his car, but said he was unable to drive away because the complainant was sitting on the bonnet and he feared he might injure the complainant if he drove off. To rid himself of the complainant, the appellant said he pulled a lever in his car which unlatched the boot-inspection of the car by the trial court proved that no such lever existed. He then walked to the boot and extracted from it a steel tyre lever. Thus armed, he approached the complainant and commenced to hit him about the head with the tyre lever. He continued to assault the unarmed complainant with ever increasing force in this manner until his wife, in fear of what might befall the complainant, got out of the car to restrain him. He left the complainant

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prostrate on the ground and drove to the police station to report that he, the appellant, was the victim of an assault by the unconscious complainant.

The complainant attempted to shield his head with his arms during this ferocious attack by the appellant, but nonetheless sustained an injury above the right eye, which required seven stitches, and another injury at the back of the head which needed nine stitches. The medical report said moderate force had been used to inflict these injuries and that although they were serious no permanent disability was expected.

The complainant said he had gone to ask the appellant for some money due to him from an overpayment of rent, and that he offered no provocation to the appellant. He said the attack was sudden and took him by surprise and that the appellant was not acting in self defence as alleged by the appellant.

Even if there had been a scuffle earlier between the complainant and the appellant, as Mrs *Mtetwa* submitted, the appellant had emerged from the scuffle unscathed and, from his own testimony, the complainant was sitting on the bonnet of his car and the appellant was in no danger from him. There was at the time of the attack by the appellant no threat of any danger to the person of the appellant from the complainant which had to be averted by a recourse to the use of force. The appellant was not followed to the boot of his car by the complainant. He had time to open the boot with a key and pick a weapon. He then approached the complainant and laid about him with the steel tyre lever.

Even if it could be said that the presence of the complainant in the vicinity of the appellant's car constituted a threat of danger to the person of the appellant, the complainant was unarmed and Kumbula, who was still present, had successfully restrained the complainant from attacking the appellant, so the use of a tyre lever to attack a person who had already been restrained was unreasonable in the circumstances.

For the appellant to avail himself of the defence of self defence it was for him to establish that he could not have averted the danger to his person without the use of force, and that such force as he used to avert the danger was reasonable in the circumstances. But from his own testimony, the threat of danger to his person was not imminent at the time he attacked the complainant, and the weapon he used and the persistence with which he wielded that weapon was unreasonable in the circumstances.

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KORSAH JA

The intention of the appellant can be gathered from the weapon - a steel tyre lever - with which he assaulted the complainant, the area of the body - the head - to which the blows were directed, the number of blows delivered - he had to be restrained by his wife, and the force used to deliver these blows - the complainant received serious injuries to the head.

To strike an unarmed person, who is not retaliating, several times with ever increasing force on the head with a steel lever is, to my mind, demonstrative of an intention to inflict on him serious bodily injury. If the complainant's testimony ever needed corroboration, it received such support from the testimonies of the appellant and his witnesses.

Mr *Chingore* attempted to raise the issue of provocation before us, but the sole defence put forward by the appellant in the court below was that of self defence. The appellant never said he was provoked. He said he acted through fear, and the defence of provocation cannot now be entertained except as the trial court used it in assessing the sentence to be imposed. In any case, as Mrs *Mtetwa* rightly submitted, if the appellant did receive any provocation from the initial altercation, what he did in retaliation was disproportionate to the provocation received.

Mr *Chingore's* criticism that the learned trial magistrate descended into the arena is justified. Mr Kumbula was the only other State witness called, apart from the complainant. His examination-in-chief by the prosecutor covers four pages of the record, cross-examination by the appellant covers less than a page and re-examination by the prosecutor is about one-third of a page. The trial magistrate then took over and asked one hundred and thirty-six questions, spanning fourteen pages of the record without interruption from any quarter.

True, Mr Kumbula's testimony did not go all the way to support the State case, but, without putting to him any former statement made by him which is at variance with his testimony, it is most irregular to treat him as a hostile witness without declaring him as such. And even where a witness is declared to be hostile, it is the prosecutor, and not the adjudicator, who should ask the questions. For the adjudicator to step in because the testimony of a witness does not wholly support the State case amounts to exhibiting partiality towards the State. It is clearly undesirable that a judge should appear to be throwing his weight on the side of the prosecution.

Kumbula obviously is not gifted with a keen sense of observation. He came upon the appellant and the complainant when they were shoving each other

KORSAH JA

about. It was dark. The scene was a mobile one. It is understandable if after some lapse of time his recollection of the scene is blurred.

There was no justification for treating him as a hostile witness or, worse still, for the trial magistrate to descend into the arena.

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In *R* v *Roopsingh* 1956 (4) SA 509 (AD) at 514, Hall AJA quotes the following passage from the English case of *Yuill v Yuill* [1945] P 15 at 20, which every adjudicator must bear in mind when trying a cause:

> "A Judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a Judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the Judge from what it is when he is being questioned by counsel, particularly when the Judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue. That it is open to an Appellate Court to find that the view of the trial Judge as to the demeanour of a witness was ill-founded has indeed been recognised by the House of Lords itself."

See also *S* v *Muchazivepi* 1973 (2) RLR 163 (AD).

In the instant case, this undesirable feature of the matter is of no consequence because both the appellant's outline of defence and his testimony support the conclusion reached by the trial court that he assaulted the complainant with the intention of doing him grievous bodily harm. There was thus no miscarriage of justice. The appeal is accordingly dismissed.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

George Seirlis & Associates, appellant's legal practitioners

LAW SOCIETY OF ZIMBABWE v LAKE 1988 (1) ZLR 168 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil appeal

19 February & 11 March 1988

Flynote

Legal practitioner - unprofessional conduct under s 23(1)(n) of the Legal Practitioners Act 1981 - legal practitioner employed by unregistered person - whether entitled to appear in court or undertake conveyancing on behalf of his employer.

Headnote

The respondent was a registered legal practitioner who, until 30 September 1983, was a partner in a firm of legal practitioners in Harare. In November 1983 he commenced full-time employment with a commercial company as its group legal adviser. Shortly afterwards, he

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enquired of the Law Society as to its opinion of the propriety of his appearing in court or undertaking conveyancing work on behalf of his employer. The Law Society replied that if the respondent were to undertake either of these tasks he would be guilty of unprofessional conduct because either (a) s 23(1)(n) of the Legal Practioners Act 1981 effectively declared such activities unprofessional in the respondent's circumstances or (b) the Council of the Society took the view, as it was entitled to under s 23(2)(b) of the Act, that those activities would constitute unprofessional conduct.

The respondent was dissatisfied with this opinion and sought an order declaring that he was authorised to perform the activities in question. EBRAHIM J refused the application insofar as it related to the respondent appearing in court, but granted an order allowing the respondent to act as a conveyancer on behalf of his employer. The Law Society appealed and the respondent cross-appealed against the ruling of Ebrahim J

Held, that it is no longer appropriate to refer to "practice as a

conveyancer", for with the enactment of the Legal Practitioners Act 1981 and the repeal

of the Attorneys, Notaries and Conveyancers Act [*Chapter 218*], conveyancers ceased to exist. Under s 8(2)(b) of the Act, "conveyancing" is but one of the activities constituting the practice of the profession of law. There are numerous other statutory provisions reserving certain activities to persons who practise the profession of law.

Held, further, that if the effect of being a party to a contract or arrangement with an unregistered person is to place a registered legal practitioner under such control as may interfere with his independence while practising the profession of law, then the entering into or continuance thereof will constitute unprofessional conduct under s 23(1)(n) of the Act.

Held, further, that the integrity of the individual registered legal practitioner is not an apposite criterion in deciding whether s 23(1)(n) applies. The issue is the degree of control; if that is such that it might (as opposed to must) interfere with his professional independence, it is forbidden. The test is objective. In this case, the degree of control exercised by the respondent's employer was absolute; there existed a normal and straightforward master and servant relationship, which by its very nature constitutes an insidious temptaion to the legal practitioner who is a party to it to act in a manner inconsistent with his professional independence.

Held, further, that in enacting s 8(2) of the Act the legislature has not seen fit to apply any distinction between the three activities comprising reserved work. No reliance could therefore be placed on authorities which indicated that the position of a conveyancer differed materially from that of an attorney or a notary. Even in conveyancing it was important for professional independence to be maintained.

Cases cited:

Lake v *Law Society, Zimbabwe* 1987 (2) SA 459 (ZH)

Ex parte Masterson 1974 (2) RLR 33; 1974 (4) SA 321 (RAD)

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de Villiers & Anor v *McIntyre* NO 1921 AD 425

Pienaar & Versfeld v *Incorporated Law Society* 1902 TS 11

Incorporated Law Society v *Versfeld* 1909 TS 309

Rosenberg v *Dry's Executors & Ors* 1911 AD 679

Transvaal Consolidated Land & Exploration Co Ltd v *Registrar of*

Companies 1910 TPD 1247.

D M Campbell for the appellant

M T O'Meara for the respondent

GUBBAY JA

Judgment

Gubbay JA: The appellant, the Law Society of Zimbabwe, which I shall call "the Law Society", is a corporate body established in terms of s 23 of the Legal Practitioners Act 1981 (hereinafter referred to as "the Act"). It is capable of suing and being sued in its own name, and some of the powers it exercises, as contained in s 36 of the Act, are:

> "(b) to represent the views of the legal profession and to maintain its integrity and status;
>
> (c) to define and enforce correct and uniform practice and discipline among legal practitioners;
>
> (f) to consider and deal with all matters affecting the professional interests of legal practitioners."

The management and control of the Law Society is vested in a Council, whose body of members exercises the powers aforementioned.

The respondent is a registered legal practitioner who, until 30 September 1983, was a partner in a firm of legal practitioners and was actively engaged in legal practice. On 1 November 1983 he commenced full-time employment with a commercial company as its group legal adviser. Shortly thereafter he made enquiry of the Law Society as to its opinion on the propriety of (i) his appearing in court in any matter in which his employer is a party; and (ii), of his undertaking, on behalf of his employer, the conveyancing of immoveable property of which his employer is either the owner or the purchaser.

The Law Society, through its Council, replied to the respondent that were he to act as envisaged he would be guilty of unprofessional conduct because either-

(a) s 23(1)(n) of the Act effectively declared the performance of such activities in the respondent's circumstances unprofessional conduct; or, if not, then

(b) the Council took the view, as it was entitled to under s 23(2)(b) of the Act, that performance of such acts in the respondent's circumstances would constitute

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unprofessional conduct.

Dissatisfied with the opinion of the Council, the respondent instituted proceedings in the High Court on notice of motion for an order declaring that

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he be "authorised" to perform the activities in question. The application came before Ebrahim J He refused it insofar as it related to the respondent appearing in court, but granted an order that the respondent "be allowed to practise as a conveyancer on behalf of his company". No order as to costs was made. The judgment is reported as *Lake v Law Society, Zimbabwe* 1987 (2) SA 459 (ZH). Save for costs, it is now the subject of an appeal against the order granted and a cross-appeal against the order refused.

Both the appeal and the cross-appeal turn upon a construction of s 8 as read with s 23(1)(n) of the Act, and it is as well at the outset to quote these provisions in their entirety. Section 8 reads:

> "8. (1) Subject to the provisions of this Act, a registered legal practitioner may practise the profession of law.
>
> (2) Without derogation from the generality of subsection (1), but subject to the provisions of this Act, a registered legal practitioner-
>
> (a) shall have the right of audience in any court in which persons are entitled by law to legal representation;
>
> (b) may prepare any document for registration in a deeds registry or for attestation or execution by a registrar of deeds;
>
> (c) may execute, attest and authenticate any thing which is required to be executed, attested or authenticated by a notary public, and any thing so executed, attested or authenticated shall, for all purposes, have the same force and effect as if it had been executed, attested or authenticated, as the case may be, by a notary public."

Section 23(1) enumerates acts which constitute unprofessional, dishonourable or unworthy conduct on the part of the registered legal practitioner. Paragraph (n) thereof specifies as such conduct that which involves the -

> "entering into or continuing to be a party to any contract or arrangement with an unregistered person, the effect of which is to place the legal practitioner under such control on the part of the unregistered person as may interfere with his professional independence".

Mr *Campbell*, who appeared for the Law Society, advanced two preliminary submissions with which I agree. The first was that the expressions "conveyancer" and "practise as a conveyancer", used both by the respondent in his founding affidavit and in the judgment, were not appropriate in the context of the Act; for since the repeal of the Attorneys, Notaries and Conveyancers

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Act [*Chapter 218*] on 22 May 1981, "conveyancers" ceased to exist. One no longer speaks of attorneys, notaries or conveyancers practising as such. The legal practitioner is none of these. He is a creature *sui generis*. The aim of the Act was to abolish the "old" legal profession, establish a "new" profession, describe the broad ambit of its functions, prohibit unregistered persons from practising the profession, and to provide controls, restrictions and safeguards upon the activities of those registered legal practitioners who choose to practise and exercise the privileges granted by the Act.

Counsel's second submission was that the references to the performance of the activities, for which authority as sought, being limited by the respondent to his employer's or his company's behalf, tended to obscure the real issue and to suggest the application of a subjective approach to the matter rather than an objective one-it being irrelevant to take account of the situation of the particular legal practitioner or that of the unregistered person who employs him.

The proper question therefore before the court *a quo* was simply whether the performance by the respondent of the activities described in s 8(2)(a) and (b) of the Act, within the course and scope of his full-time employment by a person who is not a registered legal practitioner, would constitute unprofessional conduct on his part.

Subsection (1) of s 8 gives to a registered legal practitioner the right to "practise the profession of law" and subs (2) gives him the right to perform what may be aptly termed the "reserved work" specified in paras (a), (b) and (c) thereof, without derogation from the generality of subs 9(1). Stated otherwise, subs (1) gives a general right, the generality of which is evidenced by the use of the phrase "practise the profession of law"; and subs (2) is merely an elaboration of such general right, that is, an elaboration of what the Legislature comprehends as activities constituting the practice of the profession of law. Of course, it is not necessary for a legal practitioner to perform reserved work before he can be said to practise the profession of law. If he holds himself out to the public as a legal practitioner performing other work not reserved to, but commonly performed by, a practising legal practitioner, such as the drawing or preparation of wills, contracts of sale, leases or the memorandum or articles of association of a company, he is practising the profession of law. See Ex p *Masterson* 1974 (2) RLR 23; 1974 (4) SA 321 (RAD) at 324B-C. What was intended by the Legislature is that the performance of reserved work is to fall within the purview of the expression " practise the profession of law".

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That this is so is borne out by the existence on the Statute Book of other Acts which themselves govern the activities specified in paras (a), (b) and (c) of subs (2) of s 8 of the Act, making the particularisation therein of such activities unnecessary except for the purpose of elaborating the general words in subs (1) of s 8. Thus, for example, the registered legal practitioner is given the right of audience in the Supreme Court by s 28 of the Supreme Court of Zimbabwe Act 1981, in the High Court by s 51 of the High Court of Zimbabwe Act 1981, in the Magistrates' Court by s 73A of the Magistrates' Court Act [*Chapter 18*], in the Administrative Court by s 12(1)(b) of the Administrative Court Act 1979, in the Special Court for Income Tax Appeals by s 54(9) of the Income Tax Act [*Chapter 181*], and in the Fiscal Appeal Court by s 5 of the Fiscal Appeal Court Act [*Chapter 180*]. And ss 13(1), 19, 42(1)(b) and 62(5) of the Deeds

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Registries Act [*Chapter 139*] govern the activities specified in para (b) of s 8(2) of the Legal Practitioners Act, with ss 56(1)(c) and 56(2) of the same Act governing those specified in para (c).

Furthermore, unless reserved work is understood to be part of the practice of the profession of law a legal practitioner who has been suspended from practice under s 11(a) of the Act would not be prohibited from performing such work. Such an absurdity could not have been in the contemplation of the law-maker.

It follows that if the respondent were to perform any of the reserved work specified in paras (a), (b) and (c) of s 8(2) of the Act, he would be practising the profession of law, even though he does not otherwise hold himself out to the public as so doing.

Subsections (1) and (2) of s 8 expressly apply the provisions of the Act to the performance of the activities described therein. The provisions of the Act subject to which registered legal practitioners may "practise the profession of law" and perform reserved work, include the restrictions imposed by s 11(3) (prohibition against the sharing of fees), s 12 (prohibition against practice without a compensation fund certificate), and s 23 (acts which constitute the commission of unprofessional, dishonourable or unworthy conduct). These sections, and there are others, apply either expressly or by necessary implication from their context only to legal practitioners who practise the profession of law.

Section 23(1) of the Act is of particular relevance as a limiting provision. By castigating as unprofessional, dishonourable or unworthy conduct such acts

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as touting, advertising, withholding the payment of trust money without lawful cause, champerty, and the levying of charges or the acceptance of fees less than the minimum charge or fee prescribed, the Legislature was clearly concerned with the registered legal practitioner who is in practice, exercising the functions and discharging the duties of his profession. It is the activities of the registered legal practitioner who chooses to practise the profession of law, and not the registered practitioner who does not so choose, that the Legislature has sought to control.

Against this contextual background, and with special regard to the nexus with s 8 of the Act, the phrase "his professional independence" in para (n) of s 23(1) can only be taken to mean the independence of the registered legal practitioner whilst practising the profession of law within the meaning of the Act. If the effect of being a party to a contract or arrangement with an unregistered person is to place the registered legal practitioner under such control as may interfere with his independence whilst practising the profession of law (in the respondent's case, performing reserved work), then the entering into or continuance thereof will constitute unprofessional conduct.

The learned judge drew attention to the deliberate change in phraseology from "his independence as an officer of the Court " in s 27(1)(m) of the precursor Act to "his professional independence", and expressed the view that this pointed to a legislative intent to diminish the

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degree of independence expected of a registered legal practitioner as compared to that previously expected of an attorney, notary or conveyancer (see the report at 473D-G). I am unable to agree with him. If anything, it appears to me that the effect of the change in wording is to extend the ambit of the independence required.

The other phrase in para (n) of s 23(1) that calls for examination and comment is "under such control ...as may interfere". The crucial factor here is **the degree of control** and not, as the learned judge appears to have considered, the degree of interference", "the type of work", "the task on hand", or "the extent to which legal practitioners are able to comply with the requirement to maintain professional independence" (see p 474C-D).

The integrity of the individual registered legal practitioner is not an apposite criterion. It is the degree of control to which he is liable that is in issue. If it is such that it may (not must) interfere with his professional independence, it is forbidden. The test is objective. One looks at the nature of the contract or arrangement and asks whether by virtue of it the legal practitioner has placed himself in a position which is calculated to impair his independence

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in the practice of the profession of law. It is not only the likelihood of active interference that must be guarded against, but also, as Mr *Campbell* so graphically put it, the ambience in which the legal practitioner is cushioned by the nature of the contract or arrangement; the temptation upon him to show himself up in a good light with his employer, to attract the latter's goodwill upon which he is dependent, and so bend the rules. It is this insiduous temptation that the Legislature has deemed fit to remove by enacting s 23(1)(n).

Legal practitioners in practice as such customarily bind themselves to unregistered persons under contracts of sale, lease, hire or hire purchase, insurance or loan. They enter into contracts of service with typists and clerks. In the normal course such contracts do not place the registered legal practitioner under such control of the unregistered person as may interfere with his professional independence. But it is possible to envisage a term even in these mundane contracts which might place him under such control as may be prohibited. To take an example, it may be a specified condition of the lease of prestigious premises that the practitioner as lessee will not act in litigation against the Government of the day or against any political party. To accept such a condition would constitute an inroad upon the practitioner's professional independence.

In the instant case the degree of control exercised by the respondent's employer is absolute. The contract to which the respondent bound himself gives rise to a normal and straightforward master and servant relationship. It provides that the respondent is responsible to the managing director of the company; he is to be paid a monthly salary and an annual bonus at the discretion of the Board of Directors dependent upon profitability and i**ndividual employee performance**; he is to contribute 7% of his salary to a pension fund to which the company also contributes; he has the facility of medical aid coverage; and finally he is granted the use of a company motor vehicle for business purposes and reasonable personal needs. The advantage and benefits are

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attractive.

A contract such as this by its very nature constitutes an insiduous temptation to the legal practitioner who is a party to it to act in a manner inconsistent with his professional independence. Such a danger was clearly foreseen by INNES J in *De Villiers & Anor* v *McIntyre* NO 1921 AD 425 at 461, for he observed:

> "The same reasons apply with even greater force where an attorney enters the service of a layman in respect of professional work. He automatically

> parts with his independence by engaging to practise his profession for the benefit and at the behest of his employer."

It is not an answer for the legal practitioner to rely upon his own integrity (as the respondent seeks to do) to resist any interference with his professional independence, for, in the words of SOLOMON JA in the above cited case, at 434:

> "He might be a man of such strength of character that in no conceivable circumstances would his independence be affected. But the real question, I think, is whether the circumstances in which he has placed himself are such as are calculated to impair the independence of an ordinary person."

In enacting s 8(2) of the Legislature has not seen fit to apply any distinction between the three activities comprising reserved work. It must be taken therefore to regard them as being of the same importance in their respective fields. Such an attitude is understandable, for the activities relate peculiarly to acts in which the State and the citizen are equally interested and concerned. Consequently, in the determination of whether the degree of control is such as may interfere in the professional independence of the legal practitioner, I do not consider it correct to adjudge any one of the activities described in s 8(2) of more or less importance than the others. It is not competent to hold that in relation to the performance of one of the three activities the degree of control is not such as may interfere with the legal practitioner's professional independence, whereas in relation to the performance of the remaining activities it is such as may interfere.

The learned judge had no hesitation in finding that the activity described in s 8(2)(a) was such as to require freedom from the control of an unregistered person. He reasoned that court-room representation is a highly specialised branch of the profession demanding at all times the most scrupulous independence, and that a legal practitioner advocating his employer's cause before a court could not be expected to determine "on his feet" whether a given situation occurring spontaneously in the proceedings was calculated to interfere with his professional independence; that to require such a standard or facility from the partisan practitioner would be to counsel super-human perfection. (See p 474E-F and 480E).

I respectfully agree and merely wish to illustrate the type of situation that could tempt a legal practitioner who is representing a commercial employer not to play entirely fair with the court: suppose he is appearing in an *ex parte*

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matter or against a suitor who is self-acting, and in the course of his researches into the law comes across an authority unfavourable to his employer's cause. He may be induced to foresake his duty to tell the court of the existence of that authority in an effort to protect and promote what he considers to be in his employer's best interests. He may find himself unable to prevent the close and personal relationship from obtruding into and colouring his judgment.

I think the danger goes even beyond the actual confines of the court-room, for the right of audience must embrace the right to carry out the preparatory work which precedes it - the right, for instance, to draw an *ex parte* petition on behalf of his employer or the latter's opposing affidavit to a summary judgment application. In doing both these tasks the legal practitioner may render himself susceptible to a failure to observe the requirement to disclose all the relevant facts so as to enable the court to know whether to grant or refuse the order sought. The inducement to omit certain facts, the revelation of which runs counter to the interests of his employer, would be very real, and in this way too the practitioner's professional independence would be put at risk. His capacity for taking a detached and dispassionate view may be lost to him.

No assistance is afforded to the respondent's argument from the recognition by the Legislature in s 12(1)(b), proviso (ii) to s 13(1) and the proviso to s 56(1), of the Act, that registered legal practitioners in the full-time employ of the State are entitled to practise the profession of law. Their position differs *toto caelo* from that of a registered legal practitioner in the employment of an unregistered person. The reason for this is plain. The only influence or inducement upon the State officials practising the profession is to ensure that justice is done. In their case it is presumed by the Legislature, and properly so, that they will not work towards or connive at the perpetration of an injustice, for to attempt to do so would be detrimental to rather than enhance their standing with their employer.

In considering the activities referred to in s 8(2)(b) of the Act, the learned judge was strongly influenced by the decisions in *Pienaar & Versfeld* v *Incorporated Law Society* 1902 TS 11, *Incorporated Law Society v Versfeld* 1909 TS 309, and *De Villiers* v *McIntyre supra* all of which concerned the position, under the common law, of a conveyancer in South Africa in the first quarter of the century. They held in essence that, although it was unprofessional for attorneys and notaries in their capacities as such to enter into the employment of an unregistered person, this was not necessarily so in respect

GUBBAY JA

of a conveyancer, for his position varied materially from theirs; the duties discharged by a conveyancer were neither so important nor so confidential as those performed by attorneys and notaries, and his powers not so subject to abuse.

But since the coming into operation of the Act in this country, the South African trilogy, though formerly persuasive, is now clearly distinguishable. Section 8(2) deals with the three activities under the one "species" of a registered legal practitioner. It does not differentiate them in

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importance. Thus, as I have mentioned, the effect of the degree of control exercised over a legal practitioner by an unregistered person is not to be related to or measured by the nature and importance thought to attach to any of the three activities, for they are of equal importance. It cannot, therefore, be said that the activities described in para (b) of s 8(2) stand alone and fall to be considered in a manner different from those described in paras (a) and (c).

Reference to the duties and powers of the Registrar of Deeds, as enumerated in ss 5 and 6 of the Deeds Registries Act [*Chapter 139*], indicates that, though no longer considered a judicial officer in the strict sense, he still retains the functions of a "judex", before whom transfer takes place and in relation to his duties acts in a semi-judicial capacity. See *Rosenberg* v *Dry's Executors & Ors* 1911 AD 679 at 689; *Transvaal Consolidated Land and Exploration Co Ltd* v *Registrar of Companies* 1910 TPD 1247 at 1263. As so succinctly expressed in Jones Conveyancing in South Africa 3 ed at p 15:

> "...one cannot get away from the fact that in practice a Registrar in his examination of deeds and documents must of necessity hold 'a kind of court' at which conveyancers [for which read 'legal practitioners' under Chapter 139] argue the merits in the light of the law and decide whether or not to enforce the application."

By the same token legal practitioners who appear before the Registrar enjoy the status of functionaries in semi-judicial proceedings. They are relied upon to act with the utmost integrity.

The learned judge considered that, because the registration of deeds is subject to the scrutiny of the Registrar and his officials, and records are open to inspection, thereby constituting independent checks, a contract or arrangement whereunder a registered legal practitioner agrees to undertake the activities specified in para (b) of s 8(2), on behalf of an employer who is an unregistered person, would not be such as to assail his professional independence (see p 476E-I).

GUBBAY JA

Mr *Campbell* correctly submitted that the procedures of a court are likewise scrutinised by judicial officers and other officials and are open to the public, yet much weight is nonetheless placed upon the integrity of the practitioner because, despite the safeguards, misfeasances may and do occur. He cited a number of cogent situations which may give rise to some lapse of professional independence on the part of a registered legal practitioner in the field of deeds registration. They are these:

(1) Section 11 of the Deeds Registries Act requires transfers of property to follow the sequence of successive transactions to which they are made. A substantial stamp duty is payable on each transfer. Where a property is bought and then sold quickly to successive purchasers before transfer is passed there might be a great temptation to those concerned to ignore the intermediate transfers that s 11 requires. The Registrar of Deeds and the fiscus are dependent upon the integrity of the legal practitioner to ensure due observance of that provision.

(2) The proper drawing up and lodging of transfer deeds and of declarations relating to the manner of the acquisition of the property (as required by s 28 of the Stamp Duty

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Act [*Chapter 186*]) and the payment of proper stamp duty form part of the practice of a legal practitioner attending to the execution of deeds by the Registrar of Deeds. The necessity for the practitioner to act with the integrity and independence in this function is self-evident.

(3) A practitioner drawing a deed of transfer may include new conditions of title, for example, rights of way, rights of access, rights of pre-emption, subject to s 54 of the Deeds Registries Act, or servitudes under s 55 of that Act. He would have a clear duty to point out and explain the nature and effect of these to the transferee, *a fortiori* in the case of mortgage bonds.

(4) One of the duties of the seller of immovable property is to effect delivery thereof. He has a corresponding right to appoint, where necessary, his own agent to do so and to safeguard his right to receive prompt payment of the purchase price and protect him against delays. Where, as is proposed by the respondent, he is to act in the registration of transfer as the representative of the purchaser, the seller is denied the professional independence guaranteed by s 23(1)(n) of the Act.

The learned judge rightly appreciated that a registered legal practitioner in the employ of a non-registered person, whose **main business** is concerned

with transactions in land, would be likely to be influenced in his professional independence, but he held that where, as in the present matter, the conveyancing of land is subsidiary to the main operations of the company, employed legal practitioners could be considered unlikely to be influenced in their professional independence (see p 476I-477A).

To my mind, that distinction is not a valid one, as Mr *Campbell's* potential situations so clearly demonstrate. The likelihood of interference is not to be gauged by paying regard to the present limited extent of the particular employer's interest or participation in the property market, for in no time at all he might commence to deal in land on a very large scale. If that were to occur, at what stage would the legal practitioner have to cease being a party to the contract of employment so as not to put his professional independence in jeopardy?

I think it a fair proposition that any non-registered person who takes into his employ a registered legal practitioner in order that he may practise the profession of law on his behalf poses a potential threat to the professional independence of the practitioner. The mere fact that the practitioner subordinates himself as a servant puts his independence in the practice of his profession in jeopardy.

For these reasons I am of the opinion that the court *a quo* erred in declaring the respondent at liberty to perform the activities specified in para (b) of s 8(2) of the Act.

This conclusion makes it unnecessary to consider the alternative argument advanced by Mr *Campbell*, which was to the effect that the application should have been denied by the court *a*

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quo in the exercise of its discretion pursuant to the provisions of s 23(2)(b) of the Act.

In the result I would order as follows:

(1) The appeal is upheld with costs

(2) The cross-appeal is dismissed with costs

(3) The appellant is to pay the costs incurred in the interlocutory application for an extension of time within which to note the appeal.

(4) The order of the court *a quo* is amended in the first and second paragraphs to read:

GUBBAY JA

"The application be and is hereby refused."

Dumbutshena CJ: I agree.

Korsah JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

S v KAMUSEWU 1988 (1) ZLR 182 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Criminal appeal

23 February & 11 March 1988

Flynote

Evidence - medical evidence - murder case - desirability of routinely calling doctor who prepared post-mortem report.

Criminal procedure (sentence) - murder - extenuating circumstances - intoxication - to what extent extenuating - denial by accused that he was intoxicated-acceptable evidence that he was under influence of alcohol - onus of establishing extenuating circumstances discharged in spite of accused's evidence.

Legal practitioner - defence counsel - murder case - accused falsely denying factors which would constitute extenuating circumstances - acceptable evidence aliunde to support a finding of extenuating circumstances -

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counsel entitled to argue that such circumstances exist, despite accused's attitude.

Headnote

Irrespective of how detailed a post-mortem report is, it is desirable in murder cases that the State should routinely call the doctor who prepared the report, especially when the report is highly relevant to the main issue.

There is in law no defined degree of intoxication that must be demanded before intoxication can serve as an extenuating circumstance.

Where there is perfectly acceptable evidence that the accused was under the influence of alcohol which he was seen to drink, a denial by the accused that he ever drank does not oblige the court to find that he was sober. In such circumstances, to find that he was affected by alcohol would not be mere speculation; it would be a finding made on acceptable evidence and it could not be ignored. Nor does it matter that the *onus* of establishing

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McNALLY JA

extenuating circumstances is on the accused; that onus may be discharged despite the accused's own evidence. In such a situation, defence counsel is not in any way estopped from arguing that extenuating circumstances in the form of intoxication exist; not to press for a finding of extenuating circumstances because of the accused's attitude amounts to a misconception by counsel of his duty to his client and to the court.

Cases cited:

S v *Babada* 1964 (1) SA 26 (A)

S v *Jacob* 1981 ZLR 1

S v *Mutsunge & Anor* S-38-87 (unreported)

R v *Jairos* 1966 RLR 115; 1966 (2) SA 350 (RAD)

F Juru for the appellant

A O Agyemang for the respondent

Judgment

McNally JA: The appellant was convicted of murder with actual intent in the High Court at Bulawayo and on 26 November 1986 he was sentenced to death.

It is common cause that the appellant was an acting corporal in the Fifth Brigade of the Zimbabwe National Army and that his Unit was stationed in the Mubimbi Communal Lands near Kamativi in Northern Matalebeland, where they were deployed on anti-dissident operations.

It is also common cause that at about 4 am on the morning of 25 June 1983 the rifle which he was carrying fired at least two rounds, which hit and killed the deceased woman, who at the

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time was seated in front of where the appellant was standing and about three metres away from him.

The only dispute on the facts was whether he shot her deliberately or whether he dropped his rifle accidentally, causing it to go off and kill her.

The only State witness who claimed to see the incident, a fourteen year old girl who says she was standing beside him at the time, says he aimed the rifle in the normal way and fired at the deceased, apparently because she had not been singing patriotic songs loudly and fervently enough.

The defence case was that the appellant was carrying his rifle slung over his right shoulder in such a way that it was pointing forwards at an angle of 45 degrees from the vertical. Because he wished to use the radio which was on

McNALLY JA

his back, the appellant says that he attempted to push the barrel of his rifle downwards so that it would point towards the ground. But the sling of the rifle, instead of sliding forwards and allowing the barrel of the rifle to rotate forwards and then downwards, broke or became detached. The rifle fell to the ground and went off.

Given this dispute, it was obviously of the greatest importance for defence counsel to attempt to show that the angle at which the bullets entered the body of the deceased was consistent with her being shot from at or near ground level and inconsistent with a shooting from the shoulder. Had he been able to create some uncertainty on this subject, he might have had the beginnings of a case. Adding to this the obvious hostility of all the witnesses to him and his colleagues; the fact that there was only one eye-witness who testified and that she was a young girl; that the events took place in the dark, and unexpectedly, and at that hour of the morning; he might have been able to develop an argument that his client's defence could reasonably possibly be true.

The obvious way to pursue this line would have been to insist that the doctor who prepared the post-mortem report tee called. This procedure is provided for in s 260(8) of the Criminal Procedure and Evidence Act. This procedure was not followed. The report was produced and put in without question. No-one seems to have examined it in any detail or to have attempted to translate the medical expressions used into language which is comprehensible to laymen, or to have attempted to reconcile the State case, which is that she had been shot twice, with the report which *prima facie* indicates that four bullets caused five entry and five exit wounds.

I repeat what I have said before, that I think it is desirable that the State should routinely call the doctor who prepared the post-mortem report in murder cases, but especially so when the report is highly relevant to the main issue.

Fortunately the report is a detailed one. It details the bullet wounds as, follows, and I have added in brackets after the technical terms, and with the aid of a medical dictionary, an explanation of their meaning:

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"1. Entry left axilla (armpit) - fracturing 5th rib on left - passing through left lung, heart, liver - exit right upper quadrant abdomen.

2. Left axilla (armpit) fracturing costar margin (edge of ribcage) on left, to a point about 1/4 way down between xiphisternum (back of breastbone) and the symphysis (pubic bone).

McNALLY JA

[The doctor himself has added two comments in brackets as follows:]

(?which was entry/exit wound)

(not entering abdominal cavity)

3. Through left upper arm fracturing humerus ? Exit/entry-may be same bullet as in 2.

4. Right thigh - entry posterior (back) exit anterior (front), fractured femur.

5. Left thigh - entry anterior (front) exit posterior (back), fractured femur."

The post-mortem report explains that wound (1) revealed clearly which was the entry and which was the exit because parts of the intestine had been forced out of the abdominal wound. That bullet therefore definitely entered her body in the region of the left armpit end "ravelled across her body on as lightly downward path. Wound (2) might have been caused by a bullet entering through the left arm and then into the body via the left armpit, or it might have been caused by a bullet going the opposite way. The latter, on the facts, however seems very unlikely.

The two bullet holes in the thighs are completely unexplained. It is not only unclear how they could have been caused, but it is strange that one shot should enter the front of one thigh and another the back of the other thigh. The learned trial judge did not mention them. He said:

> " In addition to the above, the way the bullets are said to have travelled through the deceased's body is consistent with a deliberate shooting of a person who was seated by a person who was standing, as testified to by Mavis. The post mortem report indicates that the bullets went in through the upper chest region and came out through the lower region showing that the person who shot steadied the rifle before shooting. If he had not the bullets would have shot out at different angles."

I am not convinced, with great respect, that those conclusions are justified without *viva voce* evidence to clarify there port. They do not explain the thigh wounds. They assume that the bullet causing wounds (2) and (3) was travelling from left to right and not from right to left. It was not even established, as it should have been, whether the deceased was sitting on the ground or on a chair or a rock. And I do not know whether the region of the fifth rib can be described as the upper chest.

I am satisfied, however, that at the lowest for the State the evidence is at least not inconsistent with the State version, in that wound (1) is consistent with

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a shot being fired into the body of the deceased on a slight downward trajectory. Taking that evidence, together with the impressive evidence of Inspector Haley the ballistics expert who denied that the gun would have gone off as a result of hitting the ground, and the clear evidence of the eye-witness, I see no reason to interfere with the decision of the learned judge to reject the appellant's contention that he dropped the rifle and it went off. The other witnesses also show that the rest of the appellant's evidence is a tissue of lies.

That is not, however, the end of the matter. The evidence of the State witnesses, which was accepted by the court, was that the appellant was a bully and a tyrant who was constantly forcing them to spend long hours attending "Pungwes", at which he would lecture them and force them to sing patriotic songs, sometimes all through the night. On this occasion he had forced them (they said) to brew beer in preparation for a celebration of Mozambique's Independence Day the next evening. He had threatened them with dire penalties, including death, if the beer was not good enough or was poisoned. The one adult witness (apart from Inspector Haley) who gave evidence was one Solomon Nyoni. He said he was appointed by the appellant to supervise the brewing of beer at his homestead, which was conveniently nearby. Villagers had to bring grain for the preparation of the beer to his homestead.

Nyoni says that the night of 24 June 1983 was the night appointed by the appellant for the tasting of the beer, in preparation for the festivities of the 25th (which were in the event cancelled because of the death of the deceased).

He says the appellant specifically instructed him to bring twenty litres of the beer to the store where they (the soldiers) were. The appellant made Nyoni taste the beer in case it was poisoned, and after that the soldiers began to drink. They drank about half of the beer and then sent Nyoni and the others away. Nyoni said he had often seen the appellant drink beer, and on the night in question, he said:

> "He appeared to have taken some liquor. (He) was intoxicated to an extent where he did not stagger. He could control himself."

It must be remembered that this was relatively early in the night's proceedings, and only half the twenty litres delivered to the soldiers had been drunk. Under cross-examination he said:

> "He appeared he was drunk. He was not staggering. (I gained this impression from) the way he spoke. He did not speak to the children

> well. He was aggressive when he spoke to people. He spoke in a cheeky manner."

The appellant's counsel, no doubt acting on instructions put it to the witnesses that his client did not drink. The witness smiled and denied this. He was with him when he drank.

The fact that the two fourteen year old girls did not say he was drunk is, I think, of little significance. Nyoni's evidence cannot, however, be ignored. The learned judge said of him:

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> "Nyoni also gave his evidence well and in a straight-forward manner, and he was not shaken under cross-examination. We therefore accept his evidence as being truthful."

The learned judge then went on, with respect quite rightly, to find that the appellant was wholly untruthful. This finding, it must be noted, applies to his claim to be a non-drinker as much as to anything else.

On the question of drink, the learned judge said:

> "Although we are inclined to believe Nyoni's evidence on this matter we consider that this does not assist the accused because Nyoni says that the accused could control himself - in other words he knew what he was doing."

That statement may be correct as a statement relative to *mens rea*, but as a statement of general application it goes too far. The learned judge is saying that intoxication on the part of the killer is irrelevant unless either the killer could not control himself or did not know what he was doing.

Had the appellant been intoxicated to that extent the court would have had to consider a verdict of culpable homicide or indeed even acquittal.

The headnote in *S* v *Babada* 1964 (1) SA 26 (A) is relevant. It reads:

> "Where on a charge of murder there was evidence that the accused was under the influence of liquor, but the trial court had, in the exercise of its function, limited its competence by assuming that in law a defined degree of intoxication was demanded before the intoxication could serve as an extenuating circumstance.
>
> *Held*, that the Court had erred because in law no defined degree was laid down."

McNALLY JA

Had the learned judge reconsidered the question of intoxication when he addressed his mind to extenuating circumstances, his earlier statement could have been treated as relating only to the question of *mens rea*. But when the time came to consider extenuating circumstances the record is very brief. Counsel for the defence, perhaps erroneously thinking that his client's protestations of total abstinence in some way estopped him from advancing any argument, made no submissions. He accepted that there was no extenuation. The court accepted that position and found accordingly. It is clear that the court regarded its earlier pronouncement as applicable also to the question of extenuation. It is here that the misdirection lies.

It is necessary to add that neither at first instance nor on appeal were defence counsel prepared to press for a finding that the appellant was under the influence of alcohol to an extent justifying the conclusion that his moral blameworthiness for an otherwise terrible crime was reduced. If this was because of the attitude of their client, I must say that they have misconceived their duty to their client and to the Court.

It may be that this approach is based on a misunderstanding of such cases as *S* v *Jacob* 1981 ZLR 1. In that case the headnote reads:

> "Where an accused person gives false evidence at his trial, and thereby fails to establish points which would mitigate the gravity of his office, he cannot always expect the court to give him the benefit of doubts based on

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speculation as to what he might possibly have been able to say in his favour."

That decision does not mean, and should not be interpreted to mean, that where there is perfectly acceptable evidence that the appellant was under the influence of alcohol which he was seen to drink, his denial that he ever drank must be held to oblige the court to find that he was sober. The court here accepted Nyoni's evidence and rejected the appellant's evidence. It was quite right to do so. Therefore it is not mere "speculation" that he was drunk. It is a finding made on acceptable evidence and it cannot be ignored. Nor does it matter that the onus is on the appellant. That *onus* may be discharged despite his own evidence.

The trial court therefore clearly misdirected itself on the question of extenuating circumstances.

I do not think this is a case in which it is necessary to remit. (Compare *S* v *Mutsunge & Anor* S-28-87, not yet reported). The trial court clearly disbelieved the appellant and believed Nyoni. Nyoni's evidence is clear that as a

McNALLY JA

result of the drink he had taken the appellant had become intoxicated and as a result was aggressive and "cheeky".

The mindlessness and wanton brutality of his actions support the conclusion that what the appellant did was done at a time when his normal inhibitions had been clouded by his consumption of alcohol.

I should add also that on the facts this case is distinguishable from *R* v *Jairos* 1966 RLR 115 at 119-120. In that case there was nothing potentially extenuating except a statement by the appellant that "I was very drunk". The learned trial judge rejected that evidence as establishing extenuation, saying "although the accused was drunk there is no evidence at all as to the extent of his drunkenness". (Note that there was apparently no reference to the *Babada* judgment *supra*). On appeal the then CHIEF JUSTICE BEADLE CJ said:

> "As I have pointed out, little credence can be attached to these statements of the appellant. The appellant was given an opportunity of making a statement to the court on extenuating circumstances, but refused to take it. **There is nothing before the court, therefore, to show how the drunkenness of the appellant, assuming that he was drunk, is related to this particular crime,** and, in the absence of any such evidence, it seems to me difficult to hold that the trial court erred in finding that there were no extenuating circumstances." (My emphasis.)

In the present case, most fortunately for the appellant, there is clear, independent and accepted evidence both that the appellant was drunk and that the amount he had consumed had affected his behaviour.

In my view a proper finding is that the influence of alcohol on the appellant's behaviour was shown to be sufficient for a finding of extenuating circumstances. But having said that, there is little more to be said in his favour. His overbearing and bullying attitude towards the local people culminated in this brutal killing and he deserves a very severe punishment.

I would enter a finding of extenuating circumstances, set aside the death sentence, and

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substitute a sentence of twenty years' imprisonment with labour. To that extent the appeal succeeds.

Manyarara JA: I agree.

Korsah JA: I agree.

Pro Deo

S v MAHATI 1988 (1) ZLR 190 (HC)

Court **High Court, Harare**

Reynolds J

Criminal review

16 March 1988

Flynote

Courts - judicial officers - personal views or grievances - not to be aired in judgments - extravagant and emotional language - inconsistent with approach expected of a judicial officer.

Headnote

A magistrate should take particular care to avoid any suggestion that he has made use of judicial proceedings to air personal grievances or to express views that have no bearing on the case in hand. To do so would be improper and would amount to an abuse of the privilege attaching to his judicial office. The use of extravagant and emotional language, unsubstantiated by the facts of the case, is equally inconsistent with the dispassionate and objective approach expected of a judicial officer.

Cases cited:

May v *Udwin* 1981 (1) SA 1 (AD)

S v *Dhamu* HH-195-87 (unreported)

Judgment

Reynolds J: The accused pleaded guilty to a charge of contravening s 3(1)(a) of the Prevention of Corruption Act No. 34 of 1985. The trial proceeded by way of agreed facts, and the accused was duly convicted, and was sentenced to undergo five years' imprisonment with labour.

The circumstances giving rise to this prosecution were that the accused was the mechanic in charge of light motor vehicle repairs at the Central Mechanical Equipment Department in Harare. On the day in question the accused observed a subordinate mechanic stealing a starter

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motor from a government

REYNOLDS J

vehicle which had been sent for repair. This mechanic offered the accused $100 to refrain from reporting the theft, and the accused accepted this "sop to Cerberus".

The conviction is in order and is hereby confirmed, but several matters arise as to the trial magistrate's reasons for sentence, and the sentence actually passed. In giving judgment the magistrate referred to several relevant factors such as the prevalence of corruption in the country, and to the dangers of allowing this evil offence to gain a significant foothold in our society. He quite properly dealt with the shortage of motor vehicle spares in Zimbabwe, and with the admitted fact that pilfering of the kind in question here was commonplace at the Harare CMED. These were all valid considerations and, I have no doubt, justified the imposition of a severe penalty. The magistrate has not, however, restricted his reasoning to factors relevant to the assessment of sentence such as those outlined, but has launched what appears to be a vehement, personal attack upon the author of an address which was reported earlier in the national press. This report was to the effect that certain court officials may have ben engaging in corrupt practices.

The trial magistrate seems to have taken the address as an allegation that magistrates and prosecutors are corrupt, and his judgment in the instant case not only vilified the person giving the address, but also sought to establish that there was no evidence of any corruption in the magistrates courts. I find it difficult to understand the relevance of these comments in relation to the present case. To my mind, any relevance is at best remote, and considerations of this kind could not have had any proper bearing on the assessment of penalty in this matter.

A magistrate should take particular care to avoid any suggestion that he has made use of judicial proceedings to air personal grievances or to express views that have no bearing on the case in hand. To do so would, in my view, be improper, and would amount to an abuse of the privilege attaching to his judicial office. See *May* v *Udwin* 1981 (1) SA 1.

In giving his judgment, the trial magistrate used expressions such as:

> "it is apparent that you were part of a well-organized ring of a gang of thieves that stole might-be millions of dollars worth of car parts from the CMED. Your conduct is very treasonous ...you allow even the meagre cars and spares to be plundered most greedifully [*sic*] and most corruptly ...This seems to indicate that the ring was organised along mafia lines

REYNOLDS J

> and vast government properties were lost to private capitalistic business people. Thus if anything at all the CMED is a hive buzzing with maladministration and corruption bleeding the people to death."

Extravagant and emotional language of this sort is not consistent with the dispassionate and objective approach expected of a judicial officer. Apart from anything else, there was no evidence to substantiate the factual content of this excerpt. The accused had accepted an offer

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of $100 to turn a "blind eye" to the theft of a starter motor valued at $300. Whereas dishonesty may have been prevalent at this government department, the facts actually proved at the trial were far removed from the suggestions conveyed in the passage cited.

The trial magistrate has a maximum jurisdiction of 12 months imprisonment, and yet he imposed a sentence of 5 years' IWL. The Prevention of Corruption Act No. 34 of 1985 provides for a maximum sentence of 5 years 'imprisonment with labour, and I presume that the magistrate believed that he could exercise that jurisdiction. There is, however, nothing in the Act in question to enhance a magistrate's ordinary jurisdiction, and it is limited accordingly, to that specified in the Magistrates Court Act [*Chapter 18*]. See *S* v *Dhambu* HH-195-87 (unreported).

In any event, the facts of the present case do not warrant anything approaching a penalty of the severity of that imposed by the magistrate, and certainly not the maximum possible sentence provided for by the Legislature. The accused is a first offender, and is only 25 years of age. He is married with one child. He pleaded guilty to the charge and expressed contrition for his misconduct. None of these mitigating factors were adverted to by the trial magistrate.

In all the circumstances the sentence imposed by the court *a quo* is hereby set aside, and is substituted by the following:

> "12 months' imprisonment with labour of which 6 months imprisonment with labour will be suspended for a period of three years on condition that the accused does not, within that period, contravene s 3 of the Prevention of Corruption Act, 34 of 1985, or commit any offence of which dishonesty is an element for which a sentence of imprisonment without the option of a fine is imposed."

Ebrahim J agrees.

MAERESERA v MAERESERA 1988 (1) ZLR 193 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Civil appeal

21 September & 3 December 1987; 14 & 22 March 1988

Flynote

Family law - parent and child - maintenance - liability of father under customary law to maintain illegitimate child who has passed his majority - community courts - powers of community courts to award maintenance when maintenance governed by customary law.

Headnote

The respondent was the illegitimate son of the appellant. At the time of the appeal, he was nearly 24 years of age but was still attending senior school, having, he claimed, missed years of schooling through no fault of his own because of the liberation war. He claimed maintenance

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from the appellant and was successful in the community court at Marondera. The appellant appealed unsuccessfully to the District Court. No evidence was led in the community court as to whether customary law recognised any legal liability on a parent to maintain a child over the age of majority or the extent of such liability. The community court appeared to assume that its authority to order the payment of maintenance was derived from the Maintenance Act [*Chapter 35*] and the magistrate in the District Court made a similar assumption.

Held, that while under s 12(3) of the Customary Law and Primary Courts Act No. 6 of 1981, the community court could make an order for maintenance, the definition in the Maintenance Act of "appropriate maintenance court " made it clear that the community court could act as a maintenance court only where the claim for maintenance is determinable according to customary law.

Held, further, that as no evidence was led in either the community court or the District Court as to what the customary law was on this matter, the

McNALLY JA

Supreme Court was unable to determine whether the appellant was obliged to maintain the respondent.

Held, further, that this was an appropriate case for the Supreme Court to exercise its powers under s 20(1)(b)(ii) of the Supreme Court of Zimbabwe Act to order appropriate evidence to be laid before it to enable it to determine the matter.

Cases cited:

In re *Robert* 1953 SR 47; 1953 (3) SA 97

R v *Rantsoane* 1952 (3) SA 281 (T)

R v *Kumalo* 1952 (4) SA 638 (O)

R v *Mofokeng* 1954 (1) SA 487 (O)

Kanis v *Kanis* 1974 (1) RLR 129; 1974 (2) SA 606 (RAD)

Gliksman v *Talekinsky* 1955 (4) SA 468 (W)

Smit v *Smit* 1980 (3) SA 1010 (O)

Hoffman v *Herdan* NO & Anor 1982 (2) SA 274 (T)

Simon v *van den Berg* 1954 SR 53; 1954 (2) SA 612

C C Seddon for the appellant

Respondent in person

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Judgment

McNally JA: The respondent was successful in the Community Court and successfully withstood an appeal in the District Court. The appellant now appeals to this Court.

The facts of the case are these. The respondent claims to be the illegitimate son of the appellant. In that capacity he claims maintenance for himself, to support himself at school. He is almost 24 years old, but says that, like may thousands of others, he missed years of schooling during the liberation war and should not therefore be penalised because of his age. He is in the Lower VI Form at Marondera High School and hopes to write his "A" Levels next year.

The original judgment of the community Court at Marondera was delivered on 7 January 1985 when the respondent was 21 years old.

There is no doubt that on a balance of probabilities the appellant is the father of the respondent. The only question is as to the respondent's right to maintenance. The relevant legislation is the Maintenance Act [*Chapter 35*] and the Customary Law and Primary Courts Act No. 6 of 1981.

McNALLY JA

The latter Act, in s 10, provides that a primary court (which term includes village courts and community courts) "shall have and may exercise jurisdiction to hear, try and determine any civil case in which customary law is applicable ...".

Section 11(2) goes on to say:

> "A community court shall have no jurisdiction in any civil case
>
> (a) where the case is not determinable by customary law; or
>
> (b) ..."

Is this case determinable by customary law? If it is not, the community court lacked jurisdiction to hear it.

It is certainly arguable that customary law does apply because of the provisions of s 3(1)(a)(iii) of the Customary Law and Primary Courts Act:

> "Subject to the provisions of this section and of any other enactment, unless the justice of the case otherwise requires, customary law shall be applicable in any civil case where -
>
> (i) ...
>
> (ii) ...
>
> (iii) having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply."

It is necessary next to consider the significance of the amended s 12 of the Act. The section has had added to it by Act 21 of 1982 the following subsections:

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"(3) Without derogating from its powers to make any other order for maintenance, a community court may make an order for maintenance in accordance with the provisions of the Maintenance Act [*Chapter 35*].

(4) For the purposes of an order for maintenance in terms of subs (3) a community court shall, notwithstanding anything to the contrary contained in customary law, regard-

(a) ...

(b) the father of a child as being primarily responsible for the maintenance of that child until the child attains the age of majority."

McNALLY JA

The same amending Act made a corresponding amendment to the Maintenance Act by introducing the new term "appropriate maintenance court", which is defined as:

"(a) where the claim for maintenance is determinable according to customary law, a community court;

(b) in all other cases a magistrates court."

It might be arguable, reading the new s 12(3) of the Customary Law and Primary Courts Act in isolation, that the community Court is authorised to apply the substantive common law in maintenance cases. However, it seems to me that any possible ambiguity is cleared away by the amendment of the Maintenance Act and the new definition of "appropriate maintenance court".

The position now is as follows:

1. The Customary Law and Primary Courts Act, s 12(3), allows a community court to mane an order for maintenance in accordance with the provisions of the Maintenance Act.

2. The Maintenance Act provides that a community court may only act as a maintenance court where the claim for maintenance is determinable according to customary law.

3. Therefore the situation never arises in which a community court has to apply the common law in determining a claim formaintenance, although it does have to apply the specific statutory provisions of 2 13(4) of the Customary Law and Primary Courts Act.

4. Therefore s 12(3) of the Customary Law and Primary Courts Act must be read as a procedural provision permitting the community courts to apply the statutory procedures contained in the Maintenance Act, and not as a substantive provision authorising them to apply the general common law in determining maintenance claims.

5. This interpretation is entirely consistent with the provisions of s 11(2) of the Customary Law and Primary Courts Act which expressly denies the community courts' jurisdiction in civil cases not determinable by customary law.

One is then left with the question whether the father is "legally liable" to maintain his major son.

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If he is legally liable under customary law as

McNALLY JA

modified by s 12(4) of the Customary Law and Primary Courts Act, then the procedured under the Maintenance Act can be applied in the making and enforcing of any order. That is because the father is then a "responible person" as defined in s2 of the Maintenance Act. The provisions of s6(1) of the Act then come into play, namely:

> "the maintenance court may...make an order against a responsible person for the periodical payment of such sums of money as it considers reasonable for the maintenance of the dependent..."

The court must be satisfied that the father is legally liable. In the circumstances that must mean "liable in terms of customary law as modified by the statute".

It may be noted that if the respondent had been a minor at the time of the judgment, the liability of his father to maintain him would have been at least *prima facie* established by reason of the provisions of s 12(4)(b) of the Customary Law and Primary Courts Act referred to earlier. However, since he was a major, that provision is not applicable.

It may also be noted that s 11(1) of the Maintenance Act provides that an order made in favour of a "child" (the word is not defined) shall cease and terminate when the child turns 18, unless upon application the order is extended.

I do not see this as relevant in the present case. Clearly "child" means a person under 18 years of age. No order was made in favour of the present respondent when he was a child. So the section does not apply. Nor is this a case where one can conclude that unless an order is made when the applicant is a child, an order cannot be made subsequently.

I regard this section as a procedural section, providing for a normal "cut-off" date in the case of maintenance awarded for children. In the present case we are concerned, not with whether the respondent is a "child", but with whether he is a "dependant" which is defined, in relation to a responsible person as:

> "any person whom that responsible person is legally liable to maintain."

Mr *Seddon*, presenting the case for the appellant, has argued that customary law does not recognise any responsibility by a father for his illegitimate child once the custody of that child is accepted by the mother's family. In this case, he contends, the mother was awarded seduction damages and custody of the

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child remained with her family. Therefore the father has no liability. (Mr *Seddon* might have added, although he did not in fact refer to the section, that since the respondent was a major

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when the proceedings were launched he was not protected by the provisions of s 12(4)(b) of the Customary Law and Primary Courts Act).

He relies for these contentions on : In re *Robert* 1953 SR 47; 1953(3) SA 97; Goldin and Gelfand *African Law and Custom in Rhodesia* at p 186; Spiro *Law of Parent and Child* 4 ed p 479.

I will deal first of all with *Robert's* case *supra*. In that matter a child, Robert, was brought before a Juvenile Court and found to be a child in need of care. He was placed in an institution and the court wished to make a contribution order against his father. Robert was an illegitimate child who had grown up in the custody of his mother. It was accepted that in customary law the mother's family had custody and the father had no liability for maintenance.

It must be noted that if that set of facts were before the court today, the provisions of s 12(4)(b) of the Customary Law and Primary Courts Act would have placed the responsibility for the maintenance of the child upon the shoulders of the father. So the decision in Robert would have been different had it arisen today.

The provisions of s 12(4)(b) need to be repeated here. They are:

> "For the purposes of an order for maintenance in terms of sub-section (3) [that is, an order for maintenance in accordance with the provisions of the Maintenance Act] a community court shall, notwithstanding anything to the contrary contained in customary law, regard the father of a child as being primarily responsible for the maintenance of that child until the child attains the age of majority."

It is important to note that this provision overrides customary law, but is nonetheless to be applied by a community court. It is equally important to consider what is meant by the limiting phrase "until the child attains the age of majority". Obviously that phrase is included because in the normal case all responsibility ceases at that stage. Neither the father nor the mother is normally responsible any longer.

It may be noted also that in South Africa it appears that the lack of responsibility of a father under customary law for the maintenance of his

illegitimate child has not prevented convictions of fathers for failure to maintain such child: See Spiro op cit p 470; *R* v *Rantsoane* 1952 (3) SA 281 (T); *R* v *Kumalo* 1952 (4) SA 638 (O); *R* v *Mofokeng* 1954 (1) SA 487 (O).

Once it is established that a community court awarding maintenance in terms of the Maintenance Act must regard the father as primarily responsible for the maintenance of his minor child, it may follow that in proper case, under s 11(1) of the Maintenance Act, it can extend the order in favour of the child who has reached majority. It is not necessary however, to decide this question.

The real point of s 12(4)(b), as it applies to maintenance cases, may be that it destroys the argument based on the allegation that maintenance is linked to custody. Once that is

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recognised, the only question that remains is whether customary law recognises any legal liability on a parent to maintain a child who is over 18, and if so, what the extent of that liability is. Does it end at "O" Level, or "A" Level, or University? Is it related only to illness or mental retardation?

It is clear that the common law recognises such a duty in a proper case. See *Kanis* v *Kanis* 1974 RLR 129; 1974 (2) SA 606 (RAD); *Gliksman* v *Talekinsky* 1955 (4) SA 468 (W); *Smit* v *Smit* 1980 (3) SA 1010 (O); *Hoffman* v *Herdan No & Anor* 1982 (2) SA 274 (T).

I have difficulty in coming to the conclusion that customary law has a similar provision, and, if it does, I have difficulty in determining the scope of that provision. I say this because no evidence was led in the community court as to what the customary law was. The presiding officer said this:

> "As father the defendant is bound to support the plaintiff. It has to be taken into account that the plaintiff failed to complete his schooling because of war. Surely that can not be penal on him. The defendant is well aware that he should look after the child till the age of majority, but the law did not expressly stop him from maintaining him if there is good cause. I have looked at the Maintenance Act, Chapter 35 [his reference to the sections seems to have been mistranscribed and does not make sense]. I am therefore satisfied that the defendant should maintain the plaintiff until he leaves school."

There is no reference at all to customary law.

Similarly in the District Court the magistrate said only:

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> "The Act clearly says that a minor should be maintained until the age of 18 or until self-supporting. The respondent is doing Form V and is unemployed and although he is now 24 years old it had not been shown that he deliberately refrained from going to school and as I have said his school was interfered with during the war. It is therefore my considered view that respondent is still entitled to maintenance from appellant."

There is no reference to customary law in this judgment either. Indeed the first sentence of the passage quoted clearly show that the magistrate is proceeding on the basis that the community court's authority derived from the Maintenance Act, whose s 11 he has misleadingly paraphrased. This is not so. The community court should have sought its authority in customary law. It seems to me that in both courts there was a failure to determine the essential question - is there a legal liability in customary law, as modified by the provisions of s 12(4) of the Customary Law and Primary Courts Act, on this father to maintain this dependant? That failure makes it impossible to determine the application.

This court, it seems to me, now has two choices. We can allow the appeal on the basis that no foundation in customary law has been laid to support the claim. Or we can call for evidence in order to determine for ourselves what the customary law is.

Generally speaking a court is far more reluctant to intervene in civil proceedings than in criminal matters. There is no equivalent civil procedure to match the provisions of s 218 of the Criminal Procedure and Evidence Act. Indeed Hoffmann and *Zeffertt SA Law of Evidence* 3 ed p 368 say "in a civil action the court has no power to call a witness without the consent of the

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parties". Reliance for this dictum is placed upon the case of *Simon* v *van den Berg* 1954 SR 53; 1954 (2) SA 612.

The position on appeal is, I venture to think, different. This court has very wide powers granted by s 20 of the Supreme Court of Zimbabwe Act, which include the power, under s 20(1)(b)(ii) to-

> "order any witness who would have been a compellable witness at the trial or proceedings to attend and be examined before the Supreme Court whether he was or was not called at the trial or proceedings..."

and under s 20(1)(b)(iv) to-

McNALLY JA

> "...remit the case to the court or tribunal of first instance for further hearing, with such instructions as regards the taking of further evidence or otherwise as appear to it necessary."

(Compare the provisions of s 31 of the High Court of Zimbabwe Act, 1981).

In this case we must bear in mind that the respondent is an unrepresented schoolboy, albeit a mature student. We must note that the real issue was confused, and that had the court pointed out to the applicant (now the respondent) that he should lead evidence of customary law he would no doubt have tried to comply, as would the respondent (appellant). And finally we must take note of the complexity of customary law and the methods prescribed for its ascertainment by the provisions of s 5 of the Customary Law and Primary Courts Act, namely:

> "If a court of law entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings after having considered such submissions thereon as may be made, and such evidence thereof as may be tendered, by or on behalf of the parties, it may, without derogation from any other lawful source which it may have recourse to, consult reported cases, text books and other sources, and may receive opinions either orally or in writing, to enable it to arrive at a decision in the matter.
>
> Provided that..."

This is an important matter of principle. It is a proper case for this Court to exercise its powers under s 20 of the Supreme Court of Zimbabwe Act and s 5 of the Customary Law and Primary Courts Act. In order to have the appropriate evidence placed before us we propose to invite a legal practitioner to appear for the respondent at the request of the Court. He and Mr *Seddon* will be invited to proceed in terms of s 5 of the Customary Law and Primary Courts Act, and to procure and place before this Court such evidence as they may consider appropriate.

In the event that it transpires that customary law on the subject is unclear, the Court will wish to hear submissions as to what action should then be taken. Should it be assumed that customary law is in accordance with the common law, or with natural justice, or should it be assumed that where there is no law there is no right? In that event is it to be assumed that the respondent has a right to proceed in terms of the general law before a maintenance court which is a magistrates court?

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McNALLY JA

At this stage therefore, and pending the necessary administrative arrangements, the order of the Court is simply that the matter is postponed *sine die.*

Manyarara JA: I agree

Korsah JA: I agree

[The matter was postponed as ordered and resumed on 14 March 1988. At the resumed hearing, Mr *Seddon* again appeared for the appellant, while Mr *D A B Robinson* appeared for the respondent at the request of the Court. Final judgment was given on 22 March 1988, as follows:]

McNally JA: This matter came before the Court last year and is the subject of an interim judgment, No SC 141/87. It is not necessary therefore to repeat the facts and the issues.

Mr *Robinson*, who has kindly volunteered his services on behalf of the respondent, and to whom the Court is indebted both for his readiness to assist and for his helpful submissions, has told us that he can find no evidence that the customary law applicable has any remedy for a person in the position of his client. Mr *Seddon*, for the appellant, submits that his client has no liability under customary law.

In the absence of full evidence I would not wish to come to a conclusion of a general and binding nature as to the exact extent of customary law in this difficult area. It is enough to say that both parties agree that under customary law there is no remedy for the respondent in this case.

I said in my earlier judgment, after setting out the provisions of s 11(2)(a) of the Customary Law and Primary Courts Act, No 6 of 1981:

> "Is this case determinable by customary law? If it is not, the community court lacked jurisdiction to hear it."

Mr *Robinson* now contends, as of course he has no choice but to do, that the common law applies, and he expressly renounces reliance on the customary law. In that event it must follow, if he is correct, that his client should not have initiated proceedings in the community court, which has no jurisdiction in a civil case where the case is not determinable by customary law.

McNALLY JA

The position in a nutshell is this: if he was in the right court, he concedes he has no remedy. If he has a remedy, then he was in the wrong court. In either event the result is the same. The appeal must succeed.

In passing an important point must be noted. In the penultimate paragraph of the interim judgment to which I have referred (S-141-87) I asked the rhetorical question:

> "In that event is it to be assumed that the respondent has a right to proceed in terms of the general law before a

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> maintenance court which is a magistrates court?"

Mr *Robinson* has pointed out that in the peculiar circumstances of this case it may be necessary for his client to institute proceedings, not in the magistrates court, but in the High Court. I am not convinced that that is so, because it seems to me that the respondent would be claiming, not as a "child" under s 11 of the Maintenance Act, but as a "dependant" under s 4 of the Act, and can do so in a maintenance court. However, it is not necessary to come to a conclusion on the point, because both the High Court and the magistrates court are courts of common law jurisdiction. In the circumstances the answer to the rhetorical question is:

> "If the matter is properly to be determined in accordance with the general law, then the respondent will be entitled to proceed in the appropriate court of competent common law jurisdiction, whether that be the High Court or 'a maintenance court which is a magistrates court'."

The appellant has understandably asked for costs in the event of his succeeding. The respondent has asked that there be no order as to costs. It seems to me that it is pointless to award costs against a schoolboy who has no assets. Moreover the Court has made an important finding in the respondent's favour, namely that he is in fact the son of the appellant, despite the latter's denials. In all these circumstances I believe the only possible order is that there be no order as to costs either in this Court or below.

Accordingly the appeal is allowed with no order as to costs. The order of the Presiding Officer in the community court, Marondera is set aside and replaced with the following:

> "The application is dismissed with no order as to costs."

McNALLY JA

The order as to costs in the Magistrates Court, Marondera is also set aside.

Manyarara JA: I agree.

Korsah JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

MVERECHENA v MVERECHENA 1988 (1) ZLR 205 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA& Korsah JA

Civil appeal

22 March 1988

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Flynote

Family law - marriage under customary law - divorce - maintenance following - customary law no longer applicable - ex-husband primarily responsible for maintenance of wife - roora - irrelevance of.

Headnote

The parties to this appeal were husband and wife under a registered customary marriage. The husband sued the wife in the community court, Harare, for a decree of divorce. The wife counter-claimed for, among other things, maintenance for herself and the children of the marriage. The court granted the divorce and awarded maintenance to the respondent as prayed.

The appellant argued that since this was a customary law marriage to which customary law applied and since roora had been paid, the respondent should simply return to the guardianship of her parents who would support her.

Held, that, since the Legal Age of Majority Act 1982 had granted full legal personality to women over the age of 18 years, there was no question of the respondent reverting to the guardianship of her father or other representative of her family.

Held, further, that the provisions of s 12(3) and (4) of the Customary Law and Primary Courts Act expressly override and extend the provisions of customary law, and permit a community court to make an order for maintenance in accordance with the provisions of the Maintenance Act. They further expressly require the court to regard the ex-husband as primarily responsible for the maintenance of his ex-wife until her remarriage.

McNALLY JA

Held, further, that the question of roora no longer being an essential element of marriage under customary law, the question of whether or not roora has been paid is irrelevant in deciding whether the ex-husband should pay maintenance.

Cases cited:

Katekwe v *Muchabaiwa* 1984 (2) ZLR 112

Jenah v *Nyemba* S-49-86 (not yet reported)

Chihowa v *Mangwende* S-84-87 (not yet reported)

Maeresera v *Maeresera* 1988 (1) ZLR 193 (SC)

Karambakuwa v *Mabaya* S-158-87 (unreported)

A Thompson for the appellant

No appearance for the respondent

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Judgment

McNally JA: In this matter the appellant sued the respondent in the Community Court, Harare, for a decree of divorce, custody of the three minor children of the marriage, and costs of suit. She counter-claimed for custody of the children, a share of the property, maintenance for herself and for the children, and costs of suit.

Both parties were partially successful. He was awarded the divorce and custody of the eldest of the three children, a boy. She was awarded custody of the two younger children, maintenance for herself in the sum of $100 per month and for the children in the sums of $80 and $60 per month respectively. There was no order as to costs.

He appealed to the District Court against the award of maintenance to his ex-wife. He claimed she was not entitled to any maintenance at all, alternatively no more than $40 per month. The appeal was dismissed with costs. He now appeals to this Court. At the hearing we dismissed the appeal and indicated that our reasons would follow. These are they.

The marriage with which we are concerned is a registered customary union. The appellant has two other wives and a total of 25 children, of whom 15 are minors. He is a prominent and prosperous businessman. The question whether he can afford to pay $100 per month does not arise.

The argument put forward on the appellant's behalf was that, since customary law applies and since lobola (*roora*) has been paid, the respondent should simply return to the guardianship of her parents. No question of maintenance

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should arise unless special circumstances are shown to exist. Since no special circumstances were proved, and there was no evidence that her parents would not or could not support her, there was no basis for making an order for maintenance.

The argument ignores two major changes introduced by the Legislature.

In the first place, the Legal Age of Majority Act No. 15 of 1982 has granted full legal personality to women who attain the age of 18 years. There is thus no question of the respondent reverting to the guardianship of her father or other representative of her family. As DUMBUTSHENA CJ said in *Katekwe* v *Muchabaiwa* 1984 (2) ZLR 112:

> "African women now have full legal capacity."

See also the comments of GUBBAY JA at p 6 of the judgment in *Jenah* v *Nyemba*, S-49-86 (not yet reported), and of the Chief Justice at p 4 of the judgment in *Chihowa* v *Mangwende* S-84-87 (not yet reported).

Secondly, we must take account of the provisions of the Customary Law and Primary Courts Act No. 6 of 1981 in particular the new ss 12(3) and (4) as introduced by s 4 of Act 21 of 1982. They

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read as follows:

" (3) Without derogation from its powers to make any other order for maintenance, a community court may make an order for maintenance in accordance with the provisions of the Maintenance Act [*Chapter 35*].

(4) For the purposes of an order for maintenance in terms of subsection (3) a community court shall, notwithstanding anything to the contrary contained in customary law, regard-

(a) the person who, according to customary law, is the husband of a woman as being primarily responsible for the maintenance of that woman during the marriage and, after the dissolution of their marriage, until her remarriage.

(b) ..."

Mr *Thompson*, who appeared for the appellant, sought to brush aside this amendment by saying that-

"...the operation of that amendment is expressly limited to an order made under the Maintenance Act [*Chapter 35*]. The amendment would therefore not apply to the proceedings in this case where the order was made in terms of s 9(1) of the Matrimonial Causes Act [*Chapter 39*]."

McNALLY JA

But the order in this case was not made in terms of s 9(1) of Chapter 39. It was made in terms of the provisions of the Customary Law and Primary Courts Act, as amended. Those provisions, already quoted, permit a community court to make an order for maintenance "in accordance with" (not "under") the provisions of the Maintenance Act. That is precisely what happened.

Moreover those provisions expressly override and extend the provisions of customary law, and expressly require the court to regard the ex-husband as primarily responsible for the maintenance of his ex-wife until her remarriage. That is precisely what the community court did (compare *Maeresera* v *Maeresera*, S-141-87 (not yet reported) at pp 1-4).*(1)

The words "notwithstanding anything to the contrary contained in customary law" clearly apply, *inter alia*, to the customary law provisions regarding roora. "It is settled that the question of roora is no longer an essential element of marriage under customary law" (per MANYARARA JA in *Karambakuwa* v *Mabaya* S-158-87). Whether or not roora has been paid is irrelevant in deciding whether the ex-husband should pay maintenance.

There is, therefore, no substance in the appeal against the principle of awarding maintenance in a case such as this.

As far as *quantum* is concerned, Mr *Thompson* abandoned this ground in his notice of amendment and advisedly so, since there was no substance in it.

The respondent was in default at the appeal hearing and accordingly no question of costs arose.

In the circumstances we simply dismissed the appeal.

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Dumbutshena CJ: I agree.

Korsah JA: I agree.

AJA Peck, appellant's legal practitioner

MINISTER OF LANDS, RESETTLEMENT & RURAL DEVELOPMENT & ANOR v MKUSHI 1988 (1) ZLR 209 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Civil appeal

23 February & 24 March 1988

Flynote

Statutes - Rural Land Act 1963 - lease of rural land-duties of heir and representative of deceased lessee in regard to continuation or cession of lease - lease under Act may not be "inherited" without Minister's approval -Minister's powers under Act.

Headnote

One Madondo had leased a farm under the Rural Land Act 1963 for a period of five years, starting on 1 July 1964. There was an option to purchase the farm. In 1970 the lease was extended for a period of fifteen years. Madondo died in July 1979, not having exercised the option to purchase the farm.

Madondo died intestate. The respondent, his nephew, was elected heir in terms of s 69 of the Administration of Estates Act [*Chapter 301*]. His election was disputed by the second appellant, the deceased's daughter. In August 1981 the District Administrator for the area in which the farm was situated signed a document purporting to be a cession of the lease to the respondent. An assistant secretary in the Agricultural Land Settlement Office appended his signature to the document, stating that his office consented to the transaction. The respondent wrote three letters to the first appellant's ministry, requesting the first appellant to grant him title to the farm. This request was refused because of the dispute about the respondent's heirship.

In 1984 the Ministry wrote to the respondent stating that the first appellant had approved the cancellation of the lease. The respondent applied to the High Court by way of notice of motion for an order declaring the cancellation null and void.

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The respondent succeeded in the High Court, the judge holding that, as the heir recognised

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under customary law, the respondent succeeded to the lease and that the purported cession of the lease was irrelevant.

Held, that while under s 38 of the Rural Land Act the legal representative of a deceased lessee may cede the lease to any qualified person approved by the Minister or may continue the lease subject to conditions imposed by the Minister, he must notify the Minister in writing of his intentions within twelve months of the lessee's death. Section 31(1) of the Act prohibits a lessee (or his legal representative) from entering into any transaction relating to a lease issued in terms of the Act without first obtaining the Minister's consent in writing.

Held, further, that the respondent not having notified his intentions to the Minister within twelve months of the lessee's death, the purported cession of the lease to him was a nullity and the Minister was entitled to cancel the purported cession to the respondent and to re-allot the holding at the expiry of the term of the lease.

Cases cited:

Madondo v *Mkushi* 1985 (2) ZLR 198 (SC)

Horvitch v *Fleischmann* 1947 (1) SA 46 (W)

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

D P Carter for the first appellant

No appearance for the second appellant

M R D Stonier for the respondent

Judgment

Manyarara JA : The dispute in this matter is over the lease of a farm holding, No. 1274 Wiltshire, in the Charter District.

Zivengwa Jafi Madondo leased the holding from the then Governor of Southern Rhodesia for a period of five years, commencing on 1 July 1964, in terms of the Rural Land Act, No. 47 of 1963. There was an option to purchase the holding. In 1970 the lease was extended for a period of fifteen years. However, Madondo died on 7 July 1979 before he had exercised the option.

As Madondo had died without leaving a will, the succession to his estate was determined in terms of s 69 of the Administration of Estates Act [*Chapter 301*].

It appears that the respondent, whom I shall call "Mr Mkushi", was elected

heir in terms of the provision. He is the son of one of the deceased's sisters, Namatirayi. The election was disputed by the second appellant ("Mrs Mawire"), who is the deceased's daughter.

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She was assisted by her mother and an uncle named Philemon Mujere. The matter reached this Court, but was remitted to the magistrate concerned for the taking of expert evidence on Karanga/Shona customary law: *Madondo* v *Mkushi* 1985 (2) ZLR 198 (SC).

That inheritance dispute is the background to the question of the lease which is the subject of the present appeal.

Following Mr Mkushi's appointment as heir, the District Administrator for Charter signed a document styled a "cession" of the lease to Mr Mkushi on 24 August 1981. Mr Mkushi also signed the document as the "cessionary" on 31 July 1981. An assistant secretary in the Agricultural Land Settlement Office appended his signature to the document on 18 September 1981, stating that his office consented to the transaction.

On 22 September 1981 an official of the Land Settlement Office requested Mr Mkushi to submit the lease agreement to enable him to attach the document. Mr Mkushi complied and he duly received back the lease and that document during November 1981.

By letters dated 22 October, 19 November and 21 December 1981 Mr Mkushi requested the first appellant's Ministry to grant him title to the holding. The response was negative. On 23 January 1982 Mr Mkushi's office addressed a letter to the Ministry in the following terms:

> "The writer refers to his telephone conversation with Mr Vutabwarova on 22 January 1982 regarding the above matter.
>
> You advised us that out Mr Mkushi cannot be granted Title Deed at the moment because of the following reasons :-
>
> (a) the late Z J Madondo's married daughter, Mrs Regina Mawire, approached you on 21 December 1981 to advise that she was contesting heirship to the farm and
>
> (b) that there is an adverse Inspection Report by one of the Ministry's inspectors.

We reply to these two issues as follows:-

> (a) (i) the dispute about heirship was settled by the District Commissioner at Charter in terms of the Administration of Estates Act;

MANYARARA JA

> (ii) Mrs Mawire attended the meeting to choose the heir;
>
> (iii) the District Commissioner Charter's Certificate naming the heir was submitted to the Secretary;
>
> (iv) cession has already been effected and if Mrs Mawire has any claim, she has to take action in the Court.
>
> (b) Mr Mkushi is prepared to attend to all items requiring attention in terms of the Inspector's reports."

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Matters continued to drag until 18 November 1983 when the Ministry wrote to Mr Mkushi as follows:

> "I wish to confirm that no consideration shall be given regarding the issue of title deeds until the dispute between Mrs Tenkai Madondo and daughter Eunice Mawire and yourself has been settled.
>
> In the light of present information before us, and if the matter of succession had been properly presented to us, then this office would have declined your application.
>
> I regret therefore to inform you that this office is withdrawing your claim to the farm until the dispute herein mentioned is settled."

On 12 January 1984 the Ministry wrote a further letter to Mr Mkushi stating that the first appellant had approved the cancellation of the lease to the holding. This information prompted Mr Mkushi to apply to the High Court by way of notice of motion for an order declaring the cancellation null and void. The application was granted with costs. The learned judge *a quo* approached the matter before him on the following basis:

> "At common law an intestate heir is deemed to inherit on the death of his benefactor (see *Dales NO* v *Lello & Ors* 1971 (1) SA 141; *Ransumer NO* v *The Master & Ors* 1978 (4) SA 877). The application of such a system is easy in the civil law legal system where intestate heirs are predetermined. But it is rather more complicated in customary law where the heir is chosen at a meeting after the death.
>
> Such a system of *post mortem* election of an heir necessitates the appointment of someone (akin to the executor in cases of testate succession) to hold the immovable property in trust until the election is made. It is to be emphasized that such an appointee assumes administrative control only over the property. He does not own it and so has no

MANYARARA JA

> right of disposal. By legal fiction the person who is eventually elected heir by the relatives of the deceased is deemed to have assumed ownership of the estate as from the date of death of the deceased.
>
> Against this background the transparent nature of the so-called cession of the lease is apparent. The District Administrator was not vested, either by statute or by common law, with a cedable interest in the lease. By virtue of the African Wills Act, the applicant, being the heir recognized at African law, succeeded to the lease. One cannot receive cession of that which is already one's own. In these circumstances the deed of cession must be disregarded. It is irrelevant legally and can be of no force or effect. Thus the respondent's allegations that the lease was breached by an illegal cession must fail."

The first appellant (hereafter referred to as "the Minister") has appealed to have the judgment of the High Court set aside. The thrust of the appeal is that the court *a quo* overlooked the appropriate legislation and applied the wrong law to this matter.

The point has not eluded Mr Mkushi's counsel, Mr *Stonier*, who deals with it in his written heads as follows:

> "1.6 It appears that s 38 of the Rural Land Act, Number 47 of 1963 has been overlooked and that this section pertains to the situation arising from the death of the lessee.
>
> In terms of s 27 of the Agricultural Land Settlement Act, Number 59 of 1969, any agreement entered into in terms of the Rural Land Act, *supra*, would continue in force, and the provisions of Part II of that Act would,

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where applicable in terms of such agreement, continue to apply.

1.7 It is accordingly respectfully submitted that the Respondent as the person administering the estate of Mr Madondo was empowered in terms of s 38 of the Rural land Act, *supra*, to cede the lease, and this lease was ceded to him, the Respondent, as heir.

The First Appellant through his representative consented to such cession."

Paragraph 1.7 is incorrect. As I have already stated, the transaction referred

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to as the cession was between the District Administrator at Charter as the "cedent" and Mr Mkushi as the "cessionary".

The transaction was entered into on a mistaken view of the law. It was certainly not intended to be a transaction in pursuance of the provisions of s 38 of the Rural Land Act, because at that stage it seems that nobody connected with the matter had thought of s 38.

Be that as it may, Mr *Stonier's* argument skirts the crisp issue for reasons which are traceable to the unsatisfactory manner in which the relevant Ministry's officials dealt with the matter. They led Mr Mkushi to believe that the Minister had cancelled **the lease** itself. What the Minister had in fact done was to refuse Mr Mkushi's application to have the deceased's holding allotted or ceded to him. This is apparent from the Minister's affidavit which was among the papers in the proceedings before the High Court.

The proper starting point is an examination of the Minister's powers under the Rural Land Act. Here, I must explain that the Minister is entitled to exercise his powers under the Act without recourse to any other person or body of persons. Therefore, all reference to the Rural Land Board or any other 'board' in the Rural Land Act and amending legislation may safely be read and construed as reference to the Minister himself.

Section 22 of the Rural Land Act vests all the power to allot holdings under the Act in the Minister.

The preceding s 21 provides as follows:

"21. (1) The board shall not be obliged to recommend any applicant.

(2) In the consideration and recommendation of applicants the board shall have regard to-

(a) the age of the applicant;

(b) his character and legal competency to hold land;

(c) whether he is willing to make a declaration affirming his intention personally to occupy the holding and to work and develop it exclusively for the benefit of himself and the members of his family, if any;

(d) whether he possesses the qualifications necessary for making beneficial use of the holding;

(e) whether he possesses the capital necessary to ensure the beneficial

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occupation of the holding as defined in subsection (2) of section *twenty-seven*;

(f) any other facts which, in the opinion of the board, are relevant to the individual applicant or the holding.

(3) The board shall not recommend any applicant who is a company unless such company-

(a) is incorporated under the laws of Southern Rhodesia relating to companies; ..."

One must then turn to s 27 which provides as follows:

"27. (1) Every lessee shall take up personal residence on his holding within such period as may be specified by the Minister after consultation with the board, and shall beneficially occupy his holding.

(2) Subject to the provisions of subs (3), beneficial occupation of a holding shall mean -

(a) in the case of an individual lessee, personal residence thereon; in the case of a company, residence thereon by a director or agent of the company who is in charge of farming operations thereon and is approved by the Minister after consultation with the board;

...

(h) the observance of any other conditions which the Minister may have imposed in the lease.

(3) Every lessee shall carry out all instructions of the board as to any of the matters referred to in subsection (2), and failure on the part of the lessee to carry out any such instructions shall be regarded as a failure to comply with a requirement of this Part:

Provided that any lessee shall have the right to appeal to the Minister against any instructions issued by the board."

It is in the light of the above provisions that one can proceed to examine s 38 to ascertain whether the Minister has acted correctly within his powers under the Act. In doing so, one must bear in mind that s 13 defines a "lessee" as "a person to whom a holding has been allotted and leased" (under Part II of the Act) and includes (a) the legal representative of the lessee who has died and (b) the person to whom a lease has been lawfully ceded.

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It is with that definition in mind that s 38 may be summarised as follows :

1. The legal representative of a deceased lessee may cede the lease to any qualified person approved by the Minister, or continue the lease on behalf of the estate, subject to such conditions as may be imposed. Alternatively, the legal representative may surrender the lease. Pending cession or continuance of the lease, Part II of the Act and any conditions imposed shall be fulfilled by the legal representative or his nominee approved in writing by the Minister.

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2. If the legal representative fails within twelve months of the lessees's death to notify the Minister in writing of his intention to cede or continue the lease, the lease may be determined.

3. The Minister may cancel the lease upon any failure by the legal representative to comply with the section or to fulfil any condition of the lease.

The Minister says that he based his cancellation of Mr Mkushi's claim to the lease on the following matters:

(a) an adverse report by the Agricultural Land Settlement Board which, after considering an unfavourable Farm Inspection Report on the holding, endorsed its findings with the advice: "Lease cannot be ceded". This report was dated 6 February 1981 [which, it will be noted, was prior to the execution by the District Administrator and Mr Mkushi of the document I have already mentioned].

(b) that Mr Mkushi, as a practising lawyer based in Harare, was not in a position to effect personal and permanent occupation of the holding. Section 27 defines "beneficial occupation" as personal residence by an individual lessee or, in the case of a company, by its director or agent. Mr Mkushi's law firm is not a company and it was not suggested that he intended to personally occupy the holding permanently: see *Horvitch* v *Fleischmann* 1947 (1) SA 46 (W) at p 48 (top).

(c) Mr Mkushi is the executor dative of the estate and the deceased's legal representative. Therefore, "there was a clear conflict of interests" when Mr Mkushi entered into the transaction for the "cession" of the lease to himself.

Paragraph (c) is based on Mr Mkushi's own affidavit in the motion proceedings before the High Court, in which he deposed to the following facts:

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"5. After the late Zivengwa's death I caused the estate of the late Zivengwa to be registered with the Master of the High Court which was duly done per the Master's reference DR 818/88. The assets in the Estate were then listed as the farm and the movables contained in annexure 'A' hereto. All this property has remained on the farm and under the effective control of Second Respondent (Mrs Mawire) personally or through Second Respondent's mother.

6. The Master of the High Court required a certificate naming the intestate heir to the estate of the late Zivengwa and accordingly my mother Namatirayi and her sisters Mrs Pasipamire and Mrs Maravanyika requested me to get the District Administrator at the Range to call a meeting of the relatives in order to decide on the intestate heir of the late Zivengwa. The ultimately successful meeting was held on 5 September 1980 when I was chosen intestate heir. Second Respondent and her mother and Philemon Mujere challenged my being the rightful intestate heir and as a result the District Administrator at the Range called another meeting of all interested parties at the Range on 9 March 1981. Second Respondent and her mother and Philemon Mujere attended this meeting. Second Respondent withdrew all claim to being the rightful heir. After Second Respondent had adopted this stand the dispute as to the correct heir was left between myself and Philemon Mujere. Philemon Mujere lost the contest and the District Administrator ruled that I was the rightful heir and issued the appropriate certificate to that effect."

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It was in such a dual capacity as the deceased's legal representative and heir that Mr Mkushi went through the procedure with the District Administrator at Charter which I have already described.

Section 31(1) of the Act prohibits a lessee (which term includes his legal representative) from entering into any transaction relating to a lease issued in terms of the Act "without the consent in writing of the Minister first had and obtained."

As Mr *Carter* submitted on the Minister's behalf, the Rural Land Act came into operation on 1 November 1963. The deceased's lease was issued in terms of Part II thereof on 1 July 1964 and extended in terms of the same in 1970. Section 28 of the Agricultural Land Settlement Act [*Chapter 137*], which re-enacted Act 59 of 1969, made provision for the continued application of Part II of the Rural Land Act to any lease which had been issued

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under that Act. Section 28 of Chapter 137 is to the following effect:

> "28. (1) Notwithstanding the amendment of the Rural Land Act, 1963 (No. 47 of 1963) by this Act and subject to the provisions of subsection
>
> (2) -
>
> (a) an agreement or transaction entered into or deemed to have been entered into under that Act, and in force immediately before 1 January 1970, shall continue in force and the provisions of Part II and section 64 of Part VI of that Act shall where applicable in terms of such agreement or transaction, continue to apply thereto;"

[Section 64 merely states that any reference to a "[land] board" shall be read and construed as a reference to the Rural Land Board.]

> "(b) regulations made or deemed to have been made under that Act and in force immediately before 1 January 1970, shall continue in force until amended or repealed in terms of this Act and shall be deemed to have been made in terms of this Act.
>
> (2) An agreement, transaction or regulation referred to in subsection (1) and the provisions of the Rural Land Act, 1963 (No. 47 of 1963) which are applicable to such agreement or transaction in terms of subsection (1) shall be construed, *mutatis mutandis*-
>
> (a) ...
>
> (b) so as to give effect to the intention that the Minister replaces the Rural Land Board which was established by that Act, is not required to consult with or refer any matter to that Board for advice, consideration, recommendation or report and may act without such consultation or reference and without the advice, recommendation or report of that Board."

Subsections (3) and (4) are irrelevant to the present matter as they leave intact the Minister's powers to alter, amend or otherwise vary any agreement or transaction entered into under the Act, subject only to an appeal to the President by any aggrieved party.

There can be no doubt whatsoever that the lease in this matter was subject to Part II of the Rural Land Act, and it is on this ground that the judgment of the High Court cannot be allowed

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to stand. In order for the lease to be lawfully ceded or continued, Mr Mkushi as the lessee's legal representative was

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required to notify his intentions to the Minister for approval within twelve months of the deceased's death (ss 38(1)(b) and 31(3)). As Mr Mkushi failed to do so, he was already out of court when he went through the purported acceptance of "cession" of the lease to himself by the District Administrator two years later. It follows that the learned judge *a quo* was put on the wrong scent in this matter and he decided the wrong point.

The District Administrator had no place in the matter simply because he was not the lessee's legal representative. I cannot find any provision in the Act in terms of which, all things being equal, Mr Mkushi could have possibly "ceded" the lease to himself - an unavoidable consequence of the "two hats" he wore as the deceased lessee's legal representative and would-be cessionary.

I believe I have demonstrated that the purported cession of the lease to Mr Mkushi was a nullity and the purported consent thereto by a Ministry official was void because the procedure adopted offended against the Act. Mr Mkushi's purported occupation of the holding through "a caretaker called Magumise" is also void because the Minister's written approval was never sought or obtained (s 38(1)). See *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I, where LORD DENNING says:

> "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 must the purported cession collapse if it did not comply with the Rural Land Act. To put the matter beyond all doubt, s 36(3) empowers the Minister to cancel a lease granted under the Act if the lessee fails to comply with any provision of Part II.

The facts establish conclusively that Mr Mkushi failed to comply with the Act in his capacity as the deceased's legal representative. Such failure entitled the Minister to cancel the purported cession as an unlawful transaction relating to the lease and to re-allot the holding when the term of the lease expired. The Minister deposed to his decision as follows:

> "8. After careful consideration of the matters [placed before me] together

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> with the Government Policy on Land Settlement I cancelled the cession and allowed the lease to run a full life. The Lease Agreement in question has expired on 31 July 1984 and I could not allow its renewal. I have caused the issue of a Fresh Lease Agreement No. ALSA 349 to the occupant and daughter of the

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deceased lessee.

It is further my humble submission that cancellation in the circumstances was lawful.

9. As the Minister who administers the Agricultural Land Settlement Act, what transpired in the Court and the subsequent Court Order do not concern me and indeed my views were never sought in respect of the State leased Land."

The court proceedings to which the Minister referred were those which this Court had remitted to the magistrate for the taking of expert evidence on customary law. It is irrelevant that the option to purchase the holding had accrued to the deceased when he died as the option was never exercised by him. Instead, and contrary to Mr Stonier's submission, the lease was breached by the "illegal cession". The inheritance laws on which the court a quo based its judgment do not arise for consideration, as special provision is made in the Rural Land Act for the lawful cession or continuance of a lease in the event of the lessee's death. The court cannot attribute to the unambiguous provisions of the Act a meaning which would defeat its object: *Craies on Statute Law* 7 ed p 85.

The appeal succeeds. The proper course is to set aside the order made by the High Court declaring the cancellation void as well as that court's order as to costs, and to award the Minister his costs on appeal. On that basis, the appeal is allowed with costs, and the order of the court a quo is altered to read:

"The application is dismissed with costs."

McNally: I agree.

Korsah JA: I agree.

Civil Division of the Attorney-General's office, first appellant's legal practitioners

Sawyer & Mkushi, respondent's legal practitioners

S v NYATHI & ANOR 1988 (1) ZLR 221 (HC)

Court **High Court, Bulawayo**

Sansole J

Criminal review

25 March 1988

Flynote

Criminal procedure - plea-of guilty - alteration of before verdict - principles applicable

Headnote

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If an accused person who has pleaded guilty to a charge wishes to withdraw his plea of guilty and substitute one of not guilty, different principles apply, depending whether the application to alter the plea is made before or after verdict has been given. In both cases, there is an onus on the accused to justify the alteration, but in the former situation he does not have to satisfy the court of the veracity of his explanation. The court is not entitled to refuse the application unless it is satisfied that the explanation is not only improbable but also that it is false beyond reasonable doubt. In the latter case, where the presumption of innocence no longer applies, the accused is required to show on the balance of probabilities that the plea of guilty was not made voluntarily, correctly and with understanding.

Cases cited:

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

S v *Haruperi* 1984 (1) ZLR 258

S v *Maseko* S-95-86 (not yet reported)

Friedman v *United States* (1954) 99 US L ed 222

S v *Mapawena* AD-79-71 (unreported)

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

SANSOLE J

Judgment

Sansole J: The accused and her friend, one Samukelo Dube, appeared at a magistrate's court at Entumbane in Bulawayo on a charge of attempting to procure an abortion on the complainant. Both accused were 24 years old. They appeared in court on 1 December 1987 and they both pleaded guilty to the charge. However, a verdict was not given then and there. Instead, the matter was stood down to 15 December 1987. At the resumption of the trial accused Zanele Nyathi sought to withdraw her plea of guilty and this is what the record reveals as what she said by way of explanation :

> "I would like to put certain questions to the Complainant - I want to know about the dates of the commission of the offence. I do not agree with the date given by the State. I also want to know who first noticed that she was pregnant and also what was said about the pregnancy - I say complainant was the first. Complainant would know what was said first. She is not here today she is at Njube.
>
> I pleaded guilty because I had been arrested for the first time, I feared. I did not know a person can say the whole truth. I have brought the truth here. I lied to the Court.
>
> I was unduly influenced at Police Station when I made a statement. When I came here I just talked. Later I thought about the whole issue. I found I had nailed myself."

And then the record reveals this:

> *" Applicant fails* : a balance of probabilities. Complainant to be called; however to clear certain issues.

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Verdict : Guilty as charged (both)."

The complainant was subsequently called to give evidence. A synopsis of her evidence is to the effect that she was employed by the first accused and accused used to send her on errands to the second accused. She took up employment with the first accused sometime in June 1987. Subsequently she started an affair with the first accused's cousin, one Nkululeko. As a result, she fell pregnant, and Nkululeko accepted responsibility. It was then resolved that the first accused would inform the complainant's relatives about the pregnancy.

In September 1987 she experienced stomach pains and first accused, who is a nursing aide at Mpilo brought her some packets of tablets for her to take. First accused instructed her to take 21 tablets in the morning and a further 21

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tablets that evening. It is the witness' contention that after taking the first 21 tablets she felt dizzy and consequently she inquired of the first accused what the tablets were for. As a result first accused advised her that the tablets were a treatment for her stomach ailment. The first accused pacified her that she was not to worry about feeling dizzy. It was the witness' contention that there was, nonetheless, no abatement in her stomach pains.

[The learned judge outlined the evidence and continued:]

First accused denied ever giving complainant any tablets. She denied ever having had such tablets. The cross-examination was cursory, and it is not surprising, in view of the fact that she was unrepresented at the trial.

Nevertheless, both accused were convicted of an attempt to procure an abortion and each was sentenced to 12 months' imprisonment with labour, of which three months' imprisonment were wholly suspended for five years on certain conditions.

The first accused is now represented by Mr *James*. He has submitted a written argument in which he has argued in the alternative. Firstly, it is his submission that the trial magistrate misdirected himself by denying the first accused her right to change her plea, more so, since her application was made before verdict.

In my view, in matters relating to the withdrawal of plea, the authorities reveal that there are two situations and each situation entails different considerations. The two situations are these, *viz*:

(a) an application to withdraw a plea **before** verdict and

(b) an application to withdraw a plea **after verdict but before** sentence. (Emphasis in each case my own.)

In respect of each case the issue of *onus* is of paramount importance and in respect of both situations the *onus* is on the accused to justify the withdrawal. Thus in respect of an application to withdraw a plea of guilty before verdict, the presumption of innocence still applies. The accused is required to give an explanation regarding why he initially pleaded guilty and why he

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now wishes to change his plea. And once he gives an explanation, it will suffice. There is no *onus* on him to convince the court of the veracity of his explanation, but if he fails altogether to give an explanation, the court is entitled to hold him to his plea.

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As CLAASSEN J put it in *S* v *Britz* 1963 (1) SA 394 (T) at 398F:

> "Even though his explanation be improbable the court is not entitled to refuse the application unless it is satisfied both that the explanation is not only improbable but also that it is false beyond reasonable doubt."

At this stage, in my view, caution needs to be exercised and the court should more readily lean in favour of the accused and allow the application.

In Zimbabwe, withdrawals of plea are governed by s 255A of the Criminal Procedure and Evidence Act [*Chapter 59*]. And as Smith J put it in *S v Haruperi* 1984 (1) ZLR 258:

> "If the application is made during the inquiry in terms of s 255 and before the court delivers its verdict the question of onus cannot arise."

But where the application to withdraw a plea is made after verdict but before sentence the court has a discretion in appropriate cases to allow a withdrawal of plea. This discretion is exercisable only in clear cases and very sparingly.

See *S* v *Maseko* S-95-86 (not yet reported).

For here different considerations apply. And the presumption of innocence no longer applies. In this situation the accused is required to show, on a balance of probabilities, that the plea that he made was not made voluntarily, understandingly and correctly.

See *Friedman* v *United States* (1954) 99 US L ed 222, where it is put as follows :

> "The issue for determination by the Court is whether the plea was voluntarily, advisedly, intentionally and understandingly entered or whether it was at the time of its entry attributable to force, fear, fraud, ignorance, inadvertence or mistake such as would justify the Court in concluding that it ought not to be permitted to stand."

See also *per* MACDONALD JP (as he then was) in *S v Mapawena* AD-79-71.

VAN DIJKHORST J in *S v Mazwi* 1982 (2) SA 344 (T) at 352 put it this way :

> "The *onus* only arises after conviction. By that time the Court ...will be satisfied that the accused is guilty and will have brought out a verdict

SANSOLE J

> accordingly. Surely, it is not inequitable to require that in these circumstances anyone who wants to set aside the conviction and install a plea of not guilty **should satisfy the court that there are good grounds for doing so**" (emphasis added).

In the instant case I am only concerned with the first situation. The accused's explanation

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appears *supra*. For the reasons I have already given in this judgment I agree with Mr *James*. In addition, there is a matter of grave concern to me. It is the perfunctory, if not cavalier, manner in which the trial magistrate dealt with the accused's application. He gave no reasons as if it deserved no serious consideration on his part. This type of remissness deserves to be deprecated.

In the result I set aside both the conviction and sentence against the first accused and the matter is remitted for trial *de novo* before another magistrate.

Secondly, and in the alternative, Mr *James* had argued that in the event of my not being sympathetic with the accused with regard to a withdrawal of her plea, the sentence imposed by the trial magistrate was manifestly excessive and he referred me to several authorities in support of this contention. In view of my conclusion above I see no purpose in directing my mind to this submission.

Muchechetere J: I agree.

GUNDANI v KANYEMBA 1988 (1) ZLR 226 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Civil appeal

14 & 28 March 1988

Flynote

Civil procedure - summons - service of - return of service by officer of court prima facie evidence of service.

Headnote

The fact that a return of service is not in affidavit form does not mean that no reliance may be placed on it by the court. The return of service by an officer of court, whether he be the sheriff, the deputy sheriff or the messenger, is to be accepted as prima facie proof of what is stated therein, although it is capable of being rebutted by clear and satisfactory evidence. In addition to the line of cases supporting this approach, the maxim omnia praesumuntur rite esse acta applies to a return of service effected by an officer of the court. There is a presumption of receipt of a summons where a public official, the messenger of court, has signed a return stating that the summons was served on the defendant.

Cases cited:

Arab v *Arab* 1976 (2) ZLR 166 (AD)

G D Haulage (Pvt) Ltd v *Mumurgwi Bus Service (Pvt) Ltd* 1979 RLR 447; 1980 (1) SA 729

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(ZRA)

de Kock v *van Niekerk & Anor* (1861) 1 Ros 1

Haycroft v *Filmer* (1863) 1 Ros 98

Ritchie v *Andrews* (1882) 2 EDC 254

Wolhuter v *Foote* (1883) 2 HCG 258

Deputy Sheriff for Witwatersrand District v *Goldberg & Others* 1905 TS 680

Lister & Anor v *Winter* 1906 TS 211

GUBBAY JA

van Rooyen v *Colonial Government* (1906) 16 CTR 296

Cape Coast Exploration Ltd v *Scholtz & Anor* 1933 AD 56

R v *Botha* 1960 (4) SA 6 (T)

T M Rajah for the appellant

A Dyke for the respondent

Judgment

Gubbay JA: This is an appeal against the dismissal of an application, brought pursuant to Rule 1(1) of Order 30 of the Magistrates Court (Civil) Rules 1980, for the rescission of a default judgment granted in favour of the respondent.

The magistrate in the court *a quo* who dealt with the application refused it on the ground that, in his opinion, the default on the part of the appellant was to be classed as wilful, thereby disentitling him to what amounts to an indulgence.

The facts leading up to the appeal are these.

On 4 February 1985 the respondent issued a summons out of the Magistrates Court, Harare, claiming as against the appellant the return of seventeen specified items of household property, or payment of their value in the sum of $1 905,49. The messenger of the court entrusted with service of the summons duly submitted his return to the clerk of the court and to the respondent's legal practitioners. It was to the effect that the summons had been served upon the appellant personally on 9 February 1985 at 10.45 am at his residential address, being house number 8500, Unit K, Seke. For want of an appearance to defend the action, default judgment was entered against the appellant on 7 March 1985. A warrant of execution was then issued and addressed to the messenger who, on 15 March 1985, rendered a nulla bona return. It stated that the appellant had been seen at his residence, but that no property had been pointed out.

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After a lapse of several months the respondent took out a summons calling upon the appellant to show cause why a decree of civil imprisonment should not be made against him. That summons was served at the appellant's place of employment on 30 November 1985 and prompted the application for rescission, which was lodged with the court on 19 December 1985.

The basis of the application was that the appellant was not in wilful default and that in respect of three items of property, valued by the respondent at

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$1 085, he had a *bona fide* defence. Nothing was said about the remaining items, valued at $820,49.

With regard to the issue of the service of the originating summons and the writ of execution, the appellant, in his founding and answering affidavits, deposed as follows:

> "I am not in wilful default of entry of appearance as I have never had sight of the summons commencing action in this matter and first became aware of plaintiff's action during the week ended 6 December 1985 when plaintiff's summons for civil imprisonment was served upon me at my place of work.
>
> I deny that the summons was served on me personally as alleged and aver that this indication by the messenger of court can only be in error. I respectfully submit that it is an easy error to make on the part of the messenger of court and that it is common knowledge that such errors have occurred in the past.
>
> I deny again that when serving the warrant of execution at 8500, Unit K, Seke, the messenger of court could have seen me as alleged in his return as I am in permanent employment with Zimbank Limited and was at work during working hours on that day."

The affidavit of Mr Chigwana, the senior security officer in the employ of Zimbank Limited, lent some support on the probabilities to the appellant's averment that he was absent from his residence on 15 March, 1985, for according to the former the records of Zimbank Limited did show that neither vacation nor sick leave had been granted to the appellant during March 1985.

As I understand the argument of Mr *Rajah*, who appeared for the appellant, it was conceded that if the court *a quo* was correct in finding that the default was wilful this appeal cannot succeed. That concession must undoubtedly be regarded as proper, for the refusal to grant the requisite indulgence in such a situation is based on the sound premise that public policy dictates that as far as possible there should be finality in litigation. See *Arab* v *Arab* 1976 (2) RLR 166 (AD) at 172E; GD *Haulage (Pvt) Ltd* v *Mumurgwi Bus Service (Pvt) Ltd* 1979 RLR 447 (AD) at 455G. Counsel submitted, however, that the messenger's return of service of the originating summons did not constitute *prima facie* evidence of what was stated therein, and that consequently the appellant's denial of having received it was conclusive.

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It is true that there is in the Magistrates Court Act [*Chapter 18*] and in the Magistrates Court (Civil) Rules 1980 no section or rule equivalent to s 17 of the South African Magistrates Court

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Act No 32 of 1944, as replaced by Act No 91 of 1977, which provides that the return of the messenger "shall be prima facie evidence of the matters therein stated". But it by no means follows that the omission of such a provision implies that unless the return is in affidavit form sworn to by the messenger no reliance may be placed upon it by the court.

The decisions of the South African courts which preceded the introduction by the Legislature of that country of provisions dealing with the evidential weight attaching to the messenger's or sheriff's return of service, reveal the existence of two approaches. In earliest times the inclination was to refuse to allow the return to be impeached for want of accuracy or truth, and to leave the aggrieved party to his remedy in damages against the serving officer concerned. See *de Kock v van Niekerk and Johnson* (1861) 1 Ros 1; *Haycroft* v *Filmer* (1863) 1 Ros 98. Subsequently a more rational view was adopted, which recognised that a return of service was not final and conclusive but merely *prima facie* evidence of the contents thereof. See *Ritchie v Andrews* (1882) 2 EDC 254 at 257; *Wolhuter* v *Foote* (1883) 2HCG 258 at 271; *Deputy Sheriff for Witwatersrand District* v *Goldberg & Ors* 1905 TS 680 at 684; *Lister & Tocknell* v *Winter* 1906 TS 211 at 214; *van Rooyen* v *Colonial Government* (1906) 16 CTR 296. Confronted with th judicial controversy as to whether a return was impeachable at all, the South African Parliament rightly put to rest the somewhat illogical strict approach.

But what the second series of cases I have referred to laid down, and this is important in the local context, was that the return of service of an officer of the court, whether he be the sheriff, the deputy sheriff or the messenger, was to be accepted as *prima facie* proof of what was stated therein, capable of being rebutted by clear and satisfactory evidence. That is a view with which I respectfully agree.

Moreover, it does seem to me that the maxim *omnia praesumuntur rite esse acta* applies to a return of service effected by the messenger of the court. Rule 3(a) of Order 2 of the Magistrates Court (Civil) Rules 1980 provides that the return must be in the prescribed form and must state the date and the manner of service. Where ex facie the return there has been compliance with this rule (as in this case), the presumption of regularity arises.

Thus in *Cape Coast Exploration Limited* v *Scholtz & Anor* 1933 AD 56 the

GUBBAY JA

issue was whether the defendant had been sent a letter from the Civil Commissioner of Namaqualand (a public official), notifying him that his diamond prospecting certificate had been withdrawn. Relying on the undisputed fact that a copy of such letter had been found in the Commissioner's file, Wessels CJ said at 76:

> "We must presume that an official will carry out the ordinary routine work of his office, for in our experience that is what usually occurs. Hence we must presume that if an official letter is written and a copy filed, that the former is despatched in the ordinary course of business to the person concerned **and that he has received it** (my emphasis)."

A *fortiori* is there is a presumption of receipt where the public official concerned is the messenger of the court, whose signed return states that the summons was served upon the

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defendant. See also *R* v *Botha* 1960 (4) SA 6 (T); Herbstein and van Winsen *The Civil Practice in the Superior Court of South Africa* 3 ed at 223. Were this not so, default judgments could not be granted, nor civil imprisonment hearings convened, because the courts would not be satisfied that service of process had been effected upon the defendant. It would be necessary for the plaintiff to obtain the return of service upon affidavit before qualifying for such relief. That has never been the position.

I am satisfied, therefore, that the messenger's return, stating as it did that personal service of the summons had been effected on 9 February 1985, cast the onus upon the appellant to prove, by the adduction of clear and satisfactory evidence, that the return was wrong. In other words, it was for the appellant to rebut the presumption of personal service arising from what was contained in the messenger's return.

It was Mr *Rajah's* alternative contention that the appellant's bald allegation that the summons was not served upon him was sufficient to discharge the onus or rebut the presumption. I am unable to agree. The appellant did not claim to be at his place of employment on the morning of Saturday, 9 February 1985. Nor did he even profess an inability to remember precisely where he was or what he was doing. But assuming he suffered a lapse of memory (which would be understandable for the summons in question was allegedly served nine months before the civil imprisonment summons), he could nonetheless have given some indication to the court, supported by the affidavit of a third party, of how he normally spends his Saturday mornings. For instance, whether he usually goes shopping, plays sport, visits relatives,

or takes the children to the park. No attempt was made to say where he thought he may have been on the morning in question.

In the result I find myself in complete agreement with the conclusion reached by the court *a quo* that standing on its own, unaccompanied by any facts or circumstances from which a favourable inference could be drawn, the appellant's denial was insufficient to rebut the presumption that the summons had been served upon him. His failure to react to it can only be taken as a deliberate intention not to defend the action. He was therefore in wilful default.

It follows that the appeal must be dismissed with costs.

McNally JA: I agree.

Manyarara JA: I agree.

Stumbles & Rowe, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

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KEARNS v MAKORE FARM (PVT) LTD 1988 (1) ZLR 232 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil appeal

29 March 1988

Flynote

Appeals - heads of argument - late filing of - need to file within time prescribed by Supreme Court Rules - consequences of late filing - security for costs of civil appeal - failure to provide timeously - consequences of.

Headnote

The Supreme Court has repeatedly warned legal practitioners of the need to file heads of argument timeously, in compliance with Rule 43(2) of the Supreme Court Rules. There being no reasonable prospect of the appeal succeeding, the Court accordingly dismissed both an application to adduce fresh evidence and the appeal itself. In addition, since the appellant had failed to provide security for costs as required by Rule 46(2) of the Supreme Court Rules, he had no right to be heard. It was not satisfactory to tender a cheque from the Bar.

Case cited:

Le Mans Motors (Pvt) Ltd v *Collins* S-160-86 (not yet reported)

MJ Gillespie for the appellant

MT O'Meara for the respondent

Judgment

Dumbutshena CJ : The appellant is asking for condonation of the late filing of the heads of argument. The record in this appeal was prepared and available by 12 October 1987 and the notice of hearing was issued on 13 November 1987. The appellant's legal practitioner had therefore more than sufficient time to brief counsel to prepare heads of argument. Besides, the

DUMBUTSHENA CJ

notice of motion was settled on 15 March and filed on 16 March 1988. The heads of argument were only filed at 8.50 am on 23 March 1988, counsel having received the brief during the lunch hour of the previous day. The heads of argument were therefore five days out of time.

What is the explanation for the failure to comply with Rule 43 (2) of the Supreme Court Rules? No acceptable explanation has been tendered by Mr *Gillespie*, who appeared for the appellant. The fault is attributable completely to the negligence of Mr Gillespie's instructing legal practitioners.

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In *Le Mans Motors (Pvt) Ltd v Collins* S-160-86 (not yet reported) we gave a warning to legal practitioners in the following words:

> "Time and time again we have warned legal practitioners of the need to file heads of argument in compliance with Rule 43 (2) of the Supreme Court Rules as amended. Insufficient heed has been paid to our warnings. The time has come to indicate this Court's disapproval by dismissing this appeal."

Regrettably that warning has not been sufficiently heeded. As in that case, it is our view that in this matter there is no reasonable prospect of the relief sought in the Notice of Motion to adduce fresh evidence succeeding, or, of the appeal itself succeeding. But for that we would not have considered it appropriate to dismiss both the application and the appeal. In addition it seems to us, by reason of the failure to comply with Rule 46 (2) of the Rules to provide security for the costs of the appeal, which provision was not waived by the respondent, the appellant had no right to be heard and it was not satisfactory to tender the cheque from the Bar.

For these reasons the application and the appeal are dismissed with costs.

Gubbay JA: I agree.

Korsah JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Scott & Associates, respondent's legal practitioners

MAPARURA v MAPARURA 1988 (1) ZLR 234 (HC)

Court **High Court, Harare**

Chidyausiku J

Exception

21 & 30 March 1988

Flynote

Practice and procedure - res judicata - action previously dismissed because discovery not made as directed - not a determination of issues-defence of res judicata not applicable.

Headnote

The respondent had in 1986 issued summons against the excipient, her husband, claiming, *inter alia*, a decree of divorce. At the close of pleadings he served on her a notice to make discovery, which she failed to do. He then obtained a court order directing her to make discovery within six days, failing which he would be given leave to apply for the dismissal of her action against him. She failed to make discovery and her action was accordingly dismissed. The excipient later commenced divorce proceedings against the respondent, who counter-claimed,

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seeking the same relief as in her original claim. The excipient excepted to her counter-claim on the basis of *res judicata.*

Held, dismissing the exception, that although the issues raised previously were identical to those now raised by the respondent and although the previous court had jurisdiction, the issues had not been determined in the previous action. What was determined was merely whether or not discovery had been made as directed; the consequent dismissal of the respondent's action decided nothing except the fact that she was refused the relief she sought.

Case cited:

New Brunswick Railway Co v *British & French Trust Corporation Ltd*

[1939] AC 1; [1938] 4 All ER 747 (HL)

CHIDYAUSIKU J

E T Manikai, for the excipient

No appearance for the respondent

Judgment

Chidyausiku J: The facts of this matter are fairly simple and straight forward. The respondent issued summons against the excipient on 22 April 1986. In that summons she claimed the following relief:

(a) a decree of divorce;

(b) custody of the four minor children of the marriage;

(c) maintenance for the minor children at the rate of $150,00 per child per month;

(d) payment of $5611,49 in respect of clothing destroyed by defendant;

(e) payment of the sum of $6000,00 in respect of the motor vehicle;

(f) costs of suit.

On the 29 April, 1986 appearance to defend was entered. Further pleadings were exchanged between the parties and when pleadings were closed the excipient served notice to make discovery on the respondent. Respondent failed to make discovery. Excipient applied for and obtained a court order directing (a) respondent to make discovery within six days and (b) that failing compliance therewith excipient be given leave to apply to court for the dismissal of the respondent's action and enter judgment for him. Respondent did not make discovery and an application was made to dismiss her case. The application was successful and the following order was given:

> "That the plaintiff's claim in this matter be and is hereby dismissed with costs."

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The excipient, who was defendant in the original action, has commenced divorce proceedings. He now seeks a decree of divorce and custody of the minor children of the marriage. The respondent has entered an appearance to defend, filed a plea and a counter-claim. In the counter-claim she seeks the same relief as in the original action that was dismissed for her failure to make discovery.

The excipient excepts to the respondent's counter-claim on the basis of *res judicata.* Mr *Manikai* appears for the excipient. There was no appearance by the respondent but her legal practitioners have written to the Registrar indicating that their failure to appear does not mean consent to judgment.

CHIDYAUSIKU J

Mr *Manikai* has argued that the parties to the counter-claim and the issues in the counter-claim are the same as those in the dismissed case. He submitted that the court that dismissed the action had jurisdiction. On that basis respondent's counter-claim should be struck out.

I accept that the parties to the counter-claim are the same as those in the dismissed action and the court that dismissed the claim had jurisdiction. It is also clear that the issues raised in the counter-claim are the same as those raised in the dismissed action. The question that arises is whether these issues were determined in the dismissed action.

The essence of the defence of *res judicata* is that the issues being raised have been previously raised and determined by a court of competent jurisdiction. In the case of *New Brunswick Railway Co* v *British and French Trust Corporation Ltd* [1939] AC 1 Lord Maugham LC at pp 19-20 had this to say:

> "The doctrine of estoppel (*per rem judicatam*) is one founded on considerations of justice and good sense. **If an issue has been distinctly raised and decided in an action** in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claimed under them."

The emphasis is my own. I entirely agree with the remarks of LORD MAUGHAM LC. *Res judicata* is intended to prevent repeated redetermination of the same issues. Common sense and public policy considerations demand that there be termination in disputes and finality in judicial decisions. It also serves to protect the individual from vexatious multiplication of suits at the instance of professional litigants.

On the facts of the present case the issues raised in the original action were not determined. What was determined was whether or not discovery had been made in compliance with the court direction.

The question of what constitutes *res judicata* in dismissals of actions or applications after hearing is discussed by Spencer-Bower and Turner in their book Res Judicata 2 ed on p 51 para 58:

> "When an action, or motion, or application, is dismissed by a judicial tribunal after a trial or hearing, it is often a question whether anything can be said to have been decided, so as to conclude the parties, beyond the actual fact

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of the dismissal. The answer to this inquiry depends upon

CHIDYAUSIKU J

> whether, on reference to the record and such other materials as may properly be resorted to, the dismissal itself is seen to have necessarily involved a determination of any particular issue or question of fact or law, in which case there is an adjudication on that question or issue; if otherwise, the dismissal decides nothing, except that in fact the party has been refused the relief which he sought."

I agree with the approach of the learned authors. Applying that approach to the facts of the present case the inescapable conclusion is that the issues of divorce, custody of the minor children of the marriage, maintenance, damages or payment for the damaged property were succinctly raised but were never determined. The dismissal decided nothing except the fact that the respondent was refused the relief she sought.

In the result the exception is dismissed with costs.

Gill, Godlonton & Gerrans, excipient's legal practitioners

Gollop & Blank, respondent's legal practitioners

BUILDING & ENGINEERING SUPPLY CO (PVT) LTD v CONTROLLER OF CUSTOMS 1988 (1) ZLR 238 (HC)

Court **High Court, Harare**

Reynolds J

Civil action

14, 15 & 31 March 1988

Flynote

> Statutes - Customs & Excise Act [Chapter 177] - s 178 - notice of intention to institute proceedings against Controller of Customs & Excise - what amounts to proper notice - s 176 - seizure of goods by Controller - whether amounts to unconstitutional acquisition of property - Constitution of Zimbabwe - s 16

Headnote

The plaintiff, a building and engineering supply company, imported into Zimbabwe a quantity of hardwood. After some time, while the timber was in bond, the defendant seized it in terms of s 176 of the Customs and Excise Act [*Chapter 177*], notifying the plaintiff that "there are reasonable grounds for believing that [the goods] are liable to seizure". In November 1985, three months after the timber was seized, the plaintiff instituted proceedings for its recovery, claiming that notice of its intended legal action, as required by s 178 of the Act, had been conveyed to the defendant in a letter dated 25 September 1985. The letter stated, *inter alia*, that

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"In the event that it becomes necessary for us to institute proceedings in the High Court, we would claim delivery of the shipment against tender of the customs duty..." The defendant took the point *in limine* that this letter did not constitute proper notice of the institution of proceedings in terms of s 178. The plaintiff argued that even if this point ere correct, the defendant's act of seizure was unlawful, in that it offended against s 16 of the Constitution of Zimbabwe 1980, which protects the individual from being deprived of his property other than under one or more of the exceptions there specified.

REYNOLDS J

Held, that while substantial compliance with the provisions of s 178 of the Customs and Excise Act is sufficient and that a robust and practical approach as distinct from a legalistic one should be adopted, and that while it is permissible to imply the necessary facts and particulars into the notice where such implication can properly be made, the notice must amount to an unequivocal indication to the Controller, in a manner understandable to the ordinary person, that the plaintiff intends to institute legal action if his claim is not settled. In this case, all that was said by the plaintiff was that if the timber was not released consideration would then be given to the institution of proceedings.

Held, further, that assuming the timber was in fact "acquired" by the Controller, his actions were fully protected by the provisions of s 16(7)(k) of the Constitution, which authorises acquisition for "so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry..." If the Controller believes that property has in some way been brought into Zimbabwe illegally, it would normally follow in the great majority of cases that it would be necessary for him to take physical control of that property while making inquiries into the circumstances of its importation.

Cases cited:

Coetzee v *Minister of Law & Order* 1984 (4) SA 752 (ECD)

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

Minister of Law & Order v *Hendricks* 1987 (3) SA 657 (A)

Minister of Police v *Mbali* 1984 (4) SA 757 (TkA)

Mphelo v *Bruwer* 1951 (1) SA 433 (T)

Dease v *Minister of Justice* 1962 (2) SA 302 (T)

Controller of Customs v *Guiffre* 1971 (1) RLR 91; 1971 (2) SA 81 (R)

Maponya v *Minister of Police* 1983 (2) SA 616 (T)

Mandirwhe v *Minister of State* 1981 (1) SA 759 (ZAD)

Hewlett v *Minister of Finance* 1981 ZLR 571; 1982 (1) SA 490 (ZS)

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J B Colegrave for the plaintiff

DP Carter for the defendant

Judgment

Reynolds J: The plaintiff in this matter is a building and engineering supply company. In the course of its business activities, it lawfully imported into Zimbabwe a quantity of hardwood. After some time, and while these bundles of timber were in bond, the defendant seized them in terms of the provisions of the Customs and Excise Act [*Chapter 177*]. A notice of seizure was sent to the plaintiff in August 1985, giving the rather cryptic reason that

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REYNOLDS J

"there are reasonable grounds for believing that they are liable to seizure". The plaintiff instituted proceedings for the recovery of the wood in November 1985, claiming that notice of its intended legal action had been conveyed to the defendant in a letter dated 25 September 1985.

Mr *Carter* for the defendant submitted in limine that there had in fact been no proper notice of the institution of proceedings as is required by s 178 of the Act. This section reads as follows:

> "178. (1) No writ or summons shall be issued against nor a copy of any process served upon the Controller or any officer for anything done by him under this Act or any other law relating to customs or excise until one month after notice in writing has been delivered to him or left at his usual place of abode by the person who intends to issue such writ, summons or process or by a legal practitioner representing that person."

The purported 'notice' given in the plaintiff's letter of 25 September 1985 was in the following terms:

> "In the event that it becomes necessary for us to institute proceedings in the High Court, we would claim delivery of the shipment against tender of the customs duty on the grounds that there has been no contravention of any law related to the importation of the timber. So far as we have been able we have set out all the relevant facts in the accompanying report. Our address is that appearing on our letter head. Our address for service is that of our legal practitioners, Messrs Kantor & Immerman, 67-69 Second Street, Harare. If we do not obtain release of the timber we reserve our rights to institute action."

Mr *Colegrave*, for the plaintiff, submitted that a wide and robust approach should be adopted in deciding whether the passage referred to amounted to a sufficient compliance with the requirements of the section in question. The case of *Coetzee* v *Minister of Law & Order* 1984 (4) SA 752 was cited in support of this contention, where, at 755 van Rensburg J identified the principles applicable to the interpretation of a similar provision in a South African statute. The learned judge in that case included the following points which are of relevance to the present matter:

> "2. Substantial compliance with the provisions of the section is sufficient: Maponya's case at 619H; *Mphelo* v *Bruwer* 1951 (1) SA 433 (T) at 437G-438A; *Mbali's* case at 598F.

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REYNOLDS J

3. . . .

4. . . .

5. . . .

6. . . .

7. The interpretation of the section should not be technical and in interpreting it a robust and practical approach as distinct from a legalistic one is to be adopted. *Commercial Union Assurance Co of South Africa Ltd* v *Clarke* 1972 (3) SA 508 (A) at 516C-E; *Maponya's* case at 620C.

8. It is permissible to imply the necessary facts and particulars into the notice provided that such implication could properly be made..."

I would, with respect, agree with this passage, but I think that it is essential, nonetheless, to stress that the notice must amount to an indication or threat that an action will be brought. CLAYDEN J expressed this sentiment in *Osler* v *Johannesburg City Council* 1948 (1) SA 1027 at 1031 when he said, "but it is still correct, I think, to say that if substantially the notice given amounts to an indication that action will be brought it will suffice" (my emphasis). In the instant case it seems to me that all that was said by the plaintiff company in its letter of 25 September, was that if the timber was not released, consideration would then be given to the institution of proceedings.

The object of this section of the Act, as I see it, is to allow the Controller of Customs an adequate period of time within which to examine the matter fully so that he may decide whether or not to meet the claim before becoming involved in expensive litigation (see *Osler* v *Johannesburg City Council supra* at 1021; *Coetzee* v *Minister of Law & Order supra* at 755D). The Controller will not embark upon such an investigation on the mere possibility that some action may eventuate. I would, with respect, agree with GROSSKOPF JA *in Minister of Law and Order* v *Hendricks* 1987 (3) SA 657 (AD), where the point is made that for a proper compliance with the requirement of giving notice, there should be an unequivocal indication to the authority, in a manner understandable to the ordinary person, that the plaintiff intends to institute legal action if his claim is not settled.

In *Minister of Police* v *Mbali* 1984 (4) SA 757 (TkAD) at 759G van Reenen CJ stated:

> "Implying is logical deduction. The consequences of implying must satisfy one's sense of fitness and propriety. In the instant case, the respondent's letter will meet the requirements of the section if, at the

REYNOLDS J

> least, one concludes that, on the reading of this letter, the appellant would reasonably have come to the conclusion that the letter is not merely a demand for payment of the averred damages, but necessarily also an indication that, if such demand is not met, the respondent would commence action against it" (my emphasis).

See, too, *Mphelo* v *Bruwer* 1951 (1) SA 433 - in which case there was a clear indication that a

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refusal to meet the demand made would result in further action; *Dease* v *Minister of Justic*e 1962 (2) SA 302; *Controller of Customs* v *Guiffre* 1971 (1) RLR 91; *Maponya* v *Minister of Police* 1983 (2) SA 616.

Mr *Colegrave* placed reliance on the fact that an official of the Department of Customs and Excise - Mr Chitava - after having read the plaintiff's letter of 25 September, initially took it to be "highly probable" that proceedings would be instituted if the timber was not released. In my view, however, Mr Chitava's opinion is not conclusive, and in any event, did not go to the extent that he believed that there was a positive assertion of an intent to institute proceedings.

In view of the foregoing it is my view that there was insufficient notice given by the plaintiff to meet the requirements of the Act, and the point raised *in limine* succeeds accordingly.

Mr *Colegrave* submitted that such a ruling would not end the matter, for he contended that the defendant's act of seizure was unlawful in that it offended against the provisions of s 16 of the Constitution of Zimbabwe 1980. This section protects the individual from being deprived of his property other than under one or more of the exceptions specified.

Mr Carter's response to this submission was advanced in various alternative forms. He argued, firstly, that this form of proceeding also required notice in terms of s 178 of the Act, and this had not been given. He submitted alternatively, that s 24 of the Constitution afforded the plaintiff his rights of redress in respect of this allegation, and he referred to the case of *Mandirwhe* v *Minister of State* 1981 (1) SA 759, in this regard. Mr Carter suggested that in any event s 16 of the Constitution had not been infringed as the Controller's powers either (a) fell within the terms of the exceptions provided for or (b) the seizure in question was not an "acquisition" of property as contemplated by s 16 (*Hewlett* v *Minister of Finance* 1981 ZLR 571). I find it necessary to consider only the one submission made, that s 16 of the constitution specifically allows the Controller to act as he did.

REYNOLDS J

Section 16(7)(k) reads as follows:

> "(7) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein in any of the following cases-
>
> ...
>
> (k) for so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry; ..."

To my mind, and assuming that the timber in question was in fact "acquired" by the Controller, his actions would be fully protected by the terms of this particular section. Mr *Colegrave* argued that this provision is concerned with the acquisition of goods which are necessarily taken for the purposes outlined, such as a possible exhibit for a criminal trial, and that it was not necessary to seize this wood. I do not consider that there is substance in this submission. In my view it is obvious that if the Controller believes that property has in some way been brought into Zimbabwe illegally, it would normally follow in the great majority of cases that it would be

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necessary for him to take physical control of that property while making inquiries as to the circumstances of its importation. Failure to do so would prejudice his right of action if his suspicions or beliefs are eventually proved to be well-founded. In the light of this conclusion it is not necessary to consider the other submissions made by Mr *Carter.*

I find that the plaintiff's constitutional rights have not been infringed by the defendant, and the plaintiff's claim will be dismissed. Mr *Carter* has conceded that the defendant is liable for the wasted costs of the hearing of 14 March 1988 and an order is made accordingly. Costs otherwise are awarded to the defendant.

Kantor & Immerman, plaintiff's legal practitioners

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

NGURUVE v SECRETARY OF THE COMMISSION OF INQUIRY 1988 (1) ZLR 244 (SC)

Court **Supreme rT, Harare B**

Dumbutshena CJ, Gubbay JA & Korsah JA

Application for extension of time to note an appeal

31 March 1988

Flynote

Appeal - extension of time within which to appeal - extensive delay due to negligence and incompetence of appellant's legal practitioner - applicant required to show chances of success are good.

Commissions of inquiry - copy of proceedings of commission - whether secretary of dissolved commission may be required to provide copy of proceedings.

Headnote

In February 1985 the President appointed a commission of inquiry to inquire into aspects of the conduct of the applicant, who was then the Commissioner of Police. The Commission found the applicant to be unfit to remain in the police force and the President dismissed him from the Force. The applicant was aggrieved by this decision and in January 1986 instituted proceedings in the High Court for an order (a) directing the respondent to furnish him with a copy of the proceedings of the Commission and (b) granting him leave to bring the proceedings of the Commission on review in terms of the High Court of Zimbabwe Act.

The High Court (Gibson J) dismissed the application, upholding the preliminary objection that the Minister for Home Affairs, and not the respondent, was the correct person to furnish the copy of the proceedings of the Commission. She also ruled that the proceedings of the Commission were not reviewable by the High Court.

GIBSON J's judgment was delivered on 9 April 1986 but the applicant's legal practitioner,

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despite making enquiries at the High Court Registry, only learned about it on 28 July. On 19 August a notice of appeal was filed but no further substantive action was taken until 17 November 1987,

GUBBAY JA

when an application was made for an extension of time within which to note an appeal. No acceptable explanation for the lengthy delay was tendered.

Held, that apart from a short period of inaction by the applicant the predominant blame for the delay was one of negligence and incompetence on the part of the applicant's legal practitioner; and in the absence of any reasonably mitigatory explanation therefor an extension should only be granted if if the applicant were able to show that the chance of success on appeal was good.

Held, further, that since the Commission of Inquiry was an ad hoc body which had discharged the functions for which it had been appointed, it would be unreasonable and impractical to expect the Secretary thereof to continue to be answerable for any inquiries over the conduct of the Commission after it had reported to the President. The life of the Commission was extinguished and the commissioners and secretary ceased to hold office as such. It would have been improper for the respondent to retain a copy of the proceedings of the Commission.

Held, further, that in terms of s 3 of the State Liabilities Act [*Chapter 54*] it was the Minister of Home Affairs, being the person assigned the administration of the Police Act, who ought to have been cited as the respondent in the application before the High Court. The Court left entirely open the question whether the High Court was empowered to review the proceedings of the Commission of Inquiry.

Cases cited:

de Kuszaba-Dabrowski et Uxor v *Steel* NO 1966 RLR 60;1966 (2) SA 277

Kombayi v *Berkhout* 1988 (1) ZLR 53 (SC)

R v *Humanikwa* 1968 (2) RLR 42 (AD)

R v *Hlupo* 1969 (2) RLR 344 (AD); 1969 (4) SA 98 (RAD)

J Sayce for the applicant

P Machaya for the respondent

Judgment

Gubbay JA: On 6 February 1985 the President, acting pursuant to s 2(1) of the Commission of Inquiry Act [*Chapter 80*] issued a Commission and appointed three commissioners to inquire in private into -

(a) allegations of misconduct made against the applicant, who was at that time the

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Commissioner of Police;

GUBBAY JA

(b) the effectiveness of the manner in which the applicant was discharging his duties as Commissioner of Police;

and make such recommendations in respect of all or any of the above matters as were deemed appropriate. A Secretary to the Commission was also appointed.

Shortly upon the Commission having completed its work and reported to the President, the Minister of Home Affairs wrote to the applicant on 19 December 1985, in these terms:

> "I have to inform you that His Excellency the President has, as a result of the inquiry conducted by the Commission of Inquiry headed by Mr Justice M M Moodley, found you to be unfit to remain in the Police Force, and has accordingly, in terms of subsection (5) of section 93 of the Constitution of Zimbabwe, removed you from office as Commissioner of Police, thereby discharging you from the Police Force, with effect from the 19th December, 1985."

The applicant was aggrieved by the Presidential decision to discharge him from the Police Force, so on 29 January 1986 he instituted proceedings in the High Court on notice of motion for an order:

(a) directing the Secretary to the Commission of Inquiry, hereafter referred to as the "respondent", to furnish to him within seven days a copy of the proceedings of the Commission, including its findings and recommendations;

(b) granting him leave to bring "the proceedings and decision" of the Commission on review in accordance with s 26 of the High Court of Zimbabwe Act 1981 within four weeks of the respondent complying with (a) above.

The application came before Gibson J on 6 March 1986 and was thereafter dismissed with costs. The learned judge upheld the preliminary objection taken on behalf of the respondent that he was not the correct person to furnish the record of the proceedings; that it was the Minister of Home Affairs who ought to have been cited as the respondent, for it is he who bears the responsibility for the Police Force. She also ruled that the proceedings of the Commission of Inquiry were not susceptible to review by the High Court. The judgment in question was delivered on 9 April 1986, and no appeal was

GUBBAY JA

noted against it within the twenty-one days allowed by Rule 30(a) of the Rules of the Supreme Court.

Notwithstanding the failure to appeal timeously, on 17 November 1987 an application in terms of

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Rule 31(3) of the above-mentioned Rules for an extension of time within which to appeal was filed with this Court. It was opposed by the respondent and on 30 December 1987 a direction was given that it be set down for hearing before a Full Court.

The relevant facts leading up to the filing of the application on 17 November 1987 may be stated as follows:

(1) During the period April to July 1986 the applicant's legal practitioner made many unfruitful inquiries to the High Court Civil Registry as to when Gibson J was expected to hand down the judgment. However, it was only on 28 July 1986 that he learned that judgment in the matter had been delivered on 9 April 1986. He informed the applicant of the existence of the judgment on the same day. The explanation tendered for the delay up to 28 July 1986 is therefore a reasonable one.

(2) Despite the knowledge that judgment had been given against him, the applicant waited for almost three weeks before instructing his legal practitioner that he wished to appeal. The applicant has omitted to explain the reason for this initial delay.

(3) On 19 August 1986 a notice of appeal was filed on behalf of the applicant. Its preamble reads:

"Be pleased to take notice that appellant hereby notes an appeal against the judgment delivered in this case on the 9th April, 1986 but only first known by appellant to have been so delivered on the 28th July, 1986.

At the hearing of this matter appellant will apply for condonation of late noting of appeal on the grounds that appellant and his legal representative were not made aware of when judgment was due to be delivered and were not advised that judgment had been delivered until appellant's legal representative enquired on 28th July, 1986 as to when judgment was likely to be delivered. It was on the 28th July, 1986 when appellant's legal practitioners learnt that judgment had been delivered on the 9th April, 1986. There was no wilful delay in noting the appeal."

GUBBAY JA

There is no explanation proffered by the legal practitioner as to why the indulgence of condonation was sought in this irregular manner and not as prescribed by Rule 31.

(4) On 31 October 1986 and on 16 July 1987 defective applications seeking extensions of time within which to appeal were lodged with this Court. Each was apparently withdrawn. Certainly neither was proceeded with. There is no acceptable explanation for the legal practitioner's failure to present an application in proper form during the period 28 July 1986 to 17 November 1987.

The only conclusion to account for an almost sixteen month delay is one of negligence and incompetence on the part of the legal practitioner, together with a short period of inaction by the applicant himself. Plainly the predominant blame is to be laid at the door of the legal practitioner.

The general principles governing an application for condonation have been frequently stated.

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The factors to be taken into consideration are first, the extent of the delay in seeking the relief; secondly, whether a reasonable explanation for the delay has been established; and thirdly, whether there is a reasonable prospect of success in an appeal against the decision of the court a quo. See, for instance, *de Kuszaba - Dabrowski et Uxor* v *Steel NO* 1966 RLR 60 (AD) at 62F; 1966 (2) SA 277 (RAD); *Kombayi* v *Berkhout* S-30-88.*(2)

In this matter even if regard is had to the misconceived attempts to seek condonation prior to 17 November 1987, the extent of the delay involved remains not insubstantial. But to condone such delays would be to adopt too charitable a view. A legal practitioner is expected to be diligent. He is expected to know, observe and follow the procedures laid down by the Rules of the Court. He must use his best endeavours to get it right, and if he gets it wrong at least be prepared to offer some reasonably cogent explanation. It is totally insufficient for him to shroud his errors in silence.

I am satisfied that because of the inordinate delay in applying for condonation, brought about almost entirely by the fault of the legal practitioner, taken in conjunction with the absence of any reasonably mitigatory explanation therefor, an extension of time should only be granted to the applicant if he is able to show that the chance of the appeal succeeding is good. See *R* v *Humanikwa* 1968 (2) RLR 42 (AD) at 44B; *R* v *Hlupo* 1969 (2) RLR 344 (AD) at 346C; 1969 (4) SA 98.

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Turning then to an assessment of the prospects of success, the first issue to be decided is whether the applicant was correct in citing the Secretary to the Commission as the person to furnish the report of the findings and recommendations which the Commission made to the President (a copy of the transcript of the evidence has now been obtained by the applicant). That he has the ability to do so was firmly disputed by the respondent. He stated in his opposing affidavit that-

> "I am unable to produce a copy of the said report as I do not have one in my possession ...In the circumstances I do not understand how I can be compelled to produce the documents required."

The learned judge *a quo* reasoned that as the Commission of Inquiry was an *ad hoc* body and comprised a group of persons from different walks of life who at the end of their sittings dispersed to their various callings, it would be unreasonable and impracticable to expect the Secretary of such a body to continue to be answerable for any inquiries over the conduct of the Commission after it had reported. I respectfully agree with these observations. Statutory Instrument No. 54/85, which embodied the President's decision to issue the Commission, specifically provided that -

> "...this Commission shall continue in full force and virtue until you have finally reported upon the matters aforesaid and that you report to me with all convenient speed all information upon matters submitted for your consideration ..."

Once the purpose for which the Commission had been issued was fulfilled, its life was extinguished. It had no other work to perform, and the commissioners and secretary ceased to hold office as such. There was no necessity for them to remain on or for anyone to replace

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them; and no one did. Thus the respondent's disclaimer of being in possession of the report is readily understandable. There was no cause for him to keep a copy of it. Indeed, I venture to think that it would have been improper for him to have done so.

Mr *Sayce*, who appeared for the appellant, sought to derive some assistance for his submission that the respondent had been correctly cited from the provisions of Rule 260 (1) of Order 33 of the High Court Rules 1971. It reads, where relevant, as follows:

> "The clerk of the inferior court whose proceedings are being brought on review, or the tribunal, board or officer whose proceedings are being

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> brought on review, shall within twelve days of the date of service of the application for review, lodge with the Registrar the original record, together with two typed copies, which copies shall be certified as true and correct copies ..."

But what this Rule contemplates is the continued existence of the body or post as officer; stated otherwise, that there will always be someone holding office as clerk of the inferior court, whose responsibility it is to retain custody of the original record of the proceedings; that there will always be in existence a tribunal, board or officer, available to provide the aggrieved party with the relief he seeks. Sub-rules (3) to (9), which deal with the manner in which the record is to be prepared by the clerk, the tribunal, board or officer, bear out this interpretation, for they clearly imply that such bodies or persons are not those constituted or appointed on an *ad hoc* basis.

It can hardly be expected of a body formed to undertake one particular function and then disbanded after completion of that function that it be reconstituted in order to prepare the record of the proceedings which it no longer retains and over which it has rightly lost control.

The report furnished to the President is presently in the custody of the State. It is therefore the State which must be looked to. Section 3 of the State Liabilities Act [*Chapter 54*] provides that, where it is desired to bring proceedings against the State, the Minister to whom the headship of the department concerned has been assigned may be made nominal defendant or respondent. It follows, in my view, that it was the Minister of Home Affairs, being the person assigned the administration of the Police Act and as such responsible for the Police Force (see SI 285/80), who ought to have been cited as the respondent in the application before the High Court. As he was not made a party to those proceedings the learned judge correctly appreciated that she could not direct him to afford the applicant the report sought. It is a fundamental principle that a judge cannot make an order, either in a civil case or a criminal case, which he knows will be a mere brutum fulmen because it cannot be put into effect.

This conclusion makes it unnecessary to decide whether the court a quo was correct in holding that in any event it was not empowered to review the proceedings of the Commission of Inquiry. That is a question I prefer to leave entirely open.

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GUBBAY JA

It was for these reasons that at the end of the hearing the application was dimissed with costs.

Dumbutshena CJ: I agree.

Korsah JA: I agree.

Sawyer & Mkushi , appellant's legal practitioners

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

ROUTLEDGE v HERTZ 1988 (1) ZLR 252 (HC)

Court **High Court, Bulawayo**

Muchechetere J

Application for variation of consent paper

8 April 1988

Flynote

Family law - child - custody of - rights of non-custodian parent following divorce - variation of existing right of access - onus on applicant - change of residence of non-custodian parent - whether justifies variation in rights of access.

Headnote

The parties in this case were formerly married to one another but their marriage had been dissolved in 1982. A consent paper had been drawn up giving the father custody of the minor children of the marriage, with rights of access being granted to the mother, the applicant. At the time the consent paper was drawn up both parties lived in Bulawayo, but since then the applicant had moved to Victoria Falls, 443 km away by road. She claimed that the rights of access granted in the consent paper could not in practice be exercised by her and applied for a variation to the consent paper.

Held, that when a variation to existing rights of access is being considered, the onus is on the applicant to satisfy the court as to why it is in the best interests of the children that the existing rights be varied. This the applicant had failed to do.

Held, further, that, in the absence of an express stipulation in the consent paper that the children be kept at a particular place or that they be brought to the non-custodian parent, it is incumbent on the non-custodian parent to go and exercise his or her rights of access at his or her own expense wherever the children may be, provided that the custodian parent does not purposely put the children away from the other parent's reach in order to frustrate that other

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parent's rights of access. This applies more

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strongly where, as here, the children have remained at the place they were when the consent paper was entered into, where the non-custodian parent has herself brought about the difficulties she encounters in exercising her rights of access and where the custodian parent is in no way to blame for those difficulties.

Cases cited:

Marais v *Marais* 1960 (1) SA 844 (C)

Hopper v *Homewood* 1963 R&N 719 (SR)

Willers v *Serfontein en 'n Ander* 1985 (2) SA 591 (T)

Page v *Bennett* 1940 CPD 299

Myers v *Leviton* 1949 (1) SA 203 (T)

S B A Longhurst for the applicant

P M Walsh for the respondent

Judgment

Muchechetere J : This is an application for an order varying the provisions of a consent paper (hereinafter referred to as "the consent paper") entered into between the parties.

The facts in this matter are that the parties were once married to each other but their marriage was dissolved by an order of this Court on 17 September 1982. Prior to the granting of the order of divorce the parties entered into the consent paper which regulates the question of custody, access and maintenance for the two minor children of the marriage. In terms of the consent paper custody of the minor children was granted to the respondent, whilst the access granted to the applicant was to have the minor children spend alternate weekends and alternate school holidays with her. At the time the consent paper was executed both parties were resident in Bulawayo. The applicant is now resident in Victoria Falls which is some 443 km by road from Bulawayo.

In support of her application the applicant states that because of the distance between Bulawayo and Victoria Falls it is neither practical nor appropriate now to have the children spend alternate weekends with her. In the result she is losing some 26 occasions in a year on which she could have the minor children with her. She therefore submitted that in the circumstances it would be in the best interests of all concerned that she be allowed to have access to the minor children every school holiday by having them spend those holidays with her. This would leave the respondent with the children every day during term time. She further submitted that in view of the minor children's ages,

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MUCHECHETERE J

twelve years and ten respectively, it is appropriate and not contrary to their best interests that they spend more time with her.

In his opposing affidavit the respondent, who is employed by the National Railways in Zimbabwe as a refrigeration foreman, stated that he is entitled to some 40 days' annual leave from his employment and has in the past availed himself of such leave in order to spend time with the minor children. Further, he has, on numerous occasions, utilised his periods of leave to accompany his children on holidays both beyond and within the borders of Zimbabwe and fully intends to continue this practice in the future. If this application is granted he will not be able to do all the above because the children will be attending school throughout their stay with him. The respondent also states that it is, in any event, incumbent upon the applicant to avail herself of the access afforded to her in terms of the consent paper and to make all necessary arrangements to exercise the rights conferred upon her therein. He also submitted that it is not in the best interests of the minor children to grant the application.

In her answering affidavit the applicant admitted that the respondent does, indeed, take the minor children with him on leave but submitted that it could only be in the best interests of the children that they be with her a significant amount of time in order to keep alive the bond between her and them. She also stated that shortly her present husband will be transferred to Kenya and that in the near future she will be living in Nairobi with him. In those circumstances she submitted that it is all the more important and in the best interests of the minor children that she has them for each school holiday.

Mr *Longhurst* for the applicant submitted that there were no hard-and-fast rules laid down as to what constitutes reasonable access which was what the applicant was, in effect, applying for. In this connection he cited Hahlo's *Husband and Wife* 4 ed p 466 where the learned author quotes DE VILLIERS AJ's words in *Marais* v *Marais* 1960 (1) SA 844 (C) at 844C:

> "What is aimed at is the preservation of some degree of parent-and-child relationship between the non-custodian parent and child, for the benefit of both, but in a manner not incompatible in substance with the vesting of undivided control and regulation of the care and upbringing of the child in the custodian parent..."

The learned author goes on to say that special arrangements may have to be made where former spouses live in different countries or where the removal

MUCHECHETERE J

of the children to another country is feared. Mr *Longhurst* also submitted that what was however paramount was the best interests of the children.

In my view the law, as submitted above, generally applies when the access is being considered in the first instance, that is, when divorce is being granted. When a variation to existing rights of access is being considered I am of the view it is primarily the applicant who must satisfy the Court as to why it is in the best interests of the children that the existing rights should be varied.

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In this connection I agree with Mr *Walsh* for the respondent that the applicant has not really indicated to the Court - and the *onus* is on her - in which way it is in the best interests of the minor children that the consent paper be varied in the manner she has indicated. See *Hopper* v *Homewood* 1963 R & N 719 SR. She approached the matter in a negative manner by submitting instead that it would not be against the interests of the minor children if the variation was granted. The nearest she came to grips with the *onus* on her was when she stated that she needed more time with the minor children in order to keep alive the bond between her and them. She also did say that because of the ages of the children it was proper that they spend more time with her but did not elaborate on how their ages affected the matter. In this connection it could, on the contrary, be said that now that they are six years older than at the time the consent was entered into they have less need of their mother. In connection with the bond between the minor children and the mother I agree with the sentiments expressed in *Willers* v *Serfontein en 'n Ander* 1985 (2) SA 591 (T), which were that to preserve a living bond of love and respect with the non-custodian parent a weekend per month and alternate school holidays will suffice if such contact is used wisely. In this connection, although because of the applicant's self-created difficulties, it will only now be practical on alternate school holidays, I still consider that if those periods are used wisely the bond will be preserved.

I also consider that, in the absence of an express stipulation that the children be kept at a particular place or were to be brought to the non-custodian parent, it is incumbent upon the non-custodian parent to go exercise her rights of access at her own expense wherever the children may be, provided of course the custodian parent does not purposely put the children away from the other parent's reach to frustrate that other parent's rights of access. See *Page* v *Bennett* 1940 CPD 299 at 300; *Myers* v *Leviton* 1949 (1) SA 203 (T) at 207-208. The above should apply more strongly where, as in this case, the children have remained at the place they were kept at the time the consent paper was entered into, where the non-custodian parent has herself brought about the difficulties in exercising her access rights by the way she has chosen

to order her life and where the respondent is not in any way to blame for the difficulties. See *Hopper* v *Homewood, supra.*

In my view all that can be said of this application is that the variation applied for is only in the interests of the applicant. She has not shown how it is in the interests of the minor children and it is certain that it is not in the interests of the respondent. If the application is granted the respondent loses all opportunities to have the minor children when they are free for holidays and also to be on holiday with them. He will therefore only be left with the duties of seeing to their schooling and not the pleasure of their company when he and they are free. That, in my view, is not a satisfactory situation when he has done nothing to upset the arrangements in the consent paper.

In the circumstances it is clear that I am of the view that the application is without merit. It is therefore dismissed with costs.

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Ben Baron & Partners, applicant's legal practitioners

Joel Pincus, Konson & Wolhuter, respondent's legal practitioners

RAMHEWA v SECRETARY OF THE PUBLIC SERVICE COMMISSION 1988 (1) ZLR 257 (HC)

Court **High Court, Harare**

Annotations **Link to Case Annotations**

Greenland J

Review of administrative proceedings

16 July 1987 & 13 April 1988

Flynote

Public service - Public Service (Officers) (Misconduct & Discharge) Regulations 1986 - s 7(a) and (b) - disciplinary powers of Public Service Commission - procedure to be followed when there is a material dispute of fact - whether material dispute of fact exists to be objectively determined - effect of failure to comply with provisions of Regulations.

Headnote

Section 7(a) of the Public Service (Officers) (Misconduct and Discharge) Regulations 1986 provides that the Public Service Commission must decide from the papers sent to it whether an officer against whom a complaint has been made is guilty of misconduct, "unless there is a material dispute of fact which it is unable to resolve on the papers before it". In that event, it is obliged to direct that an enquiry be held in terms of s16 of the regulations. The test as to whether such a material dispute of fact exists is an objective one. The position of the Commission in this respect is analogous to that of a court in motion proceedings seized with a dispute of facts. There the court should endeavour, if possible, to resolve the dispute between the parties without hearing evidence, but should not do so unless amply satisfied that the dispute can be so resolved without doing an injustice to the other party. This approach, appropriately modified, should be employed by the Commission.

The failure to comply with the peremptory provisions of a governing statute in action taken against a civil servant renders such action a nullity.

GREENLAND J

Cases cited:

SA Defence & Aid Fund & Anor v *Minister of Justice* 1967 (1) SA 31 (C)

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Sachs v *Minister of Justice* 1934 AD 11

Kloppenberg v *Minister of Justice* 1964 (1) SA 813 (D)

Netto v *Clarkson & Anor* 1974 (1) SA 66 (D)

Liversidge v *Anderson* [1942] AC 206; [1941] 3 All ER 338

Inland Revenue Commissioners & Anor v *Rossminster Ltd* [1980] AC 952; [1980] 1 All ER 80 (HL)

Watson v *Commissioner of Customs and Excise* 1960 (3) SA 212 (N)

United Democratic Front v *Theron* NO 1984 (1) SA 315 (C)

Ndabeni v *Minister of Law & Order* 1984 (3) SA 500 (D)

Shangese v *Minister of Native Affairs* 1958 (4) SA 554 (N)

de Bruin v *Director of Education* 1934 AD 252

Joossab & Ors v *Shah* 1972 (1) RLR 137

Lalla v *Spafford & Ors* 1973 (2) RLR 241

Schierhout v *Minister of Justice* 1926 AD 99

Rogers v *Durban Corporation* 1950 (1) SA 65 (D)

Stoop v *Lichtenburg Town Council* 1952 (2) SA 72 (T)

Nkisimane & Ors v *Santam Insurance Co Ltd* 1978 (2) SA 430 (A)

M Foroma for the applicant

B P O Simelane for the respondent

Judgment

Greenland J: This is a review of administrative proceedings. The complaint is against a decision by the Public Service Commission disciplinary committee in which the applicant was found guilty of misconduct and in consequence thereof discharged from the Public Service on 28 November 1986.

It is common cause that the applicant was employed in the Ministry of Education since 10 September 1969. He was promoted to the post of Principal Executive Officer on 1 September 1983. In that capacity he was empowered to compile certain forms for the benefit of properly interested parties. These forms, which are called "Confirmation Forms", set out the results achieved in public examinations conducted under the auspices of the Ministry. Quite obviously the information thus imparted should be accurate.

Shortly after 22 February 1985, and after a verbal confrontation on the same subject, the

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applicant received from his superior the following minute, hereinafter referred to as the Masango minute, which is reproduced in full:

GREENLAND J

"P.Ex.O (Ramhewa)

DISCREPANCIES IN CONFIRMATION FORMS AND STATEMENTS OF RESULTS FOLIO 141 OF E/8/31 (a): BILLY KAHARI

I refer to a letter dated 22 February 1985 from Mr CL Henson of the institute of Chartered Secretaries and Administrators in Zimbabwe and two attached Confirmation of Results Forms signed by you. The following discrepancies are noted:

1. The two confirmation forms show different subjects (in some cases) for the same years January 1973 and January 1974.

2. The official passbook has alterations supposedly initialled by Mrs Stallwood in 1973 and 1974. The only 1974 alteration has the year 1984 changed to 1974. These alterations are not normal because they do not have full dates.

3. The Confirmation forms signed by you contain subjects that are not in the pass list, altered or unaltered, e.g. Economics (January 1973) Principles of Accounts (January 1973).

4. You have given History a different grade (B) from that in the pass list (D) in the confirmation form of 1 February 1985.

5. Below is a summary of the discrepancies

Subject	Confirmation	Pass list
Form Result	Result January 1973	
English Language	C	C
History	D	B
Economics	D	-
Maths	C	C
Principles of Accounts	C	-
	January 1974	
	Pass List	
Art		C
Commerce		B

6. Your confirmation forms refer to the person as Billy Kahari (16/11/83) and Billie Saini Kahari (1/2/85).

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Will you please explain the discrepancies above?

Will you also tell me who does alterations and who keeps the alteration stamp?

R.B. Masango

DEPUTY CHIEF EDUCATION OFFICER (EXAMINATION)."

GREENLAND J

Applicant responded on 1 March 1985 in the following terms:

> "DISCREPENCIES IN CONFIRMATION FORMS AND STATEMENT OF RESULTS BILLY KAHARI
>
> I acknowledge receipt of your M1 in connection with the above.
>
> I agree that the two confirmation forms show different results. The London section has results entered on cards and some on pass lists.
>
> The cards were arranged in alphabetical order in the longroom at the old branch. I can only attribute the discrepancies to different information on cards and pass lists. On this regard I intend to come and make a personal search of the cards on Monday. The names were given by the candidate.
>
> The alteration stamp is normally kept in my office. At the moment it is with the Senior Clerk Grade 7. Alterations are done by Senior Clerks and above.
>
> S.J.G. Ramhewa"

On 5 June 1986 the Secretary for the Ministry took the first formal step in the procedure prescribed in the Public Service (Officers) (Misconduct and Discharge) Regulations SI 161/86. He put two allegations of misconduct to the applicant in terms of the procedure provided for in s 4 of the Regulations. The gravamen of each allegation was the same, ie that applicant has failed to follow standing orders and had falsified official records or recorded thereon false information. The first count related to Billy Kahari, as particularised in the Masango minute above. The second count related to one Martha Matiza in respect of whom applicant had apparently written a note endorsing that she "has 3'O' Levels" whereas, in fact, she had failed nine subjects at "O" Level. As a result of this endorsement Martha actually secured employment in applicant's department.

From a reading of item 4 of respondent's official record of its proceedings, hereinafter referred to as the Minute Sheet, it is clear the respondent correctly accepted that applicant's defence was-

(a) that at no stage did he improperly forge or misrecord official information;

(b) that as regards Billy, he had inadvertantly perpetuated mistakes in official records;

(c) that as regards Martha, he had no present memory of having signed or endorsed anything on her behalf.

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GREENLAND J

Despite these denials it is apparent that respondent summarily determined the matter and on 29 October 1986 wrote to applicant informing him, *inter alia,* that he had been "found guilty of the alleged acts of misconduct...". It was in consequence of these findings that applicant was subsequently discharged. It is clear therefore that applicant's alleged guilt was determined in his absence and that he was afforded no opportunity of confronting, testing or rebutting the evidence or of making representations to respondent in relation thereto. The question raised is whether or not respondent had the power, in the circumstances, summarily to determine the matter as it did.

Section 7 of the Regulations is relevant and reads:

> "Consideration of allegation of misconduct by Commission
>
> 7. Upon receipt of the report and relevant papers forwarded in terms of paragraph (a) of section 6, the Commission -
>
> (a) shall, unless there is material dispute of fact which it is unable to resolve on the papers before it, proceed, in terms of section 19, to determine whether or not the officer is guilty of misconduct; or
>
> (b) shall, where there is a material dispute of fact which it is unable to resolve on the papers before it, direct that an inquiry be held in terms of section 16; or
>
> (c) shall, where it deems that further investigation is necessary, direct the head of Ministry or any other person to conduct such further investigation on such terms as it may direct and, at the conclusion of such further investigation, proceed in terms of paragraph (a) or (b), as may be appropriate:
>
> Provided that the officer against whom the allegation is made shall be given an opportunity to reply to any further allegations made against him in the course of such further investigation; and
>
> (d) may, subject to the provisions of section 8, suspend the officer from service, unless he has already been suspended, or cancel any suspension or prohibition order which may have been imposed."

As applicant was disputing any impropriety on his part there clearly existed a "dispute of fact" as envisaged by s 7(a) above. The remaining but important question is the one raised in the words "material dispute of fact **which it is unable to resolve on the papers before it**..." (my emphasis). If the dispute was of the character stipulated by these words it is clear that respondent was obliged, in terms of s 7(b) above, to "direct that an inquiry be held in terms of section 16...". It is clear that respondent, in terms of s 7(a) *supra,* derives

GREENLAND J

its power summarily to determine guilt from what is now referred to as a "jurisdictional fact". The issue is made clearer by quoting Corbett J (as he then was) in *SA Defence & Aid Fund & Anor* v *Minister of Justice* 1967(1) SA 31 (CPD) at 34 H:

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"Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power (see eg *Kellerman* v *Minister* of Interior 1945 TPD 179; *Tefu* v *Minister of Justice & Anor* 1953 (2) SA 61 (T). On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact or state of affairs existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter (See eg *Minister of the Interior* v *Bechler & Ors supra; African Commercial and Distributive Workers' Union* v *Schoeman NO & Anor* 1951 (4) SA 266 (T); *R* v *Sachs* 1953 (1) SA 392 (AD)."

The first issue therefore is whether the respondent is to be considered as being the sole arbiter of the existence of the jurisdictional fact, ie that the dispute of fact was capable of resolution by the respondent.

As stated by CORBETT J, a "proper construction of the legislation concerned..." determines the question. A careful reading of the Regulations reveals that, in terms of content, purpose, scope and object, they constitute a prescription for a reasonable, fair and functional determination of allegations of misconduct. Mr *Simelane*, for respondent, accepts that the rules of natural justice are inherent to the Regulations, often being expressly or

implicitly included but nowhere obviously excluded. The spirit and intent revealed is to afford an officer accused of misconduct the right to meet the allegation and thereafter have the issue resolved by an impartial independent body. ie, respondent. Respondent's station is very much akin to that of a court which is aloof from the investigations and personalities involved and adjudicates issues purely in terms of the merits or demerits of evidence properly before it. The entire procedure so prescribed is designed to be **objectively** fair and reasonable. This scenariois inconsistent with any notion that at some stage the accused officer can be arbitrarily deprived of an expectation to a fair and open contest of the very matter he has put in issue. It is inconsistent with the notion that the respondent can, in its complete unfettered discretion, determine guilt without a trial and in such determination dispense with the rules of natural justice. That is the implication of upholding the view that the test is subjective. Also to do so is to effectively render respondent as a "judge in its own cause". This is because it is clear that the Regulations clearly provided for a situation where the respondent, without option or discretion, is obliged to refer a dispute to inquiry. Hence the use of the peremptory word "shall" in s 7(a) and (b) supra. Now if the legislation intended the respondent to be deprived of option or discretion in certain circumstances it is inconceivable that it would empower respondent to be the sole judge and arbiter as to whether or not it is so deprived. Put differently, had it been the intention of the Legislature to bestow an unfettered discretion on respondent to decide if and when disputes of fact are to be referred to inquiry the Legislature would have quite easily

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conferred that discretion in clear unequivocal terms. eg "the Commission may, in its discretion, determine the matter or refer..." To quote Baxter *Administrative Law* p 465:

> "As Professor Wade has put it,'courts have an ingrained repugnance to legislative devices for making public authorities judges of the extent of their own powers, or for exempting them from judicial control'."

A study of precedents bears out this submission. It is clear that everything depends on whether or not the relevant clause is "subjectively" worded. As Baxter *supra* states at p 462:

> "Such clauses are designed to operate as partial ousters of review jurisdiction. Examples are: 'if the minister is satisfied'; 'if, in his opinion'; 'if he has reason to believe'; 'in his discretion'; 'in his sole discretion'."

Where the clause is subjectively worded the courts, in terms of what is known as the "literal" approach will uphold the inviolability of the decision matter.

GREENLAND J

See *Sachs* v *Minister of Justice* 1934 AD 11 at 36-7 and 40; *Kloppenberg* v *Minister of Justice* 1964 (1) SA 813(D) and *Netto* v *Clarkson & Anor* 1974 (1) SA 66(D), all of which accord with the now notorious English war-time decision of the majority in *Liversidge* v *Anderson* [1942] AC 206.

Even when the clause is subjectively phrased courts have insisted on an objective test wherever possible. See *Inland Revenue Commissioners* v *Rossminster Ltd* [1980] AC 952; *Watson* v *Commissioner of Customs and Excise* 1960 (3) SA 212 (N) 216; *United Democratic Front* v *Theron NO* 1984 (1) SA 315 (C) 323-E; *Ndabeni* v *Minister of Law and Order* 1984 (3) SA 500 (D) 512-13; *Shangese* v *Minister of Native Affairs* 1958(4) SA 554 (N).

The important point to be made from the above is that, in the present instance, the relevant clause is not subjectively phrased. Section 7(a) contains none of the attributes or characteristics of a subjectively phrased clause as instanced in the numerous precedents referred to directly and indirectly above. It is my conclusion therefore that the test is objective, ie unless it can be **objectively demonstrated** that respondent actually resolved the dispute of fact and **that the dispute was actually capable of such resolution** then there has been a breach of s 7 of the Regulations. This conclusion accords with the weight of authority on approach in such matters including Baxter supra, Wiechers *Administrative Law* pp 220-223, 139-141, and Rose-Innes, *Judicial Review of Administrative Tribunals in South Africa* pp 109-119. The words of SIR ETIENNE DE VILLIERS in *de Bruin* v *Director of Education* 1934 AD 252 still hold good:

> "I take it as a cardinal principle that when legal proceedings are brought for the infringement of legal right, as in this case, the Court has jurisdiction to determine all questions both of law and of fact, which are material to the issue raised in such proceedings, **unless its jurisdiction is clearly excluded by some statute or other law** " (my emphasis).

It seems to me that respondent's position in such matters is analogous to that of a court in motion proceedings seized with a dispute of fact. Motion proceedings, like the disciplinary proceedings as provided for in the Regulations, are intended as a relatively speedy, functional but fair procedure for the resolution of relevant issues. The attitude of this Court to disputes of fact in motion proceedings was indicated by DAVIES J (as he then was) in *Joossab & Ors* v

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Shah 1972 (1) RLR 137 at 138 B:

GREENLAND J

"Mr *Andersen*, for the applicants, referred the court to the case of *Soffiantini* v *Mould* 1956 (4) SA 150 (ED), particularly at 154. In that case PRICE JP had to consider the question of the attitude of the court in motion proceedings where there was a dispute of fact. At the above page he says, adopting first the words of MURRAY AJP in *Room Hire Company (Pty) Limited* v *Jeppe Mansions (Pty) Ltd* 1949 (3) SA 1155(T) at 1165:

> 'A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduce a preliminary examination ... and to ascertain whether the denials are not fictitious, intended merely to delay the hearing', [or for some other purpose].
>
> The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after *viva voce* evidence has been heard.
>
> See also the case of *Prinsloo* v *Shaw* 1938 AD 570.
>
> If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device.
>
> It is necessary to make a robust commonsense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.'

With respect, I agree in principle with the approach there set out by PRICE JP. It seems to me that in motion proceedings the court should endeavour, if possible, to resolve the dispute between the parties without the hearing of evidence. But it would be wrong to adopt such an approach unless the court is amply satisfied that the dispute can be so resolved without doing an injustice to the other party."

See also *Lalla* v *Spafford & Ors* 1973 (2) RLR 241. It is not possible to improve on the above dicta, save to say that the approach, appropriately modified, is available for respondent's purposes and is that which essentially should have been employed in this case. It is now necessary to deal with the particular acts of misconduct alleged.

GREENLAND J

Count 1 - BILLY KAHARI

The Masango minute and Applicant's response (pp 259-60 above) refers.

To my mind this response constitutes an innocent explanation which, if accepted, absolves applicant of the charge of misconduct. The explanation was advanced *ab initio* and adhered to for over a year. In itself it is not obviously untruthful. It cannot be said to be fanciful, nor is it improbable. It has no complexion, character or attribute to render it susceptible to summary rejection. It accords with known circumstances. This can be demonstrated by pointing to the

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following remarkable feature which has emerged in the papers.

On 28 March 1985 Mr Masango wrote:

> "...I wrote to the University of London ...Their reply says that no trace of this candidate...for 1973 and 1974...It seems...that Billy did not write the exam in the years indicated..."

This represents a blatant contradiction of his certification in the Masango Minute, para 5, that Billy passed a total of five subjects in 1973 and 1974. Like applicant therefore he is now on record for furnishing incorrect and apparently false information. Is guilt or misconduct on his part to be summarily inferred despite his innocent explanation that:

> "The implication is that someone has made false alteration of official records
>
> (28/3/85 manuscript)?"

Obviously such inference would be purely arbitrary and unjust. Analysis of para 5 of the Masango minute reveals the significant feature of the confirmed results being quite inferior to the genuine results. This factor is strongly consistent with the discrepancy being explicable on the basis of mistake rather than an improper motive.

In the absence of, at least, rebutting evidence from Billy or the official records the dispute of fact was not amenable to summary resolution. Respondent appreciated this. I quote form the Minute Sheet:

> "5.1 It is observed that the two bound volumes of the London General Certificate of Education results for the 1973 and 1974 academic

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GREENLAND J

> years (which is when Mr Kahari sat for his 'O' level examinations) mysteriously disappeared from the Examinations Branch while Mr Ramhewa was the administrative head. This disappearance has made it absolutely impossible to reconcile the discrepancies in the confirmation of results in favour of Mr Kahari."

As may be seen respondent was of the view that the matter could not be resolved as the evidence had "mysteriously disappeared". Respondent surmounted this evidential problem rather crudely and quite unfairly. It simply attributed responsibility for the disappearance of the evidence to applicant. I quote from the Minute Sheet:

> "5.3. It is perfectly possible that he could have used his position to steal and destroy the records or could have asked someone (a subordinate) to do so in order to hamper investigations, since he was not suspended from duty.
>
> 5.4 We take great exception to the Ministry's failure to suspend the officer from duty..."

It must be concluded that as regards the first count there was a material dispute of fact not amenable to summary resolution by respondent who was, in terms of s 7(a) and (b) of the Regulations, compelled to refer the matter to inquiry.

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Count 2 - MARTHA MATIZA

On this count respondent had only a memorandum apparently (he was afforded no opportunity to deny) signed by applicant in which it is certified that Martha "has 3 'O' levels" as at 25 September 1984. This constituted prima facie proof of the allegation, but is *prima facie* explicable on the same basis as the first allegation, ie innocent perpetuation of mistakes in official records.

Respondent also had a statement from Martha dated 11 October 1985. It is "colourless"; it neither exonerates nor incriminates applicant.

It is clear that respondent recognised the obvious, ie that the dispute of fact was not susceptible to summary resolution. The Minute Sheet reveals that respondent therefore conducted investigations which culminated in Martha subscribing to a statement dated 24 September 1986 which does incriminate Applicant.

GREENLAND J

Mr *Foroma* is quite right when he submits that this unilateral investigation in the absence of and without the knowledge of applicant was impermissible. In terms of s 7(a) and (b) respondent was obliged to refer the dispute to inquiry, or subs (c) could have been invoked.

Further Irregularity

An important aspect which has emerged from the papers is that respondent summarily considered and found proved an allegation which had never been put to applicant at all. this is apparent from the Minute Sheet which reads:

> "3. ALLEGATIONS
>
> 3.1. It is alleged that Mr Ramhewa committed acts of misconduct as defined in paras 24 and 17 of the Public Service (Officers) (Misconduct and Discharge) Regulations, 1986 in that he
>
> (a) acted in ways which are inconsistent with or prejudicial to the discharge of official duties including the abuse of authority..."

This allegation which is represented as item 24 in the First Schedule ("ACTS OF MISCONDUCT") had never been put to applicant in terms of the peremptory provisions of s 4 of the Regulations. Item 6.1 of the Minute Sheet and the letter to applicant dated 29 October 1986 reveal that applicant was "found guilty of misconduct as alleged".

It is clear therefore that applicant was charged, summarily tried and convicted in his absence of an allegation of which he was unaware. This was quite obviously totally impermissable. In particular s 4 of the Regulations was breached. Section 4 reads:

> "4. Where an allegation of misconduct is made against an officer, the head of office in which the officer is employed -
>
> (a) shall forthwith call upon the officer to reply, in writing, within seven days...; and

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(b) shall-

(i) within seven days of his having received the officer's reply;...

submit to the head of department a report;..."

These provisions which constitute the first step to be taken in disciplinary proceedings are **peremptory.**

GREENLAND J

In all the above particularised circumstances it must now be held that the disciplinary proceedings were totally vitiated by virtue of non compliance with the regulations.

An attempt has been made in a supplementary affidavit by respondent to show that the two counts against applicant were resolvable. The problem is that the evidence tendered is tendered, not by the Ministry or any witness but, by respondent itself. As already stated respondent cannot be a "judge in its own case". It cannot both give evidence and adjudicate. It can act only on evidence properly referred in terms of the Regulations.

It is trite that the failure to comply with the provisions of a governing statute in action taken against a civil servant renders such action a nullity. *Schierhout* v *Minister of Justice* 1926 AD 99 at 109; *Rogers* v *Durban Corporation* 1950 (1) SA 65 (D); *Stoop* v *Lichtenburg Town Council* 1952 (2) SA 72 (T). Helpful also is the approach set out in N*kisimane & Ors* v *Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433 H-434 D

There will be an order that:

1. The finding of the Public Service Commission Disciplinary Committee that the applicant is guilty of misconduct is set aside;
2. The decision to discharge the applicant from the service is set aside;
3. In the event of disciplinary proceedings being re-instituted against him, an inquiry be held in terms of s 16 of the Regulations;
4. Respondent pay the costs of this application.

Sawyer v Mkushi, applicant's legal practitioners

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

KASHIRI v MUVIRIMI 1988 (1) ZLR 270 (SC)

Court **Supreme rT, Harare B**

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Annotations Link to Case Annotations

Dumbutshena CJ, McNally JA & Korsah JA

Civil appeal

22 March & 20 April 1988

Flynote

Family law - paternity - proof of - credibility of woman where no other evidence of intimacy is available - binding nature of previous court decision on same matter between same parties.

Evidence - res judicata - judgment of community court in action for damages for seduction determining that sexual intimacy had occurred-man estopped in later claim for maintenance from denying that intimacy had occurred.

Courts - decisions by - need for reasons and findings of credibility to be given.

Headnote

A maintenance court had ordered the appellant, as the alleged father of the respondent's two illegitimate children, to pay maintenance in respect of them. He denied knowing the respondent or ever having had sexual relations with her. However, he admitted that about eighteen months after the birth of the first child he had been sued in the community court for damages for seduction of the respondent. The community court had determined that intercourse had occurred and had ordered him to pay damages.

Held, that where in a paternity suit no other evidence is adduced in substantiation of the averment of sexual intimacy, the sole factor in determining whether the woman has discharged the onus on her is the credibility of her own evidence. It is therefore important for courts to make findings of credibility and give reasons for their decisions.

Held, further, that the much-criticised decision in *Hollington* v *F Hewthorne*

KORSAH JA

& Co [1943] KB 587; [1943] 2 All ER 35*(3) did not apply in the present situation because the action for damages for seduction was not a criminal matter. The judgment of the community court determined the question of sexual intercourse between the parties in relation to the first child and made that issue *res judicata.* The determination of that issue by the community court raised an issue estoppel.

Held, further, that the revelation that there had been a finding that the appellant had seduced the respondent demolished his defence that he did not know her and had never had relations with her and her assertion that he was the father of the second child must be accepted as well founded.

Cases cited:

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R v *Swanepoel* 1954 (4) SA 31 (O)

S v *Sambo* 1962 (4) SA 93 (EC)

National Employers' Mutual General Insurance Association v *Gany* 1931 AD 187

Hollington v *F Hewthorne & Co supra*

Tomes v *Sithole & Ors* 1981 ZLR 494

Liley & Anor v *Johannesburg Turf Club & Anor* 1983 (4) SA 548 (W)

T M Rajah for the appellant

No appearance for the respondent

Judgment

Korsah JA: This appeal lies against the decision by the Court of the Provincial Magistrate of Mashonaland, sitting as a Maintenance Court, awarding maintenance of $50 a month for each of the two children of the respondent by the appellant.

The respondent applied for maintenance. She averred that she and the appellant fell in love in 1979, and soon thereafter she moved in to stay with him in anticipation of marriage. This association persisted until December 1984 when the appellant mysteriously left her. During the course of their association she gave birth to two children; P, born on 28 October 1980, and W, born on 1 May 1985; the appellant is the father of both children. She is unemployed. And although the appellant is self-employed as a welder earning about $1 800 a month, he has failed or refused to maintain the two children. She presented a modest expenditure of $130 a month for the two children.

KORSAH JA

The appellant's defence to the claim for maintenance was a complete denial of all knowledge of the respondent. He said:

> "I deny paternity and I do not know the applicant. I deny sexual intercourse."

He said in evidence that he was a respectably married man who had never spent a night out of the matrimonial home. The truth of this statement was not, however, borne out by the overall evidence, as I shall shortly demonstrate.

The sum total of the respondent's testimony in support of her claim was that in 1979 the appellant rented accommodation for her at a certain unit in Chitungwiza. The landlord was a Mr M Apart from the landlord's two sons there was no other tenant in the house. She lived at the rented premises and the appellant visited her there twice or thrice a week. He visited her after working hours and on occasions in the afternoon. Her sisters and brothers, who also visited her at these rented premises, knew of the relationship between her and the appellant. After she was delivered of her first child on 28 October 1980 the appellant was informed and he went to

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collect her from hospital when she was discharged. The name of the first child was chosen by agreement between the two of them, but the appellant was nowhere to be found after the arrival of the second child and so the respondent alone as responsible for choosing a name for it.

In a case where paternity is denied, the *onus* is on the woman to establish that intimacy has occurred between her and the man she claims to be the father of her child. In most cases, naturally, there can be no direct testimony in support of the bald assertion by the woman that sexual intercourse has indeed taken place between her and the man she accuses. But evidence from which an inference of the possibility of such intimacy having occurred may be drawn will always go along way to support the truth of her assertion.

In the instant case, the landlord, Mr M, was not called to verify the assertion that the appellant rented the premises for the respondent and frequently visited her there. Nor were the respondent's brothers and sisters called to affirm that they were aware of the relationship between the appellant and the respondent. Not even the elder son of the respondent, who appears to have been in court, was asked, as suggested by the respondent, to identify his father. In the face of the denials by the appellant the evidence adduced in support of the respondent's case was rather thin.

KORSAH JA

Where in a paternity suit no other evidence is adduced in substantiation of the averment of sexual intimacy, the sole factor in the determination of whether the woman has discharge the onus which rests with her is the credibility of her own evidence. See *R* v *Swanepoel* 1954 (4) SA 31 (O) at 40; *S* v *Sambo* 1962 (4) SA 93 (EC) at 95.

Mr *Rajah* submitted that because of the dichotomy between the averment in the affidavit of the respondent that she and the appellant were living together, and her statement in evidence that the appellant only visited her twice or thrice a week at the rented premises, her evidence was inconsistent on a material point and that this undermines her credibility.

Were the above all the evidence led at the trial, Mr *Rajah's* submission would maybe have fallen on more receptive ears; for the trial magistrate gave no reasons for awarding maintenance in respect of the respondent's children, and there was thus no finding as to credibility.

This case highlights the need for courts to give reasons for their decisions because, as Wessels JA also reminds us in *National Employers Mutual General Insurance Association* v *Gany* 1931 AD 187 at 189:

> "Where there are two stories mutually destructive, before the *onus* is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the *onus* rests is true and the other false."

Without a finding of credibility in favour of the respondent, her case would have been doomed had not the appellant conceded that in 1982, about a year-and-a-half after the birth of P, there had been a finding of sexual intimacy between himself and the respondents, in proceedings before the Community Court, and he was condemned to pay seduction damages.

Mr *Rajah* submitted that the fact that the appellant paid seduction damages, resulting from the

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Community Court's decision, does not assist in establishing that intercourse did in fact occur between the parties, because that decision was nothing more than the opinion of the Community Court.

The much criticised decision in *Hollington* v *G Hewthorne & Co* [1943] KB 587; [1943] 2 All ER 35, upon which counsel relied for the above submission, decided that at common law a conviction is not admissible in evidence against a defendant in a civil matter because-

KORSAH JA

(a) that conviction merely proved that another court, acting on evidence which was unknown to the tribunal trying the civil proceedings, was of a certain opinion; and

(b) that the contest in a civil suit is not between the same parties as the contest in a criminal matter.

See also *Tomes* v *Sithole & Ors* 1981 ZLR 494.

My short answer to that submission by counsel is that an action for seduction damages is not a criminal matter. No conviction is pronounced by the trial court, and the contest, in this case, is between the same parties as appeared in the proceedings before the Community Court. Therefore, the judgment of the Community Court, sitting as a court of civil jurisdiction, determining the question of sexual intercourse between the parties in relation to P, makes that issue *res judicata*.

The policy of the law, as regards issue estoppel, was succinctly stated in *Phipson on Evidence* 13 ed paras 28-46, thus:

> "If, in litigation upon one such cause of action, any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

With regard to P, precisely the same issue as that before the Community Court - sexual intercourse between the parties - arose in the present case for determination. That issue having been determined between the same parties by the Community Court, the determination of it by that court raises an issue estoppel. The parties are estopped from disputing an issue decided by a judgment of a court of competent jurisdiction. See *Liley & Anor* v *Johannesburg Turf Club and Anor* 1983 (4) SA 548 (W).

Clearly, the revelation that there had been a finding in 1982 that he had seduced the respondent demolishes his defence that he does not know the respondent and has never had sexual intercourse with her. His credibility

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KORSAH JA

therefore is very low, and the respondent's assertion that the appellant is the father of W must be accepted as well founded.

I would accordingly dismiss this appeal and confirm the order made by the trial court.

I make no order as to costs as there was no representation by or on behalf of the respondent.

Dumbutshena CJ: I agree.

McNally JA: I agree.

Stumbles & Rowe, appellant's legal practitioners

DONALD v MASTER OF THE HIGH COURT & ANOR 1988 (1) ZLR 276 (HC)

Editor's Note:(4)

Court **High Court, Harare**

Ebrahim J

Application for declaration

26 November 1987 & 27 April 1988

Flynote

Succession - wills - amendment of - wills made before promulgation of Wills Act 1987 - how amendments to be made - reservatory clause requiring amendments to be signed and witnessed "according to law" - effect of.

Costs - wills - case deciding validity of - by whom payable.

Headnote

Before 1 January 1988, when s 9 of the Wills Act No. 13 of 1987 came into effect, alterations to wills were categorised according to whether or not they introduced new material to a will. Where the alteration consisted simply of an erasure or crossing out, with nothing added to replace the deleted words, the only requirement in law was that the deletion is shown to have been made *animo revocandi*. On the other hand, an alteration which introduced new material to the will was regarded by the common law of Zimbabwe as new execution, which meant that any new or substituted provision had to be attested according to the old provisions of the law, that is, that such alterations had to be signed by the testator (or someone else at his direction) and that this signature had to be acknowledged by the signature of two competent witnesses signing at the same time as each other and as the principal signatory. The alterations should have been specifically (if not individually) acknowledged by the testator's and witnesses' signatures; it would be inadequate and inappropriate for several alterations to be acknowledged by a single

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"floating" signature.

Where a will executed before 1 January 1988 contained a reservatory clause which required alterations and additions to the will to be made under the testator's signature, "duly witnessed according to law", the effect of the clause is that additions and alterations must be made with the formalities mentioned above.

Where the Master had mistaken the law to be applied in a case involving a will, but where the testator had failed to take proper legal advice when embracing the patently complex task of redrafting his will, with a result that would have been the same for the person seeking to establish the validity of the alterations, it was appropriate for the costs to come out of the estate.

Cases cited:

Nelson v *Currey & Ors* (1885-6) 4 Juta 355

King NO v *The Master* (1909) 19 CTR 505

In re t*he late Sir John Wilde's Will* (1873-4) 4 Buch 113

Gow v *The Master* 1936 CPD 296

M T O'Meara for the applicant

M J Gillespie for the respondent

Judgment

Ebrahim J : The applicant in this case seeks to have certain amendments to her late husband's will declared valid. A second leg of the application sought condonation for the late lodging of the petition. As the respondent has not opposed the latter motion and it seems in the interests of all concerned that the matter should proceed, condonation is granted.

Alterations to wills and their validity are now governed by s 9 of the Wills Act No. 13 of 1897. However, prior to the promulgation of this statute, the basis for the validation of alterations made after execution appears to have been uncertain. As the Wills Act applies only to wills executed after 1 January 1988, wills executed before that date fall to be governed under the law as it was at the time of their execution. It follows that the old law applicable to alterations will co-exist with s 9 of the Wills Act for a very long time to come. It is hoped, therefore, that the exposition of this law in the following judgment will prove useful to practitioners and testators who deal with amendments or alterations made before 1 January 1988. Those made after this date are governed by s 9.

The applicant's husband (hereinafter called "the testator") executed a will on 15 June 1979, in which he divided his property between his wife, his son, David, and his daughter, Wendy. Both David and Wendy pre-deceased the

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EBRAHIM J

testator, who consequently made numerous changes to the will, redistributing the property originally bequeathed to them. He signed each of the alterations himself and had his signature witnessed by a single witness, whose signature appears with that of the two witnesses who witnessed the original execution at the foot of the first and third pages of the will, though not at the foot of the second. These last mentioned signatures seem, in the circumstances, to have been added at a later date and so cannot have served the purpose of witnessing the testator's signature. They are also surplus to requirements as only two witnesses are necessary to formalise a will. In such circumstances, the signatures of the purported third witness at the foot of pp 1 and 3 must be disregarded.

The issue crucial to this application, however, is whether the mechanism used to effect the alterations to the will was efficacious enough to render the amendments legally valid. The applicant maintains that it was, and that consequently the wishes expressed by the testator in the amended will should be followed. The Master maintains that the signature of the testator and one witness is insufficient to lend legal credence to the amendments. The Master's contention is based on a view of the law which assumes that because there was at the time no statute law governing the making of alterations to wills, there was no law at all, and consequently we ought to adopt the practice followed in South Africa, whereby two witnesses are required to attest the signature of a testator on every amendment.

The Master's contention excludes the possibility that there is common law on the subject. The bequeathing of property on a person's death is a practice common in a materialistic society. Therefore the law of succession is pre-eminently an area with which one would expect common law to deal in the first instance. Statute law in such areas usually clarifies and supplements the pre-existing common law. (*Vide* the Wills Act 1987).

The common law of Zimbabwe is prescribed by s 89 of the Constitution of Zimbabwe as being the law in force in the Colony of the Cape of Good Hope on 10 June 1891. The High Court is enjoined to apply this law as modified by subsequent legislation in Zimbabwe having the force of law. The practice which the Master has urged me to follow is based on the provisions of s 2(b) of the South African Wills Act No. 7 of 1953. This legislation has never had the force of law in this country. It would be wrong, I think, to adopt such a foreign practice merely because it is convenient to do so, and more particularly where a firmly grounded rule of law on which to base a local practice can be deduced.

EBRAHIM J

The proper way of ascertaining the law which the High Court in this country is empowered to apply is to research the law of the Cape of Good Hope on the relevant date and discover how that law has been altered by local legislation. The methodology required for such research is not as arcane as may be supposed. Cape law reports and other legal materials dating from that time are fairly comprehensive and available at most of the major law libraries in this country.

Reference to relevant contemporary case law reveals that the law of succession was largely

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governed by the Cape Wills Ordinance of 1841. Compare *Nelson* v *Currey & Ors* (1885-6) 4 Juta 355 and *King NO* v *The Master* (1909) 19 CTR 505. See also Beinart "Testamentary Form - Wills Act, 1953" (1953) 70 SALJ 159.

The Wills Ordinance 1841 substantially altered the formalistic requirements for making a will, but did not alter the common law relating to amendments and alterations. See In re *the late Sir John Wilde's will* (1873-4) 4 Buch 113; *Nelson* v *Curry supra; Gow* v *The Master* 1936 CPD 296; *Beinart* op cit 289 n 12. In the SALJ article to which I have referred, Professor Beinart summarised the law on this subject.

Alterations in wills are categorised according to whether or not they introduce new materials to a will. In cases where the alteration consists simply of an erasure or crossing out, with nothing added to replace the deleted words, the only requirement in law is that the deletion is shown to have been made *animo revocandi* (with intention to revoke). In *Gow's* case *supra*, for example, the testator put a line through the name of the applicant whom he had nominated as executor and acknowledged the deletion by putting his initials next to it. His intention to revoke was reinforced, so the court held, by his substitution of another name, despite the intrinsic invalidity of the substitution. The substitution of the second name, while it went towards proving *animus revocandi*, was in itself invalid because the requirements of the second category of alterations (those which introduce new material) had not been complied with. The usual rule is that the introduction of new material amounts to new execution and therefore must be accompanied by the full formalities required of a new will. As Professor Beinart points out (*op cit* p 289) there is not much direct authority for this view, but it seems correct in principle and court pronouncements supporting it have not provoked appeals (see eg *Gow's* case *supra*). An exception may lie where the cancellation of a term is dependent on the substitution being valid. In this case substituted words may be read into a will even though they are not duly witnessed.

EBRAHIM J

Before the new Zimbabwe Wills Act came into force the formal requirements of a valid will were that it should be signed by the testator in the presence of two competent witnesses who would acknowledge that he had signed. The testator had to sign each page of the will and the witnesses were similarly required to acknowledge these signatures. This having been the requirement for the validation of a new will, it follows that to lawfully make an alteration which introduces new material to a will each such alteration must have been signed and witnessed in the same manner. The law as stated above is the same as the requirements for validating amendments in the new Wills Act, which tends to confirm the correctness of the reasoning in this decision.

The effect of this reasoning on the testator's will is that the deletions he made are valid. Each has been signed by himself and witnessed by a single witness. In addition there are handwritten amendments which redistribute the bequests. If any more evidence is necessary of an *animus revocandi* it is to be found in the fact that, as appears from the Master's affidavit, the testator's son and daughter, to whom the amended bequests had been made, pre-deceased him. In these circumstances, I have no difficulty in finding that the deletions were made with the necessary

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intention.

The additions to the will present quite a different problem. Their admissibility is not dependent on the opinion of the court as to their authenticity. As has been determined above, the common law of Zimbabwe (which governed the drawing of wills at the relevant time) regarded alterations to a will which included importation of new material as new execution. This consequently meant that any new or substituted provision would have to be attested according to the old provisions. The formalities required by these provisions were that such alterations had to be signed by the testator or someone else at the testator's direction and that this signature had to be acknowledged by the signature of two competent witnesses signing at the same time as each other and as the principal signatory (ie the testator or he who signed at the latter's direction). As the above requirements were prescribed by common law, the court has no discretion to vary them and to make exceptions even in circumstances where it is fairly certain that the additions were made by him.

A clause-by-clause analysis of this will may help to clarify the application of these principles both to the instant case and to the interpretation of pre - 1988 wills in general.

The will consists of three leaves, each of which has been signed by the testator and two witnesses. On the first and third leaves a third signature, that of the

person who witnessed the alterations, appears also as a witness for those leaves. As the third witness's signature has obviously been added as an afterthought (the first and second witnesses have signed in regular spaces clearly allocated for the purpose on the original typescript, but the last mentioned signature has been made against a pencilled number) it is not at all clear that this represents a due witnessing of the leaves in question in the sense that the third witness was present when the testator signed those leaves. The legally required number of witnesses has been two since the promulgation of the Wills and Attesting Witnesses Act which reduced the number from seven (in line with the Cape Wills Ordinance 1845). As, therefore, the third signature is surplus to requirements in any case, I propose to disregard it in as much as it purports to bear witness to the testator's signature at the foot of the relevant leaves.

In the preamble to the will the words "Umtali, Rhodesia" have been deleted and "Mutare, Zimbabwe" have been substituted. The alteration has been signed by the testator and countersigned by the witness. In my view such an alteration would have been valid even if it were completely unsigned. Place names were altered by statute. Therefore, as a matter of necessity, the names would have been deemed, for practical purposes, to have changed, whether altered or not.

Clause 1 is the normal clause revoking prior testamentary acts. It has not been altered.

Clause 2 appoints the administrators and executors of the estate. It has not been altered.

Clause 3 originally made two bequests to the testator's daughter, Wendy. Her name has been deleted and that of his grandson, David Lewis, substituted. Two further alterations were made to

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this clause. These will be discussed below.

The main purport of the alteration to clause 3 is to change the beneficiary thereunder. The deletion may be ruled valid. It has been confirmed by the signature of the testator which in turn, has been witnessed by another signature. This deletion compares well in evidential weight with the deletions in *Gow's* case where the mere initialling of a line through a word was accepted as valid. However, this validity does not carry through to the addition to the clause of the name of the testator's grandson. The testator and one witness have signed the alteration, but an alteration involving an addition

EBRAHIM J

to the text must be signed by the testator and two witnesses to be valid. The bequest to the testator's grandson, therefore, must fail.

The other two alterations to clause 3 may be regarded as technical. The bequest was one leaving shares in various companies. In one case a company obviously changed its name by dropping "Rhodesia" from its title. This word has accordingly been struck out. Although it is of academic interest only I would mention that similar considerations would apply to this alteration as to the name-change in the preamble. The remaining alteration involved a change of company in which a block of shares were held. The name "Messina Transvaal Development Company Limited" has been deleted and "Dunlop Ltd Zimbabwe" substituted therefor. A point of interest is whether the substituted name would have been valid, all else being equal. In my opinion, as the exact number of shares in each company (ie "all my shares") was ascertainable, the name of the company was not a material consideration and therefore the alteration would not have constituted new execution requiring the signatures of two witnesses.

In terms of clause 4 the testator's son, David, was to have received-

(a) any motor-car or motor-cars owned by the testator at the time of his death;

(b) a sum of Z$400 in cash;

(c) Such funds held in the testator's name by Grindlays Bank Ltd of London plus the interest accumulated thereon at the time of the testator's death. There has been no substitute beneficiary named for these bequests.

A peculiarity of this clause is that although the preambulatory words nominating the intended beneficiary have been deleted together with bequests (a) and (b), bequest (c) (ie the money in London) has not. The positioning of the signatures of the testator and his witness, which attest the deletions, appear to indicate that non-deletion of bequest (c) was international. However since the testator has not specified a substitute beneficiary bequest (c) must also fail.

Clause 5 originally bestowed a joint interest in certain funds and investments in the United Kingdom on his son, David, and his daughter, Wendy. The property is identified as that which is held and administered on the testator's behalf by the Cumberland Building Society of Carlisle, England, having been inherited by him from his mother. The significant alteration to this

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EBRAHIM J

clause is that the names of David and Wendy have been deleted and the testator's wife (the applicant) instituted instead. As with the other deletions these have been struck through in ink, and acknowledged by the testators signature which, in turn, has been witnessed by the signature of a single witness. The deletion of the names of David and Wendy is valid but the substitution of the name of his wife is invalid for want of due attestation. Further alteration to this clause has taken the form of a substitution of the Cumberland Building Society for the firm of solicitors who formerly administered the property. This may be regarded as aprocedural (as opposed to a substantive) alteration, and is not affected by the requirement of formal attestation. In the result the bequest envisaged by clause 5 fails.

The testator has, however, given the sensible direction that the costs of the administration of his estate in the United Kingdom are to constitute first charge on the funds and investments before distribution. In view of possible exchange control difficulty in settling foreign debts, such an arrangement commends itself. This provision of clause 5 contains no amendment and can stand by itself.

Clause 6 grants a bequest of $200,00 to the testator's godson. No substantive alterations have been made to this clause and the bequest is quite in order. An alteration has been effected to indicate a change of address at which the godson may be contacted but this in no way affects the donation.

Clause 7 bequeaths the remainder of the estate (ie after the bequests provided for above have been fulfilled) to his wife (the applicant). Written on the will next to this clause are the words "including any motor-car or cars owned by me at the time of my death". There is, in the margin adjacent to these insertions, the signature of the testator and that of the same single witness who attested all the acknowledgements of amendments. Now, it is clear that, as before, the signature of a single witness is insufficient to validate an insertion. However, it must be asked here whether words following the participle "including" are true insertions? Are they not, rather, reiterations or clarifications of the stated wish of the testator? In this instance the testator has not made mention of his life insurance policy anywhere else in the will. But in the clause leaving his estate, after making his express bequests, to his wife, he saw fit to emphasise specifically that he wished to leave the proceeds of his Norich Union Life Assurance policy to his wife. The fact that he acknowledged this wish with his signature has been acknowledged by his one witness. Especially in the light of the fact that one of the principal objects of a life insurance policy is to provide financial security, I would be most

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reluctant, in the circumstances, to deprive the applicant of the benefits which her late husband quite clearly wished to bestow on her because of what would amount, in this instance, to a highly technical legality.

Clause 8 makes provision for the contingency of the testator's wife not surviving him for more

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than thirty days. Obviously this provision in now void for want of fulfilment. It is, however, worth noting that if the necessity to implement it had occurred, its construction as evidently intended would not have been possible. The reason for this is the same as for the invalidity of the other clauses: want of proper formality. Originally, David and Wendy were instituted heirs to the remainder if the applicant had died within thirty days of her husband. Their names have been deleted and the name of a third child, Fiona, inserted. The deletions are valid but the insertion is not. Therefore, in the event of the applicant having died within thirty days of her husband, Fiona would not have been eligible to inherit.

At this point I wish to make an observation regarding the positioning of the signatures to the amendments. So numerous are these in this will that a number of signatures (with the relevant, though inadequate, attestation) have been written seemingly at random in the margin. Presumably the intention was that each alteration was sufficiently proximate to a signature for one to say, "this signature validates that alteration." I do not think such non-specificity is advisable. Although the old Wills Act is silent on the formalities required for alterations, it seems a clear implication of common law the alterations should be specifically (if not individually) acknowledged by the testator's signature. The alterations in Clauses 6, 7 and 8 have been acknowledged by a single "floating" signature. This seems to me inadequate and inappropriate.

Clause 9 was a natural adjunct to Clause 8. It provided that if Wendy and David inherited the remainder of the estate (ie in the event of the applicant not surviving the testator by thirty days), and either of them pre-deceasing the testator, their share of the remainder was to go to their issue by representation *per stirpes* and, in the absence of issue, to their survivor or his or her issue by representation *per stirpes*. The clause has been deleted but the deletion has not been acknowledged in any manner whatsoever. But it was a contingent clause and the contingency for which it provided has not occurred. Tthere is no need for formal revocation.

Clause 10 is the customary reservatory clause, in which the testator reserves the right to make any alterations and additions to his will and expresses the

desire that "all alterations and additions so made under my own signature, duly witnessed according to law, may be held as valid and effectual to all intents and purposes as if originally included herein." It is to be noted that the clause itself requires that alterations and additions be made "according to law" as a condition precedent to their being held valid and effectual. The additions made to the will were not so made and cannot be validated by virtue of the reservatory clause.

The net result is that in the majority of instances the attempts to redistribute the testator's legacies have failed and the property concerned must be distributed according to the rules of intestate succession. The notable exceptions are the bequests to the testator's godson and the specific donations to the applicant of the proceeds of the Norwich Union Life Assurance policy and any motor car or motor cars owned by the testator at the time of his death.

The question of award of costs in this case raises an interesting problem. The Master mistook

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the law to be applied and to this extent may be said to have "lost" the case. This would, in most cases, result in costs being awarded against him. On the other hand, the testator failed to take proper legal advice when embarking on the patently complex task of redrafting his will in the light of changed circumstances. Section 12 of the Administration of Estates Act [*Chapter 301*] requires the Master to register a will, and in terms of proviso (i) to that section he must refer any queries regarding the validity or legal effect of such a will to this court. If the Master had, in terms of s 12 sought the advice of this court on the validity of the amendments in the testator's will, my answer would have been that they were invalid, albeit for reasons superficially different to those tendered by the Master in this application. The end result as far as the applicant is concerned would have been the same. In the result, I agree with the consensus opinion of both counsel that the estate should pay the costs of the application. It is so ordered.

Gargan Brothers & Chadder, applicant's legal practitioners

Winterton, Holmes & Hill, second respondent's legal practitioners

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CHIZENGENI v CHIZENGENI 1988 (1) ZLR 286 (HC)

Court **High Court, Harare**

Reynolds J

Application for variation of maintenance order

31 March & 27 April 1988

Flynote

Family law - maintenance - variation of maintenance order - good cause therefor - remarriage of maintenance-payer and assumption of new obligations - whether good cause for variation of order - matrimonial home - when desirable to sell jointly-owned home.

Headnote

The parties to this action were formerly married, but had been divorced in 1987, the respondent having been granted custody of the child of the marriage and maintenance in respect of the child. The respondent continued to live in the jointly-owned home, a four-bedroomed house. Since the divorce the applicant had remarried; he now lived in a one-bedroomed flat with his new wife and the child of that marriage. His wife was expecting another child. The applicant claimed that in his present circumstances he was unable to meet his obligations under the maintenance order. He also asked that the house in which his first wife lived be sold in order to enable him to meet his obligations to his first family.

Held, that any change in the needs or obligations of either of the spouses may amount to "good cause" (as required by s 9 of the Matrimonial Causes Act 1985) for ordering the variation of the earlier maintenance order.

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Held, further, that where a divorced man with maintenance obligations towards his first family remarries, it is superficial and unrealistic to suggest that the first wife must continue to be maintained at the same standard regardless of her former husband's subsequent commitments. The standard of living of both parties should not be reduced more than is necessary in the light of the fact that there are now two households to be maintained. Neither party should enjoy an appreciably higher or a

REYNOLDS J

lower standard of living than the other. While obligations to the first wife and children are properly regarded as a prior charge, subsequent commitments will possibly reduce the husband's capacity to maintain the first wife to the extent originally decreed. In order to accommodate both needs, the standards of living of all parties may possibly have to be reduced, with the second family playing a subordinate role to the first.

Held, further, that this was an appropriate case for an order that the jointly-owned matrimonial home be sold. The parties had acquired the house on the basis that it would be their joint home during the subsistence of their marriage. The whole basis of the acquisition and use of the house had fallen away and the need of each of the parties thereafter is, in essence, to have a suitable home in accordance with his or her new status. In addition, if the sale did not take place, there was little prospect of the applicant improving his present unsuitable living conditions. The sale would enable him to meet his obligations in full and to provide satisfactory accommodation for his new family, while the respondent would not be prejudiced to any appreciable extent by the sale.

Cases cited:

Dawe v *Dawe* 1979 RLR 395

Hobart v *Hobart* HH-160-86 (unreported)

Bellenden v *Satterthwaite* [1948] 1 All ER 343 (CA)

Roberts v *Roberts* [1968] 3 All ER 479

Foster v *Foster* [1964] 3 All ER 541

Prophet v *Prophet* 1948 (4) SA 325 (O)

Stone v *Stone* 1966 (4) SA 98 (C)

Ashley v *Ashley* [1965] 3 All ER 554

Harnett v *Harnett* [1973] 2 All ER 593

Mesher v *Mesher* (1973) *The Times* 13 February

V S Nyangulu for the applicant

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M T O'Meara for the respondent

Judgment

Reynolds J : The parties in this matter were married in August 1971 and a matrimonial home was purchased by them in 1978. It is common cause that the house in question is jointly owned by the parties in equal shares and that the respondent and the minor child of the marriage are presently occupying this house.

In September 1987, and by consent, the present respondent was granted a decree of divorce against the applicant and was awarded custody of the child.

REYNOLDS J

The applicant was ordered to pay $300 per month maintenance for the child and half the costs involved in maintaining the house. He was also ordered to pay maintenance to the respondent in the nominal sum of $1 per annum.

The applicant in this case seeks a variation of the original court order as he alleged that in his present circumstances he is unable to meet his obligations under that order. In terms of s 9 of the Matrimonial Causes Act No. 33 of 1985, such a variation may be granted on "good cause" shown. Mr *O'Meara*, for the respondent, submitted that the applicant had not established any change in his circumstances since the making of the order which would amount to "good cause". He cited the case of *Dawe v Dawe* 1979 RLR 395, which case undoubtedly supports this proposition. *Dawe* is consistent with several other authorities to the effect that the first wife and family take precedence over any subsequent commitments. It must be noted, however, that there is another school of thought which holds that the reality of the changed or changing positions of spouses must also be taken into account. As it is expressed in Hahlo Husband and Wife 5 ed at p 366:

> "But it has also been said that the second wife and family ought to enjoy precedence. One of the main purposes of the new divorce legislation is to enable spouses, whose marriage has hopelessly broken down, to achieve a 'clean break' and marry again respectably, and this object would be defeated if a man could not economically afford to remarry unless he was one of the fortunate few who can provide adequately for more than one family."

See, too *Hobart* v *Hobart* HH-160-86; *Bellenden* v *Satterthwaite* [1948] 1 All ER 343 (CA); *Roberts* v *Roberts* [1968] 3 All ER 479; *Foster* v *Foster* [1964] 3 All ER 541.

It seems to me, with respect, that it is superficial and unrealistic to suggest that the first wife must continue to be maintained at the same standard regardless of the husband's subsequent commitments. This would mean that in starting a new family the husband would live in increasingly impoverished circumstances in order that the first wife may be maintained in the opulent style she enjoyed *stante matrimonii.*

In general terms, as I see it, it may be stated that the standard of living of both parties should not be reduced more than is necessary in the light of the fact that there are now two households to be maintained. Their standard of living is essentially dependant upon their joint incomes, and

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neither party should

REYNOLDS J

enjoy an appreciably higher or a lower standard of living than the other. When the money available is limited, the standard of living must be adjusted accordingly. I believe that the apparently conflicting judicial views on the position of the first wife vis-a-vis a husband's new family are capable of reconciliation. I would suggest, with due deference, that the true position is that obligations owed to the first wife and children are properly regarded as a prior charge, but subsequent commitments will possible reduce the husband's capacity to maintain the first wife to the extent originally decreed. In order to accommodate both needs, the standards of living of all parties may possibly have to be reduced, with the second family playing a subordinate role to the first. In assessing the needs of all concerned, a variety of considerations would obviously have to be examined, and the ultimate decision would be based on an evaluation of these considerations.

Section 7 of the Matrimonial Causes Act No. 33 of 1985, in common with similar provisions in other jurisdictions, enjoins the Court, when making an order concerning the assets of the spouses, to "place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses". Fortunately, this direction is preceded by the qualification "... as far as is reasonable and practicable and ...just to do so...", for it is my view, in the absence of substantial wealth, that it is seldom possible to come anywhere near to giving effect to this requirement. See *Hobart* v *Hobart supra.*

In *Dawe* v *Dawe supra* it was held that the fact that after the divorce a man married the woman he had been living with prior to the divorce was not a change in his circumstances justifying a variation of the original order. With great respect, it seems to me that this takes the matter too far, and takes account only of the man's actual expenditures. Other factors arise too. For one thing, the husband now assumes legal obligations and consequences which were not applicable before. In the instant case, the applicant has also assumed responsibility for other dependants. As I understand the position, any change in the needs or obligations of either of the spouses may amount to "good cause" for ordering the variation of the earlier order. See *Prophet* v *Prophet* 1948 (4) SA 325; *Stone v Stone* 1966 (4) SA 98; *Bellenden* v *Bellenden supra; Ashley* v *Ashley* [1965] 3 All ER 554. I would hold, therefore, that in the present case the applicant has established that there is good cause for consideration to be given to varying the order that presently applies.

To turn to the merits of the application itself, there are certain disputes of fact

REYNOLDS J

which cannot be resolved on the papers, but taking a broad view of the case as a whole, I find that I am able to determine the matter nonetheless. It is common cause that the respondent, on the one hand, is accommodated in the previous marital home, a four-bedroomed house in Bluff Hill. The minor child of the marriage and the respondent's mother live with her, and, at times,

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another child lives there as well. The applicant, on the other hand, lives in a one-bedroomed flat with his new wife and their child. The wife is expecting another child. She is also responsible for an eleven year old child of a previous marriage, and this child lives in the flat too. It seems clear, on these facts, that the two parties here are in no way in similar situations. The applicant is a man of position and standing, and he finds his present level of accommodation unsuitable, frustrating and unsatisfactory. I sympathise with his sense of dissatisfaction. It is necessary to examine the respective positions of the parties in order to ascertain whether the applicant's complaints are of substance, and if so, whether there is some prospect of relief being afforded to him. On an overall view of the respective positions of the parties in this case, it seems to me that, broadly speaking, they are virtually equal in all respects. As is almost inevitable in such cases, the list of expenses produced by each party can and should be pruned drastically. In the present case, this is particularly true of the respondent's list. Some of the items on both lists have been inflated to an unreasonable extent, and others should not have been included at all. Certain expenses will come to an end at some unspecified date as far as the applicant is concerned. It is noted that the respondent did not include the applicant's maintenance payments on her list. It is not possible to make an accurate calculation based on these unreliable lists. On a broad view of their incomes and responsibilities, however, I believe that the parties are evenly balanced from a financial point of view. Once these respective lists are properly adjusted, they will be found to be in much the same financial positions.

Making due allowance for necessary adjustments to the applicant's expenses, and if he economises strictly, he would be able to meet his obligations to the respondent and to their child, and he would also be able to live reasonably well within his means. Despite this, I do not consider that he would, after making payments to meet those needs, be in a position to make any significant savings, nor would he be able to pay greater rental charges for more suitable accommodation.

The respondent, however, after adopting more stringent economies, would be in a greatly improved position, and should have no difficulty in meeting substantial monthly charges for satisfactory housing. It may also be men-

tioned that she would also be in receipt of far more than the traditional one-third of the joint incomes.

The crux of this whole case really relates to the question of whether the jointly owned house should be sold or not. There are two over-riding factors that persuade me that it should. The first of these is that I can see little prospect of the applicant improving his present unsuitable living conditions without the sale taking place. This would not only enable him to settle his indebtedness, but would also allow him to meet all his obligations in full, and to provided satisfactory accommodation for his present family. Furthermore, and while it may well be that, generally speaking, it is undesirable and uneconomic to require the sale of a house in which the one spouse is happily accommodated, I do not believe that the respondent in the instant case will be prejudiced to any applicable extent by such a sale.

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The second factor is that whereas a marital "partnership" does not really equate with a commercial venture, there are nonetheless points of similarity which bear on the question of the disposal of assets. The parties, after all, acquired this house on the basis that it would be their joint home during the subsistence of marriage. It became a joint asset in the unique form of partnership created by marriage. If it happens that the relationship comes to an end, it may well be in the present and future interests of the parties that their joint assets be distributed in the same way as would the assets of a dissolved business partnership. The whole basis of the acquisition and use of the house has fallen away, and the need of each of the parties thereafter is, in essence, to have a suitable home in accordance with his or her new status. I appreciate that the decision regarding the marital home does not depend solely on a division of the capital assets of the family, but where other factors do not necessarily ilitate against such a disposition, it is my view that the overall circumstances should determine the matter.

Mr *O'Meara* referred to the English case of *Harnett* v *Harnett* [1973] 2 All ER 593, in which reference was made, at p 600, to *Mesher* v *Mesher* (1973) *The Times* 13 February. The report of the latter case reads as follows:

> "In *Mesher* v *Mesher* the Court of Appeal reversed a decision whereby LATEY J had ordered the husband to transfer the matrimonial home, which was owned beneficially in equal shares, to the wife, and ordered that it should be held on trust for sale to hold the proceeds of sale and rents and profits until sale for the husband and wife in equal shares with provisions designed to enable the wife to live in the house with the

REYNOLDS J

> daughter until the latter should be 17. This, it seems to me, reproduced as nearly as possible the respective financial positions before the marriage ended. The husband owned half of the house, subject to the right of the wife and daughter to live in it; the wife had the right to live in a house of which she owned a half share. The income positions were evenly balanced."

The original report of the *Mesher* case is not available to me, and in the excerpt cited no reference is made to the position of the husband. It is not stated in what circumstances the husband was living. In the present matter, however, the husband's situation is quite clear. He and his pregnant wife are living in a one-bedroomed flat together with two children. He is, therefore, living in inferior conditions, and is in no way in a similar position to the one he enjoyed during the subsistence of his first marriage. Were the positions of husband and wife to be reversed, I am sure that the respondent would very quickly protest about it. I am satisfied that the best and most suitable method of providing for both parties is to accede to the applicant's request that the house be sold. It may even be a possibility that the respondent would prefer to buy out the applicant's share of the house.

Part of the original order was that the applicant pay half of the mortgage instalments; half of the Municipal rates on the house, and half of the maintenance costs of the permanent fixtures to the property. The sums due on the first two items are $139,50 and $17,50 respectively, and although no specific sum has been specified in respect of the maintenance costs of the house, I consider that a figure of $50 *per mensem* would be reasonable. It has been agreed by the legal representatives of the parties that this total sum be made payable as maintenance to the respondent.

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I find that following the sale of the house the applicant will be able to continue with his maintenance payments for the child without difficulty, in addition to his other obligations. He has no objection to paying this amount, and has only suggested that he cannot afford to do so. As already stated, I find that he will be able to do so. The respondent must also bear in mind that she is required to contribute an equal sum towards the child's maintenance. The total figure of $600 *per mensem* should be more than sufficient to cater for his needs.

In the result the application is granted and an order will be made as follows:

REYNOLDS J

"IT IS ORDERED THAT -

1. The Order issued by this Honourable Court on 22 September 1987 in Case No. HC 2029/87 be and is hereby varied as follows:

   (a) by the deletion of $1,00 per annum in para 4 thereof and the substitution of $207 *per mensem* in place thereof;

   (b) by the deletion of para 5, and the substitution of the following in place thereof:

   '5. That the immovable property known as No. 18 Childwell Road, Bluff Hill, Harare, be disposed of to the best advantage, and the net proceeds from the sale remaining after settling the existing Bond over the property be divided equally between the applicant and the respondent;

   6. That the company Central Real Estate Agents (Pvt) Ltd be and is hereby appointed to act as the Estate Agents in the disposal of the said property.'"

There will be no order as to costs. Until such time as the proceeds of the sale have been distributed, the applicant is required to abide by the original court order.

PA Chinamasa, Manyika & Co, applicant's legal practitioners

Byron Venturas & Partners, respondent's legal practitioners

VAN T'HOFF v VAN T'HOFF & ORS (1) 1988 (1) ZLR 294 (HC)

Court **High Court, Harare**

Gibson J

Application for spoliation order

13 & 27 April 1988

Flynote

Practice and procedure - spoliation order - husband and wife - wife unlawfully depriving husband of home -

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appropriate to grant spoliation order.

Headnote

Following marital troubles, the first respondent, the wife of the applicant, moved out of the matrimonial home. About six months later, she returned and gained entry unlawfully by breaking three windows. The husband applied for a spoliation order.

Held, that although in matrimonial disputes the courts, like outsiders, must tread with care and not be seen to make decisions which make reconciliation between the spouses more difficult, there is no reason in principle to exclude spoliation orders from matrimonial disputes. Here, the joint possession of the matrimonial home was cancelled by mutual consent and the respondent used force to assert her claim to possession as joint owner of the house. Spoliation proceedings are designed to stop the resort to force in order to assert one's rights of possession and a spoliation order was appropriate.

Cases cited:

Burnham v *Neumeyer* 1917 TPD 630

Nienaber v *Stuckey* 1946 AD 1049

Badenhorst v *Badenhorst* 1964 (2) SA 676 (T)

Buck v *Buck* 1973 (2) RLR 315; 1974 (1) SA 609 (R)

Oglodzinski v *Oglodzinski* 1976 (4) SA 273 (D)

Rosenbuch v *Rosenbuch & Anor* 1975 (1) SA 181 (W)

1988 (1) ZLR p295

GIBSON J

R Costa for the applicant

S Chihambakwe for the respondents

Judgment

Gibson J: At the end of the arguments in support of the affidavits filed by both parties and following the filing of a certificate of urgency, I granted the order prayed as follows:

> "THAT the 1st, 2nd and 3rd respondents and all other persons claiming through them vacate 78 East Road, Avondale, Harare forthwith together with the goods and possessions of the 2nd and 3rd respondents and give the applicant peaceful possession of the aforesaid property.
>
> THAT failing compliance with this order the Deputy Sheriff be and is hereby authorised to evict the respondents from the said property and to seize from the respondents and deliver to the applicant all keys affording access to and in the aforesaid property.
>
> THAT the respondents pay the costs of this application jointly and severally the one paying the others to be absolved."

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The applicant and the first respondent (hereinafter to be called wife respondent) are husband and wife. The second and third respondents are both connected to the wife respondent, second respondent being described by wife respondent as "my domestic worker for whom I am obliged to provide a home", and the third respondent as "my niece with whom I have always lived". Divorce proceedings at husband's suit are pending between the parties. Also still to be heard is an application by the wife respondent for the transfer and registration of the matrimonial home, the subject of this spoliation order, to her name and that of the applicant jointly.

[The learned judge outlined the evidence and continued:]

At the hearing, Mr *Chihambakwe* argued that there were numerous disputes of fact, such that it was not possible to resolve on the papers. It was therefore necessary to stand the matter down for trial. I agree that there are numerous disputes of fact, but I am quite clear in my mind that it is totally unnecessary to resolve the disputed facts in order to reach a decision on this application. To my mind, the question whether the applicant did agree first to let the wife respondent return and then changed his mind subsequently is totally irrelevant. The critical fact is that he was opposed to her return, and she only got in by using unlawful force. In any event, there remains within those areas

GIBSON J

where there is common ground sufficient evidence upon which to come to a decision on whether the applicant has proved his case on a balance of probabilities.

It is well established that in spoliation proceedings, all that the applicant needs to prove is that -

(i) he was in peaceful and undisturbed possession of the property; and

(ii) that he had been unlawfully deprived of such possession.

Once the applicant has proved those two elements, the applicant is entitled to have the status quo ante restored. See: *Burnham* v *Neumeyer* 1917 TPD 630; *Nienaber* v *Stuckey* 1946 AD 1049.

In the instant case the wife respondent agrees that she moved out of the matrimonial property 6 months previously, leaving the applicant in sole and exclusive possession. It is also clear that the applicant's exclusive possession was disturbed by her return on 10 April 1988 when she unlawfully gained entry into the matrimonial home by breaking three windows. It seems to me that from this statement alone it is quite clear that the applicant has shown beyond reasonable doubt that there has been a spoliation, he must succeed.

The wife respondent's further contention that she returned as a rightful owner to assume and enjoy her rights as a 50% owner of the property must also fail. It is well settled that in spoliation proceedings the fact that a person has rights as owner of the property is an irrelevant consideration: *Badenhorst* v *Badenhorst* 1964 (2) SA 676 (T); *Buck* v *Buck* 1974 (1) SA 609; 1973 (2) RLR 315 (GD).

The wife respondent's explanation or defence of her actions must also fail, because even if she

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had been despoiled she could not assert her rights by despoiling her adversary.

Mr *Chihambakwe* next argued that it was clear on the evidence that it was still possible for the parties to live together peaceably, that the drastic step to exclude one spouse from the matrimonial home was not warranted, that in any event the husband is duty bound to provide a home for his wife. I agree that public policy demands that married couples should live together and that as long as there is a valid marriage the Court's discretion, to exclude one or other spouse from the matrimonial home should be exercised sparingly, and should only be done where it is shown that it has become impossible for the parties to live together. But this consideration is beside the point because one

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GIBSON J

is dealing here with a case where there has been a cessation of cohabitation, and where one of the spouses had been allowed to enjoy exclusive possession of the matrimonial home.

I am therefore not concerned with the question of whether to evict or eject a spouse. The joint possession having been cancelled by mutual consent, my sole consideration remains whether a person who has taken the law into her own hands and used force to assert her rights should be allowed to enjoy her ill-gotten gains.

It seems to me that the remedy of the wife respondent is to seek means of support, if she is a dependent wife, and to acquire alternative accommodation.

Although in matrimonial disputes, the Courts, like outsiders, must tread with care, and not be seen to make decisions which make reconciliation between spouses more difficult, it seems to me from the papers that the likelihood of reconciliation is far removed from realisation.

However, what did concern me a great deal was whether it was proper to allow spoliation proceedings in matters between husband and wife. On reflection, there did not seem to be any good reason for excluding this remedy from matrimonial disputes. Spoliation proceedings are, after all, designed to stop the resort to force in order to assert the rights of possession. My inclination was, fortunately fortified by a passage in Hahlo The South African Law of Husband and Wife 5 ed at p 144, where the author states:

> "Where one of the spouses is in peaceful and undisturbed possession of the matrimonial home and the other spouse, taking the law into her hands, unlawfully deprives him of such possession, the former may apply for a mandament van spolie."

The author quotes a passage in *Oglodzinski v Oglodzinski* 1976 (4) SA 273 (D) where LEON J states:

> "...it is my opinion that there is no reason in principle or in logic why the Courts should exclude cases between husband and wife from the general rule."

I respectfully agree. The learned judge gave support to this expression of opinion from the definition of "possession" contained in Price *Possessory*

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GIBSON J

Remedies in Roman Dutch Law p 108. Further support was found from the case of *Rosenbuch* v *Rosenbuch & Anor* 1975 (1) SA 181 (W). But this last case is clearly distinguishable, in that the Court was there dealing with a joint possessor who had illicitly excluded the other possessor. *Oglodzinski*, though, is much more in line with the present facts. In that case the husband had exclusive possession of a flat, pending divorce proceedings already instituted. One day, while the husband was out, the wife arrived at the flat and changed the locks, thus excluding the husband from possession because she felt she was entitled to the flat. It was held that her husband was entitled to an order of *mandament van spolie*.

These are the reasons why I gave the order sought.

Stumbles and Rowe, applicant's legal practitioners

Chirunda, Chihambakwe and Partners, respondents' legal practitioners

S v CHIDODO & ANOR 1988 (1) ZLR 299 (HC)

Court **High Court, Harare**

Greenland J

Criminal review

27 April 1988

Flynote

Criminal procedure - review - certificate by reviewing judge that procedings in accordance with real and substantial justice - lesser charge laid when more serious charge appropriate - judge entitled to withhold certificate.

Headnote

The High Court has common law powers of review of the proceedings of inferior tribunals; these powers are supplemented by the powers specially conferred by the High Court Act to deal with irregularities. Among these is the power, given by s 29(2) of the Act, to certify the criminal proceedings of magistrates courts as being "in accordance with real and substantial justice". This is a prerogative and requires the judge (and, where he is acting in terms of s 63A of the Magistrates Court Act, a regional magistrate) to make a value judgment on the question. He must be satisfied that everything that transpired at the trial conforms with the notions of justice that the words imply.

It is not just that a man should be treated by a court of law more favourably than others are treated on the same facts, or that he should be charged with and convicted of a lesser offence

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than the facts disclose he is guilty of. It is not just that he should be so treated because of his status in society. Where the court's hands are tied because the prosecutor, as *dominus litis*, has put a lesser charge, the trial court should at least query the matter. While it is not the court's function to dictate to the Attorney-General what charges should be preferred, in such circumstances the proceedings cannot be certified as being in accordance with real and substantial justice.

1988 (1) ZLR p300

GREENLAND J

Cases cited:

S v *Bouchet* S-13-85 (unreported)

S v *Mutamba* S-51-85 (unreported)

S v *Sibanda* HB-72-86 (unreported)

S v *Cloete* HB-54-87 (unreported)

S v *Alexander & Ors* (1) 1965 (2) SA 796 (A)

S v *Robinson & Ors* (1) 1973 (2) RLR 205

Levy v *Benatar* 1987 (4) SA 693 (ZS)

Gardiner v *Heading* [1928] 2 KB 284

S v *Chisango* HH-705-87 (unreported)

S v *Mpofu* 1983 (2) ZLR 118

Judgment

Greenland J: Both records of the trials of the above-named accused persons have been forwarded by the Regional Magistrate in terms of s 63A(3)(b) of the Magistrates Court Act [*Chapter 18*] with the submission that it is not possible to certify the proceedings as being in accordance with real and substantial justice. I agree.

In each instance the accused was charged with contravening s 45(1) of the Road Traffic Act. Each pleaded guilty and was subsequently convicted in terms of the procedure prescribed in s 255(2)(b) of the Criminal Procedure and Evidence Act. The problem related to the facts produced and agreed to by the accused in each case. For instance as regards the accused Mukwirimba these facts are recorded as:

> "The accused is a member of the Central Intelligence Organisation and is currently based at Bindura.
>
> On 10 July 1987 at about 2245 hours, the accused was driving a State motor vehicle, a Landcruiser registration number G-LL 2378, along the Guruve - Nyangavi road, Guruve. He had one passenger on board.
>
> On approaching the scene, after Shinje bridge along the same road, he lost control of the vehicle which went off the road to the left and overturned. Both vehicle occupants escaped with minor injuries and the vehicle sustained

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moderate damages.

The report of the accident was made by the accused at Guruve Charge Office at 0024 hours the same day. The Police arrived at the scene of the accident at 0045 hours. **Patrol Officer Muwanzuri suspected that the accused was under the influence of alcohol** and as such he took the accused to Guruve hospital where a blood sample was extracted from the accused at 0130 hours by Getrude Chitsungo.

GREENLAND J

The accused was negligent in that he was driving under the influence of alcohol; he was travelling at a speed which was excessive in the circumstances and that he failed to keep the vehicle under proper control" (my emphasis).

The Regional Magistrate makes the obvious point that, on these facts, a charge of contravening s 46(1) of the Act ie drunk whilst driving was indicated. He cites precedents which indicate as much : *S* v *Bouchet* S-13-85; S v Mutamba S-51-85; *S* v *Sibanda* HB-72-86; *S* v *Cloete* HB-54-87. Reference should also be made to the presumption of guilt prescribed in s 46(2) of the Act in cases where the blood alcohol level is in excess of 150mg per 100 ml. In a minute addressed to me the Acting Attorney General states:

"Of course the accused persons could have been convicted of the more serious offence of contravening s 46(1); ie if they had been so charged."

No explanation appears on the record as to why the accused was charged with the lesser offence. In the absence of an explanation the unease experienced by the Regional Magistrate is perfectly understandable and is precisely the situation envisaged by s 63A(3)(b) of the Magistrates Court Act, which reads:

"(b) if it appears to him that doubt exists whether the proceedings are in accordance with real and substantial justice, cause the papers to be forwarded to the register, who shall lay them before a judge of the High Court in Chambers for review in accordance with the provisions of the High Court of Zimbabwe Act, 1981."

Section 29(2) of the High Court Act, No. 29 of 1981 reads:

"(2) If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings-

(a) are in accordance with real and substantial justice, it shall confirm the proceedings;...

...

(5) A judge ...;

...

(c) shall, if he confirms the proceedings, cause the record to be endorsed with a certificate to that effect and returned to the court concerned."

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GREENLAND J

As may be seen it is the *proceedings* which have to conform to real and substantial justice. In this type of situation the words "criminal proceedings" and "proceedings" simply mean the trial of the accused: *S* v *Alexander & Ors (1)* 1965 (2) SA 796 (AD); *S* v *Robinson & Ors* (1) 1973 (2) RLR 205. It should also be noted that the High Court has common law powers of review which are supplemented by the power specially conferred by the High Court Act to deal with irregularities. See *Levy* v *Benatar* 1987 (4) SA 693 (ZS). This case is an example of the inherent common law review power in relation to criminal proceedings. The statutory powers are set out in ss 26, 27, 28 and 29 of the High Court Act. These are essentially powers of correction.

The power of certifying proceedings as being in accordance with real and substantial justice is an **additional** power more properly viewed as a prerogative. It seems clear from the words employed, ie "in accordance with real and substantial justice", that a judge (and regional magistrate) is required to make a value judgement on the question. He must be satisfied that everything that transpired at the criminal trial conforms with the notions of justice that these words imply. The words employed are individually and collectively very wide in ambit. Notions of justice, being essentially abstract, are necessarily as wide, as any textbook on jurisprudence will show. As Scrutton LJ pithily observed: "I am sure it is justice. It is probably the law for that reason" (*Gardiner* v *Heading* [1928] 2 KB 284 at 290). What is to be considered just, depends on the norms and sense of values generally prevailing in society. The test therefore can only be objective and can be expressed by quoting Lord Devlin, *The Judge* at p 58: "The British ...say that justice should not only be done but should be seen to be done, and the English system observes this precept in the spirit and in the letter". So too with our own criminal law and procedure, which are largely English in character.

Adopting this approach it might be difficult to determine what is just. It is however easier to determine what is not just. It is not just that a man should be treated more favourably than others are treated, on the same facts, by a court of law. It is not just that he should be charged with and convicted of a lesser offence when the admitted facts show that he is guilty of a more serious crime. It is not just that he should be so favoured because of his status as a member of the CIO. These are all impressions, reactions and assumptions which are induced in the mind of a reasonable man with variable degrees of certainty by the facts in this case, in the absence of an explanation or reason advanced for the apparently extremely favourable treatment. The position is akin to that in the case of *S* v *Chisango* HH-705-87 where a certificate was withheld because-

GREENLAND J

> "Unfortunately, and to the great prejudice of justice and in breach of the sacrosanct notions of justice adverted to herein, the impression which is given is that the accused was afforded special and favourable treatment because of his status as a soldier. It is therefore necessary to emphasize that all persons are equal before the law."

It should be noted that that case was different in the sense that the presiding magistrate had it within his power to prevent the injustice. In this case the magistrate's hands were tied because the State, as dominus litis, put the lesser charge. However, the magistrate's sense of justice

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should have induced him to, at the least, query the matter. It may be that some satisfactory explanation would have been advanced although this is difficult to imagine in the light of the admitted facts.

In the result, therefore, I decline to certify the proceedings as being in accordance with real and substantial justice. This does not mean that it is this court's function to in any way dictate to the Attorney-General what charges should be preferred in given circumstances. The Attorney-General has an unquestionable constitutional discretion in that regard. It does mean that proceedings cannot be certified if they do not appear to be in accordance with real and substantial justice on an objective test. Compare *S* v *Mpofu* 1983 (2) ZLR 118.

As similar factors pertain to the case of the *S* v *Mukwirimba* a certificate is withheld in relation to those proceedings as well.

COTTON MARKETING BOARD OF ZIMBABWE v NATIONAL RAILWAYS OF ZIMBABWE 1988 (1) ZLR 304 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Manyarara JA & Korsah JA

Civil appeal

9 March & 10 May 1988

Flynote

Contract - carriage of goods - by land - applicability thereto of Praetorian edict relating to liability of sailors, innkeepers and stable-keepers - damage to goods carried due to negligence of carrier or its servants - where onus of proving damage lies - "owner's risk" clause in contract - effect of - "at sole risk of sender" - meaning of.

Headnote

The appellant claimed damages from the respondent for the value of 95 bales of cotton belonging to the appellant, which were destroyed by fire while being carried by the respondent under a contract of carriage entered into between the parties. The respondent denied liability, on the grounds that it undertook to carry the goods "...upon the written request and at the sole risk of the sender or consignee", and that the appellant accordingly had to show that the loss was due to the wilful misconduct or gross negligence of the respondent.

The appellant maintained that the Praetor's Edict *de nautis, cauponibus et stabulariis,* which dealt with the liability of sailors, inn-keepers and stable-keepers for damage to goods entrusted to them, applied to carriers by land as well as carriers by sea and that the effect of the "owner's risk" clause in the contract of carriage was not to exempt the carrier from liability for negligence, though the clause would exempt the carrier from the absolute liability of the common law. Counsel for the respondent did not dispute that the Edict applied to cariers by land, but argued that the "owner's risk" clause was expressed widely enough to exclude liability for damage

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caused by negligence.

Held, that the nature of the business of public carriers by land is the same as that of such carriers by water. The principles of the Edict should not be confined only to carriage by water or to the letter of the Edict, but should grow and develop with the times in order to serve the interests of both the carriers and the owners of goods. It is good law and good common sense that the strict liability imposed by the Edict on public carriers by water should be extended to public carriers by land, particularly in Zimbabwe, where the Edict forms part of the common law and the main mode of transportation is by land.

Held, further, that in any action against a carrier for the loss of or damage to goods the owner of the goods need not prove how the goods were damaged, lost or destroyed. The *onus* is on the carrier to prove that the loss was due to *vis major* or to *damnum fatale*, to inherent vice in the goods or to the negligence of the owner of the goods. All that he requires to shake off liability is to prove that the occurrence resulting in the event was unforeseen, unexpected and irresistible and that human foresight could not have guarded against it.

Held, further, that the use of the word "sole" in the phrase "at the sole risk of the sender or consignee" merely emphasized that the risk is the sender's or consignee's, but added nothing that helped in the interpretation of the clause, nor did it help to explain whether the head of damage arising from negligence is included or excluded.

Held, further, that while carriers may contract out of the strict liability imposed on them by the common law or by contract limit their liability, the clause exempting the carrier from liability must do so in clear terms, with an express reference to negligence. In the absence of such clear terms, the clause is to be construed as relating to a different kind of liability and not to liability based on negligence.

Cases cited:

Tregidga & Co v *Sivewright NO* (1897) 14 SC 76

Davis v *Lockstone* 1921 AD 153

Lewis v *Rhodesia Railways* 1921 SR 80

Mashonaland Railway Co Ltd v *Gordon* 1921 SR 80

Scandia Industrial Products (Pvt) Ltd v *Thornton's Transportation (Rhodesia) (Pvt) Ltd* 1962 R & N 364 (SR)

Naylor v *Munnik* (1858) 3 Searle 187

Central South African Railways v *Adlington & Co* 1906 TS 964

Stocks & Stocks (Pty) Ltd v *T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A)

Essa v *Divaris* 1947 (1) SA 753 (A)

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Hall - Thermotank Africa Ltd v *Prinsloo* 1979 (4) SA 91 (T)

International Combustion Africa Ltd v *Billy's Transport* 1981 (1) SA 599 (W)

Histor Boerdery (Edms) Bpk v *Barnard* 1983 (1) SA 1091 (A)

Sable Chemical Industries Ltd v *Coley Hall Transport (Pvt) Ltd* HH-659-87 (not yet reported)

Pohoomull Brothers v *Rhodesia Railways* 1921 SR 88

SA Railways & Harbours v *Conradie* 1922 AD 137

Watson Brothers v *Colonial Government* (1906) 10 HCG 79

Farm Implement Co of Kroonstad v *Minister of Railways* 1916 OPD 183

Alderslade v *Hendon Laundry Ltd* [1945] 1 All ER 244 (CA)

Canada Steamship Lines Ltd v *Regem* [1952] 1 All ER 305 (PC)

Smith & Ors v *South Wales Switchgear Ltd* [1978] 1 All ER 18 (HL)

Industrie Chimiche Italia Centrale SpA v *Nea Ninemia Shipping Co SA*

(The Emmanuel C) [1983] 1 All ER 686 (QBD)

Rosenthal v *Marks* 1944 TPD 172

SA Railways & Harbours v *Lyle Shipping Co Ltd* 1958 (3) SA 416 (AD)

Galloon v *Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (C)

Government of the Republic of SA v *Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A)

Bristow v *Lycett* 1971 (2) RLR 206; 1971 (4) SA 223 (RAD)

A P de Bourbon SC for the appellant

J Sayce for the respondent

Judgment

Dumbutshena CJ: The appellant brought an action in the High Court against the respondent, claiming damages in the sum of $49 044,63, being the value of 95 bales of cotton belonging to the appellant which were destroyed by fire while being carried by the respondent under a contract of carriage entered into between the appellant and the respondent.

The appellant appeals against the judgement of the High Court dismissing its application to

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strike out part of the respondent's plea, in which it was pleaded in para 6(4) that-

> "...the goods destroyed were being conveyed by Defendant at the sole risk of Plaintiff, by virtue of the provisions of clause 216(b), alternatively 211(b), of the Tariff Book, and in the absence of it being proved that the said loss was caused by gross negligence or wilful misconduct of Defendant's servants or agents, Defendant is not liable for Plaintiff's loss."

DUMBUTSHENA CJ

The appellant applied to strike out the following words in the above paragraph:

> "... and in the absence of it being proved that the said loss was caused by gross negligence or wilful misconduct of Defendant's servants or agents, Defendant is not liable for Plaintiff's loss."

The appellant submitted that the above averment was bad in law because the clause in the Tariff Book providing that the goods were transported "at the sole risk of the owner" would not exclude liability on the part of the defendant for negligence.

In the court below the appellant argued that it was not necessary in law for it to prove gross negligence or wilful misconduct on the part of the respondents servants or agents to render the latter liable for the loss, notwithstanding the condition that the goods were conveyed at the sole risk of the appellant.

Further, the appellant averred that the "owner's risk" clause would only absolve the respondent from absolute liability as a common carrier, but would not exclude liability for any loss caused by an act or ommission which under law would give rise to a claim for damages.

The court *a quo* did not agree.

This appeal comes to us with leave of the judge *a quo*.

What this court has to decide is whether para 6(4) of the respondent's plea is excipiable as being bad in law because the allegation in the plea is that the appellant has an *onus* of proving gross negligence or wilful misconduct on the part of the respondent's servants or agents because of the "owner's risk" clause pleaded by the respondent.

The appellant contends that an "owner's risk" clause does not exempt a public carrier from ordinary negligence, but merely imposes upon the claimant the obligation of proving fault on the part of the public carrier.

To this the respondent contends generally that if the "Praetor's Edict" is applicable to carriers by land the "owner's risk" clause is wide enough to exempt the respondent from liability for negligence. If the allegation in the plea that the appellant bore an onus of proving gross negligence or wilful misconduct on the part of the respondent's servants or agents was correct in law, then the plea is not bad in law.

DUMBUTSHENA CJ

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There is no doubt that the Praetor's Edict (*nautis, cauponibus et stabulariis*), hereinafter called "the Edict", is the law of Zimbabwe and South Africa. See *Tregidga & Co* v *Sivewright NO* (1897) 14 SC 76; *Davis v Lockstone* 1921 *AD* 153; *Lewis* v *Rhodesia Railways* 1921 SR 50; *Mashonaland Railway Co Ltd* v *Gordon* 1921 SR 80; and *Scandia Industrial Products (Pvt) Ltd* v *Thornton's Transportation (Rhodesia) (Pvt) Ltd* 1962 R & N 364 (SR).

Mr *de Bourbon* who appeared for the appellant, argued that if the Edict applies to the respondent, then the effect of the "owner's risk" clause did not exempt the respondent from liability for negligence, but exempts the respondent from the absolute liability of the common law. All that was required was that the appellant proves fault or negligence on the part of the respondent in order to succeed at the trial.

Absolute liability under the Edict has been debated in a number of South African cases and discussed by writers.

Gane's translation of *Voet's Commentary on the Pandects* 4.9.2. deals with the matter in Volume 1 at p 767. Having said that the Praetorian action lies against inn-keepers, stable-keepers and sailors, he commented as follows:

> "It lies for their making good all damage which has been sustained in whatever manner to the property received by theft, spoiling or otherwise, with the exception only of what clearly appears to have perished by inevitable loss or vis major, as by shipwreck or the outrage of pirates."

In *Tregidga & Co* v *Sivewright NO, supra*, at p 58 MAASDORP J said:

> "Under this rule they are held liable for loss and damage, even though it did not result from any default or negligence on their part, unless it happened by what was called fatal damage, or *damnum fatale*."

See also *Davis* v *Lockstone supra* at p 158.

As stated above, the Edict is accepted as part of Roman-Dutch law. In *Davis* v *Lockstone supra* at p 159, SOLOMON JA, citing Tregidga's case, said:

> "In the case of *Tregidga* v *Sivewrigh*t, DE VILLIERS CJ recognised the Edict as part of our law, and in expounding it said: 'The construction placed upon this Edict was that the bailees named were liable in every case of loss or damage occasioned by theft, injury or otherwise, although

DUMBUTSHENA CJ

> happening without any default on their part, unless it happened by superior force or what was called 'fatal damage' as for instance by shipwreck or by the act of pirates.'"

See *Lewis* v *Rhodesia Railways supra* a case in which *Naylor* v *Munnik* (1958) 3 Searle 187, *Tregida's* case and *Central South African Railways* v *Adlington & Co* 1906 TS 964 were cited in argument although not referred to in the body of the judgment of TREDGOLD SJ.

Mr *Sayce*, for the respondent, indicated in his heads of argument that the respondent abides the decision of the court on whether the Edict applies to public carriers by land. He agrees that the Edict is part of the Roman-Dutch law. Mr Sayce, however, pointed out that the question whether it applies to public carriers by land is still an open question, both in Zimbabwe and in South

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Africa. There is no dispute between the respondent and the appellant on this point. In the instance case the learned judge *a quo* held that the Edict applies to public carriers by land.

In support of this submission that the question is still open, Mr *Sayce* relies on *Stocks and Stocks (Pty) Ltd* v *T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A). In that case the appellant, which conducted the business of a building contractor, hired the respondent, carrying on the business of a transport and heavy haulage contractor, to transport a large mobile crane. The crane was damaged. The appellant sued the respondent, claiming damages suffered as a result of the damage to the crane. The trial court dismissed the claim. The appellant appealed. The main argument on appeal was the question of onus which the court below had placed on the appellant. It was argued for the appellant that the contract was one of carriage by land by a public carrier and that the Edict applied. What is important for the purposes of the present appeal is that Corbett JA did not decide the question whether the Edict applied to contracts of carriage by land by public carriers. See p 761G.

In *Essa* v *Divaris* 1947 (1) SA 753 (A) the South African Appellate Division declined to extend the concept of "stable-keepers" covered by the Edict to a person running a parking-garage. In that case TINDALL JA, in declining to apply the Edict to a person in the business of a parking-garage, after reviewing the authorities, said at p 763:

> "In my opinion to extend the principle applicable to the stable-keeper to the keeper of a parking-garage would be going much further than extending the principle applicable to a carrier by sea to a carrier by land.

DUMBUTSHENA CJ

> The difference between stabling a horse and garaging a motor vehicle propelled by an internal combustion engine seems to me so great that there is no justification for putting these two classes of bailees on the same footing. If the liability were limited to loss caused by theft there would be more to be said in favour of the argument of counsel for the plaintiff. But the liability would have to be extended to loss caused by fire and to make the keeper of a parking-garage liable for loss by fire in the absence of negligence on his part or on the part of his servants would, in my opinion, be inequitable in the extreme. A motor vehicle contains a highly inflammable liquid and is fitted with electrical equipment which, as the evidence show, is liable to develop faults which may ignite the petrol in the vehicle without intervention by or negligence on the part of any human being. It seems to me fanciful to put the two cases on the same footing in respect of liability; the alleged analogy is too strained. Assuming that we have the power to interpret the intendment of the existing law in a sense which is wide enough to cover conditions which were not contemplated when the law was propounded, I am of opinion that' considerations of fairness and convenience' do not demand the extension contended for in this case."

I am not concerned with the comparisons between a stable-keeper and the owner of a parking-garage which the learned JUDGE OF APPEAL so ably drew. I, however, doubt whether the principle applicable to the two is different. In my view it is not. What is of importance is the application of the liability applicable to public carriers by sea to public carriers by land.

Let me refer briefly to Roman-Dutch law writers who support the appellant's contention that the Edict applies to carriage by public carriers on land.

Mr *de Bourbon* contends in support of his case that *Utrechtshe Consultatien* Vol 1, Cap 21 is favourable to his submission. Note 2 states that-

> "Drivers of horses are comparable with sailors and stable-keepers who are liable even when damage is caused

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without *culpa*."

This view supports the extending of the principle of the Edict to common carriers by land.

Dönges in his book *The Liability for Safe Carriage of Goods in Roman- Dutch Law* discusses the views expressed by various Roman-Dutch Law writers. After considering the views of those who do not think that the Edict applies

to carriage of goods by a public carrier by land and those who think it does affirmatively apply, Dönges says in para 61 at p 84:

> "On these grounds, then, I would submit that the case for the extension of the provisions of the Praetor's Edict to carriers by land has been made out. In modern Roman-Dutch Law this point has been expressly decided in *Tregidga and Co* v *Sivewright NO* (*supra*). Even before this case, as early as 1859, the language of HODGES CJ in *Naylor* v *Munnik* (*supra*), which was a case of a carrier by land, suggests that in his opinion the principles of the Edict were equally applicable to the case of carriers by land 'It appears to me', says Hodges CJ,'that a carrier who undertakes to carry goods is bound to take a faithful care of those goods, and is answerable for their loss even in case of theft. It is for the interest of the public that this rule should be enforced, as otherwise a door would be opened for the perpetration of gross frauds when goods are handed over by their owners for the purpose of transit' (*supra,* at 191)."

(For the full discussion of the authorities see at 73-86.) He acknowledges that some South African authorities think otherwise in spite of the fact that *Tregidga's* case settled the law as far as South African courts are concerned.

Gibson says in his book *South African Mercantile and Company Law* 6 ed at p 607 that there is a strong body of authority in favour of the view that liability should be extended in modern times to the public carrier by land. He believes that this is the correct view. That submission is based on the authority of *Naylor* v *Munnik supra; Tregidga & Co* v *Sivewright NO supra; Davis* v *Lockstone supra;* and *Essa* v *Divaris supra*. He, however, acknowledges that there is conflicting opinion in the cases of *Hall-Thermotank Africa Ltd* v *Prinsloo* 1979 (4) SA 91 (T), in which KING J held that the Edict applies to public carriers by land, and *International Combustion Africa Ltd* v *Billy's Transport* 1918 (1) SA 599 (W), where CILLIERS AJ doubted that the Edict could be extended to cover liability of public carriers by land but felt bound to follow the precedent set by *Hall-Thermotank Africa Ltd* See p 587.

Christie *Business Law in Zimbabwe* seems to favour the authorities that say the Edict applies to public transport by land. The learned author says at p 183:

> "Whether the Edict applies to carriers by land is less certain. The question has expressly been left open by the South African Appellate Division (*Stocks and Stocks (Pty) Ltd* v *T J Daly & Sons (Pty) Ltd supra* 761G), and a thorough review of the authorities has led to the conclusion that it

> is very doubtful whether it should be so applied, but in the present state of the law those authorities that say it

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should are to be followed. (*International Combustion Africa Ltd* v *Billy's Transport supra*). In *Scandia Industrial Products (Pvt) Ltd* v *Thornton's Transportation (Rhodesia) (Pvt) Ltd* 1962 R & N 364 the point was not argued and Beadle CJ assumed, obiter, that the Edict did not apply to carriage by land."

I note with passing interest the authorities examined and discussed by CILLIERS AJ in *International Combustion Africa Ltd* at p 601-606. He has successfully highlighted the confused state of the Law in South Africa.

As pointed out above, the South African Appellate Division left the question open in *Stocks and Stocks (Pty) Ltd* v *T J Daly & Sons (Pty) Ltd supra.* And in *Histor Boerdery (Edms) Bpk* v *Barnard* 1983 (1) SA 1091 (A) at 1096 VILJOEN JA refers in his judgment to CILLIERS AJ's judgment in *International Combustion Africa Ltd.* Commenting on that judgment the LEARNED JUDGE OF APPEAL says at 1096E-G:

"The first question which must be answered is whether the Praetor's Edict applies in this instance, and if it does, what is the nature and extent of the carrier's liability. Whether the Praetor's Edict applies to carriers by land was seriously questioned by CILLIERS AJ in *International Combustion Africa Ltd* v *Billy's Transport* 1918 (1) SA 599 (W) at 602-605 who, after a thorough examination and critical review of numerous authorities, came to the conclusion on p 606 that on the strength of certain *obiter dicta* in *Central SA Railways* v *Adlington & Co* (*supra* at 970-971) and *Essa* v *Divaris* 1947 (1) SA 753 (A) he could not, as a Judge sitting alone, say that King J's decision in *Hall- Thermotank Africa Ltd* v *Prinsloo* 1979 (4) SA 91 (T), that it is well established that the Edict applies to carriers by land, was wrong. This matter was not fully argued before this Court and I, therefore, leave it undecided. Leaving aside that argument I also pose the further question as to whether, irrespective of whether it is well established that the provisions of the Edict include carriage by land, the Edict applies to the carriage of livestock as opposed to goods. This question was also not fully argued and I also leave it undecided. For the purposes of this judgment I shall assume that the Edict applies to carriage by land and that it also applies to livestock. " (Unofficial translation.)

What do South African writers say? I have already referred to Dönges and

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Gibson. I now solicit the assistance of those writers who tend to support the view that the Edict applies to public carriers by land. I accept that their writings are not authority, nor does what they have written bear the stamp of authority for the proposition that the Edict applies to public carriers by land. However, the thread running through the minds of learned authors cannot lightly be ignored. They lend weight to those cases which say positively that the Edict applies to public carriers by land.

Lee and Honoré *The South African Law of Obligations* 2 ed at para 680 says:

"Originally the section of the Praetor's Edict relating to carriers was confirmed to carriers by water, but it seems that it now applies to common carriers on land (Tregidga v Sivewright NO (1897) 14 SC 76, 81f, 84; contra NSAR v Lewitt (1898) 5 OR 81, 83; cf Stephen Frazer & Co v PE Harbour Board (1900) 17 SC 231, 234; Essa v Divaris supra 765, 775)."

See also para 411 (note 1) where the learned authors point out that the "weight of authority in our modern law appears to be in favour of its application to carriage by land as well". In support of this assertion they cite *Tregidga & Co* v *Sivewright NO supra; Essa* v *Divaris supra; Donges op cit* at 74-84; and Conradie, *Carriage of Goods by Railway in South Africa* (1964) at 3-5.

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Wille's *Principles of South African Law* 7 ed at 43, relying on Tregidga's case supra says the Edict has been held in South Africa to be in force "and to apply not only to carriers by water, but also by land". See also Joubert *The Law of South Africa* Vol 2 at 85, para 170; Conradie *op cit* p 3; Bamford *The Law of Shipping and Carriage in South Africa* 3 ed at 329; and Nathan *Common Law in South Africa* (1904) Vol II, 2 ed at 1002 and 1058.

Bamford *op cit* submits, after a consideration of the authorities and Roman and Dutch law writers, at p 329-

> "...that the Edict applies to a public carrier on land, and that he is subject to strict liability. He will be liable for loss of or damage to the goods unless he can establish a cause thereof which was beyond his control, namely *vis major*, inevitable *accident,* a latent defect in the goods or the consignor's negligence, provided that the carrier's own negligence did not expose the goods to the risk of the event or was not in some other way a contributory cause of the loss or damage."

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It is clear from a cursory reading of the commentators on the Roman law, together with the comments of Dönges, that there were differences among Roman law writers on the extension of the Edict to public carriers by land. Some did not think the Edict applied to carriers by land, others thought it did. As we have seen above, that difference of opinion has not been resolved by the courts of South Africa.

It is with this background in my mind that I intend to examine the state of the law and its implications to the prevailing circumstances in Zimbabwe.

I agree with Conradie supra when he says that it was because the bulk of the trade in the Netherlands was done by water and not by land that the Roman-Dutch jurists were silent on the liability of public carriers by land. And he says at p 4:

> "What authority there is, however, supports the extension of the edictal liability to carriers by land."

If the Roman and Dutch writers were in Zimbabwe they would have applied the principles of the Edict to public carriers by land because Zimbabwe is a landlocked country and the principal mode of transport is by land.

In Zimbabwe, the Edict was discussed in *Lewis* v *Rhodesia Railways supra* and *Mashonaland Railway Co Ltd* v *Gordon supra*. In these two cases no conclusion was reached on the extension of the Edict to public carriers by land. But in *Scandia Industrial Products (Pvt) Ltd supra,* although the point was not argued, Beadle CJ assumed obiter that the Edict applied to carriage by land. Christie *Business Law in Zimbabwe* is of the view that in the present state of the law the authorities that say the Edict applies to public carriers by land should be followed.

What then is the position in Zimbabwe? The law is also in a state of confusion because in the past the judges of this country preferred to leave open the liability of public carriers by land. However in the instant case the learned judge a quo came to the conclusion that the Edict applies to public carriers by land. In *Sable Chemical Industries Ltd* v *Coley Hall Transport (Pvt) Ltd* HH-659-87 (as yet not reported), Adam J was of the same opinion.

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Taking an overview of the cases decided in this country, the overwhelming opinion of Judges is that the Edict applies to public carriers by land.

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I have already pointed out that Zimbabwe is a landlocked country. Its mode of transport is in the main by land, that is, by railway and by road. Zimbabwe is not concerned with transport by sea. As Christie supra points out, the few waterways we have are used by some as a means of transport. Such carriers are without doubt subject to the Edict. It is therefore difficult, as Christie says, to conceive of a contract of carriage by sea being governed by Zimbabwean law.

In my opinion, the nature of the business of public carriers by land is the same as that of public carriers by water. I do not believe that the principles embodied in the Edict should in present circumstances be confined only to carriage of goods by water or be confined to the letter of the Edict as it was in Roman and Dutch times. In modern times the business of transportation has become complicated and vast. Its ramifications are wide. The principles of the Edict must, in my view, grow and develop with the times in order to serve the interests of both the carriers and the owners of goods.

I cannot see any good reason why the strict liability imposed by the Edict on public carriers by water should not be extended to public carriers by land. The principle is the same: the carrier is liable for loss of the goods (or injury to the goods) because he does not deliver them in an undamaged condition or at all. This makes good law, and it is also good common sense.

I have, like other judges in this country, come to the view that the Edict applies to public carriers by land. Happily counsel in this case are also agreed that it does apply to public carriers by land.

Let me say in passing that the owner of the goods which have been lost or damaged in any manner need not in any action that he brings against the carrier prove how the goods were damaged, lost or destroyed. The onus is on the carrier to prove that the lose was due to vis major or to damnum fatale, to inherent vice in the goods or to the negligence of the owner of the goods (see *Pohoomull Brothers v Rhodesia Railways* 1921 SR 88). At present, all that he requires to shake off liability is to prove that the occurrence resulting in the event was unforeseen, unexpected and irresistible and that human foresight could not guard against it. See Joubert The Law of South Africa Vol 2 para 174; Gibson op cit at 608; Dönges op cit at 45-48;Wille's Principles of South African Law at 452; Bamford *op cit* at 328; and Christie *op cit* at 184.

Generally, carriers by land may contract themselves out of strict liability imposed by common law or limit their liability. The issue here is whether in

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spite of the strict liability imposed by common law, the respondent is exempted from liability for

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damage occasioned by its servants' negligence. This is the only part of the appeal which has been hotly contested. I intend, therefore, to follow closely counsel's submissions.

In the instant case the respondent sought to contract itself out of liability by the terms of the clauses found in the Official Railways Tariff Book, in particular clause 216(d) which states among other things that it undertakes to handle traffic "... **at the sole risk of the sender or consignee**" (the emphasis is mine).

There is authority to the effect that, where the contract specifies that goods are carried at "owner's risk", the carrier is free from liability unless it is shown that he was guilty of wilful misconduct or gross negligence. See *Naylor* v *Munnik supra* at 192; *Central South African Railways* v *Adlington & Co supra* at 971-4; *South African Railways and Harbours* v *Conradie 1922 AD 137* at 143; *Watson Bros* v *Colonial Government (1906) 10 DCG 79* at 82-83; *Farm Implement Co of Kroonstad* v *Minister of Railways* 1916 OPD 183 at 187-188 and 190; *Mashonaland Railways Co Ltd* v *Gordon supra* 5 82. See also Christie op cit at 186; Conradie op cit at 36; Joubert op cit at para 177. In this case the appellant contends that those authorities were wrongly decided and should not be followed. The respondent does not agree.

Mr *Sayce's* contention, clearly outlined in the respondent's heads of arguments, is:

> "...that the effect of the relevant clauses in the Respondent's Tariff Book was clearly to exclude liability on its part except for gross negligence or wilful misconduct."

He submitted that while-"

> "...there was no express exclusion of liability for negligence the wording used was unambiguous and wide enough to exclude such liability. If anything this point is underscored by the employment of the word' sole'. What else, one asks, can the phrase' at the sole risk of the owner' mean but that all liability which the *proferens* could lawfully exclude was excluded?"

Mr *de Bourbon,* on the other hand, contended that the six cases relied upon by the respondent as authority for the exemption of liability upon the inclusion of an "owner's risk" clause in a contract were incorrectly decided

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insofar as they hold that an "owner's risk" clause exempts a public carrier from ordinary negligence. The cases referred to by Mr *de Bourbon* are *Naylor* v *Munnik supra; Central South African Railways* v *Adlington & Co supra; South African Railways and Harbours* v *Conradie supra; Watson Bros* v *Colonial Government supra; Farm Implement Co of Kroonstad* v *Minister of Railways supra; and Theron* v *Lotts* 1949 (1) PH A26.

Mr *de Bourbon* bases his contention on the results of a brief analysis of each case. *Naylor* was a case where the carrier sought to avoid liability by publishing a public notice to the effect that he would not be responsible for loss or damage of goods carried by him. The court held that he had to show that the owner of the goods saw the notice and consented to its terms. Without the owner's knowledge the terms of the notice the carrier would not be exempted from liability. Even with the consent of the owner, the carrier would not be excused where there is malfeasance or

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gross negligence. Mr *de Bourbon* argued that these remarks were not based on authority and were contrary to the accepted principles of interpretation. He asserted that *Watson Bros* followed *Naylor* without considering the principles of interpretation, and in *Farm Implement Co of Kroonstad* the court assumed the law was as stated in earlier cases. See p 188 of the report.

However, Mr *de Bourbon* agreed that Central South African Railways v Adlington & Co supported the respondent's contention that it is exempted from liability for negligence because the "owner's risk" clause is unambiguous. He, however, disagrees with the interpretation of the "owner's risk" clause because in that case the court did not examine the principles of interpretation relevant to exemption clauses.

It is trite that the question of the exclusion of liability by a carrier is one of fact or interpretation, which is decided in the light of all relevant circumstances.

Mr *de Bourbon* submitted that in the cases which are relied upon by Mr *Sayce* in support of the contention that where in a contract of carriage of goods the goods are carried at "owner's risk" the carrier is free from liability (except where he has been shown to be guilty of gross negligence or wilful misconduct), the courts did not apply the accepted principles of interpretation. It was argued on behalf of the appellant that the above cases do not interpret the "owner's risk" clause "in the light of the legal position were it not for such an exemption clause".

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Mr *de Bourbon* urged this court to follow the approach of English cases which have been accepted by South African courts.

Before I consider the English cases relied upon by the appellant, it would be useful to set out in full the "owner's risk" clause the respondent relies upon in the instant case for the exclusion of liability. It is contained in clause 216(d) of the National Railways of Zimbabwe Official Railway Tariff Book No 36. It reads:

> "At stations where sufficient resident staff is available, the Railways undertake to perform the handling of S to S traffic at a charge of $2,10 per tonne, minimum charge of $2,10 per consignment, upon the written request and at the sole risk of the sender or consignee."

Mr *Sayce* argued that the words "at the sole risk of the sender or consignee" were unambiguous. He said because the clause contained the word "sole" it was all-embracing. It exempts the respondent from everything except gross negligence or wilful misconduct. He relied for this proposition on *Naylor v Munnik*, *supa*, at 192; *Central South African Railways v Adlington & Co supra* at 971-4; *Watson Bros v Colonial Government supra* at 82-83; *South African Railways and Harbours v Conradie supra* at 143. He further submitted that of the cases he relies on *Farm Implement Co of Kroonstad v Minister of Railways supra* supports his proposition that all other negligence except gross negligence is exempted In that case Ward J citing *Naylor's* case said at 187:

> "There has been a judicial expression of opinion that owner's risk does not exclude liability arising from gross negligence or from malfeasance. From what liability then, does it exonerate the carrier? From the fact that the word "owner" is used in defining the risk seems to us to show that the parties must be held to have contemplated

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> that the carrier is not to be held liable if he shows such diligence as an ordinary owner is expected to show when transporting and handling his own goods. ...If the carrier, however, employs suitable servants, and by some error of judgment on their part, but through no malfeasance or gross negligence, an accident occurs by which the goods are damaged, then the carrier is not liable if he takes the goods at "owner's risk", and at a lower rate. An error of judgment on the part of a servant is a condition to which the owner who carried his own goods may reasonably be considered to be exposed."

The respondent contended that the word "sole" in the clause adds emphasis to the phrase. Let me examine the meaning of the word sole so as to establish

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its ordinary meaning. The clause "at the sole risk of the sender or consignee" is not defined in the Tariff Book. The Shorter Oxford Dictionary defines "sole" as meaning-

> "without companions; apart from or unaccompanied by another or others; alone; solitary".

In my opinion what the word "sole" emphasises is that the "risk" is the sender's or consignee's. He shares it with no one else, not even the consignor or carrier. It is a word of emphasis and nothing more. It adds nothing to the "owner's risk" clause that helps in the interpretation of that clause. The inclusion of the word "sole" does not help to explain whether the head of damage arising from negligence is included or excluded. It does not help to explain whether at "owner's risk" includes or excludes other heads of damage and if it does which of those heads of damage are excluded.

Although in para 6(4) of the respondent's plea it is pleaded that the-

> "...said goods destroyed were being conveyed by Defendant at the sole risk of Plaintiff, by virtue of the provisions of clause 261(b), alternatively 211(b), of the Tariff Book, and in the absence of it being proved that the said loss was caused by gross negligence or wilful misconduct of Defendant's servants or agents, Defendant is not liable for Plaintiff's loss",

there is nowhere in the Tariff Book where the respondent accepts liability even for gross negligence or wilful misconduct.

Mr *de Bourbon's* contention is that the "owner's risk" clause does not limit liability for damages based on negligence. He relied on Alderslade v Hendon Laundry Ltd [1945] 1 All ER 244 (CA). In that case Hendon *Laundry Ltd* lost certain articles received by it from a customer. It had a term in its conditions of acceptance of goods which said: "The maximum amount allowed for lost or damaged articles is 20 times the charge made for laundering". In an action for damages by the respondent the appellant company sought to limit its liability by relying on this clause. It was argued on appeal that the clause limited liability for lost articles. LORD GREENE MR said at 245D-G:

> "...where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. **Where, on the other hand, the head of damage may be based**

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> **on some ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through the negligence**. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of any such clear terms the clause is to be construed as relating to a different kind of liability and not to liability based on negligence. A common illustration of the principle is to be found in the case of common carriers. A common carrier is, to use a common expression though it may not be quite accurate, an insurer, and his liability in respect of article entrusted to him is not necessarily based on negligence at all. Accordingly, if a common carrier wishes to limit his liability for lost articles and does not wish to make it quite clear that he is desiring to limit it in respect of his liability for negligence, then the clause will be construed as only extending to his liability on grounds other than negligence. But if, on the other hand, the carrier, not being a common carrier and being only under an obligation to take reasonable care, makes use of that clause, then unless it is construed so as to cover the case of negligence there would be no content for it at all " (my emphasis).

What is of import in this passage for present purposes is contained in the sentence emphasized above.

The approach to the interpretation of clauses of limitation in the Alderslade case supra was followed in Essa v Divaris supra, where the above passage was cited with approval. Tindall JA queried whether the approach to interpretation in the English cases was present in the minds of the judges who decided Central South African Railways v Adlington & Co supra, a case in which it was held that the "owner's risk" clause does not exempt the carrier if he is guilty of gross negligence or malfeasance or if he employs such servants as are likely to be guilty of gross negligence or wilful misconduct. The learned Judge of Appeal remarked at p 767:

> "It is not clear to me that the word 'owner' in the expression 'at owner's risk' is used in defining the risk; it seems to me to be used not in relation to the carrier, but in order to indicate that the owner of the goods takes the risk. Be this as it may, the sentence just referred to seems to indicate that the owner's risk clause left unaffected not only liability for gross negligence or malfeasance but also liability for ordinary negligence or the failure to take such care as a bonus paterfamilias would take in transporting or handling his own goods."

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I agree that the "owner's risk" clause leaves unaffected not only liability for gross negligence or malfeasance but also for ordinary negligence.

Alderslade's case *supra* was followed by Canada Steamship Lines Ltd v Regem [1952] 1 All ER 305 (PC). I need not summarise its contents. All that I seek to do is to repeat Lord Morton of Henryton's approval of what Lord Greene MR stated in the Alderslade's case supra. He summarised the passage cited above at 310A-D as follows:

> "... (i) If the clause contained language which expressly exempts the person in whose favour it is made (hereafter called' the *proferens*') from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed as to whether this was the law of the Province of Quebec were removed by the decision of the Supreme Court of Canada in *Glengoil SS Co v Pilkington* (1897) 28 SCR 146; 41 Digest 200 a. (ii) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt

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> arises at this point, it must be resolved against the proferens in accordance with art 1019 of the Civil Code of Lower Canada: 'In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation'. (iii) If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence' to quote again Lord Greene MR in the *Alderslade's* case (*supra*). The 'other ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it, but, subject to this qualification, which is, no doubt, to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are, *prima facie*, wide enough to cover negligence on the part of his servants."

I would like to mention in passing the case of *Smith and Ors v South Wales Switchgear Ltd* [1978] 1 All ER 18 (HL). For the purposes of this case I would like to extract from Lord Fraser's speech the sentence at 26b where he said:

> "I do not see how a clause can 'expressly' exempt or indemnify the *proferens* against this negligence unless it contains the word 'negligence' or some synonym for it and I think that is what LORD MORTON OF

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> HENRYTON must have intended as appears from the opening words of his second test ('If there is no express reference to negligence')."

See also Lord Keith of Kinkel's speech at 30f-31b.

Industrie Chimiche Italia Centrale SpA v Nea Ninemia Shipping Co SA (The Emmanuel C) [1983] 1 All ER 686 (QBD) is another English case worthy of a passing mention. This case concerned a charterparty agreement. The charterparty provided among other things in clause 16 that if the vessel was lost, hire already paid in advance by the charterers was to be returned to them 'all dangers and accidents of the Seas ...and errors of Navigation ...always mutually excepted ...". The vessel was grounded in the St Lawrence River. It became a constructive loss. On appeal from the decision of the arbitrator's award of damages it was held that clause 16 of the charterparty "was presumed not to exempt the owners from the consequences of their negligent navigation unless the contrary was expressed or implied". It was also stated that: "

> "On the true construction of cl 16 of the charterparty 'errors of navigation' did not include negligent errors of navigation, because (a) the clause contained no express reference to negligence, nor any synonym for it, whereas it was not unusual for exemption clauses in the shipping commercial world to expressly exclude liability for negligence ..."

(See the Headnote.)

It is this broad approach to exemption clauses that appeals to me. The court has to examine the exclusion clause in order to find out whether it exempts the owner from only one head of damage and if it does, which head of damage is exempted. If there are many heads of damage not exempted, the court must find out whether it was the intention of the parties to exclude negligence. In doing this, the court must find out whether the words of the exclusion clause are clear enough or wide enough to include negligence.

In Rosenthal v Marks 1944 TPD 172 at 177-178 Murray J (as he then was) considered the submission of the respondent's counsel that a person wishing to exempt himself from legal

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liabilities must do so in express and unambiguous terms and the "owner's risk" clause must be strictly construed. The learned judge stated a point central to the appellant's submission in this appeal which is that-

> "...an exemption clause ... (which is) couched in general terms without particularisation, must be taken not to free a common carrier from

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> responsibility for the consequences of loss or damage during carriage when occasioned by the negligence of himself or his servants ..."

and that-

> "...the exemption clause is to be interpreted in the light of the legal position existing but for such exemption, so as to ascertain from it what it was that the parties proposed to exempt the bailee ..."

(See at p 177).

In *Essa v Divaris supra* Tindall JA expanded the above concept of interpreting exemption clauses and followed the reasoning in Alderslade's case supra at 197. The passage cited by Tindall JA has already been referred to above.

I think in order to protect the justification for coming to the conclusion that the "owner's risk" clause does not exempt the respondent from liability caused by its negligence or that of its servants, the following passage from Alderslade's case supra is helpful. LORD GREENE MR said at 245E:

> "...if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the clause is to be construed as relating to a different kind of liability and not to liability based on negligence."

The principles stated by Tindall JA in Essa v Divaris were applied by Steyn CJ in South African Railways and Harbours v Lyle Shipping Co Ltd 1958 (3) SA 416 (AD) at 491C-E, where the learned Chief Justice said:

> "The rule to be applied in construing an exemption of this nature appears from Essa v Divaris 1947 (1) SA 753 (AD) at p 756. Generally speaking, where in law the liability for the damages which the clause purports to eliminate can rest upon negligence only, the exemption must be read to exclude liability for negligence, for otherwise it would be deprived of all effect; but where in law such liability could be based on some ground other than negligence, it is excluded only to the extent to which it may be so based, and not where it is founded upon negligence. Mr *Cloete*, for the appellant, did not seek to cast any doubt upon the soundness of this rule, either in equity or as a means indicated by the inherent improbability that any person would be content to forgo all legal protection against the negligence of another, of ascertaining the probable intention of parties to a contract."

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See also *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (C) at 650-655; *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2)

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SA 794 (A) at 803F-805G.

I think I have shown above why it is that in this case the exclusion clause, that is the"owner's risk" clause, does not exempt the respondent from liability. The authorities I have cited in support of the conclusion that the clause "at the sole risk of the (owner)" does not exempt the respondent from liability occasioned by its or its servants' negligence are clear enough. They do not require any elaboration.

In Zimbabwe the same guidelines to principles of interpretation apply. In Bristow v Lycett 1971 (2) RLR 206; 1971 (4) SA 223 (RAD) Beadle CJ, after considering English and South African cases embodying the principles of interpretation discussed above and citing what was said by Murray J in the case of Rosenthal v Marks supra at 177, commented as follows at 221G-I (236F-H of the South African report):

> "This approach of Murray J is clearly in accord with first principle. The exemption clause is, after all, nothing more than a clause in a contract. There is no special magic in the exemption clause in this case. Its meaning must be ascertained in the same way as any other clause in a contract, by ascertaining what the parties must have intended it to cover, and bearing in mind the rules applicable to implied or tacit contracts. The intention of the parties can, therefore, only be ascertained in accordance with the normal rules applying to the interpretation of implied or tacit contracts generally. All the circumstances of the case must be considered and in determining what the parties must have intended regard must be paid to the fact that in case of doubt, as the defendant is the *proferens*, the clause must be construed against him."

The question is whether clause 216(d), on a proper construction, exempts the respondent from all heads of damage including that of negligence. Are the words used wide enough in their ordinary meaning to embrace negligence on the part of the respondent and its servants?

An exemption clause must be construed strictly, both because of its nature and because this particular exclusion clause is found in the respondent's standard conditions of carriage. It is therefore construed against the party whose standard form of contract (in the instant case the respondent's) is used. See *Halsbury's Laws of England* 4 ed Vol 5 para 409.

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Since the respondent is the *proferens* who has not made clear what the "owner's risk" clause exempts the *proferens* from, the exemption clause must be construed against the respondent.

Before I give consideration to the meaning and effect of the exclusion clause let me say this: I have already said that the exclusion clause is not defined in the Tariff Book. It is not even stated that the respondent is or may be liable for damage occasioned by gross negligence or wilful misconduct. That is left to be implied. The respondent says that except for damage arising from gross negligence or wilful misconduct it is not liable. Is that enough? The exclusion clause does not make even that clear.

In my opinion, for this exemption clause to exclude liability arising from negligence, there must be express reference to negligence. I do not believe that the words are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the respondent. And if the words are wide enough to cover negligence I believe the head of damage may be based on

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some ground other than that of negligence. There may be other heads of damage which may entitle the respondent to proffer the protection of the "owner's risk" clause. Where negligence is included as a head of damage exempting the respondent from liability, that fact must be stated expressly or excluded or included in the same manner. And as is pointed out in *Canada Steamship Lines Ltd v Regem supra* at 310D:

> "...the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are, *prima facie,* wide enough to cover negligence on the part of his servants."

Because the exemption clause is not defined, the doubts that I entertain about the inclusion of negligence among the heads of damage from which the proferens is exempted must be resolved in favour of the appellant.

It is therefore my view that clause 216(d) does not exempt the respondent from liability arising from negligence.

In the result, the aforementioned portion of clause 6(4) of the respondent's plea is struck out as being bad in law. The appeal is allowed with costs. The judgment of the Court below is altered to read:

> "The application to strike out is allowed with costs."

Manyarara JA: I agree.

Korsah JA: I agree.

Atherstone & Cook, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

S v F (a juvenile) 1988 (1) ZLR 327 (HC)

Court **High Court, Harare**

Greenland J

Criminal review

11 May 1988

Flynote

Criminal procedure - children - prosecution of - need to ensure that child understands proceedings - injustice of prosecution where such understanding absent - necessity to ensure knowledge by accused of wrongfulness of act before prosecution resorted to.

Criminal procedure (sentence) - juvenile - sentence of whipping-child too immature to understand proceedings

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or wrongfulness of his act - barbaric and brutal treatment.

Headnote

The accused was a ten-year-old boy. He was alleged to have raped an eight year old girl. Because a child of that age is presumed incapable of committing rape, the State prosecuted him on a charge of indecent assault, in spite of the professional opinion of a probation officer that both the accused and the complainant were still too young either to appreciate the wrongfulness of his action or to understand criminal proceedings. Neither before nor at the trial, despite the accused's age and the presumption that a child of his age is *doli incapax,* was the question of knowledge by the accused of the wrongfulness of his act investigated. The accused was nevertheless convicted and sentenced to a whipping of four cuts.

Held, that it is wrong, unjust and prejudicial to the interests of the accused and society to prosecute a child where the evidence is that the child will not understand or appreciate the proceedings.

Held, further, the question of whether or not the accused was actually *doli incapax* not having been investigated, the State could not have

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GREENLAND J

discharged the onus on it of showing that the accused knew his act to be wrongful.

Held, further, that imposition of a whipping, in the face of the probation officer's report that the accused would not understand the proceedings and his recommendation that the matter be settled under his profesional counselling, was barbaric, inherently brutal, cruel, inhuman and degrading.

Cases cited:

R v *Magope* 1931 OPD 57

R v *M* 1949 (4) SA 831 (A)

R v *Mahwahwa* 1956 (1) SA 250 (SR)

R v *K* 1956 (3) SA 353 (A)

R v *Tsutso* 1962 (2) SA 666 (SR)

S v *Dyk* 1969 (1) SA 601 (C)

R v *Judson* 1965 RLR 501; 1966 (1) SA 88 (SRAD)

S v *Mativenga* AD-41-81 (unreported)

S v *du Preez* 1975 (4) SA 606 (C)

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S v *Ncube & Ors* S-156-87

S v *Kwadiso & Anor* 1977 (3) SA 876 (N)

Judgment

Greenland J: These proceedings greatly offend my sense of justice. A ten-year-old boy was convicted on an allegation which the law stipulates he is incapable of perpetrating and sentenced to a cruel and inhuman punishment. As this Court is the upper guardian of all minors I am extremely distressed by the facts of the whole matter and find it abhorrent that the administration of justice was unable, at any stage, to protect this child and consciously perpetrated this grave injustice.

The allegation against the accused was that he had raped an eight-year-old girl. Because the law stipulates that a male under the age if 14 years of age is incapable of committing rape, the State surmounted this hurdle by proceeding on a charge of indecent assault. See *R v Magope* 1931 OPD 57, *R v M* 1949 (4) SA 831 (AD).

In authorising the prosecution the Acting Attorney-General observed:

> "The accused seems to live by the saying of 'where there is a will there is a way...' In view of his tender years it may well be that a **court appearance will have the desired remedial effect. Please proceed**" (my emphasis).

GREENLAND J

It is simply not possible to comprehend or justify this stance in view of the report of the probation officer. This professional officer conducted a thorough investigation and nowhere in his report does he give the impression that the accused is of the callous or brazen attitude implied by the observation: "...he seems to live by the saying...'where there is a will there is a way'". I quote from the report:

> "BEHAVIOUR There has not been any adverse reports about his behaviour. He is said to be truthful, obedient and trustful.
>
> PERSONALITY TRAITS F never showed signs of fear or evasiveness in his replies to questions. Nor did he falter in narrating what happened before and after he was apprehended...The accused has refused [*sic*] forcing the complainant. He simply stated he kicked the complainant who had used bad language in scolding him and had kicked her."

This independent view of a professional officer, skilled in dealing with and assessing young persons, aloof of the matters in issue, simply does not support the first observation of the Acting Attorney-General.

More indefensible though is the proposition that "...court appearance will have the desired remedial effect...". In his "Case Evaluation/Conclusion" the probation officer stated:

> "2. **Both the accused and the complainant are still too young to appreciate what goes on in the Criminal Court of Law**."
>
> (My emphasis.)

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The probation officer then concluded by stating that, in the circumstances, he respectfully recommended that the charge be withdrawn and the matter settled under his professional counselling.

It must follow that, on the evidence, a criminal prosecution was simply not indicated as a appropriate or viable course of action. In the absence of understanding by the child of such proceedings, they simply could not induce any remedial effect. The likely effect would be purely persecutory, ie persecution as opposed to prosecution. The attendent trauma would be detrimental to the mental and emotional well-being of both the accused and the young complainant, especially as the accused persistently denied the allegation and a "full blown" trial was indicated.

GREENLAND J

It is pertinent to point out that, at the trial, the Court felt constrained to permit the father of the accused to conduct the defence on his behalf. There is no indication on the record that the trial magistrate applied his mind to the question of the accused's understanding and appreciation of the proceedings.

Though mindful of the Attorney-General's prerogative in regard to prosecutions, I am compelled to hold that it is wrong, unjust and prejudicial to the interests of the accused and society to prosecute a child where evidence is that such child will not understand or appreciate the proceedings.

Furthermore, a reading of the probation officer's report admits of the clear implication that the accused was incapable of appreciating the wrongfulness of his alleged action, ie that he was *doli incapax*. That is the overall impression given. It is common knowledge that young children necessarily internalise perceived behaviour of those around them and then will often proceed to experiment themselves without being conscious of the wrongfulness of such behaviour. In thus mimicking behaviour they are not acting criminally. The law recognises this. Hence its insistence that, in regard to young offenders, the element of knowledge of wrongfulness be proved. At the very least this aspect required investigation before prosecution was resorted to.

It was not investigated then, neither was it investigated, considered or decided at the subsequent trial. It is trite that a child between the ages of seven and fourteen years is legally presumed to be *doli incapax*. The *onus* is on the State to rebut the presumption by proving that, at the time of commission, the accused knew his act to be wrongful. See Burchell and Hunt *South African Criminal Law and Procedure* vol 1 p 186, citing extensive authority, including *R v Mahwahwa* 1956 (1) SA 250 (SR) at 251; *R v K* 1956 (3) SA 353 (AD) 356; *R v Tsutso* 1962 (2) SA 666 (SR) at 667-8; *S v Dyk* 1969 (1) SA 601 (C) 603.

In *Tsutso's* case Maisels J set aside a conviction of culpable homicide, where a ten year old boy picked up a knife and fatally stabbed the deceased who had been knocked to the ground by the father of the accused. Maisels J held that the prosecution had failed to prove "that the accused's **mind was sufficiently mature to understand, and that he did understand, the wrongful character of the conduct in question"** (My emphasis.)

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As this important issue was totally ignored by the trial court it is not possible to hold that the State proved the crucial element of knowledge of wrongfulness. I quote the evidence of the complainant:

GREENLAND J

"Accused came and pulled me to his father's maize garden. He did not say why he was pulling me.

Q. What happened?

A. He put me on the ground. He lay on my stomach. He removed my pant. He then removed his pair of shorts.

Q. When he lay on you did he do anything to your private part?

A. He inserted his penis into my private part.

Q. How did you feel?

A. I felt pain. I was injured.

Q. Did you cry?

A. Yes."

As can be seen these facts are entirely consistent with an instance of childish experimentation which went wrong. Had there been no pain and injury it is unlikely that anything would have come of it. It is not possible to say that the "pulling" etc of the complainant, without protest or objection on her part, does not represent behaviour the accused had innocently internalised. It is not possible to conclude that these facts in themselves indicate knowledge of wrongfulness.

What may have indicated such knowledge was that the complainant stated that the accused thereafter ran away. However such behaviour is hardly surprising in the circumstances as things had gone horribly wrong. Apart from the obvious distress the complainant was then displaying, the independent evidence is that the hymen was torn and bleeding. It would be a natural inclination of a child to "flee the scene" of such a traumatic eventuality particularly if this was unexpected.

All these factors were not considered by the trial court because the crucial element of knowledge of wrongfulness was not adjudicated upon. In the circumstances I must hold that the State failed to prove its case and the conviction must therefore be quashed.

I would go further and hold that, in any event, there was insufficient corroboration of the complainant's evidence. The corroboration, as such, reposed in the facts and circumstances of a report the complainant made to her aunt. However the complainant and the aunt contradicted each other on most aspects of this matter. It is clear that the court was not alive to these contradictions and therefore failed to appreciated that the corroboration was, in reality, very thin. Bearing in mind the approach to be adopted in such cases

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of sexual offences on young persons corroboration was insufficient: *R v Judson* 1965 ALR 501; 1966 (1) SA 88 (RAD); *S v Mativenga* AD-41-81. Relevant to this issue was the accused's defence that he had only kicked the complainant. The doctor should have been called on the question as to whether or not the vaginal injury could have been caused by a kick with an unshod foot.

Lastly, it is now history that despite the facts of the case, especially the probation officer's report, the trial magistrate imposed a whipping of four cuts. In tragic consequence of that sentence this boy, at the tender and impressionable age of 10 years, and despite his persistent protestations of innocence, was taken away by prison officers to a prison, "tied to a flogging bench", and beaten with a cane measuring one metre by ten millimetres in diameter.

Incredible as it may seem, the trial magistrate paid no regard to the probation officer's report which was produced to him before sentence was passed. A reading of his reasons for sentence reveals that he was preoccupied with the State's frustration at not being able to legally charge rape but only indecent assault. His answer to the problem was to punish the accused for rape anyway. He was totally unmindful of the subjective factors evidenced in the probation officer's report which favoured the accused and showed that, at the very least, the offence represented uncharacteristic behaviour committed without appreciation of the implications. Not for a moment did he consider the brutalizing effect such a punishment would have on this child at such an extremely impressionable age. The accused's interests were neither considered nor weighed up in the scales of justice. The magistrate simply did not proceed with the caution required in view of the fact that whipping has always been resorted to with judicial reluctance. I quote from MA Rabie & SA Strauss *Punishment* 3 ed p 202:

> "Judicial disapproval of injudicious imposition of whipping as a punishment for juvenile offenders was voiced again in Ruiters, Beyers, Louw 1975 (3) SA 526, (C). Steyn J observed that the unshakeable faith of some judicial officers in the efficaciousness of whipping as a method of correction is not supported by available evidence in the United Kingdom and other Western countries. Strokes should not be imposed at random and without reference to the character and the needs of a specific offender. In *Du Preez* 1975 (4) SA 606 (C) it was held that judicial strokes are altogether inappropriate as punishment for a boy 8 to 9 years old."

The basis for judicial disapproval is articulated by Van Heerden J in *S v Du Preez supra* where he points out the real danger of "the humiliation and shock connected with the infliction of judicial strokes by a (prison) official-with whom he has no emotional or any other bond - would quite possibly..." have such a detrimental effect on a child as to result in a "twisted person" being returned to society.

I have been furnished with a report from the Chief Prison Officer as to the manner in which the sentence was carried out. To quote therefrom:

> "CORPORAL PUNISHMENT : JUVENILE 1393/87 [F]

I refer to your unreferenced minute dated the 1 March, 1988 which addressed to the Officer in

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Charge, Kadoma Prison.

It is noted that you would like to know how corporal punishment was administered to the above-named juvenile.

All corporal punishments are carried out in accordance with provisions laid down in the Prisons Act and Prison Regulations:

(a) a medical officer must examine the prisoner and certify that the prisoner is medically fit to undergo the punishment.

(b) a medical officer and the Officer in Charge of the prison must be present when the cuts are being administered.

(c) the prisoner's hands and legs must be tied to a flogging bench on which he should lie.

(d) the prisoner should not be allowed to identify the person administering the cuts.

(e) a blanket or similar form of protection is placed across the small of the prisoner's back just above the buttocks.

(f) a small square of thin calico cloth is dipped in water and wrung out before being tied over the prisoner's buttocks.

(g) for juveniles a light cane which is a rattan cane measuring one metre in length and 10 millimetres in diameter is used but for adults the cane should be 1,2 metres long and 12,5 millimetres in diameter.

(h) strokes are administered from one side on the buttocks of the prisoner and on no account must they be inflicted on the prisoner's back.

(i) strokes must not be inflicted by instalments.

(j) the medical officer may intervene and stop the remainder of the strokes if the punishment is likely to cause more serious injury than is contemplated in the sentence.

GREENLAND J

(k) for juveniles the parents or guardians have a right to be present when the punishment is being carried out.

The above are the general rules and regulations to be observed by each Officer in Charge and [F's] punishment was carried out under the same conditions."

As may be seen the procedure adopted was not essentially different from that described by Gubbay JA in the important decision in *S v Ncube & Ors* SC-156-87 in referring to adult whipping. The Supreme Court went on to hold that such whipping of adults was unconstitutional. The Court found that such treatment of an offender was barbaric, inherently brutal, cruel, inhuman and degrading. I hold that the same must apply, *a fortiori,* in the present instance where a ten year old boy was whipped in consequence of criminal proceedings which a probation officer was satisfied the child was too immature to appreciate.

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Though the constitutionality of the matter is not up for decision, as this Court is the upper guardian of all minors, I must express its condemnation of what has occurred. Like Adhesion J in *S v Kwadiso & Anor* 1977 (3) SA 876 I have discussed the matter with other Judges of the High Court and we are all very perturbed. It is also of great concern that the Acting Attorney-General is still of the attitude that the proceedings were warranted and the conviction and sentence appropriate. Contrast this attitude with what was said at 877B of *S v Kwadiso supra:*

> "I therefore referred the matter to the Attorney-General for his views and he has replied as follows:
>
> 1. Normally a child of nine years should not be brought before a criminal court but rather taken to a children's court. This policy is followed by my office, and only in exceptional cases will children of such tender years be charged in a criminal court. Cf S *v Yibe* 1964 (3) SA 502 (E); *S v Du Preez* 1975 (4) SA 606 (C); R v E 1967 (3) SA 627 (R); *S v Jodwana* 1968 (4) SA 367 (E)."

This country had adequate legislation to cater for juvenile offenders in the form of the Childrens Protection and Adoption Act [*Chapter 33*].

In the result all that I can do is to quash the conviction and set aside the sentence. It is therefore so ordered.

Gibson J agrees.

VAN T'HOFF v VAN T'HOFF & ORS (2) 1988 (1) ZLR 335 (HC)

Court **High Court, Harare**

Adam J

Application for execution of judgment pending appeal

13 May 1988

Flynote

Appeal - execution of judgment pending - onus and criteria.

Headnote

The applicant was granted a spoliation order against the respondents in respect of the former matrimonial home of the applicant and the first respondent.*(5) The respondents noted an appeal to the Supreme Court, which meant that the execution of the order granted was automatically suspended. The applicant applied to the High Court for leave to execute the judgment pending the appeal.

Held, that the overall *onus* of establishing a proper case for the grant of leave to execute will rest upon the applicant.

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Held, further, that the High Court has a wide general discretion to grant or refuse leave, on the basis of what is best and equitable in all the circumstances, having regard, *inter alia*, to the following factors:

(a) the potentiality of irreparable harm or damage to the respondent, if leave to execute were to be granted;

(b) the potentiality of irreparable harm or damage to the applicant, if leave to execute were to be refused;

(c) the prospects of success on appeal and whether the appeal is frivolous and vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, to gain time or to harass the other party;

(d) where there is the potentiality of irreparable harm or prejudice to both parties, the balance of hardship or convenience, as the case may be.

ADAM J

Held, further, that this was an appropriate case to grant the relief sought.

Cases cited:

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)

Leask v French & Ors 1949 (4) SA 887 (C)

A M Donagher for the applicant

S Chihambakwe for the respondents

Judgment

Adam J: The applicant was granted a spoliation order by Mrs Justice Gibson on 3 April 1988 against the respondents. On 14 April 1988 the respondents filed a notice of appeal to the Supreme Court which meant that the execution of the order granted was automatically suspended.

By notice of motion on 22 April 1988 on a certificate of urgency the applicant seeks an order:

"1. That the respondents and all other persons claiming through them vacate 78 East Road, Avondale, Harare, forthwith together with the goods and possessions of the 2nd and 3rd respondents and give the applicant peaceful possession of the aforesaid property pending the outcome of an appeal lodged by the respondents in respect of case No. HC 1520/88 being a decision of this Honourable Court handed down on 13 April 1988.

2. That failing compliance with this order the Deputy Sheriff be and is hereby authorized to evict the respondents from the said property and to seize from the respondents and deliver to the applicant all keys

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affording access to and in the aforesaid property.

3. That the costs of this application in the event of it being opposed be borne by the respondents jointly and severally, the one paying the other to be absolved."

The applicant's supporting affidavit states that he requires the premises to carry out his work obligations as well as the fact that he cannot live with the respondents; that he is being prejudiced in the extreme by the noting of the appeal; that prior to 9 April 1988 the first respondent had lived away from the matrimonial home for a period of six months; that in view of the spoliation order granted by GIBSON J the level of communication between the applicant and the first respondent is minimal and it has made it impossible for them to live under the same roof.

ADAM J

In the supplementary affidavit filed on 9 May 1988, the applicant stated that scheduling difficulties and failure to serve the respondents resulted in the hearing set down for 25 April 1988 being withdrawn on the understanding that if necessary it could be set down for a hearing on a subsequent date. In that affidavit he further indicates that the first respondent returned to the premises on 8 May 1988 with the other two respondents and that because of this he had to spend the night of 8 May 1988 in a hotel. In his answering affidavit he indicates he has spent further nights in a hotel.

Whilst he appreciates that the respondents' legal practitioners are attending to the preparation of the court record for purposes of the appeal, he believes it will be some time before the Supreme Court hears the appeal; that apart from the fact that it is impossible for the parties to continue living together and in view of the reasons for judgment given by Gibson J on 27 April 1988, the respondents' prospects of success on appeal are minimal.

The first respondent in her replying affidavit challenges certain of the allegations made in the applicant's founding and supporting affidavits. It is clear that on both these affidavits there is a dispute, but for the purposes of this application they are not material and in my view can be dealt with on the papers. The second and third respondents also have filed replying affidavits which also challenge certain statements made by the applicant. Again, these are not material to this particular application.

I have read the reasons for judgment given by Gibson J where she carefully weighed the arguments presented by both parties. The applicant has handed in, through his counsel, heads of argument; the respondents have, through their counsel, provided me with a note on the law applying to the application before me. The law is clear from the authorities cited to me, more particularly *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977(3) SA 534 (A) at p 545, where CORBETT JA observed:

> "The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave. This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments. In exercising this discretion the court should, in my view, determine what is best and equitable in all the circumstances, and in doing so would normally have regard, *inter alia*, to the following factors:

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1. The potentiality of irreparable harm or prejudice sustained by the appellant on appeal (the respondent in the application), if leave to execute were to be granted;

ADAM J

2. The potentiality of irreparable harm or prejudice being sustained by the respondent, (applicant in the application) if leave to execute were to be refused;

3. The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose to gain time or to harass the other party;

4. Where there is the potentiality of irreparable harm or prejudice to both the appellant and the respondent, the balance of hardship or convenience as the case may be."

This means that overall the *onus* of establishing a proper case for the grant of leave to execute will rest upon the applicant. In the case of *Leask v French & Ors* 1949 (4) SA 887 (C) at p 893 Searle J observed:

> "In every case of an order of court *ad factum praestandum* there must be a serious risk of prejudice to one or other party in the event of an appeal. If execution is authorized and the appeal succeeds it is seldom if ever possible to restore the *status quo ante.* Whereas on the other hand, if execution is stayed and the appeal ultimately fails, the successful party, through the delay, generally suffers a loss for which he cannot be compensated.
>
> In the circumstances the court can only reduce to a minimum the possibilities of prejudice by granting or refusing the application in accordance with the demands of the preponderance of equities."

It is argued on behalf of the applicant that the prospects of success on appeal by the respondents are minimal, and that on the papers it is clear that the prejudice that the applicant will suffer is irreparable. The respondents' counsel, on the other hand, argues that there are prospects of success on appeal, particularly since the decisions were made by Gibson J on the papers especially with regard to material disputes of fact.

As indicated, I have read the reasons for judgment given by Gibson J She observed that many of the facts surrounding the proceedings were common ground between the parties. She outlined these very carefully in her judgment. Her reasons disclosed that the proceedings before her were spoliation proceedings and that the applicant proved to her satisfaction that he was in peaceful and undisturbed possession of the premises in question;

ADAM J

that he had been unlawfully deprived of such possession. Accordingly, she said, the applicant was entitled to have the *status quo ante* restored.

The authorities indicate to me that I have a wide general discretion to grant or refuse leave, and in exercising this discretion I have to determine what is best and equitable in all the

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circumstances. I am satisfied that the harm or the potentiality of irreparable harm or prejudice being sustained by the applicant is greater that the potentiality of irreparable harm or prejudice being sustained by the respondent if leave to execute were refused.

It is also clear that the prospects of success on appeal are minimal from the reasons for judgment given by Gibson J I am satisfied that the applicant has discharged the *onus* placed upon him to establish a proper case for the granting of leave to execute. Accordingly leave is granted in terms of the order sought by the applicant.

Accordingly, it is ordered:

1. That the respondents and all other persons claiming through them vacate 78 East Road Avondale Harare forthwith together with the goods and possessions of the second and third respondents, and give the applicant peaceful possession of the aforesaid property pending the outcome of an appeal lodged by the respondents in respect of Case No HC 1520/88, being a decision of this Honourable Court handed down on 13 April 1988.

2. That failing compliance with this order the Deputy Sheriff be and is hereby authorized to evict the respondents and deliver to the applicant all keys affording access to and in the aforesaid property.

3. That the costs of this application be borne by the respondents jointly and severally, the one paying the other to be absolved.

Stumbles and Rowe, applicant's legal practitioners

Chirunda, Chihambakwe & Partners, respondents' legal practitioners

S v CHIMINYA 1988 (1) ZLR 340 (HC)

Court **High Court, Harare**

Chidyausiku J & Greenland J

Criminal appeal

15 February & 1 June 1988

Flynote

Criminal procedure (sentence) - Road Traffic Act 1976 - s 46(1) - drunken driving - accused seriously intoxicated - imprisonment appropriate for first offender.

Headnote

The warning given by Beadle CJ in *S v Gadzi* 1971 (1) RLR 176; 1972 (1) SA 432, that in bad cases of drunken driving sentences of imprisonment will be confirmed even where the accused is a first offender and no serious injury or damage has been caused, is even more appropriate now than when it was given. Those who take to the wheel in a hopeless state of drunkenness, like the appellant, whose blood/alcohol level was 392mg per 100 ml, place the lives of other

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road users at great risk and should not expect any leniency from the courts.

Cases cited:

S v *Bore* HH-274-86 (unreported)

S v *Nyawo* HH-190-86 (unreported)

S v *Towe* S-45-85 (unreported)

S v *Chirume* S-298-86 (unreported)

S v *Gadzi* 1971 (1) RLR 176; 1972 (1) SA 432

S v *Maposa* 1972 (2) RLR 353; 1973 (1) SA 546 (RAD)

B Wabatagore for the appellant

Mrs J Zindi for the respondent

Judgment

Chidyausiku J: The accused in this case was charged with and convicted of contravening 46(1) of the Road Traffic Act No. 48 of 1976, an offence

CHIDYAUSIKU J

commonly known as drunken driving. He pleaded not guilty but was found guilty. He was sentenced to 3 months' imprisonment with labour and prohibited from driving any class of vehicle for a period of 8 months. His driver's licence was also cancelled. The appellant now appeals against sentence. He does not appeal against conviction.

In convicting the accused the magistrate relied upon the following facts as having been proved. The accused drove a motor vehicle along Gura road in Chitungwiza at about 18.45 hours on the evening of 23 August 1986. As the accused drove along he met up with another vehicle driven by a Mr Siyamuzhombwe travelling in the opposite direction. As the vehicles approached each other the appellant moved on to the wrong side of the road and the driver of the other vehicle had to move out of the road to avoid a head-on collision. There was however a minor accident in that the vehicles "side-swiped" as they passed each other. The appellant was unaware that an accident had taken place and drove on. The complainant followed the appellant's vehicle and found the vehicle stationary in the middle of the road. Police were called to the scene. The evidence of the police officer who attended the scene was that the appellant was unable to tell him his name and could not stand on his own properly. He smelt of liquor and was taken to hospital for the extraction of a blood sample. The appellant had a reading of 392 mg in 100 ml of blood. The evidence establishes these facts beyond reasonable doubt and the magistrate was correct in finding accused guilty on the basis of the above facts.

Mr *Wabatagore* for the appellant submitted that the sentence imposed was manifestly excessive and the appellant should have been given the option of a fine. He also submitted that the trial

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magistrate erred in that he failed to take into account when assessing sentence the fact that no life was lost and minimal damage was caused in this case.

In support of his submission that the sentence imposed was manifestly excessive Mr *Wabatagore* cited the following cases: *S v Bose* HH-274-86: there, a fine of $200 was confirmed; the blood/alcohol reading was 211 mg per 100 ml. The alcohol level in that case is much lower than the present case. The accused drove his vehicle into the rear of a motor vehicle travelling in front of him when the latter stopped at a robot controlled intersection. In *S v Nyawo* HH-190-86 a fine of $300 was reduced to $200. The accused was found behind the steering wheel with the engine running and the car was in the middle of the road. The blood/alcohol reading was 104 mg per 100 ml. There was no evidence of bad driving and the falling asleep behind the wheel

CHIDYAUSIKU J

could not be attributed to drunkenness. It could have been caused by lack of sleep and tiredness. In *S v Towe* S-45-85, the blood/alcohol reading 223 mg per 100 ml. There was no evidence of bad driving. An appeal against a fine of $250 was dismissed. Again this case is distinguishable from the present case. Firstly, the blood reading in the present case is far higher than in that case. Secondly, there is evidence of bad driving in the present case and there was none in *Towe's* case. Lastly, Mr *Wabatagore* referred us to *S v Chirume* S-298-86. It is difficult to understand the relevance of this citation. The judgment in that case concerned itself with an incompetent order of prohibition imposed by the magistrate. The question of sentence was never discussed.

In my view, the cases cited by Mr *Wabatagore* do not in any way support his submission that the sentence imposed in this case is manifestly excessive. They are clearly distinguishable from the present case.

In the present case the appellant was so drunk that he did not know his name and could not stand on his own properly. He had a reading of 393 mg in 100 ml of blood. His manner of driving was extremely dangerous. He came on to the wrong side of the road in front of oncoming traffic. It is difficult to imagine a worse case of drunken driving.

Mrs *Zindi* for the respondent has referred us to the cases of *S v Gadzi* 1971 (1) RLR 176; 1972 (1) SA 432 and *S v Maposa* 1972 (2) RLR 353; 1973 (1) SA 546. In both cases it was held that sentences of imprisonment without the option of a fine will be confirmed in this court in bad cases of drunken driving. In *Gadzi's* case *supra*, Beadle CJ had this to say at p 435 A:

> "In bad cases of drunken driving, in the absence of special circumstances, this court will now confirm sentences of imprisonment without the option of a fine, notwithstanding the fact that the offender may have a clear record and notwithstanding the fact that no serious injury is caused to persons or property."

In view of the carnage that now takes place on our roads almost daily, arising mainly out of drunken driving, those remarks are even more appropriate now than when they were made in 1972. Those who take to the wheel in a hopeless state of drunkenness like the present appellant place the lives of other road users at great risk and should not expect any leniency

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from the courts.

In my view the trial magistrate did not misdirect himself. Even if he had

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misdirected himself and this court was at large on sentence we would impose the same sentence.

The appeal is therefore dismissed.

Greenland J: I agree.

Guni & Guni, the appellant's legal practitioners

A v COMMISSIONER OF TAXES 1988 (1) ZLR 344 (HC)

Court **High Court, Harare**

Annotations Link to Case Annotations

Smith J

Income Tax Appeal

19 June 1987 & 1 June 1988

Flynote

Revenue and public finance - income tax - Income Tax Act [Chapter 181] - Fourth Schedule, para 1 - farm improvements - whether school erected on farm for education of dependents of farm employees is a farm improvement.

Headnote

The appellant was a company which carried on farming operations. A school was built on the farm for the benefit primarily of dependents of farm employees, although children from neighbouring farms were admitted if there were vacancies.

The Fourth Schedule to the Income Tax Act [*Chapter 181*] provided for deductions which were allowed in respect of "farm improvements". This term was defined in para 1 of the Schedule as meaning, *inter alia,* "any building ...used in the carrying on of farm operations", but did not include "staff housing".

Held, that while the school buildings were necesarily incidental to and used *in connection with* the carrying on of the appellant's farming operations, in the same way as are staff accommodation and staff amenities such as beerhalls, they were not used *in* the carrying on of those operations. There was no direct and proximate connection between the farming operations and the provision of a school for the dependents of the farm's employees. The

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school buildings therefore did not rank as "farm improvements", as defined.

Cases cited:

Income Tax Case No 885 (1959) 23 SATC 336

Commissioner of Taxes v Swaziland Ranches Ltd (1978) 40 SATC 232

SMITH J

J Sayce for the appellant

M J Gillespie for the respondent

Judgment

Smith J: The appellant is a company which carries on farming operations near Banket. In its return of income for the year ending 31 March 1984 the appellant claimed a deduction of the cost of erecting a school on the farm it operated. The cost thereof amounted to $13 130. In the notice of assessment the respondent refused to allow the deduction so claimed. The appellant duly objected and its objection was disallowed. It thereafter appealed to the High Court.

The managing director of the appellant, who is in fact the owner of the company, gave evidence which was uncontradicted. The appellant produced tobacco, maize and soya-beans on the farm and kept cattle. It had carried on farming operations since 1961. During the period 1983-84 its labour force consisted of 85 permanent employees and between 20 and 30 seasonal employees. In addition, some 50 to 60 women, who were wives of the employees, worked on the farm when their services were required. This word was seasonal. It consisted mainly of helping with the planting, suckering and topping of tobacco and the picking and grading thereof, and the weeding of the maize and soya bean lands and the reaping of the crop. The labour provided by the women was an important factor in the farming operations and augmented the earnings of the families concerned. There was a village on the farm in which all the employees were housed. The average size of family amongst the employees was 4 or 5 children, which meant that thee were almost 300 children living in the village.

There had been a school on the farm since 1968. It had been rebuilt to Government specifications in the year under review. It consisted of two classrooms, an office, a storeroom and a number of toilets. The school was registered with the Ministry of Education and supervised by Government inspectors. Two teachers were employed, their salaries being paid by Government. The appellant provides desks, benches and other equipment, but the parents of the pupils had to provide such items as paper, pens and pencils. The school could accommodate 100 pupils and priority was given to children of employees. If there were vacancies, children from neighbouring farms were admitted. The school provided primary education only. The nearest alternative primary school was in the town of Banket, some 5 km distant. No fees were charged for schooling, even in the case of children from neighbouring farms.

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SMITH J

The owner of the appellant said that he had been engaged in farming operations since 1957. He found that prospective employees who were family men sought work where there were adequate housing and facilities for educating their children. He felt that the provision of the school attracted a more settled type of employee and helped to keep him on the farm. It also made the wives of the employees more contented if educational facilities were at hand for the children. Furthermore, when the wives were working on the farm they were more productive and concentrated better on their work when they knew that their children were at school under supervision. He concluded his evidence by submitting that a stable labour force improved the efficiency and output of the farming operations. He felt that in order to maintain a stable labour force it was necessary to provide good housing, clean water and educational facilities.

The Fourth Schedule to the Income Tax Act [*Chapter 18*] provides, *inter alia*, for the deductions which are allowed in respect of farm improvements. That term is defined in para 1 of the Fourth Schedule. It was repealed by s 9 of the Finance No. 2) Act 1980 (No. 11 of 1980) and the following was substituted:

> "'farm improvement' means any building or structure or work of a permanent nature, including any water-furrow, which is used in the carrying on of farming operations, but does not include -
>
> (a) any building, structure of work of a permanent nature referred to in paragraph 2 of the Seventh Schedule; or
>
> (b) staff housing or any dwelling-
>
> (i) used by the taxpayer as the homestead of himself and his family: or
>
> (ii) purchased or constructed after the year of assessment beginning on the 1st April, 1979;
>
> or
>
> (c) a tobacco barn;"

The previous definition, which was repealed by Act 11 of 1980, read as follows:

> "'farm improvement' means any building or structure or work of a permanent nature, including any water-furrow and farm dwelling, which is used in the carrying on of farming operations, does not include -
>
> (a) any building or structure of work of a permanent nature referred to in paragraph 2 of the Seventh Schedule; or
>
> (b) African housing; or

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> (c) any building which is used by the taxpayer as the homestead of himself and his family; or
>
> (d) a tobacco barn."

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The term "African housing", which was repealed by Act No. 11 of 1980, read in part as follows:

> "'African housing' means any permanent building acquired or constructed by the taxpayer and used by him for the purpose of his trade for the housing or general welfare of African employees but does not include ..."

In *Income Tax Case No. 885* (1959) 23 SATC 336, the Cape Income Tax Special Court considered whether expenditure incurred in the erection of a school and a medical clinic could be deducted in the determination of the taxable income of the taxpayer. Paragraph 17(1)(f) of the 3rd Schedule to the South African Income Tax Act 1941 provided for the deduction of expenditure incurred by a farmer in respect of "the erection of buildings used in or in connection with farming operations, other than those used for the domestic purposes of persons who are not employees of such farmers." At p 337 of the judgment HERBSTEIN J said:

> "It is common cause that these buildings are not used in farming operations and what is really in issue between appellant and the Commissioner is whether the school and the clinic can be said to be buildings used in connection with farming operations."

The learned President of the Court went on to consider a number of cases where the meaning to be accorded to the phrase "in connection with" had been considered, and concluded at p 338:

> "The true position is that while the closest and most intimate relationship is not necessary it is not enough to show merely a loose and remote one. As Rowlatt J said in *Prance's* case (*supra*) -

'it is a matter of degree in which we are to be guided by common sense'."

He went on to say:

> "In its approach the court must not lose sight of the language of the Legislature. It must be shown by the taxpayer that the expenditure was incurred in 'the erection of buildings **used** in connection with farming

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> operations'. That the buildings might be useful or desirable or even necessary from the taxpayer's point of view will not justify the deduction of their cost, if, in fact, the buildings are not used in, or in connection with, farming operations. Thus, while it might be greatly in the interests of the farmer-taxpayer to have a contented labour force to which end the provision of recreational facilities in the form of a swimming pool, a squash court or a cinema might contribute, the expenditure on such buildings would clearly not be deductible inasmuch as they would not 'be used in connection with farming operations'. Likewise while it might be highly advantageous to a taxpayer to have an educated labour force able because of this to shoulder greater responsibilities, nevertheless, in my opinion, expnditure incurred in the erection of school buildings to provide such education would not be deductible in terms of paragraph 17(1)(f) of the Third Schedule for the simple reason that the buildings would not be 'used in connection with farming operations'. The school buildings would be used for educational purposes and any connection with the taxpayer's 'farming operations' would be so remote and indirect as to be negligible. It might, perhaps, be pointed out that in the instant case, the school is not attended by the employees but by their children who might never enter the employ of the taxpayer. Furthermore the taxpayer has no right to interfere with the syllabus or to require that what is taught should be of such a nature as to prepare the pupils as agricultural workers. Appellant's direct interest in the school is in respect of the rental it receives for the buildings."

This statement of the law was apparently accepted by all for many years because there has been no case in which a similar deduction was claimed until 1978. In that year the Swaziland Court of Appeal considered an appeal from a decision of the High Court of Swaziland which

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held that a school was not a building used in connection with the taxpayer's farming operations. The decision of the High Court was founded mainly on *Income Tax Case No. 885 supra*. *In Commissioner of Taxes v Swaziland Ranches Ltd* (1978) 40 SATC 232 the appeal concerned, *inter alia*, the meaning of "buildings used in connection with farming operations". In that case it was agreed that the purpose in building the school was to induce potential employees to enter into and remain in the appellant's service by creating satisfactory conditions of employment, and to keep its staff, consisting of married people with young children of early school-going age, contented and therefore productive, and to attract additional married staff in the same category. Ogivlie Thompson P found that "there is thus a good deal to be said for the view that the buildings in issue (ie the school) are no less 'used in connection with farming

SMITH J

operations' conducted by the taxpayer than are any buildings it may have erected to house its employees". However, after analysing the contents of the relevant subsection and the history of the provision, he came to the conclusion at p 239 that -

> "the use of the buildings in issue - although undoubtedly an amenity for the taxpayer's employees - is too remote to warrant them being included within the category of 'buildings used in connection with farming operations' within the meaning of subpara 17(1)(f)."

The other members of the court, Milne and Smit JJA reached a different conclusion, their judgment being delivered by the former. At pp 240 and 241 Milne JA said:

> "It is clear, as he (ie Ogilvie Thompson P) says, that in subpara (f) the legislature does not require as a prerequisite for deductibility that expenditure in respect of buildings used for the domestic purposes of a farmer's employees, should have any direct connection with the actual operations of farming. But it seems to me, with respect, once it is clear that a farmer has erected a building on his farm, though it is not used or intended to be used for the domestic purposes of his employees at all, that unless one concludes that he may have erected the building as a matter of mere charity, or for the purposes of some commercial venture quite separate from his farming operations and that the building is not used for the domestic purposes of persons other than his employees, one is entitled and, indeed, obliged to say that he has erected the building, for business reasons, in connection with his farming operations. In this case the agreed facts as set out by the President show quite clearly and strongly that the erection of the school and beerhalls was not done for charity or in connection with some commercial venture other than that the taxpayer would have a contented and, therefore, as well, a stable labour force. The legislature, as we have seen, regards the cost (within the prescribed limits) of buildings used for the domestic purposes of a farmer's employees as deductible, clearly showing, in my view, that it is much concerned with the housing on his farm of a farmer's employees. Why should it be so concerned other than to ensure that the farmer's resident labour force will be a contented one? What, one asks, were the beerhalls and the school erected for other than for bettering the taxpayer's farming operations by enhancing the productivity of his employees, as the agreed facts indeed indicate? I find myself unable to say that the building with which we are concerned in this case were any **less** used

SMITH J

> **in connection with** the taxpayer's farming operations than buildings used by its employees as places where they merely sleep and eat and wash and, presumably, spend some leisure. No less in the former case than in the latter can the buildings be said, in any sense, to be used in any direct connection with the farming operations, but the legislature plainly recognizes that buildings may be used in connection with farming operations, although they are

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in no way, at all, directly so used."

The buildings, structures and works which are specifically excluded, by virtue of paras (a), (b) and (c) of the definition of "farm improvement", from the ambit of the deductions provided for in the Fourth Schedule give some indication of what buildings, structures and works would otherwise be regarded as farm improvements. The buildings, structures and works mentioned in para (a) of the definition are those referred to in para 2 of the Seventh Schedule, namely works for the prevention of soil erosion, water conservation works and fencing. Those mentioned in paras (b) and (c) are staff housing and the taxpayer's homestead and tobacco barns. Clearly works for the prevention of soil erosion, water conservation works and fencing, whilst not connected with the actual operating of a farm in the sense of income-earning operations as that expression is understood in tax matters, are used in the carrying on of farming operations. Likewise, tobacco barns are used in the carrying on of farming operations. Staff hosing and the taxpayer's homestead, whilst not actually used in the carrying on of farming operations as such, are necessarily incidental to farming operations as labour is essential for that purpose and must be housed. There is a direct and proximate connection between farming operations and the provision of housing for persons carrying on the farming operations. Mr Sayce argued that, because the definition of "farm improvement", which was in force prior to Act No. 11 of 1980 coming into force, excluded "African housing", and that term was defined as meaning any building used "for the housing or general welfare of African employees", the Legislature must have contemplated that buildings used for the general welfare of staff would otherwise have been regarded as farm improvements. I cannot accept this submission. The Fourth Schedule used to provide for deductions for African housing, and obviously it was intended to extend the deductions to buildings used for general welfare purposes. Hence the extended definition of the term "African housing". I do not think, however, that such extension of the definition can colour the meaning to be given to the term "farm improvement".

In *Income Tax Case No. 885 supra* HERBSTEUN J said that it was common cause

that the school buildings were not used in farming operations. He was of the view that they were likewise not used in connection with farming operations. For the reasons given by Milne JA in the Swaziland Ranches case (supra) I do not agree with him on that point. I consider that the school buildings erected by the appellant were used in connection with the carrying on of its farming operations. Consequently, had the term "farm improvement" been defined in the same manner as it was defined in para 17(1)(f) of the Third Schedule to the South African Income Tax Act, I would have allowed the appeal. However the term is defined more narrowly in para 1 of the Fourth Schedule to the Income Tax Act [*Chapter 181*]. In order to qualify for the deduction the building, structure or work must be used in the carrying on of farming operations. The onus lies on the appellant to satisfy me in this regard and he has failed to do so. I do not conider that there is a direct and proximate connection between the school and the farming operations.

I sympathise fully with the appellant in its desire to provide educational opportunities for children of its employees. The policy of the Government is enunciated in Part II of the Education Act 1987. Section 4 thereof provides that every child in Zimbabwe shall have the right to school

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education. In s 5 it is stated that the objective in Zimbabwe is that primary education for every child of school-going age shall be compulsory and to that end it shall be the duty of the parents of any such child to ensure that such child attends primary school. Then s 8 provides that for the purpose of ensuring a fair and equitable provision of primary education throughout Zimbabwe every local authority shall endeavour to establish and maintain such primary schools as may be necessary for all children in the area under its jurisdiction.

This statement of Government policy cannot, however, be used to ascertain the intention of the Legislature when formulating the Income Tax. In the light of this policy, however, employers in the rural areas should be encouraged to provide educational facilities for children of their employees. If this is to be done by way of tax benefits, then the legislative provisions must be appropriately worded.

The appeal is dismissed.

Honey & Blanckenberg, appellant's legal practitioners

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

ATTORNEY-GENERAL v HOWMAN 1988 (1) ZLR 352 (HC)

Court **High Court, Harare**

Adam J

Application to reserve a question of law

1 June 1988

Flynote

Practice and procedure - reservation of question of law for consideration of Supreme Court - matter must arise "on the trial" and not as a consequence of the judgment - question of law must be important.

Criminal law - culpable homicide-guilt nexus between act of accused and death of deceased - child being pursued by accused running into dam and drowning - no nexus shown.

Headnote

The accused was charged with murder. It was alleged that the accused, who was at the time the chairman of a club on the banks of the Darwendale Dam, chased a group of six juveniles who were trespassing in the boat launching area of the club. The deceased was a member of the group. During the chase the group split up. The deceased ran into the dam, but the accused followed the rest, who continued on land. The deceased got into difficulties in the water and drowned. A State witness alleged that the accused had by this time returned to the dam but did nothing to help the deceased. The trial court found that there was no case of either murder or culpable homicide for the accused to answer, there being no intent to kill, actual or constructive, and death not being a reasonably foreseeable consequence of his acts. The Court acquitted

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him at the end of the State case. The Attorney-General applied on notice of motion to have a question of law reserved for the consideration of the Supreme Court in terms of s 2(1) of the High Court of Zimbabwe Act.

Held, that the High Court has a discretion as to whether or not to reserve a question of law for the consideration of the Supreme Court. Regard must be had to the importance of the point of law, but in this case there was

ADAM J

nothing on the trial of the accused that required the matter to be reserved as an important question of law.

Held, further, that the question of law must arise "on the trial" and not as a consequence of the judgment or sentence. The Attorney-General's remedy, if he is dissatisfied with a judgment of the High Court on a point of law, is to appeal against the judgment in terms of s 44(6) of the Act.

Held, further, that there was clearly no guilt nexus between the accused's acts and the deceased's death. The deceased's act of running into the dam was not reasonably foreseeable and there was no legal duty on the accused to do anything when the deceased got into dificulties.

Cases cited:

S v *Sigwahla* 1967 (4) SA 566 (A)

R v *John* 1969 (2) RLR 23; 1969 (2) SA 560 (RAD)

R v *Chenjera* 1960 R & N 67; 1960 (1) SA 473 (FSC)

R v *McEnery* 1943 SR 158

R v *Sikona* 1937 SR 54

Attorney-General v Bvuma & Anor S-111-87 (not yet reported)

A O Agyemang for the applicant

A P de Bourbon for the respondent

Judgment

Adam J: This is an application pursued by way of notice of motion, filed on behalf of the Attorney-General in terms of s 25(1) of the High Court of Zimbabwe Act 1981 to reserve a question of law. That section reads as follows:

> "25.(1)If any question of law arises on the trial in the High Court of any person for any offence, the High Court may, after the accused has been convicted and sentenced or acquitted, as the case may be, reserve that question, of its own motion, or at the request of the prosecutor or of the accused, for consideration of the Supreme

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Court."

It is clear from the foregoing provision that the legislature has given this Court a discretion, which it must exercise judicially, to determine whether to reserve any question of law that arises on the trial.

In this matter the Stated Question of Law has been framed as follows:-

"1. Whether or not on the facts as outlined in Annexure 'B' the evidence established a prima facie case of murder against the accused. (See

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R v *Nemashakwe and Ors* 1967 (3) SA 520)

2. Whether or not on the facts as outlined in Annexure 'B' the evidence established a *prima facie* case of culpable homicide against the accused (See *R v John* 1962(2) SA 560)

3. Whether or not the trial court in deciding that a prima facie case had not been made out against the accused applied the correct legal test in determining this issue (*Attorney-General v Bvuma & Anor* S-111-87).

4. Whether or not Annexure 'B' ex facie considered the legal issue as to whether the accepted facts consisted a prima facie case of culpable homicide."

As the notice of motion was also addressed to the counsel who had appeared at the trial for the accused, the Registrar assigned duties on criminal matters was asked to make enquiries of him. Mr *de Bourbon* obligingly confirmed that a copy of the documentation had been received by him. Further, besides indicating that, though his mandate had expired, should this court find it necessary for the matter to be argued he was prepared to act on behalf of the accused, he also made certain written submissions with the observation that an answering affidavit was not being filed on behalf of the accused. These have been made available to the counsel who had appeared for the State at the trial. Besides the papers filed in this matter, Mr Agyemang has not on behalf of the Attorney-General made any further written submissions. It was Mr de Bourbon's contention that in deciding to act under s 25 of the Acts regard must be had to the importance of the point of law that had been stated to be reserved. Also, it was his sumission the question of law must be one that arises on the trial and not as a consequence of the judgment. Any dissatisfaction felt by the Attorney General with the judgment required him to seek a remedy pursuant to the provisions of s 44(6) of the same Act. He maintained that the prosecutor in this matter had adopted an incorrect procedure. There is substance in his arguments.

Section 44 (6) of that Act provides as follows:

"(6) If the Attorney-General is dissatisfied with the judgment of the

High Court in a criminal matter in the exercise of its original or appellate jurisdiction ...

(a) on a point of law ...he may, with leave of a judge of the Supreme Court, appeal against such judgment to the Supreme Court."

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ADAM J

I should indicate that this matter was not set down for oral argument, it being left for this Court to determine whether that was required. Accordingly, I have dealt with this issue on the papers before me without the added expense of oral arguments.

At the close of the State's case, the trial Court found that the prosecutor had not established a *prima facie* case on the evidence presented to it. The evidence did not prove that the accused intended - in the way of "actual intention" - to bring about death. Also, the Court held that the evidence led by the State did not prove that the accused foresaw that what had taken place might cause death, that is, the existence of legal or constructive intent.

It is trite that murder as a crime is the unlawful and intentional causing of the death of another person. On such a charge the State has to prove that when the accused acted unlawfully (*actus reus*) he had the requisite intention (*mens rea*) to kill, that is, either he had actual intention - "in the sense of dolus directus ie where the will is directed to compassing the death;" or he had legal or constructive intention - in that it "is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*": *S v Sigwahla* 1967 (4) SA 566 (A) at 569 and 570.

As for culpable homicide, which as a crime is the unlawful and negligent causing of the death of another person, the consequent homicide involves the unintended killing of a person and so the accused must be the factual cause of that person's death if but for the accused's negligence death would not have resulted. In *R v John* 1969 (2) RLR 23 at 27-28 and 33-36 Macdonald JA (as he then was) observed:

> "...it is necessary to examine recent South African decisions...in which the Appellate Division of South Africa reviewed the Roman-Dutch Law of culpable homicide...it [was] not until *van der Mescht's* case [1962 (1) SA 521] and *Bernadus's* case [1965 (3) SA 287] that it was affirmatively laid down that it was necessary to establish as a separate and distinct element a guilt nexus between the unlawful act of the accused and the death of the deceased, and, in order to do this, show that the accused ought to have foreseen the fatal consequences of his unlawful act...

On the basis of the views expressed above, the effect of the decisions [in *van der Mescht's and Bernadus's* cases] is not to introduce the element

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of foreseeability for the first time or alter its essential nature as an element in the crime but simply to emphasize the importance of foreseeability as an objective element by stating that henceforth it must be treated as a separate distinct element of a mens rea. But, whether foreseeability is introduced as a separate element or not, it is of great importance that the meaning of cause should be clearly understood, because a causal nexus remains an essential and basic element of the offence.

> ...The degree of foreseeability described in Bernadus's case as the guilt nexus is not something different from the degree of foreseeability required to establish the causal nexus for the purpose of legal liability...

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> A further point which should be emphasized is the test of foreseeability in the crime of culpable homicide as an objective one...
>
> It is sufficient, for legal responsibility to arise, that the accused ought to have foreseen some risk of death...if the manner of his death is within the range of ordinary human experience."

Further whilst dealing with the topic of "omissions" in *Hunt South African* Criminal Law and Procedure Vol II 2 ed (1982) at p 364, the learned author mentions:

> "Where X has no significant prior connection with an event or circumstances detrimentally involving Y, and no relationship with Y himself, the law does not require X, altruistically, to intervene in order to ward off the evil and benefit Y "

The learned author cites R v Chenjera 1960 R & N 67 (FSC) at 79, a decision of the Federal Supreme Court of Rhodesia and Nyasaland, as his authority.

On the facts in this case, the trial court found that there was no legal duty on the accused to do anything when the deceased juvenile got into difficulties. The evidence presented did not satisfy the trial court that it could be said that the accused ought to have foreseen that when he was in lawful pursuit of all six juveniles that the deceased juvenile would enter the dam when all the other five juveniles continued on land and when, as the Court found as a fact, the choice to enter the dam or not was the deceased's juvenile's and was made deliberately. It was not as if the accused had specifically driven the deceased juvenile into the dam.

1988 (1) ZLR p357

ADAM J

In *R v McEnery* 1943 SR 158, where, on a charge of culpable homicide, the accused, a drunk unarmed soldier, had entered at night a coach of a moving train and assaulted the occupant. This caused some of them out of panic to jump from the train, and resulted in the death of the deceased shortly thereafter due to the injuries suffered. It was assumed that the deceased had deliberately jumped from the moving train. Blakeway J at pp 159-160, applying a judgment of this Court in *R* v *Sikona* 1937 SR 54, stated:

> "Now, in this case it is undoubtedly the fact that the accused did an unlawful act...But it is necessary for the Crown to prove the nexus between the wrongful act and its effect.
>
> ...
>
> The Court finds that the deceased's conduct in jumping from the moving train was not reasonable conduct in the circumstances."

The evidence given at the trial by David Lungu indicated that the accused chased three juveniles. One of the three went into the dam while the other two continued on land. The accused followed the two on land and ignored the deceased juvenile. While the accused was nowhere near the deceased juvenile and in pursuit of the other two, on Lungu's testimony the deceased juvenile was already in trouble. He further testified that the accused then returned and stood and watched the deceased juvenile. The trial Court found that the accused had previously warned the juveniles to leave that private location and site and that the accused was in pursuit of the juveniles who were trespassers.

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It is clear from the foregoing that there was no "guilt nexus" between the accused's lawful pursuit and the subsequent tragic death of the deceased juvenile. To put it another way, the evidence was not sufficient to establish the causal *nexus* for the purpose of legal liability. The trial Court applying an objective test of foreseeability, did not find that the accused should have foreseen that the deceased juvenile might go into the dam. it did not find that the conduct on the deceased's juvenile's part was within the range of human experience that may happen and which the accused ought to have foreseen.

Section 188(3) 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 there is no evidence that the accused committed the offence charged on the indictment, summons or charge, or any other offence of which he might be convicted thereon, it may return a verdict of not guilty."

ADAM J

In *Attorney-General v Bvuma & Anor* S-111-87 DUMBUTSHENA CJ correctly observed at 6:

> "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...
>
> There is a discretion vested in the court...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 the prosecution evidence."

The trial Court found that the State evidence was not sufficient to put the accused on his defence for the offence of murder or culpable homicide. What constitutes a prima facie case for the crime of murder or for the crime of culpable homicide or what the test was that applied as a question of law has been previously considered and settled by appellate courts. There was nothing on the trial of the accused that required the matter to be reserved for the consideration of the Supreme Court as an important point of law.

Further, as stated, it has been argued, with justification, that the question of law must arise on the trial and not as a consequence of the judgment. Although "judgment" and sentence" form an integral part of a trial it does not follow that a question of law as a consequence of the judgment "arises on the trial". Even if I am incorrect on this I am satisfied that the State has not established that this is a proper application which warrants this Court exercising its discretion to state the questions of law sought by the Attorney-General. His remedy, if he is dissatisfied with the judgment, is under s 44(6) of the Act.

Accordingly I decline to reserve the stated questions of law as formulated in the Attorney-General's application for the consideration of the Supreme Court. ,

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S v MULEYA & ORS 1988 (1) ZLR 359 (SC)

Court **Supreme Court, Bulawayo**

Gubbay JA, Manyarara JA & Sansole AJA

Criminal appeal

16 May & 6 June 1988

Flynote

Criminal procedure - sentence - multiple accused - approach to be adopted - where guilt evenly apportioned, punishment should be identical - murder - belief in witchcraft and obedience to orders as mitigating features.

Headnote

The deceased admitted to a village gathering to having by witchcraft caused the death of three children. The mother of the children was related to the accused, who proceeded to torture the deceased, by piling a sledge and heavy rocks upon him, in order to make him reveal where he had hidden his *muti*. As a result of this treatment the deceased died of asphyxiation.

Two of the appellants were convicted of murder with an actual intent to kill and sentenced to 20 years' imprisonment; the other three were convicted of murder with a constructive intent and sentenced to 15 years' imprisonment. They appealed against the sentences.

Held, that the two principles to be adopted in this case were, firstly, that if a principal offender has a positive intent to kill, the socius must be held to have had a similar intent if he aids and abets the principal in his purpose, in the knowledge of what his purpose was, even though the role of the socius is a menial one; and secondly, that where a court finds it impossible to apportion guilt unevenly between accused persons, it should treat them all in the same way.

Held, further, that the appellants, acting with common purpose as a family, murdered the deceased not out of a genuine belief in witchcraft (whose mitigatory value has continued to decline) but out of an evil sense of revenge. This was not a case where they were under any threat from the

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MANYARARA JA

deceased or where they acted to protect anyone from the alleged witchcraft.

Held, further, that the appellants found guilty of murder with actual intent were fortunate that extentuating circumstances were found. In the light of the finding of a constructive intent, the sentences on the other appellants were quite appropriate.

Cases cited:

S v *Mokonto* 1971 (2) SA 319 (A)

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S v *Frashishiko & Ors* 1977 (2) RLR 37

S v *Goredema & Ors* AD-63-81 (unreported)

S v *Bvuure* 1973 (2) RLR 393; 1974 (2) SA 24 (RAD)

R v *Nemashakwe & Ors* 1967 RLR 127; 1967 (3) SA 520 (RAD)

S v *Mhlanga* AD-27-81 (unreported)

R v *Werner & Anor* 1947 (2) SA 828 (AD)

E L Masina for the appellants

K A Esat for the respondent

Judgment

Manyarara JA: In my judgment I shall refer to the appellants by their first names to avoid confusing their identities as some of them share common surnames inter se and with other persons to be mentioned in the judgment.

The appeals arise out of what may be termed a witchcraft gang killing of one Siasigayi Munenge, aged about 55 years, at Siazara Village in the Binga District of Matabeleland North Province on 4 October 1983. The incident led to the prosecution of the appellants and two other persons for murder. Anderson and Kelius were convicted of having committed the crime with an actual intent and were each sentenced to twenty years' imprisonment with labour. The other three appellants were convicted of murder with a constructive intent and each was sentenced to fifteen years' imprisonment with labour. All five appellants were granted leave to appeal against their respective sentences.

The sixth and seventh accused, Mathias Mumbe and Raphael Muzamba, were found guilty of common assault. There is no record of the sentences they received but the fact that they have not appealed indicates their acceptance of their less serious plight.

The facts are common cause. Three young children of one Juliet Munkuli of Siazara Village died in rather quick succession in unexplained circumstances. The woman's relatives went and consulted a spirit medium, Ma

Tshabalala, who held up to them a mirror. On it was reflected the image of Siasigayi (the deceased in this case) carrying the corpse of one of the dead children. Two further corpses of Juliet's children also appeared in Ma Tshabalala's mirror but the deceased was not carrying these. The achievement of the whole feat is mind-boggling and remains unexplained.

Be that as it may, the bereaved family returned home intending to confront the deceased with its finding, but he had gone to his own village at Hwange. He was sent for and he duly presented himself before a village gathering attended by Juliet's relatives, who included the

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seven accused persons. They were related to each other and to the woman. In their presence, the deceased admitted that it was he who had caused the death of the children by witchcraft. The accused thereupon bound the deceased's hands behind his back and marched him to his home to fetch the offending muti. He was brought back to the gathering, with his hands still bound but dragging a wooden sledge. Some of the accused persons were assaulting him with stalks of sorghum.

It appears that one Lameck Munkuli was not satisfied that the deceased had disclosed all his *muti.* He demanded that the deceased produce a certain water bag whose existence was denied by the deceased. Lameck appears to have been a sort of head of the family. One of the accused persons then placed a rock weighing some 22 kg on the deceased's head as he stood before the gathering. Another passed a rope over the rock and between the deceased's legs to secure the rock on his head to get the deceased to talk. The rock fell off his head.

It was then that the deceased was made to lie on his back on hard ground in scorching heat from the bright October sun. The sledge he had brought was placed on him and the rock on top of the sledge. More rocks were fetched and added to the load on the deceased until the total weight on him came to 103,25 kg. His feet and hands were bound to the sledge to prevent him from pushing away the sledge and rocks. He repeated that he had disclosed all his *muti*. Not believing this, the accused brought another rock of some 49 kg and placed that over the chest area of the deceased's body. This rock required two men to fetch from a distance of about 100 metres and to lift into place.

The deceased then said he had thrown into a pool the *muti* with which he had caused the deaths of Juliet's children.

However, the load under which he lay was not removed from him. Instead, the accused went and sought shade from the sun under the nearby trees as did

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MANYARARA JA

the onlookers, telling the deceased that they wanted "to sentence him". Not long thereafter, Mathias went over to where the deceased lay under the sledge and rocks and pronounced him dead. A report was subsequently made to the police who attended the scene and found the deceased's body still lying on its back behind an anthill. The sledge and rocks had been removed and placed ten to thirteen metres away from the body. The police took possession of all the exhibits relating to the case upon indications made by the accused whom they apprehended. The body was conveyed to Mpilo Hospital mortuary where a pathologist examined it and gave the cause of death as asphyxia, consistent with the events I have summarized.

It is idle to suggest that this was anything but a despicable crime deserving of the severest censure of all the appellants and their accomplices. They were not under any threat from the deceased and it was not suggested that they acted as they did in order to protect anyone, least of all themselves, from the alleged witchcraft of the deceased: *S v Mokonto* 1971 (2) SA 319 (A) and *S v Frashishiko* 1977 (2) RLR 37.

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Mr *Masina* has urged on behalf of all the appellants that this Court should follow *S v Gordema & Ors* AD-63-81 and reduce the present sentences because they are manifestly excessive. I respectfully disagree because all that I believe the appellate court did in Goredema's case supra (2) was merely to uphold the sentences imposed by the trial court, save in respect of the so-called secretary of the gang whose role had been to record the proceedings culminating in the murder of the deceased.

Even then I have my doubts whether the facts of Goredema's case supra justified any differentiation in sentence between (a) the party officials who ordered the beating to death of an old man on the pretext that they were merely carrying out the will of the people, (b) the thugs who carried out the beating and (c) the secretary whose recording of the proceedings showed "a calculated and cold-blooded approach to a brutal and tragic murder": see p 3 of the cyclostyled judgment.

In this regard, two principles of our law strike me as the appropriate approach to be adopted to the present case. The first is that a socius criminis is guilty of the crime committed by his principals to the same extent as they are: and, if the principals had a positive intent to kill a particular person, the socius must be held to have had a similar intent if he aids and abets them in that purpose in the knowledge that this was their avowed purpose, even though his role is menial one: *S v Bvuure* 1974 (2) SA 24 (RAD).

MANYARARA JA

I would rephrase the second principle as follows: where a court finds it impossible to apportion guilt unevenly between accused persons on the evidence before it, the court should treat them all in the same way: S v Frashishiko & Ors supra at 39E. See also R v Nemashakwe & Ors 1967 RLR 127; 1967 (3) SA 520 and S v Mhlanga AD-27-81 (unreported).

The evidence in this case is that Robert, Johm and Benson actively assisted Anderson and Kelius in bringing the deceased to the scene of the killing, tying him to the sledge and heaping rocks on it. They also aided and abetted the interrogation and torture of the deceased to death even after he had told the quite unsupported lie they wished to hear that he had killed Juliet's children by his *muti*.

All the appellants claimed to have been acting in obedience to the orders of Lameck Munkuli, the sort of head of their extended family. So do the Mafia of Sicilian and American notoriety. In our law, Lameck had no authority whatsoever to give orders which were patently illegal and there was no duty thrust upon any of the appellants to obey such orders: R v Werner & Anor 1947 (2) SA 828, which our courts have continued to apply.

It is by such reasoning that I respectfully suggest that the present case, and probably Goredema's case supra, fall squarely within both principles I have mentioned. Here, the appellants, acting with common purpose as a family, murdered the deceased not out of a genuine belief in witchcraft (whose mitigatory value has continued to decline) but out of an evil sense of revenge. They deliberately formed themselves into a lynching squad and executed their common purpose in a calculated and cold-blood manner reminiscent of the burnings at the

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stake and other atrocities of medieval history.

Our courts believe that an unjustified and unlawful taking of a human life by another rarely deserves any mercy. In my view, this applies a fortiori to any brutally innovative method of murdering the victim such as that adopted by the appellants.

Anderson and Kelius should consider themselves rather fortunate that extenuating circumstances were found despite the fact that they were convicted of murder with actual intent. Their sentences do not induce in me a sense of shock. It follows that I consider the lesser sentences passed on the rest of the appellants to be quite appropriate for the magnitude of their offence in the light of the more favourable finding of only a constructive intent on their part.

MANYARARA JA

Therefore, I would dismiss the appeals.

Gubbay JA: I agree.

Sansole AJA: I agree.

S K M Sibanda, appellants' legal practitioner

BOOK v DAVIDSON 1988 (1) ZLR 365 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

9 February & 17 June 1988

Flynote

Contract - restraint of trade - reasonableness of restraint - to be assessed at time restraint is challenged - onus of proving that restraint unreasonable on person seeking to resile from agreement - no onus on person seeking to enforce restraint to show that restraint reasonable and in public interest.

Courts - precedent - judgments from courts in other Roman-Dutch law jurisdictions - persuasive value of - Supreme Court departing from line of Rhodesian and Zimbabwean decisions.

Headnote

The decisions of courts in other countries which have Roman-Dutch law as their common law have, in relevant cases, very persuasive authority. While the Supreme Court will normally treat its own past decisions and those of its predecessors as binding, it will, in appropriate cases, depart from those decisions, especially in the light of s 24 of the Supreme Court of Zimbabwe

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Act 1981 and Practice Direction No. 2 1981 ZLR 417; 1981 (4) SA 981.

On the subject of contracts in restraint of trade, there was a line of Rhodesian and Zimbabwean cases, in addition to a number of decisions in Provincial courts in South Africa, which followed the English law approach. This is to the effect that contracts in restraint of trade cannot be enforced unless they are (a) reasonable as between the parties; and (b) consistent with the interests of the public. The onus of proving reasonableness and that the contract is in the public interest lies on the person seeking to enforce the contract, and reasonableness has to be judged at the time the restraint is entered into.

In *Magna Alloys & Research (SA)(Pty) Ltd v Ellis* 1984 (4) SA 874, the Appellate Division in South Africa declined to follow the English law approach, holding that the party who alleges he is not bound by a restrictive condition which he had agreed to bears the onus of proving that the enforcement of the condition would be contrary to public policy. There is no principle in Roman-Dutch law to the effect that contracts in restraint of trade are prima facie invalid; the rule is that each agreement should be examined in its own context to ascertain whether the enforcement of the restraint would be contrary to the public interest. In deciding this question, the court would have to have regard to the circumstances prevailing at the time it is asked to enforce the restraint.

The Supreme Court considered that the approach taken by the South African Appellate Division made good common sense and accorded with logic and justice. Accordingly, it decided to follow the Appellate Division's approach, in spite of the previous decisions in the Rhodesian and Zimbabwean courts which had followed the English law approach.

Cases cited:

Magna Alloys & Research (SA)(Pty) *Ltd* v *Ellis supra*

Roffey v Catterall, Edwards & Goudre (Pty) Ltd 1977 (4) SA 494 (N)

National Chemsearch (SA)(Pty) *Ltd* v *Borrowman* 1979 (3) SA 1092 (T)

Mparadzi v Mangwana HH-637-87 (not yet reported)

Spa Food Products Ltd & Ors v Estate Sarif 1951 SR 279; 1952 (1) SA 713 (SR)

H E Sergay Estate Agencies (Pvt) Ltd v Romano 1967 RLR 81; 1967 (3) SA 1 (R)

Rhodesian Milling Co (Pvt) Ltd v *Super Bakery* (Pvt) Ltd 1973 (2) RLR 145; 1973 (4) SA 436 (R)

Commercial and Industrial Holdings (Pvt) Ltd & Anor v Leigh - Smith & Ors 1982 (1) ZLR 247 (SC); 1982 (4) SA 226 (ZSC)

Aling & Streak v Olivier 1949 (1) SA 215 (T)

Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd [1894] AC 535 (HL); [1891-4] All ER Rep 1 (HL)

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Morris(Herbert) Ltd v Saxelby [1916] 1 AC 688; [1916-7] All ER Rep 305

Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] AC 300; [1967] 1 All ER 699 (HL)

Pest Control (Central Africa) Ltd v Martin 1953 SR 67; 1955 (3) SA 609

SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd 1968 (2) SA 777 (D)

Poolquip Industries v Griffin & Anor 1978 (4) SA 353 (W)

DUMBUTSHENA CJ

Stewart Wrightson (Pty) Ltd & Anor v *Minnitt* 1979 (3) SA 399 (C)

Madoo (Pty) Ltd v Wallace 1979 (2) SA 957 (T)

Highlands Park Football Club v Viljoen & Anor 1978 (3) SA 191 (W)

Drewtons (Pty) Ltd v *Carlie* 1981 (4) SA 305 (C)

Mobil Oil Southern Africa (Pty) Ltd v Mechin 1965 (2) SA 706 (A)

Pillay v Krishna & Anor 1946 AD 946

D A B Robinson for the appellant

G S Wernberg for the respondent

Judgment

Dumbutshena CJ: The appellant carries on business at 18 Alexandra Drive, Hatfield, in Harare. Before this he used to carry on business under the name and style of Respo - Technik, Zimbabwe. His business specialised in re-enamelling, stain-removing and polishing of baths.

At the beginning of 1984 he invited the respondent to join him in partnership. The respondent acquired a half share of the business at a purchase price of $5 000,00. The appellant and the respondent then entered into a memorandum of agreement. Clause 12 of the agreement states:

> "Furthermore neither partner shall within three years from the termination of the partnership and within the magisterial province of Mashonaland, operate or engage in or be interested in, whether directly or indirectly, any business or occupation involving the re-enamelling or restoring of baths or any other business carried out by the partnership."

On 24 May 1984 the respondent purchased the appellant's half share and the partnership was dissolved. The respondent, now the sole owner of the business, continues carrying on the business of re-enamelling, stain removing and polishing of baths.

Later the appellant formed a partnership of his own with a Mr Larkins. The new partnership carried on the business of re-enamelling baths. They advertised their business in the name of "The Bath Doctor". The appellant justifies his re-entry into the same business as that of the

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respondent on several grounds. He said in his replying affidavit that one of the reasons why he entered into a new partnership with Mr St Clair Monro Hone doing the same type of business as that of the respondent was that the respondent was obtaining the monopoly of the business in Zimbabwe. He was no longer obtaining paint and machinery from Switzerland. He was using a local product. However, this change of franchise was not part of the restraint of

trade provision. It had nothing to do with the appellant's breaching of the restraint provision.

It was because the appellant carried on business of a similar nature to that prohibited that the respondent applied on notice of motion for an interdict forbidding him from carrying on the business of re-enamelling or restoring of baths or any other business carried out by the partnership as it existed between the parties and for an order directing the appellant to make available to the respondent all his books of account and other records relating to the conduct of his business.

The appellant said he believed that the restraint was for two years instead of the three years in the agreement. He does not deny that he was in breach of the restraint of trade provision. All he was asking the court was to be allowed to rectify the agreement so that it could reflect the period of restraint that he assumed he had agreed upon. He had no defence to the allegations made by the respondent.

The court *a quo* granted the respondent the order prayed for with costs. It is against this judgment that the appellant now appeals.

Before arguing the appeal, Mr Robinson , for the appellant, applied for condonation for the late filing of the notice of appeal. He said the notice of appeal that had been filed timeously was defective. He submitted that the application should be allowed because the appeal was not an ordinary one. It had an important point of law that should be argued. Mr *Wernberg*, for the respondent, agreed with Mr Robinson. The application for leave to file the notice of appeal out of time was granted.

The new notice of appeal contains one ground, that-

> "The court *a quo* erred in failing to hold that the Respondent had not discharged the onus of proof resting upon him that the restraint of trade provision contained in clause 12 of the former partnership agreement between the parties was, in all the circumstances, reasonable."

It was contended for the appellant that the respondent had failed in the court a quo to discharge the onus of proof resting upon him that the restraint of trade provision contained in clause 12 of the partnership agreement was in all the circumstances reasonable. Mr Robinson argued that because the respondent had failed to discharge the onus resting on him the court a quo had erred in granting the respondent the order enforcing the restraint of trade provision

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DUMBUTSHENA CJ

against the appellant and directing the appellant to make available to the respondent all his books of account and other records relating to the conduct of the appellant's business of re-enamelling and restoring baths. This in general was the broad sweep of the appellant's submission.

The importance of this appeal rests on the question of the *onus* of proof in cases in which the enforcement of a restraint of trade provision contained in any agreement is at issue. The onus of proof has assumed importance because the South African Appellate Division has now decided that the onus does not rest upon the person seeking to rely upon the restraint to prove that it was reasonable as between the parties or was reasonably necessary to protect the interest of the covenantee Now the party resisting the enforcement of the restraint has the onus resting on his shoulders.

Mr *Wernberg*, while recognising that the weight of authority in Zimbabwe places the onus upon the person who seeks to enforce the restraint, contends that the right approach to the question of onus is to be found in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). In that case Rabie CJ, following a line of cases decided in the Natal Provincial Division and the Transvaal Provincial Division, and Roman-Dutch writers and the opinion of learned South African writers, gave the stamp of authority to those cases that say that "the party that alleges that he is not bound by a restrictive condition to which he had agreed ...bears the onus of proving that the enforcement of the condition would be contrary to public policy" (See the English headnote).

RABIE CJ says, consonant with what was said in *Roffey v Catterall, Edwards and Goudre (Pty) Ltd* 1977 (4) SA 494 (N) and *National Chemsearch (SA) (Pty) Ltd v Borrowman* 1979 (3) SA 1092 (T):

> "(5) It is in the public interest that agreements freely entered into must be honoured. Generally speaking, however, it is also in the public interest that anyone must as far as possible be able to participate in the business and professional world. It can be assumed that an unreasonable restriction of a person's freedom of trade would probably also harm the public interest if the person, concerned were to be held bound thereby" (unofficial translation).

In order to appreciate the import of the decision in *Magna Alloys supra*, it is proper to consider briefly the two cases that mapped out the path the South African Appellate Division followed.

DUMBUTSHENA CJ

The decisions in *Roffey* and *National Chemsearch* upset the beaten path that Zimbabwean courts and indeed South African courts had for a long time followed. In this regard the path was:

(a) that the onus to establish reasonableness fell on the party seeking to enforce the restraint;

(b) that reasonableness is determined at the time the contract was entered into;

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(c) that partial enforcement of an invalid restraint is possible only if the term has been formulated so as to be readily severable, that is, the valid and invalid parts should form distinct restraints.

Roffey's case put the onus upon him who alleges that he is not bound by a restrictive provision of an agreement to which he consented. This view was not supported by Botha J in National Chemsearch. See at 1100 E-H. But Didcott J's view was adopted and given expression to by the Appellate Division at 898C.

Both in *Roffey* and in *National Chemsearch* it was held that the time to consider the reasonableness of the restraint was as at the time the court is asked to make an order enforcing the restraint provision. See at 507G and 1107G-H, respectively.

Let me outline in brief and discuss Zimbabwean cases on the restraint of trade. The Zimbabwean courts have consistently followed the English approach when deciding the validity of a contract in restraint of trade. The only exception is Mparadzi v Mangwana HH-637-87 (as yet unreported), a judgment of the High Court which purported to follow *Magna Alloys* and Research (SA) (Pty) Ltd v Ellis supra, a South African case, while flying in the face of Zimbabwean authorities which are to the contrary.

Briefly stated, a contract in restraint of trade is, in Zimbabwe, one which restricts a party's future liberty to carry on his trade, business or profession in such a manner and with such people as he chooses. In English law and in Zimbabwe law such a contract is prima facie void. Until Magna Alloys Research (SA) (Pty) Ltd v Ellis, the majority of cases in South Africa followed English law. Under English law, in order for the restriction to be binding upon the parties, there must be proof that it is reasonable from the point of view of the parties themselves and also of the community. Spa Food

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DUMBUTSHENA CJ

Products Ltd & Ors v Estate Sarif 1951 SR 279 at 282; 1952 (1) SA 713 (SR) at 717 F-G is a case that follows the English approach. BEADLE J, as he then was, considered English cases on contracts in restraint of trade and endorsed their approach. In *HE Sergay Estate Agencies (Pvt) Ltd v Romano* 1967 RLR 81 1967 (3) SA 1, GOLDIN J, as he then was, remarked as follows:

> "The law appertaining to a matter of this nature has been stated in many cases in this country, in the Republic of South Africa and in England. All covenants in restraint of trade are prima facie invalid and unenforceable, unless the person seeking to enforce such a covenant proves, and the onus is on the applicant, that the restraint is reasonable in the interests of both parties, not contrary to public policy and affords adequate protection, and no more than adequate protection, of some proprietary interest owned by the applicant. (See *Berger v Osher* 1965 (1) SA 558 (W); *Nursing Services of SA Ltd v Clarke* 1954 (3) SA 394 (D); *Pest Control (Central Africa) Ltd v Martin* 1955 (3) SA 609 (SR), and *Re Jenkins Deed of Partnership* [1948] 1 All ER 471)."

In *Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd* 1973 (2) RLR 145 at 153A; 1973 (4) SA 436 (R), the passage cited below shows the English approach on the enforcement of contracts in restraint of trade. Goldin J said at p 153 (pp 441A-C of the South African Report):

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"A covenant in restraint of trade is prima facie invalid and unenforceable unless it is proved to be reasonable. It is therefore necessary to consider whether the provisions of this contract can be justified. The onus is on the party asserting the contract to show the reasonableness of the restraint. (See *HE Sergay Estate Agencies (Pvt) Ltd v Romano* 1967 (3) SA 1 (R)). In the Esso Petroleum case, supra at p 724, Lord Pearce summarises the proper approach in determining what is reasonable, as follows:

Although the decided cases are almost invariably based on unreasonableness between the parties, it is ultimately on the ground of public policy that the Court will decline to enforce a restraint as being unreasonable between the parties; and a doctrine based on the general commercial good must always bear in mind the changing face of commerce. There is not, as some cases seem to suggest, a separation between what is reasonable on grounds of public policy and what is reasonable as between the parties. There is one broad question: is it in the interests of the community that this restraint should, as between the parties, be held to be reasonable and enforceable?'"

DUMBUTSHENA CJ

In *Commercial and Industrial Holdings (Pvt) Ltd & Anor v Leigh - Smith & Ors* 1982 (1) ZLR 247 (SC); 1982 (4) SA 226 (ZSC) this Court assumed, without deciding the point, that as between the Roman-Dutch law approach and the English approach the courts of this country follow the English approach. It did not accept that the reasonableness of a restraint provision must be judged as at the time the court is asked to enforce it. It agreed with what PRICE J said in Aling and *Streak* v *Olivier* 1949 (1) SA 215 (T) at 219. The learned Judge stated there that-

"If the validity of the restraint of trade clause had to be tested by reference to the facts on any date other than the date when the agreement was made, the question of such validity would always remain uncertain. Events might interpose between the date of the contract and the date of hearing of a case some of which might make a restraint clause invalid which was originally valid and then other events might occur to make that clause valid again. If the validity of the clause had to be determined by events which had occurred after the date when the contract was entered into the enquiry would become arbitrary and artificial. The clause is valid or invalid *ab initio* and therefore the only facts that are relevant are the facts at the moment the contract was signed."

GEORGES JA as he then was, added in *Commercial and Industrial Holdings (Pvt) Ltd & Anor (supra)*:

"I am aware that this formulation has been criticised most recently by VAN DEN HEEVER in *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (C) at pp 312-3. I am not convinced, however, that the existing law is so plainly wrong in logic or in good sense that any radical departure is required.

The reasonableness of a restraint must be judged at the time when it was entered into, taking into account what was in the contemplation of the parties as can be deduced from the broad agreement which they reached."

As already pointed out above, this appeal is solely concerned with the onus of proof. However, a general review of the authorities on this subject broadens the approach on the question of onus. Whether Georges JA was right in his view when he said: "I am not convinced, however, that the existing law is so plainly wrong in logic or in good sense that a radical departure is required" is the issue this Court has to decide again.

DUMBUTSHENA CJ

Speaking for myself, I find it logical and just that the proper time to assess the restraint that is being challenged is as at the time when the Court is asked to enforce or not to enforce the

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restraint. The Court can then take into account the relevant circumstances. In my view that is the time when the unreasonableness of the restraint can properly be assessed. See National Chemsearch (SA) (Pty) *Ltd v Borrowman* at 1107H and Magna Alloys and Research at 894F. It might be that in the resolution of this problem the common sense approach is more appropriate in considering the circumstances that have made the restraint unreasonable or unenforceable. One has to ask what made the restraint provision unenforceable. If the court finds that circumstances that did not exist when the contract was first entered into have, since its implementation, developed and are detrimental to either of the parties or prejudicial to the public interest then the court will not enforce the restraint of trade provision.

Mr *Robinson* argued that the reason why the onus rests upon the covenantee is because contracts in restraint of trade are *prima facie* void and cannot be enforced unless they are proved to be reasonable. So proof of the circumstances which are alleged to justify a restraint falls upon him who intends to enforce the restraint . This, he says, is the law in Zimbabwe. Its nature and consequences have never been doubted. Spa Food Products Ltd & Ors v Estate Sarif supra puts the stamp of approval on the English approach. At p 283 (717G-718D of the South African report) BEADLE J remarked:

> "The *onus* of proving that the contract is reasonably in the interests of the parties rests on the party alleging it. For the leading case on the subject see *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company* [1894] AC 535 per LORD MacNaughten at p 565, as follows:
>
> > 'The true view at the present time I think is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification and indeed it is the only justification, if the restriction is reasonable for the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public':

DUMBUTSHENA CJ

see also *Mason v Provident Clothing & Supply* Co [1913] AC 724 at p 733; *Herbert Morris Ltd v Saxelby* [1916] AC 688; *McEllistram v Ballymacelligot Co-operative Agriculture & Dairy Society* [1919] AC 548 per LORD BIRKENHEAD LC at p 562:

> 'A contract which is in restraint of trade cannot be enforced unless (a) it is reasonable as between the parties; (b) it is consistent with the interests of the public'.
>
> Wessels *Law of Contract* 2 ed p 179 paras 547 and 548 and the cases there cited.
>
> To prove that the contract is reasonable in the interests of the parties the covenantee must show that the contract was not wider than was reasonably necessary to protect the interests of the parties; see Mason v *Provident Clothing & Supply Co supra; Herbert Morris Ltd v Saxelby* supra at p 707 per Lord Parker; McEllistram v Ballymacelligott Co-operative Agricultural and Dairy Society supra per Lord Birkenhead LC at p 563:
>
> > 'The real test is, as your Lordships have so often pointed out, does the restriction exceed what is reasonably necessary for the protection of the covenantee.'"

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See also *HE Sergay Estates Agencies (Pvt) Ltd supra* at 2D-F; *Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd supra* at 153; 1973 (4) SA 436 (R) at 441A.

In *Commercial and Industrial Holdings (Pvt) Ltd & Anor v Leigh - Smith & Ors supra* this Court left the question of *onus* open. Georges JA remarked at 254D-G (232 A-D of the South African report):

> "It was rightly accepted in the Court *a quo* that the agreement sought to be enforced was an agreement in restraint of trade. There was, however, argument as to whether the onus of establishing that the restraint was reasonable in all the circumstances rested on the appellants who sought to enforce it or whether the *onus* rested on the respondents who were resisting enforcement to show that it was unreasonable. Squires J held that the party seeking to enforce the restraint had to show that it was reasonable. Mr *Andersen*, who appeared for the appellants, challenged that finding. Mr *de Bourbon* for the respondents, supported it but contended that the decision of the issues raised in this case would not in the final analysis depend on a decision as to where the onus lay. I do not understand that Mr Andersen seriously challenges this view.

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> Indeed that particular issue, though canvassed in the heads of argument, was not discussed in depth in argument before this Court. In recent times it has been the subject of sharp disagreement in the Courts of South Africa. In Zimbabwe, as the learned Judge a quo correctly pointed out, the decided cases have all held that the onus lies on the party seeking to enforce a covenant in restraint to show that it is reasonable. There has, however, been no decision at appellate level."

As long as the majority of the South African courts continued to follow the English approach, the Zimbabwean courts were in good company. I say this because both countries have Roman-Dutch law jurisdictions.

Now the question of onus has assumed added importance because the sharp disagreements in the courts of South Africa have now been put to rest by the Appellate Division decision in Magna Alloys supra. That case finally decided that the onus rests on him who resists the effect of a restraint provision. I shall revert to this case later in this judgment.

Mr *Robinson* contended that it was not wise to abandon English law which has been consistently followed by the courts of this country as the law applicable in Zimbabwe in cases involving covenants in restraint of trade. He argued that the High Court case Mparadzi v Mangwana supra was wrongly decided on the question of onus on the party resisting the restraint.

Should this Court decide that the correct approach is the one urged upon us by Mr *Robinson*, the fact that the South African Appellate Division has decided otherwise on the question of onus will not matter because the decisions of the South African Appellate Division are not binding on this Court.

This Court cannot, however, lightly ignore the decision in Magna Alloys, because Zimbabwe is a Roman-Dutch common law country. Decisions of a court in another Roman-Dutch law jurisdiction have, in related cases, very persuasive authority. It is therefore the duty of this Court to weigh on the scales of justice the approaches of English law and Roman-Dutch law to the question of the onus of proof and generally the whole question of the law in cases where the

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restraint of trade is at issue. It is in this regard that Magna Alloys assumes great importance in this jurisdiction.

It is with this appreciation in mind that I now consider in depth the submissions of counsel. It is contended by the appellant that the principles

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of English law, clearly stated in many weighty English authorities, have never been doubted. That is true. In support of his submission Mr Robinson relied on a number of cases decided in this country which follow the English approach.

The English approach was enunciated by Lord MacNaughten in the celebrated case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 (HL); [1891-1894] All ER Rep 1 (HL). See the passage cited in this judgment. That passage was cited with approval by LORD ATKINSON in *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688; [1916-17] All ER Rep 305 (HL) as authoritatively laying down "the law upon the subject of the validity or invalidity of contracts in restraint of trade..." See at 308H. See also *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* 1967 [1967] 1 All ER 699 (HL) at 720 G-I.

This approach has been followed and applied in our courts. See *HE Sergay Estate Agencies (Pvt) Ltd v Romano supra; Spa Food Products Ltd v Estate Sarif supra; Lewin v Sanders* 1937 SR 147; *Commercial Industrial Holdings (Pvt) Ltd & Anor v Leigh - Smith & Ors supra; Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd supra; Pest Control (Central Africa) Ltd v Martin* 1953 SR 67; 1955 (3) SA 609 (SR); and see also *Christie Business Law* in Zimbabwe at 95-101, and the cases cited therein.

Mr *Wernberg* submitted that the contention that contracts which are in restraint of trade are prima facie void is incorrect because such contracts are entered into between parties who are aware of their obligations. Such contracts cannot, therefore, be *prima facie* void. They are in fact prima facie valid. He argued that under Roman-Dutch law the onus of proving that a contract in restraint of trade is contrary to public policy and therefore unreasonable rests upon the party who alleges that the contract is void or unreasonable. In other words he who seeks to avoid the consequence flowing from such a contract must prove, in order to succeed, that the restraint is unreasonable inter partes or that it is detrimental to the public interest.

I need not discuss in this judgment South African cases which adopted the English approach. It was assumed in that country, as indeed in Zimbabwe, that the South African law on contracts in restraint of trade was the same as the English law. However, for some time there were doubts in some quarters in South Africa. Arthur Suzman QC, writing a book review in (1968) 85 SALJ 90, queried the correctness of the English approach especially on *onus*. He stated at 91:

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> "As is often the case with borrowings from another system, all the implications of the borrowings are not always appreciated. A case in point (not mentioned in the lectures) is that of restraint of trade, where our courts for over a

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century have almost slavishly followed the English law, including the rule that the *onus* is on the party seeking to enforce a restraint to prove its reasonableness.

This rule as to *onus,* which appears to have its roots in the English Statute of Monopolies, is, it is submitted, in conflict with the basic principle of our law that an agreement seriously and deliberately entered into is binding, unless the party seeking to escape from its provisions can set up some specific ground vitiating his undertaking. It is submitted that it is no part of Roman-Dutch law that all restraints of trade are per se or even *prima facie* contrary to public policy. The truer view would seem to be that a person who has voluntarily submitted to a restraint is bound by his undertaking unless he can show that in all the circumstances the particular restraint is contrary to public policy. Because of the lack of a critical examination of the historic origins of the English doctrine that all restraints of trade are *prima facie* unenforceable, the corollary that the party seeking to enforce a restraint must establish that it is not contrary to public policy, has been accepted without question by our courts."

LEON J picked up Mr Suzman's contention and used it to effect in an obiter dictum in *SA Wire Co (Pty) Ltd v Durban Wire & Plastics (Pty) Ltd* 1968 (2) SA 777(D) at 787G-H where he said:

"I am not, however, by any means certain that the South African cases have been right in adopting the English view relating to onus. If it is correct to say that the doctrine of restraint of trade is applied in our law because of public policy then it becomes relevant to enquire what that public policy is. What I think is contrary to public policy is a contract in unreasonable restraint of trade."

It would serve no useful purpose were I to recite the development of the South African law on the restraint of trade. For present purposes it suffices to refer to Dr Ellison Kahn's article "The Rules Relating to Contracts in Restraint of Trade - Whence and Whither?" published in (1968) 85 SALJ 391, in order to recapitulate the history of that development. The learned author ended his review expressing the hope that the South African Appellate Division would soon find the occasion to go fully into the law of restraints. In some way the learned author's hope has been fulfilled.

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I think what is required in Zimbabwe is the development of the law of restraint which accords with modern times and which is more appropriate to the circumstances now prevailing in the country. That development may result in a mixture of that which is good in both the English law and the Roman-Dutch law. What is important is the formulation of principles, the use of which will result in the doing of justice to the parties engaged in a dispute. It may be that justice would be readily done were the courts of Zimbabwe to blend the rules of English law and Roman-Dutch law. See the full discussion at (1979) 96 SALJ 35 et seq, by Carmen Nathan.

Roffey v Catterall, Edwards & Goudre (Pty) Ltd supra is a case decided by the full Natal Bench which put into effect the views expressed by LEON J in *SA Wire Co (Pty) Ltd* DIDCOTT J carefully weighed the English law approach and the Roman-Dutch law approach. After discussing the cornerstone of the English law of restraints, that is public policy, the learned judge said at 504-505E:

"One should not however overlook the impulse behind the English policy. It was the ideal that everyone should have the maximum freedom to trade or to earn his livelihood when, where and how he pleased, which was taken seriously enough to be thought worthy of protection in the public interest. The ideal surely remains one today and has a place in our ethos too. Few countries, if any, seem on the other hand to treat it nowadays with the reverence it once enjoyed. In an era when controls and restrictive practices of all sorts abound, when many of them have

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statutory force, and when *laissez-faire* has acquired a nostalgic ring, the liberty to trade and work as one likes has been sharply eroded, in South Africa as elsewhere, by the prior demands of public policy in a modern industrial society, or what are reckoned to be such. This may be regrettable or not, according to one's viewpoint, but it is a fact of life which cannot be ignored once public policy is under scrutiny.

There is however another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the ideal of freedom of trade. It is the sanctity of contracts."

Jessel MR made the point in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 by saying at p 465:

'(1) If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall

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have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider-that you are not lightly to interfere with this freedom of contract.'

The 'inviolability' of contracts was described by LINDLEY MR in *E Underwood and Son Ltd v Barker* (1899) I CH 300 (CA) at p 305, as essential to trade and commerce. He continued thus, referring to the covenantor as the defendant:

'[T]o allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country. Of course I am not speaking of contracts induced by fraud, duress or undue influence, or impeachable on any other recognised ground of invalidity. Omitting all such cases, the public policy which allows a person who obtains employment, on certain terms understood and agreed to by him, to repudiate his contract conflicts with, and must to avail the defendant prevail for some sufficient reason over, the manifest public policy which as a rule holds him to his bargain." (See E *Underwood and Son Ltd v Barber* (1899) 1 CH 300 (CA) at 305 and *Roffey v Catterall, Edwards & Goudre (Pty) Ltd supra* at 505A).

In *Pest Control (Central Africa) Ltd v Martin and Anor* 1955 (3) 609 (SR) TREGOLD CJ added (at p 614 C-D):

> 'The rule against covenants in restraint of trade was built up at a time when freedom of trade was almost a fetish. I feel that the trend of modern decisions is to recognise that, whilst it is against public policy that trade should be fettered, it is also against public policy that contractual obligations solemnly undertaken should be avoided without strong and cogent reason'.

The collision between these two ideas, freedom of trade and the sanctity of contracts, does not dictate the unqualified acceptance of one to the total exclusion of the other. For all its commitment to freedom of trade, English law does not disregard the sanctity of contracts, as is obvious form the judgments in England from which I have quoted. It needs that notion making allowance for restraints proved to be reasonable inter partes. Not even they would be upheld if freedom of trade were all that mattered. South African law, on the other hand, would not repudiate freedom of trade by recognising covenants which restricted it unless their unreasonableness was established. If it had no respect at all for the

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concept, and the sanctity of contracts was its sole concern, it would enforce unreasonable restraints as well. Whether covenants are *prima facie* valid or *prima facie* void in any system does, however, depend upon which

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> idea takes precedence over the other in the eyes of the law and is used as its basic working assumption. What is therefore required is the choice of the one by which to set the greater store."

In my view it is not only a question of selecting the ideas which takes precedence over the other in the eyes of the law. What is important is the bringing together of those concepts of the law, English or Roman - Dutch, because when put together they bring about a result which is just and fair. A complete abandonment of all English rules on this subject may in some cases result in injustice. While Roman-Dutch law has no aversion to contracts in restraint of trade, it, like English law, refuses to enforce covenants in restraint of trade which are contrary to public policy. See *Roffey v Catterall, Edwards and Goudre (Pty) Ltd supra* at 502 E-F. I agree with DIDCOTT J that the collision between freedom of trade and the sanctity of contracts "does not dictate the unqualified acceptance of one to the total exclusion of the other". See *Poolquip Industries v Griffin & Anor* 1978 (4) SA 353 (WLD) at 359H; *Stewart Wrightson (Pty) Ltd & Anor v Minnitt* 1979 (3) SA 399 (C) at 405 E-H; and *Madoo (Pty) Ltd v Wallace* 197 (2) SA 957 (T), cases which also endorse the approach on the question of onus laid down by DIDCOTT J in *Roffey v Catterall, Edwards and Goudre (Pty) Ltd.*

The approach to the question of the onus of proof, the main contention in this appeal, has been based on the view that a restrictive provision should be judged on the criterion of whether it conflicts with public policy. And what is important is that now the person who alleges that the restraint is unreasonable must prove that its enforcement would prejudice the public interest. And reasonableness is now to be looked at in the light of the circumstances prevailing at the time the court is asked to enforce the restraint. See Magna Alloys at 898D.

It is necessary to consider, before following the submissions of counsel, the Magna Alloys case supra. In that case the appellant company employed the respondent as a commission agent to sell its products, mainly welding materials, and to find customers. There was a restraint provision in the contract of employment. The appellant company did not provide the respondent with all products he required because there was a shortage of these products. The respondent left the company and was employed by another in breach of the restraint provision. At the end of the period of the

restraint the respondent sued the appellant company alleging that he had not been paid his commission. The appellant company counterclaimed. The court a quo dismissed the counterclaim. The appellant company appealed.

That the judgment is momentous appears from the matters considered which are summarised in the English headnote as follows:

> "The approach followed in many South African judgments, that a covenant in restraint of trade is prima facie invalid or unenforceable stems from English law and not our common law, which contains no rule to that effect. The position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be unenforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it

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> be enforced. Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the onus of proving that the enforcement of the condition would be contary to public policy. The Court would have to have regard to the circumstances obtaining at the time when it is asked to enforce the restriction. In addition, the Court would not be limited to a finding in regard to the agreement as a whole, but would be entitled to declare the agreement partially enforceable or unenforceable."

See also the following cases in which the conclusions summarised in the headnote were discussed: *Highlands Park Football Club v Viljoen & Anor* 1978 (3) SA 191 (W) at 194B-200A; *National Chemsearch (SA) (Pty) Ltd v Borrowman & Anor supra* at 1099H-1100A; *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (CPD) at 312B-313C.

Mr *Robinson* relies for his contention on the authority of many cases decided by the courts of this country. He cites: *Spa Food Products Ltd & Ors* at 283 and 717G respectively; *HE Sergay Estate Agencies (Pvt) Ltd* at 2 D-F; *Rhodesian Milling Co (Pvt) Ltd* at 153A and 441A respectively; *Commercial and Industrial Holdings (Pvt) Ltd* at 245 D-G; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* at 688; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* at 7051, 721C and 724B; and Christie The Law of Contract at 357 where the learned author says:

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> "It is equally surprising that the Natal Full Bench should have taken up the theme of those two cases and decided, in *Roffey v Catterall, Edwards and Goudre (Pty) Ltd* 1977 (4) SA 494 (N) that the onus was on the promissor to prove reasonableness. This bold decision involved expressing the view that Van de Pol had not decided the point ..."

The Appellate Division has given its decision in favour of Roffey's case supra. The passage from the speech of Lord MacNaughten in *Nordenfelt v Maxim Nordenfelt* cited in Magna Alloys at 887 B-C, already referred to above, encapsulates English law, the linchpin of the law being, in as far as onus is concerned, that the burden of proof falls on him who wants to enforce the restraint provision. That view has now been rejected by the South African Appellate Division which has accepted, on the question of onus, the view expressed in *Roffey v Catterall,* Edwards and Goudre.

The effect of Magna Alloys is that the covenantee can now rely on the enforceability of the restraint provision without bearing the onus. And if the covenantor wishes to challenge the agreement, he bears the onus of proving that it would be against public policy. The validity of a restrictive provision in a contract is to be determined by whether it is in conflict with public policy. Because of this, the party to the agreement who alleges that he is not bound by the restraint bears the onus of proving that the enforcement of the restraint provision would be against the public interest. See Professor Louise Tager's article in Annual Survey of South African Law 1984 at 128; Businessman's Law 1985 Vol 14 No 4 at 109. In Magna Alloys at 893 Rabie CJ says:

> "...when a party to an agreement alleges that he is not bound by a restriction which he has allowed to be placed upon him, he will bear the burden of proving that the enforcement of the restriction will damage the public interest-just as a party to any other sort of agreement, who alleges he is not bound thereby, must normally offer proof of one ground or another which can release him from his obligation under the agreement.

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> Acceptance of the view that the enforceability of a provision restricting someone's freedom of trade should be judged according to whether the restriction damages the public interest entails certain consequences. One such consequence is that, when a party to an agreement alleges that he is not bound by a restriction which he has allowed to be placed upon him, he will bear the burden of proving that the enforcement of the restriction will damage the public interest-just as a party to any other sort of agreement, who alleges he is not bound thereby, must normally offer proof of one ground or another which can release him from his obligation under the agreement." (Translation)

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I am more that persuaded that it makes good common sense to place the onus of proof on the party that wished to renege on the contract. Why should the onus not be on the person opposing the enforcement of the restraint? It is he who is challenging the reasonableness of the restraint. He must show why the restraint provision is unenforceable. It is he who has suffered from the continued application of the restriction. He should tell the court why he says the restraint is unreasonable. I can see no good reason why it should not fall upon him to prove what he alleges is against his and/or the public interest.

In the instant case, right at the signing of the agreement, the appellant agreed that the restraint was-

> "...reasonable in the interests of the partners and goes no further than is necessary for the protection of the business of the partnership. Moreover, it is agreed that it is not inconsistent with the interests of the public, and is an agreement concluded between equal contacting parties."

The appellant has not cast any doubt on the sentiments expressed in the restraint provision. He still believes that the restraint provision in this respect was reasonable. He signed the agreement because he believed that the restraint provision was reasonable. Why has he changed? He must tell the court the reason why he now says the restraint is against his interests. If he does not the court must accept that the provision is *prima facie* reasonable. The appellant's averment that he was influenced by a prior agreement whose restriction as to time was only two years cannot be accepted. See *Roffey v Catterall,* Edwards and Goudre at 500 D-F; *Stewart Wrightson (Pty) Ltd and Anor v Minnitt* at 404 D-G.

I cannot see why a person who agreed to the restraint with both his eyes open should be allowed to aver that the restraint was unreasonable without showing the court the circumstances that make it unreasonable or unfair to him. The question of the enforcement of a covenant restricting the appellant's freedom of carrying on a similar trade to the one he was used to-that is his freedom of trade-ought to be judged like all other agreements according to the rules which apply to agreements which are against the public interest. See Magna Alloys at 892E-893G. There is no doubt in my mind that the reasoning in the passage indicated above correctly presents the law as it should be. As Rabie CJ states at 893A-B:

> "Acceptance of the view that the enforceability of a provision restricting someone's freedom of trade should be judged according to whether the

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> restriction damages the public interest entails certain consequences. One such consequence is that, when a party to an agreement alleges that he is not bound by a restriction which he has allowed to be placed upon him, he will bear the burden of proving that the enforcement of the restriction will damage the public interest-just as a party to any other sort of agreement, who alleges he is not bound thereby, must normally offer proof of one ground or another which can release him from his obligation under the agreement." (Translation)

That that is the general principle running throughout our law can be seen from a number of judgments mentioned above by the learned Chief Justice. In *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (AD) at 711E-G Potgieter AJA, as he then was, said:

> "The general principle governing the determination of the incidence of the *onus* is the one stated in the *Corpus Iuris semper necessitas probandi incumbit illi qui agit* (D 22.3.21). In other words he who seeks a remedy must prove the grounds therefore. There is, however, also another rule, namely, *ei incumbit probatio qui dicit non qui negat* (D 22.3.2.) That is to say the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove (cf *Kriegler v Minitzer and Anor* 1949 (4) SA 821 (AD) at 828). Together with these two rules must be read the following principle, namely: *agere etiam is videtur, qui exceptione utitur nam reus in exceptione actor est* (D 44.1.1.) This principle is stated thus by DAVIS AJA in *Pillay v Krishna and Anor* 1946 AD 946 at 952:
>
> > 'Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded, quoad that defence, as being the claimant; for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.'"

See *Pillay v Krishna & Anor* 1946 AD 946 at 951-952. The learned authors Hoffmann and Zeffertt *South African Law of Evidence* 3 ed at 397 say:

> "...the *onus* rests on the party who avers negligence; who impeaches the validity of a will, who claims that a person is mentally defective; that a court has no jurisdiction; that he has performed his obligations under a contract, and that novation has taken place."

In applying these principles I see no contradiction between them and what Wigmore on Evidence 3 ed says in para 2486 *in fine* that all rules dealing with the subject of proof rest "for their ultimate basis upon broad and undefined reasons of experience and fairness." See *Pillay v Krishna supra* at 954. The

experience and fairness are to be applied within the set of principles outlined above. It is within these principles that experience and fairness interplay in the course of doing justice to the parties.

The appellant in this case said rather ineptly, in his replying affidavit "...I agreed to a restraint on the same basis as I had obtained a restraint from Mr St Clair Monro Hone. At no time did I agree to a three year period of restraint (which is unreasonable in time and distance), and at all material times believed the period was two years". The agreement before him was not that he agreed to with Mr St Clair Monro Hone. He had one before his very eyes. His new partner was Mr Davidson and not Mr St Clair Monro Hone. The appellant does not say he was deceived by the respondent.

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I have therefore come to the view that the onus of proof rests with the appellant because he avers that the restraint provision is against the public interest and is therefore unreasonable or unenforceable. In coming to this conclusion I have been guided by both common sense and logic and the weight of persuasive authority in another Roman-Dutch common law jurisdiction.

In coming to this decision, I have taken cognisance of the fact that this Court, while it treats its past decisions and those of its predecessors as normally binding, will depart from such decisions, especially in the light of s 24 of the Supreme Court of Zimbabwe Act No. 28 of 1981, and Practice Direction No. 2 1981 ZLR 417 in which Fieldsend CJ said:

> "...in a changing society, it is essential for the Court to have some flexibility so as not to restrict unduly its power to develop the law in proper cases to meet changing conditions and injustice in particular cases."

I think that this case is one that requires this Court to depart form previous decisions in order to do justice to the parties.

Accordingly the appeal is dismissed with costs.

Gubbay JA: I agree.

McNally JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

DW Aitken & Co, respondent's legal practitioners

S v DAVY 1988 (1) ZLR 386 (SC)

Court **Supreme Court, Bulawayo**

Gubbay JA, Manyarara JA & Korsah JA

Criminal appeal

17 May & 17 June 1988

Flynote

Appeals - record of proceedings in lower court - rectification of - procedure to be adopted - courts-criminal trials - record of proceedings in - should be complete, clear and accurate.

Criminal law - mens rea - mistake - ignorance of law - effect on liability.

Headnote

Judicial officers who preside at trials in which the facility of a mechanical recorder or shorthand writer is not available have a duty to write down completely, clearly and accurately everything that is said and happens before them which can be of any relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or

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confusing or does not give the real sense of what the witness says. They must remove obscurities of language or meaning whenever possible by asking questions. A failure to comply with this essential function, where the deficiencies in the transcript are shown to be substantial and material, will constitute a gross irregularity necessitating the quashing of the conviction.

On appeal, the appeal court is to have regard to what appears on the record. If an appellant from a decision of a magistrates court is not satisfied with the record as it stands, his first recourse is to follow the procedure laid down in Order III Rule 6 of the Magistrates Court (Criminal) Rules 1966 (RGN 871/1966) and apply to the court to correct the record. If that procedure is not open to the appellant-because, for example, the record was not available before the expiry of the prescribed period within which to make such an application and the Rules do not allow a concurrent application to the magistrate for an extension of time-he must bring

the proceedings on review before the High Court. He must apply expiditiously on notice of motion for rectification, serving the notice, together with an affidavit setting out the omitted matters he seeks to have incorporated, upon the presiding magistrate and the Attorney-General, giving them ample opportunity to answer the allegations. If the High Court grans the application, the Supreme Court will be in a position to hear the appeal on the record as amended. The Supreme Court itself will not ordinarily entertain applications for the amendment of a trial record. It did so in this case only because there was no dispute on the matter between the parties. The grant of relief by the Supreme Court in this case should not be taken as a precedent justifying the granting of applications for amendments of the record by the Supreme Court.

If an accused person relies for his defence on a mistake of fact, it is incumbent on him to prove not only that the mistake was made bona fide but also that it was reasonable. This is the effect of the decision in R v Stainer 1956 R & N 199; 1956 (3) SA 498 (FSC), which has been repeatedly followed and applied, though reservations have been expressed about it. It may be that even a case so firmly established should be re-examined. If the mistake is one of law, the rule that ignorance or mistake of law is no excuse, which judicial officers have applied for so long in Zimbabwe, remains valid. The rule is subject to the exception that where the accused has acted on incorrect advice as to the law, given by a Government official who is primarily resposible for the administration of the particular statute to which the matter relates, his ensuing mistake of law is a good defence.

Cases cited:

Joseph Baynes Ltd v Minister of Justice 1926 TPD 390

S v *Moikabi* 1964 (1) SA 228 (O)

S v *Booi* 1972 (4) SA 68 (NC)

Mrazuli v Attorney-General & Anor 1973 (4) SA 134 (E)

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S v *Siwela* 1981 (2) SA 56 (T)

S v *Maruziva* S-51-84 (unreported)

R v *Parmanand* 1954 (3) SA 833 (AD)

R v *Bates & Reidy* 1902 TS 199

S v *Sergeant Tom & Ors* 1981 ZLR 547 (SC)

S v *Jenkins* 1985 (2) ZLR 193 (SC)

R v *Sikumba* 1955 (3) SA 125 (E)

S v *K* 1974 (3) SA 857 (C)

R v *Stainer supra*

S v *Zemura* 1973 (2) RLR 357 (AD); 1974 (1) SA 584 (RAD)

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S v *Rhotan* (Pvt) Ltd 1982 (2) ZLR 137

S v *Lanchashire Steel* (Pvt) Ltd 1984 (1) ZLR 89 (SC)

S v *Stouyannides* 1984 (1) ZLR 144 (SC)

R v *Breingan* 1966 RLR 259 (AD); 1966 (3) SA 410

S v *Munks* 1972 (1) RLR 129 (AD); 1972 (2) SA 651 (RAD)

S v *de Blom* 1977 (3) SA 513 (A)

S v *Appleton* 1982 (2) RLR 110 (SC); 1982 (4) SA 829 (ZS)

S v *Fisher* 1970 (1) RLR 179 (AD); 1970 (3) SA 446 (RAD)

S v *Johnson* 1977 (2) RLR 3 (AD); 1977 (4) SA 116 (RAD)

S v *Lorenz* AD-47-81 (unreported)

S v *Banet* 1973 (1) RLR 335 (AD); 1973 (4) SA 430 (RAD)

S v *Bledig & Anor* 1974 (1) RLR 100 (AD); 1974 (2) SA 613 (RAD)

M J Gillespie for the appellant

K A Esat for the respondent

Judgment

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Gubbay JA: The appellant, the owner of Riverside Ranch in the Matetsi Safari Area, Hwange, was jointly charged with one Keith Vincent, a professional hunter in his employ, with a contravention of s 2(1) of the Parks and Wild Life (Restriction on Hunting) (No. 13) Notice 1985 (SI 321 of 1985), it being alleged that on 23 August 1986 they did both or each or one or other of them hunt and kill one male elephant in a restricted area, being State Land Option Area, Hwange, without a permit to do so.

The trial took place in the Magistrate's Court, Hwange, with the appellant and Vincent being represented by a legal practitioner. Both denied the charge. Vincent was acquitted upon an acceptance of his assertion that he genuinely believed that the appellant had exclusive hunting rights on the Option Area and that he was merely carrying out instructions when, accompanying a foreign client on a hunt, he permitted the latter to shoot the elephant. The appellant, however, was convicted and sentenced to a fine of $200 or, in default of payment, fifty days' imprisonment with labour. In addition, payment of compensation to the appropriate authority in the sum of $3 500 was ordered.

The appellant was aggrieved by his conviction and so appeals to this Court on the ground that, although not authorised by the strict terms of his permit to hunt the elephant on the Option Area, the trial court erred in not holding that by virtue of a mistake he lacked the requisite *mens rea* to commit the offence.

1988 (1) ZLR p389

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The evidence adduced before the trial magistrate was not recorded by mechanical means. The principal and critical witness for the State was the Matetsi game warden, Kenneth Worsley. He was on the stand for an hour-and-a-half, yet his testimony has been condensed into fifty-one lines, eight of which contain the single word "Yes". It was taken down in a far too summarised and terse form with obvious omissions and limitations, making it difficult to understand. A cursory reading reveals its inherent inadequacy. The appellant's evidence also discloses two obvious errors. It does not set out, however, a comprehensible account of the nature of his defence.

It was these deficiencies in the record that led to a notice of motion being instituted in this Court, addressed to and served upon both the presiding magistrate and the Attorney-General, seeking the rectification of the record in several respects. The affidavit of the appellant's legal practitioner, one Hugh Bisset, and that of the appellant himself, are in support thereof. The first amendment asked for is that there be added to the end of the cross-examintion of Worsley the following narrative:

> "There was a practice of issuing permits in respect of blocks of land and this practice had been followed in respect of, among other landholders, the Erasmus brothers, Mr Cumming and the first accused. In the case of Mr Cumming the property referred to in the permits was 'Frances Farm' and the permits were intended and did apply to the block of contiguous properties commonly known as 'Frances Farm' though none of these properties has that name. In respect of the first accused, his block of properties near Victoria Falls, one of which is called 'Ursula' were similarly treated and permits were issued which specified 'Ursula' but applied to the whole block. I admit that I confirmed this practice in reply to a question by one of the Erasmus brothers at an ICA meeting in May, 1986 although I did not mean by this that elephants were to be treated similarly to other game. I considered, as did my Department, that elephant permits were supplementary to permits for other game and I believe that and holders

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and hunters knew this, though there is no difference in form between elephant and other permits.

As far as I was concerned the first accused had no right to hunt an Option Area because there was no formal lease between him and Government at the material time, and because Mr Rabinovitch held a permit to hunt there. I know that Mr Rabinovitch had applied unsuccessfully for an order against my Ministry and the Ministry of Lands preventing Government from allowing hunting rights or a lease on the property to

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the first accused but I still considered that the first accused had no right to hunt there.

I did not intend, when issuing the disputed permit to the first accused, to include any property other than Riverside Ranch in that permit. The first accused admitted to me that the permit did not mention any property other than Riverside Ranch."

The second amendment is for the deletion of the sentence: "It was said elephant permits were supplementary permits and not a blanket permit" in the appellant's evidence-in-chief and the substitution therefor of:

"I have heard Mr Worsley's evidence that elephant permits are supple-mentary to those in respect of other game. I did not know this to be so and I believed that they were the same as other permits and therefore covered blocks of land, not individual properties."

And the third amendment, also in the appellant's evidence, seeks the substitution of "only because the camp is based at Riverside" for "only because the cap is capped at Riverside".

Neither the presiding magistrate, the public prosecutor at the trial nor anyone else, considered it necessary to file affidavits in opposition to the relief claimed. They had ample time in which to do so if that were the intention, but they deliberately chose not to place any information before this Court.

In consequence, when Mr *Gillespie* moved the preliminary application to the appeal, we granted an order rectifying the record in the respects sought. We did so for the reason that the failure to reply to the notice of motion was to be taken as a tacit admission on the part of the magistrate and the Attorney- General that the transcript was at fault and the amendments requested necessary to correct it, and that the appeal could only be properly argued on the record as incorporating the amendments. Moreover, we were abundantly satisfied that such amendments were all consistent with the evidence, particularly the documentary exhibits, already on record.

I hasten to add, however, that if the allegations in the affidavits had been contested we would have declined to resolve the dispute on the ground that it was procedurally incorrect to bring the proceedings of a magistrate's court on review before the Supreme Court, for that is the effect of an application for rectification. True though it is that s 23 of the Supreme Court of

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Zimbabwe Act 1981 gives the Supreme Court the same power to review the proceedings of inferior courts as is vested in the High Court, the proviso to the section makes it clear that the

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existence of such power is not to be taken as conferring upon any person the right to institute any such review **in the** first instance before the Supreme Court.

Order III Rule 6 of the Magistrates Court (Criminal) Rules 1966 lays down

the procedure to be followed in the event of either the prosecutor or the

accused person wishing to obtain from the magistrate rectification of the

record of the proceedings over which he presided. The Rule reads:

> " The prosecutor or the accused may, not later than fourteen days after the conclusion of the trial or, where the proceedings have been taken down in shorthand or by mechanical means, within fourteen days after the transcription thereof has been completed, apply in writing to the court to correct any error in the record or the certified transcript thereof and the court may correct any such error."

It seems likely (although it has not been said) that-by the date the appellant obtained a certified copy of the longhand transcript the prescribed period of fourteen days had long expired. And unlike Order 33 Rule 2(1) of the Magistrates Court(Civil) Rules 1980, there is no provision in the Magistrates Court (Criminal) Rules which allows of a concurrent application to the presiding magistrate for an extension of time.

Upon the fair assumption then that recourse to the above procedure as not open to the appellant, he ought to have invoked the jurisdiction of the High Court in terms of s 27 of the High Court of Zimbabwe Act 1981 and Order 33 Rule 256 of the Rules of the High Court and brought the proceedings before the High Court on review, as the power to rectify a record is exercisable by the High Court. *See Joseph Baynes Ltd v Minister of Justice* 1926 TPD 390 at 397; S v *Moilrabi* 1964 (1) SA 228 (O); *S v Boei* 1972 (4) SA 68 (NC) at 69H; *Mrazuli v Attorney-General & Anor* 1973 (4) SA 134 (E)***;*** *S v Siwela* 1981 (2) SA 56 (T) at 58G-59C;Sv *Maruziva* S-51-84 (not reported).

The application should have been made as soon as the certified copy of the record had been received (it was received by the Registrar of this Court on 5 June 1987). The longer the delay involved, the more cliff cult it is likely to be for a magistrate and prosecutor to be able to retain an independent recollection of the evidence given at a trial.

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It is obvious to me that in approaching this Court the appellant failed to appreciate the difference between the appeal procedure and the review procedure. That difference was emphasised by GREENBERG JA in R v *Parmanand* 1954 (3) SA 833 (AD) at 838B-C in these words:

> "There is a well-recognised distinction between an appeal against a decision in a magistrate's court and a review of the proceedings in such a court . . .; so far as it is relevant in the present case, apart from the difference in the form, in an appeal the Court ordinarily has regard only to the record of the proceedings in the inferior court, whereas in review proceedings other information can be placed before the Court."

See also R *v Bates & Reidy* 1902 TS 199 at 200; Sv *Sergeant Tom & Ors* 1981 ZLR 547 (SC)

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at 548C-H.

When considering an appeal, the appeal court is to have regard to what appears on the record. If the appellant is not satisfied with the record as it stands, and is unable through no fault of his to obtain its rectification pursuant to the procedure specified in Order III Rule 6 of the Magistrates Court (Criminal) Rules, he must apply expeditiously on notice of motion for rectification. He must serve the notice, together with an affidavit setting out the omitted matters he seeks to have incorporated upon the presiding magistrate and upon the Atorney- General, giving them ample opportunity to answer the allegations. On the day mentioned in the notice the High Court will rule on the application. If it is granted, this Court will then be in a position to hear the appeal on the record as amended.

The judgment of BECK JA in S v *Jenkins* 1985 (2) ZLR 193 (SC) is not to be regarded as sanctioning the procedure adopted in this matter. In that case the legal practitioner who appeared for Jenkins at the trial filed an affidavit on appeal in support of a substantive application to set aside the conviction and sentence on two grounds: first, that the record which was kept by the magistrate in manuscript failed in some respects to reflect evidence that was given and in others incorrectly reflected evidence that was given; and, secondly, on account of certain irregularities in the conduct of the proceedings, the principal of which was the magistrate's action in adjourning the trial during the cross-examination of a witness in order to consult with him in private. No attempt was made by the presiding magistrate or the public prosecutor to answer the detailed averments contained in the affidavit of the legal practitioner, and counsel who appeared for the State on appeal felt constrained to concede that he was unable to support the conviction in the

circumstances which had been revealed. The situation was therefore some what analagous to the present in that albeit the incorrect procedure had been I adopted. in view of the failure to contest the allegations and the recognition I on the part of State counsel that the irregularity in interviewing the witness I was serious enough to vitiate the trial, it would have been pointless to have l insisted that the relief be sought by way of review to the High Court. Jenkins, like the present appellant, was thus fortunate that the matters of which he I complained were not placed in dispute, for if they had been I have little doubt that this Court, in the light of what was said in S v *Maruziva supra* at p 7 of the cyclostyled copy of the judgment, would have held that they were not the proper subject of an appeal.

Before concluding on this aspect, I wish to sound a note of warning to judicial officers who find themselves presiding at a trial in which the facility of a mechanical recorder is not available. It is their duty to write down completely, clearly and accurately, everything that is said and happens before them which can be of any relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says. They must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done. See *R* v *Sikumba* 1955 (3) SA 125 (E) at 128E-F; *S* v *K*

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1974 (3) SA 857 (C) at 858H. A failure to comply with this essential function, where the deficiencies in the transcript are shown to be substantial and material, will constitute a gross irregularity necessitating the quashing of the conviction.

Finally, I would reiterate that the grant of the relief in this case must not be taken as a precedent justifying the granting of applications for amendments of the record by this Court. The application was allowed because it would have served no purpose to have insisted that the appellant follow the correct procedure before the appeal could be heard.

What falls now to be considered is whether, having regard to the amendments made to the record, the State proved the appellant's guilt. The issue was straightforward. It was alleged by the State and admitted by the defence that on 23 August 1986 an elephant had been shot, vicariously by the appellant, on the Option Area. It was also common cause that the permit, which had been issued to the appellant for the hunting of one elephant of either sex, was restricted to the property known as Riverside Ranch. The appellant founded

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his defence on a belief and understanding that, although the permit named the property on which the hunting of the elephant was authorised as Riverside Ranch, it was to be read as extending to all the land controlled by him which was contiguous to Riverside Ranch.

The facts and circumstances relevant to the shooting of the elephant were these:

1. Besides being the owner of Riverside Ranch, the appellant was the lessee of an adjoining farm called Janjinga. On 24 March 1986 he was notified in writing by the Secretary of Lands, Agriculture and Rural Resettlement that, subject to the approval of the Ministry of Mines, his application to lease the block of State land contiguous to Riverside Ranch, and known as State Option Area, for the purpose of grazing cattle and hunting game, had been granted. On 9 July 1986 he was informed that the Ministry of Mines had no objection to his leasing the Option Area and that a formal agreement was being prepared for his signature. On 22 July 1986 the Secretary wrote to Mr Gavin Rabinovitch, informing him that his hunting rights over the Option Area had been withdrawn and that the land had been leased to the appellant. A postscriptum to the Director of National Parks and Wild Life Management instructed that all hunting rights in respect of the Option Area were to be granted only to the appellant. The correspondence indicates that Worsley was wrong in his belief that on 23 August 1986 Rabinovitch still retained hunting rights over the Option Area. He did not. The appellant had been awarded the lease and was in effective control of the Option Area, but the grant of hunting rights to him was subject to the existing prohibition upon the hunting of all animals, other than problem animals, as enacted in by the Parks and Wild Life (Restriction on Hunting) (No. 13) Notice 1985.

2. On 14 August 1986 the appellant was issued with a permit, signed by Worsley on behalf of the Director of National Parks and Wild Life Management, to hunt one elephant on Riverside Ranch from 15 October 1986 to 30 October 1986. The month "October" was written in error for "August". This was admitted to by Worsley under cross-examination,

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and the mistake is apparent from what is contained in the State outline.

3. Subsequent to the issue of the permit, but prior to 23 August 1986, the appellant verbally confirmed with an official of the Ministry of Lands, Agriculture and Rural Resettlement that general hunting rights in respect of the Option Area had been granted to him. He then informed

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Rabinovitch that he proposed to hunt an elephant on the Option Area.

4. At an Intensive Conservation Area meeting held during May 1986 and attended by landowners in the Matetsi Area including the appellant, Worsley acknowledged, in answer to a query, that permits for hunting were to be taken as applying to a block of contiguous properties under the control of the individual holder, and were not necessarily limited to the specific property named in the permit. But he did not mean to convey thereby that elephants were to be treated similarly to other animals. He testified that permits to hunt elephant were "supplementary" to permits for other animals and that landowners were aware of this distinction, though there was no evident difference in the form between a permit to hunt elephant and a permit to hunt other species.

5. The appellant is also the owner of a block of properties near Victoria Falls, one of which is called "Ursula". In the past permits to hunt animals on Ursula have always been regarded as authority to hunt upon the whole block. The appellant was not aware that permits to hunt elephant were "supplementary" to those relating to other animals.

Mr *Gillespie* submitted, correctly in my opinion, that the offence with which the appellant was charged is one of those "intermediate group" of offences, in which the accused person can escape liability by showing on a balance of probabilities that he did not have the mental element requisite for the offence. In other words, it is for him to prove the absence of *mens rea* which is otherwise to be inferred once the State proves the commission by him of the prohibited act constituting the offence. See *R v Stainer* 1956 R & N 199 (FSC) at 203B-C; *S v Zemura* 1973 (2) RLR 357 (AD) at 364F-G and 365G.

The next stage of the inquiry is whether or not the appellant discharged the evidential *onus* of showing that he had no *mens rea*. That he genuinely, though mistakenly, believed that he had the legal right to hunt one elephant on the Option Area seems to me to have been successfully established. The existence of such belief was grounded cumulatively in the acquisition by him of the general hunting rights over the Option Area, in his personal experience pertaining to the grant of permits to hunt animals (albeit not specifically elephant) on the property Ursula, and in Worsley's remarks at the ICA meeting. Moreover, it is inconceivable that the appellant would have informed Rabinovitch, a person with whom he was at the time very much at arm's length, that he intended to hunt an elephant on the Option Area, if he did not believe that he was legally entitled to do so; for the inevitability of

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Rabinovitch reporting any suspected transgression to the authorities must have been apparent to him - and that indeed is what occurred.

But the *bona fides* of the appellant's belief merely goes to show that he did not authorise the hunt of the elephant in the knowledge that that act was forbidden by law. The existence of such a subjective state of mind is thus the first requirement essential to a defence based on either mistake of fact or mistake of law, since a *mala fide* mistake is an impossibility.

If the mistake is one of fact then, as the law now stands in this country, it is incumbent upon an accused to prove the additional element of reasonableness. See *R* v *Stainer supra* at 293E-F; *S* v *Rhotan* (*Pvt*) *Ltd* 1982 (2) ZLR 137 (SC) at 139H; *S* v *Lancashire Steel (Pvt) Ltd* 1984 (1) ZLR 89 (SC); *S* v *Stouyannides* 1984 (1) ZLR 144 (SC). Although *Stainer's* case has been repeatedly followed and applied, reservations have been expressed about it. Thus in *R* v *Breingan* 1966 RLR 259 (AD) at 269A MACDONALD JA (as he then was) said:

> "...it seems to me that, so far as statutory crimes are concerned, the question whether a belief of facts which, if true, found a defence, should be honest only or, in addition, be based on reasonable grounds, must depend upon the intention of the Legislature, and it would be wrong to attempt to decide the matter by rule of thumb."

See also *S* v *Munks* 1972 (1) RLR 129 (AD) *per* LEWIS AJP (as he then was) at 135 *in fine* - 136A; 1972 (2) SA 651 at 655D-E.

It may be therefore that even a case so firmly established as *Stainer's* should be re-examined. It could be argued that its fundamental weakness is that the requirements of honesty and reasonableness have been run together. The approach seems to have been that once a court decides that the offence is one in which the *onus* is cast on the accused to prove the absence of *mens rea*, automatically he must prove both the honesty and reasonableness of his belief. But there is no general rule that when the Legislature has placed the *onus* on the accused to disprove *mens rea*, whether expressly or by necessary implication from the wording used, he must show both honesty and reasonableness. What he has to show must surely depend on what the Legislature says he must show. Honesty and reasonableness are separate requirements and if it is the intention of the law maker that the accused is to demonstrate reasonableness in addition, the statutory provision must spell it out.

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If, on the other hand, the mistake is one of law, then does an accused escape liability by showing that he genuinely believed that what he did was not an offence even if his mistake was unreasonable - an objective approach being of value only in assessing what his actual belief was? See *S* v *de Blom* 1977 (3) SA 513 (AD) at 532E-H. Or must he show that his ignorance of the fact that the law penalised his conduct was due to an honest and reasonable belief? See *S* v *Appleton* 1982 (2) ZLR 110 (SC) *per* FIELDSEND CJ at 114E-H; 1982 (4) SA 829 at 832; or finally, does the rule expressed in the maxim "*ignorantia juris neminem excusat*" still hold good, making the reasonableness of his belief that what he did was lawful relevant only to the mitigation of punishment, with *Zemura's* case *supra*, on its own particular facts, being regarded

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as a legitimate exception to that rule? See *S* v *Appleton supra per* Baron JA at 115A and BECK JA at 120H. A resolution of which of these criteria correctly expresses the law in this jurisdiction only arises, of course, if the appellant's mistake falls into the category of one of law.

It was conceded by Mr *Gillespie* that the permit issued to the appellant on 14 August 1986 neither in fact nor in law authorised him to hunt an elephant on the Option Area. It restricted such activity to the property Riverside Ranch. The appellant misconstrued its terms. He believed it allowed him to hunt one elephant on the Option Area - that he had a legal right to hunt there. His mistake, in my view, was one of law though "clothed in some vestment of fact", in the sense that his personal experience that permits which had granted the right to hunt animals on his property Ursula in practice included the right to hunt also on the contiguous properties under his control, taking in conjunction with Worsley's verbal confirmation at the ICA meeting of the existence of such practice, led him to believe that he was legally entitled to hunt the elephant on the Option Area when in actual law he was not so entitled. That defence must not be confused with the defence of a *bona fide* claim of right. Strictly speaking the latter avails only where the absence of such claim is, either expressly or by judicial construction, made an ingredient of the *mens rea* required, as with theft, robbery, malicious injury to property or trespass, where the accused knew perfectly well that theft, robbery, malicious injury to property or trespassing, constituted a crime but thought that in the particular circumstances the law entitled him to commit the act. See *S* v *Fisher* 1970 (1) RLR 179 (AD) at 180E-F; *S* v *Johnson* 1977 (2) RLR 3 (AD) at 14A-G.

Mr *Gillespie* did not urge that the very far-reaching approach to the defence of ignorance or mistake of law propounded by the South African Appellate Division in *S* v *de Blom supra* should be followed. In two previous cases *S v*

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Lorenz AD-47-81 and *S v Appleton supra* doubts were expressed about adopting the principle therein laid down that intention must include an awareness that the act is forbidden by the law; or, stated otherwise, that consciousness of wrongfulness or unlawfulness is an integral part of the *dolus* element. Thus, if the accused genuinely, albeit unreasonably, was unaware that what he was doing was prohibited by law (where the crime was not one where only negligence had to be proved) he would lack the intention to contravene the law and would not have the requisite *dolus*.

I venture to think, with respect, that the acceptance of this principle would seriously upset the balance between the conflicting objectives of social protection and justice to the individual and shift the emphasis very markedly towards the interests of the individual at the expense of those of society. The most important rule by which this essential balance is achieved and maintained is that it requires *mens rea* only as to the prohibited act, it being in general irrelevant whether the accused knew that the act is prohibited by law.

Nor should it be seen that a rejection of the *de Blom* principle necessarily involves the imposition of punishment where there was no moral culpability. Before it was propounded, while holding that an unwitting contravention of the law must, in the interests of the proper

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administration of justice, nonetheless be declared an offence, courts confronted with honest mistakes of law, in proper cases, could, and did, discharge the accused with a caution or reprimand, which sentence operates as an acquittal. So even the argument that a conviction is in itself a punishment cannot be sustained.

There is one situation in which hardship may perhaps result, and that is where a mandatory minimum sentence is prescribed. But even here hardship may be avoided. Usually the Legislature permits courts to refrain from imposing the minimum penalty where there are "special reasons in the particular case" (see, for instance, s 5(2)(b)(i) of the Firearms Act [*Chapter 308*]); and as a last resort the Executive can intervene. I do not therefore believe that the possibility of hardship in one or two cases, which in any event would be exceptional, is sufficient to justify such a drastic and radical change in the law, especially where the existing and long-standing law is seen to work satisfactorily.

Be all this as it may, I trust that these tentative criticisms will suffice to support the sentiment of FIELDSEND CJ in *S* v *Appleton supra* at 115A that:

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> "[This Court is] not prepared to make new law in this very controversial area without much fuller argument."

This brings me conveniently to the second basis upon which FIELDSEND CJ came to the conclusion that *Appleton's* appeal was to be dismissed. Having held that, for the present time at least, the *ignorantia* rule, traditionally applied in our system, was to be left undisturbed and that therefore the appellant's ignorance of the law in relation to the possession of uncertified firearms was not a defence, he proceeded to deal with the argument that a *bona fide* but unreasonable belief on the part of an accused that what he was doing was lawful constituted a defence. After distinguishing the cases of *S* v *Banet* 1973 (1) RLR 335 (AD); 1973 (4) SA 430 (RAD) and *S* v *Johnson supra* (relied upon by counsel for his submission) on the ground that they involved the defence of claim of right, the learned CHIEF JUSTICE held that only a reasonable belief that the law did not penalise the particular conduct could excuse. In support of his view he referred to a passage in the judgment of RUMPFF CJ in *de Blom's* case *supra* at 532F-G, to the effect that a person must act with the necessary circumspection to inform himself of what is required of him before embarking on a course of conduct. He then went on to find that Appleton's *bona fide* belief that he was not committing an offence by keeping in his gun cabinet a shotgun belonging to the widow of his friend and neighbour who had recently died, since the widow who entrusted it to him as entitled to possess it, was not reasonable. This was because he had made no effort to enquire whether he was entitled to have the shotgun in his custody, but had merely relied on what he thought the law allowed him to do (see at 114D-H).

With all due deference, it appears that FIELDSEND CJ read the passage cited in *de Blom* out of its context. The remarks of RUMPFF CJ referred to cases where *culpa* was the *mens rea* required. Where *dolus* was the required *mens rea* the judgment is emphatic that *bona fides* alone was necessary and that the unreasonableness of the mistake of law could only have a bearing in determining whether such mistake was *bona fide*.

I would, with respect, associate myself with what was said by BARON JA in the same case at

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199D-F:

> "(If) a mistake of law is available as a defence there is no basis as the law now stands for qualifying the defence by a requirement of reasonableness. For this reason, just as I would not be prepared without full argument to hold that ignorance of the law may be a defence, equally I

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> would not be prepared without full argument to attach a requirement of reasonableness to such a defence.
>
> However, my reservations are not based simply on the present state of the law and the lack of authority for a reasonableness test: they are based also on a belief that such a test would be very difficult to apply and to limit, and would be likely to give rise to far more problems than it would solve - if indeed it would solve any."

and with his conclusion at 120D that:

> "...it is both safer and simpler to have a universal rule, leaving questions of reasonableness to be considered for the purpose of sentence."

It necessarily follows that in my opinion the rule that ignorance or mistake of law is no excuse, which judicial officers have applied for so long in this country in conformity with both English law and the decisions of the South African courts prior to the advent of *de Blom's* case *supra* remains valid. Its strength has hardly been shaken. It is, however, subject to the exception that where the accused acted upon incorrect advice as to the law, given by a Government official who is primarily responsible for the administration of the particular statute to which the matter relates, his ensuing mistake of law is a good defence. See *S* v *Zemura supra* at 377E-G. As stressed by LEWIS AJP in *S* v *Bledig & Anor* 1974 (1) RLR 100 (AD) at 109A:

> "There is something in the nature of an estoppel present when the State prosecutes a person for certain conduct when he has been induced by advice received from a responsible representative of the State to embark on such conduct."

Clearly the exception is grounded in reasons of public policy. Where the State has misled a man into a contravention of the law, as a matter of public policy he should be entitled to an acquittal. But care must be taken not to extend the exception beyond the strict limits of *Zemura's* case, for to do so would be "extremely dangerous and would tend to frustrate the enforcement of statutory provisions". See *Bledig's* case *supra* at 108 *in fine*.

Mindful of that caution, it remains to decide whether the legitimate exception is applicable to the appellant. I revert briefly to the facts: it was not the appellant's evidence that with the sanction of the Department of National Parks and Wild Life Management he had actually hunted **an elephant** on the

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contiguous properties under the authority of a permit to hunt **animals** only on Ursula. Nor was it suggested by him that Worsley's acknowledgement at the ICA meeting related specifically to the grant of permits for the hunting of elephants. The appellant assumed that it did. Once he

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received the permit on 14 August 1986 he ought to have put on his guard, and sought clarification as to whether the description of Riverside Ranch included the Option Area. Just as he took the trouble to confirm the award to him of general hunting rights over the Option Area by asking an official in the Ministry of Lands, Agriculture and Rural Resettlement, so too he ought to have enquired from Worsley whether the permit authorised him to hunt an elephant on the Option Area. The situation therefore, was one in which the appellant made no direct approach to a Government official entrusted with the issue of permits to hunt and received no specific advice from him that he was at liberty in terms of the issued permit to hunt an elephant on the Option Area.

Accordingly, it is my view that the appellant was rightly convicted, and I would dismiss the appeal.

Manyarara JA: I agree.

Korsah JA: I agree

Webb, Low & Barry, appellant's legal practitioners

CAR RENTAL SERVICES (PVT) LTD v DIRECTOR OF CUSTOMS & EXCISE 1988 (1) ZLR 402 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

31 May & 17 June 1988

Flynote

Practice and procedure - execution - attachment of goods - goods of judgment debtor in possession of Director of Customs and Excise - not declared forfeit - attachment valid - Customs and Excise Act [Chapter 177] - s 176.

Headnote

In August 1985 one George Niamkey entered Zimbabwe in possession of articles of business equipment, which were seized by an officer of the Department of Customs and Excise, acting in terms of s 176(1) of the Customs and Excise Act [*Chapter 177*]. In October 1985, the Deputy Sheriff of the High Court served on the respondent (the Director of Customs and Excise) a writ of execution which had been issued out of the High Court by the appellant and another Judgment creditor, in whose favour judgments had been given against Niamkey. The writ directed the Sheriff to place under attachment the articles seized from Niamkey in August. Instead of exercising his powers under s 176(6) of the Act and declaring the articles forfeit, the Director applied on notice of motion for an order declaring the attachment invalid. The order was

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granted. On appeal,

Held, that as the Director had not declared the articles forfeit, they did not vest in the President under s 176(10) of the Act and ownership remained in Niamkey's hands.

Held, further, that there was no provision in the Customs and Excise Act or any other statute which protected seized property against attachment in execution.

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Held, further, that the fact that the appellant, knowing of the Director's real rights in respect of the property, had the articles attached did not destroy the validity of the attachment.

Held, further, that the power of the Director to declare the articles forfeit afforded no basis upon which to withhold attachment in execution. Forfeiture was not an inevitable consequence of seizure; the Director was empowered to release the goods from seizure. Consequently, there was no certainty that attachment would prove to be a *brutum fulmen*.

Cases cited:

Patel v *Controller of Customs & Excise* 1982 (2) ZLR 82

Liquidators Union & Rhodesia Wholesale Ltd v Brown & Co 1922 AD 549

In re *Woeke*: *Cloete* v *Colonial Government* (1832) 1 Menz 564

Mangold Bros v *Eskell* (1884) 3 SC 48

Symons v *The Messenger* 1909 TS 749

Grobbelaar v *Wilken & Ors* 1915 OPD 140

Reynders v *Rand Bank Bpk* 1978 (2) SA 630 (T)

Schoeman NO v *Aberdeen Trading Co (Pty) Ltd* 1955 (1) SA 100 (C)

de Jager v *Harris NO & The Master* 1957 (1) SA 171 (SWA)

Ex p *Saltmarsh* 1913 TPD 710

Master Compressed Yeast Co (Pty) Ltd v *Commissioner of Customs &*

Excise 1949 (4) SA 813 (A)

R v *Venter* 1907 TS 910

M J Gillespie for the appellant

J Sayce for the respondent

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Judgment

Gubbay JA: On 6 August 1985 George Niamkey entered the country at Harare Airport in possession of two Canon photocopiers and two Olivetti lift-off correction tapes for typewriters. Having reasonable grounds for believing that such articles were liable to seizure, an officer in the Department of Customs and Excise immediately effected their seizure under Notice of Seizure No.s 57761 and 57763, pursuant to s 176(1) of the Customs and Excise Act [*Chapter 177*] ("the Act").

At the foot of each Notice the following information was contained:

> "In terms of section 176(6) of the Act, the Director of Customs and Excise may -

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> (a) release these goods from seizure; or
>
> (b) declare them to be forfeited; or
>
> (c) in the case of dangerous or perishable goods, dispose of them out of hand.
>
> If you wish, you may, within three months from the date of this notice, make representations to the Director of Customs and Excise, Private Bag 7715, Causeway, for the release of the goods. Additionally or alternatively you may, within three months from the date of this notice and subject to the provisions of section 178 of the Act, institute proceedings for the recovery of the goods from the Director or for the payment of compensation in respect of any dangerous or perishable goods which have been disposed of by the Director.
>
> If the Director does not release the goods following representations made by you or if you do not institute proceedings within the period specified, any goods declared to be forfeited will become the property of the State without compensation."

Subsections 178(1) and (4) provide:

> "(1) No writ or summons shall be issued against nor a copy of any process served upon the Director or any officer for anything done by him under this Act or any other law relating to customs or excise until one month after notice in writing has been delivered to him or left at his usual place of abode by the person who intends to issue such writ, summons or process or by a legal practitioner representing that person.
>
> (4) Every such action shall, subject to the provisions of subsection (9) of section *one hundred and seventy-six,* be brought within three months after the cause thereof arose, and if the plaintiff discontinues the action or if judgment is given against him, the defendant shall receive as costs full indemnity for all expenses incurred by him in or in respect of the action and shall have such remedy for the same as any defendant has in other cases where costs are given by law."

And subsections 176(9) and (10) read:

> "(9) Subject to the provisions of section *one hundred and seventy-eight*, the person from whom the articles have been seized or the owner thereof may institute proceedings for -

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(a) the recovery of any articles which have not been released from seizure by the Director in terms of paragraph (a) of subsection (6); or

(b) the payment of compensation by the Director in respect of any articles which have been dealt with in terms of the proviso to subsection (6);

within three months of the notice being given or published in terms of subsection (8).

(10) If proceedings are not instituted in terms of subsection (9), any articles declared to be forfeited shall without compensation vest in the President and may, by direction of the Director, be sold or destroyed or appropriated to the State."

It will be observed that two periods are prescribed: first, the requirement of giving the Director one month's notice before the issue of any process against him; and second, the requirement that the action be brought within three months after the cause thereof arose.

To revert to the scenario: on 8 October 1985 the Deputy Sheriff served upon the respondent (to whom I shall refer hereafter as "the Director") a writ of execution which had been issued out of the High Court by the appellant and one other judgment creditor, in whose favours judgments in the respective amounts of $5 975,98 and $4 500 had been pronounced against Niamkey. The writ directed the Deputy Sheriff to levy execution on the articles held under seizure by the Director. They were duly placed under attachment, but were not physically removed by the Deputy Sheriff from the State warehouse or other place of security where they were being detained. Indeed it would seem that, by virtue of the provisions of s 213(3) of the Act, physical delivery to the Deputy Sheriff of the articles attached could have been lawfully refused.

By the date the attachment was made, Niamkey had not complied with the requirement of giving the Director one month's notice in writing under s 178(1) of the Act, although the three month period within which an action could be brought had not yet expired. But the failure to give notice by 6 October 1985 effectively barred him from instituting proceedings for the recovery of the articles from the Director unless, of course, the latter was prepared to waive or extend the period. See *Patel* v *Controller of Customs and Excise* 1982 (2) ZLR 82 (HC) at 87 *in fine* - 88C.

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Be this as it may, the Director did not, either the day before the attachment or afterwards, purport to exercise his powers under s 176(6) of the Act and declare the articles to be forfeited. Consequently, as there can be no question of the articles vesting in the President of Zimbabwe in terms of s 176(1) of the Act, ownership in them subsequent to both seizure and attachment remained in Niamkey's hands. See *Liquidators Union and Rhodesia Wholesale Ltd* v *Brown & Co* 1922 AD 549 at 558-559.

Against this background and the impasse to which it gave rise, the Director, almost a year after the attachment of the articles had been made, applied on notice of motion to the High Court for an order declaring the attachment invalid. The application, which was opposed by the Deputy

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Sheriff, the appellant and the other judgment creditor, succeeded with costs. The court *a quo* held in essence that it was to be assumed that the Legislature was aware of possible claims of rights to property seized under s 176(1) of the Act, and that the obvious inference was that "the Act is intended to and does nullify any such claims by anyone, rendering any claim not envisaged by the Act void *ab initio*". That judgment is now the subject of this appeal.

It was rightly conceded by Mr *Sayce*, who appeared for the Director, that although Parliament has passed laws protecting certain property against attachment in execution, there is no provision either in this Act or in any other which expressly exempts therefrom articles seized under s 176(1).

The main exemptions from attachment are to be found in s 4 of the State Liabilities Act [*Chapter 54*], which protects the property of the State from execution, attachment or process in the nature thereof, and in s 21 of the High Court of Zimbabwe Act 1981. The latter section protects from seizure in execution of any process of the High Court -

(a) the necessary beds, bedding and clothing of the person against whom execution is levied or any member of his family;

(b) the necessary furniture of such person, other than beds, and household utensils insofar as they do not exceed in value such sum as may be prescribed by the Minister of Justice, Legal and Parliamentary Affairs;

(c) stock, tools and implements necessarily used by such person in his trade and occupation insofar as they do not exceed in value the sum prescribed;

(d) any food and drink sufficient to meet the needs of such person and the members of his family for one month; and

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(e) professional books, documents and instruments necessarily used by such person in his profession insofar as they do not exceed in value the sum prescribed.

The High Court may, however, in exceptional circumstances and on such conditions as it may determine, increase by not more than double the amount prescribed in respect of (b), (c) or (e) above. Similar provisions are contained in s 26 of the Magistrates Court Act [*Chapter 18*].

Further exemptions from attachment with regard to pensions, other benefits and compensation, are to be found in s 14 of the Ministerial and Parliamentary Pensions Act [*Chapter 6*]; s 4(3) of the High Court Judges' Salaries Allowances and Pensions Act [*Chapter 15*]; s 45 of the War Pensions Act [*Chapter 99*]; s 108 of the Workers' Compensation Act [*Chapter 269*]; s 17 of the State Provident Fund Act [*Chapter 273*]; s 41 of the State Service (Disability Benefits) Act [*Chapter 274*]; s 12 of the State Service (Pensions) Act [*Chapter 275*]; s 36(i) of the Pensions and Provident Funds Act No. 20 of 1976, as read with s 38(2) of RGN 578/76; and s 29 of the

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War Victims Compensation Act No. 22 of 1980.

Three further propositions relevant to the determination of the dispute between the parties were accepted by Mr *Sayce* as correct in law. The first is that a judgment creditor may execute against bank notes and "all other kinds of moveable property". See Order 40 Rule 334 of the High Court Rules (which is merely an embodiment of the common law): In re *Woeke*: *Cloete* v *The Colonial Government* (1832) 1 Menz 564; *Mangold Bros* v *Eskell* (1884) 3 SC 48 at 49. The second is that property in the possession of a third party may be attached in execution at the instance of a judgment creditor: see *Symons* v *The Messenger* 1909 TS 749 at 752; *Grobbelaar* v *Wilken & Ors* 1915 OPD 140 at 144; Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at p 607. And the third is that a judgment creditor obtains a real right in property which is attached in execution of a judgment - a judicial mortgage or "*pignus judicale*" is created by the attachment. It gives the judgment creditor a preference on the proceeds of the sale of the property as against the other creditors of the debtor, save for those who have a prior effective security over the property and other judgment creditors who lodge writs of execution before the property is sold: see Wille's *Mortgage and Pledge* 3 ed at p 110.

The admitted fact that both the appellant and the other judgment creditor were aware when suing out the writ of attachment that, by virtue of the

GUBBAY JA

seizure, the Director had obtained a prior real right to the articles in question (see Silberberg and Schoeman *The Law of Property 2* ed at pp 38-39) led to debate as to whether the existence of such knowledge defeated the attachment in execution. Mr *Gillespie*, for the appellant, referred to *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T) and submitted that, although the decision concerned the effect of knowledge of a prior **personal** right in the property of the judgment debtor, the remarks of NESTADT J at 641G-H apply with equal force to knowledge of another person's prior **real** right. The learned judge said this:

> "...I am unpersuaded that either in principle or on authority there is any warrant for extending the rule or applying the principle, that knowledge of a prior personal right in respect of property will destroy the validity of a subsequently acquired real right in it, to the case of a judgment creditor levying execution against the property of his debtor. My conclusion is that such creditor is entitled to attach and have sold in execution the property of his debtor notwithstanding that a third party has a personal right against such debtor to the ownership or possession of such property which right arose prior to the attachment of even the judgment creditor's cause of action and of which the judgment creditor had notice when the attachment was made."

Mr *Sayce,* on the other hand, albeit with not much confidence I thought, contended that the acquisition of a prior real right in the property was such as to render any subsequent attachment invalid. I am unable to agree.

It seems clear, for instance, that salvage liens (liens for repair) and improvement liens over property, both of which are classified under the wider term "enrichment liens", create real rights and security. They afford a person who has put money or labour representing money's worth into the property of another, thereby enriching him, a defence to a vindicatory action. They entitle the holder to retain the *res* until he has received payment from the debtor. If not paid, he can obtain judgment and have the *res* attached. But he cannot prevent another creditor from

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attaching the *res* in execution of a judgment. See *Schoeman NO* v *Aberdeen Trading Co (Pty) Ltd* 1955 (1) SA 100 (C) at 104E-H; *De Jager* v *Harris NO and The Master* 1957 (1) SA 171 (SWA) at 177F. The same position holds good with regard to a bond holder where the mortgage bond over the immovable property was registered prior to its attachment. See Ex p *Saltmarsh* 1913 TPD 710; *LAWSA* Vol 17 at para 441. All that occurs is that the lien holder or bond holder have preferent claims while the judgment creditor is preferred to the unsecured creditors of the debtor. See *LAWSA op cit* at para 520.

GUBBAY JA

Approving, as I respectfully do, of the judgment in *Reynder's* case *supra* , I can see no warrant for adopting a different approach to knowledge of a prior **real** right, on the part of a judgment creditor levying attachment, to that which pertains where there is knowledge of a prior **personal** right.

In supporting the judgment of the court *a quo* Mr *Sayce* argued that it is implicit from a reading of s 176 of the Act that the law-maker could neither have intended nor envisaged that articles under seizure would be liable to attachment at the instance of a judgment creditor. Echoing the words of SCHREINER JA in *Master Compressed Yeast Co (Pty) Ltd* v *Commissioner of Customs & Excise* 1949 (4) SA 913 (AD) at 819, he said that, once seized, articles become "impressed with a liability to be lost to the owner" by virtue of the Director's power of forfeiture, and that the courts will not countenance an attachment which could prove nugatory, as would occur in the present case if the Director were to declare the articles to be forfeited.

The immediate difficulty which faces the argument is that it involves interpolating into s 176 a provision that "articles seized in terms of s 176(1) are to be exempt from attachment in execution of a judgment".

The wording of s 176 in its entirety is anything but ambiguous. Unless therefore it can be said that the clear language used, which read literally does not render an attachment impermissible, creates an absurdity:

> "...so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account ..."

(per INNES CJ in R v *Venter* 1907 TS 910 at 915), it must be given effect to. In my view, none of the criteria justifying a departure from the plain meaning of s 176 has been satisfied.

It is not for the Courts to legislate or to attempt to improve on the situation achieved by Parliament through the language it has chosen in its enactment. Effect must be given to what the Act says or permits and not to what it may be thought it ought to have said or prohibited. If there is a *casus omissus* in the Act, and if it could lead to undesirable consequences, the Court has no power to fill it. It is a matter for the Legislature.

But let me hasten to add that the strong indication, so it seems to me, is that the Legislature intentionally refrained from protecting seized articles from attachment in execution.

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GUBBAY JA

It must not be assumed, as did Mr *Sayce*, that, once the safeguards unde r paras (a) and (c) of subs 176(6c) have been met, forfeiture of the articles is the inevitable result. It is always open to the Director to utilize his power under s 176(6)(a) and:

> "either unconditionally or subject to such conditions, whether as to the payment of a fine ...or otherwise, as he may fix, order all or any of the articles to be released from seizure ..."

Thus the apparent power vested in the Director to declare the seized articles to be forfeited affords no basis upon which to withhold an attachment in execution, for the judgment creditor may be able to reach some accommodation with the Director under s 176(6)(a) of the Act. He may be able to persuade the Director to release the articles or some of them from seizure subject, for instance, to the payment of duty by himself. Furthermore, a release of the articles from seizure does not affect the owner's liability for the payment of duty in respect of them. See ss 176(1)(c) and 183(1).

I can see no justification, therefore, to deprive a judgment creditor of his right to attach in execution the seized articles, merely because the Director **may**, not must, in due course declare them to be forfeited. That is a risk the judgment creditor is prepared to take. There can be no certainty that the attachment will prove to be a *brutum fulmen*, for one cannot anticipate that the Director will exercise his power of forfeiture. Even if he were to do so, it was Mr *Gillespie's* submission that the pre-existing attachment might nonetheless give the appellant and the other judgment creditor a right to some form of compensation. I have some doubt as to whether this is so, especially as the attachment was made in the full knowledge that forfeiture might prove to be the fate of the articles seized. But is it unnecessary and indeed undesirable to decide the point and I leave it open, for that position does not obtain at the present time and may never arise.

In addition to the aforegoing, s 183(1) of the Act is of some significance, for it tends to show that the absence of a provision prohibiting an attachment in execution was not a *lapsus calami*. In terms of the subsection, where duty is payable by a person in respect of any goods, and such goods or others belonging to him happen to be in a bonded warehouse or are elsewhere in the custody of the Department, they become subject to a lien until the debt is paid:

> "...and the claims of the State shall have priority over the claims of all persons upon the said goods of whatever nature and may be enforced by

GUBBAY JA

> sale or other proceedings if the debt is not paid within three months after the date upon which it became due."

Evident as it is that Parliament was alive to the advantage of according liens and preferences to the Department, it strikes me as improbable that in a somewhat similar field it would neglect the need to protect seized articles from attachment had it intended otherwise.

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Finally, it is not to be overlooked that there are on the Statute Book, as I have demonstrated, many instances where Parliament has thought it fit to exempt both corporeal and incorporeal property from attachment in execution. It is a fair presumption to make that, in enacting this particular piece of legislation and in amending it from time to time, Parliament was aware of those of its laws which provide for such exemptions, especially the State Liabilities Act which protects from attachment the property of the State. Having dealt expressly with the issue of what property is exempt from attachment to the wide extent that it has, I simply cannot credit Parliament with an intention that there is to be read into the Act under consideration a similar restriction in respect of articles under seizure.

It is for the reasons mentioned that I find myself in respectful disagreement with the conclusion reached by the court *a quo.*

I would accordingly allow the appeal with costs and amend the order granted to read:

> "The application is dismissed with costs."

Dumbutshena CJ: I agree

Mcnally JA: I agree

Coghlan, Welsh & Guest, appellant's legal practitioners

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

S v BHAIWA 1988 (1) ZLR 412 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Korsah JA

Criminal appeal

23 May & 20 June 1988

Flynote

Criminal law - attempted murder - intent - whether constructive intent sufficient.

Criminal procedure - outline of State case - impropriety of leaving damning statements in outline when prosecutor does not intend to call evidence of witnesses in question.

Headnote

It is improper and highly prejudicial to an accused person for the prosecutor to leave damning statements in the outline of the State case when the prosecutor knows he is not going to call the evidence of the witnesses in question.

It has been held in such cases as R v Poteradzayi 1959 (1) R & N 31; 1959 (2) SA 125 (FSC)

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that attempted murder may be committed although there is no actual purpose to cause death, a constructive intent being sufficient. However, the English law approach, that recklessness as to the consequences is not sufficient to found a conviction for attempted murder, has much to commend it, although it was not necessary to decide the point in this case, the facts disclosing only an assault with intent to do grievous bodily harm.

Cases cited:

R v *Huebsch* 1953 (2) SA 561 (A)

R v *Poteradzayi supra*

R v Mohan [1976] QB 1; [1975] 2 All ER 193 (CA)

A M Donagher for the appellant

A O Agyemang for the respondent

Judgment

McNally JA: The appellant was convicted by the Regional Court, Harare, of the attempted murder of the complainant by setting the complainant's person alight following an altercation between them. She was sentenced to four years' imprisonment with labour of which two years were suspended on the usual conditions. She appeals against both conviction and sentence.

The Regional Magistrate gave a long and careful judgement in which he analysed the events which started on the evening before the final episode at 9.30 am on 22 July 1985. He came to the following conclusions as to the facts:

1. The argument between these two nursing sisters began the previous evening;
2. The appellant, who was the senior of the two, was probably in the right as far as the merits of the argument were concerned;
3. The dispute began again the following morning and it is not possible to say who started the actual physical confrontation. But an unseemly brawl took place. The appellant was bitten on the ear, the complainant on the finger. This brawl was broken up by other parties and the complainant retired to her room;
4. At the next stage the appellant was clearly the aggressor because the complainant stayed in her room while the appellant came from her room and broke the windows in the complainant's room while the complainant was still inside, having locked herself in;
5. It was the appellant who threw an inflammable liquid into the complainant's room and followed by throwing in a lighted match so that the room caught fire and the complainant was burned;
6. The appellant's defence that it was the complainant who threw paraffin at her but she managed to ward off the paraffin tin so that the match struck by the complainant resulted in

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her burning herself, was so obviously improbable as to be clearly untrue;

7. The appellant waited by the complainant's door with a stick and chased her when she emerged, brandishing the stick as the complainant, with her clothing in flames, ran towards the hospital.

McNALLY JA

I do not propose to analyse the evidence. The Regional Magistrate has done so with commendable thoroughness. It seems to me that his conclusions on the facts cannot be faulted.

The only matter which concerned us on appeal was whether, in all the circumstances, the findings of fact justified the conviction for attempted murder or whether a verdict of assault with intent to commit grievous bodily harm would have been more appropriate. Such a verdict is competent by virtue of the provisions of s 198(1) of the Criminal Procedure and Evidence Act [*Chapter 59*].

This aspect of the case was not raised, either in the court a quo or in argument before us. Yet it may explain why the magistrate, in his reply to the notice of appeal, conceded that the sentence was severe and left it to us to decide whether it was manifestly excessive.

I do not think it is necessary to become involved in the controversy as to whether or not legal intention (constructive intent) will suffice in providing the mens rea necessary for a conviction of attempted murder. In the South African Appellate Division (R v Huebsch 1953 (2) SA 561) and in the Federal Supreme Court (R v Poteradzayi 1959 (1) R & N 31) it has been held that-

> "The crime of attempted murder may, however, be committed although there is no actual purpose to cause death. It has been settled law since R v Ngcobo 1921 AD 92, that a constructive intention to cause death will suffice. ...It is sufficient if there is 'an appreciation that there is some risk to life involved in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death'."

(*Poteradzayi's* case *supra,* at 34 E-H).

It may be noted that Poteradzayi's case involved the pouring of petrol over his wife by a husband who then ignited her clothing with a match and ran away.

In England it seems that recklessness as to consequences will not be sufficient to found a conviction for attempted murder. This is, at any rate, the position under the common law. It seems to be the same under the Criminal Attempts Act 1981. See: R v Mohan [1976] QB 1; [1975] 2 All ER 193 (CA); Glanville Williams Textbook of Criminal Law 2 ed at 408; South African Criminal Law and Procedure Vol I 2 ed 138 at (e); Smith and Hogan Criminal Law 5 ed at 255-6.

McNALLY JA

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I must say that I find a great deal in the English approach which commends itself to me. To attempt to murder is to try to murder. Trying to kill someone connotes a positive intention to kill. If you are trying to do him grievous bodily harm and you succeed, it seems to me unreal and inappropriate that you should be convicted of attempting to murder him. Your answer to the charge is surely to say:

1. "I didn't try to kill him";
2. "I didn't kill him".

(The matter is, of course, more complex when the accused puts up a lying defence).

I do not, however, in the absence of full argument, wish to come to any conclusion which might have the effect of overturning the decision in *Poteradzayi supra*. It seems to me that this case can be decided on its facts.

I approach the facts on the basis that almost any assault on a person can be said to involve some risk to life. A punch over the heart may cause cardiac arrest or may cause the victim to fall and crack his skull on a concrete floor. But people who punch others over the heart are not normally charged with attempted murder if the victim lives, or with murder if he dies. This is because there are two legs to the test: The appreciation of the risk to life must be accompanied by "recklessness as to whether or not the risk is fulfilled in death".

On the facts of the present case, I am not at all satisfied that there is evidence that either of these tests were satisfied beyond a reasonable doubt.

The evidence of the complainant was that the petrol was thrown through her window or poured into her room. She put it this way:

> "When the accused came she had a tin of olivine in her possession. The top part of it was open. The accused then poured some fluid through the broken window. When she was pouring that fluid I then smelt a smell of petrol. When I tried now to open the door so that I could escape the accused then struck a stick of matches. So the flames went out [I take this to mean "spread out"] and the house started burning. At that time it was rather difficult for me to find the keys or find my keys or even to open the door. My legs started burning and my dresses started burning. I then managed to find some keys and then opened the door and at that time when I opened the door I was burning.

> when I opened the door I was burning. In fact instead of using the front door I then used the back door and the accused was standing (waiting?) for me. The accused was hiding for me holding a stick."

From this narrative two things are clear: first, the petrol was not poured on to the complainant but into her house; second, the appellant expected the complainant to emerge and was waiting to pursue her with a stick when she did so. One may add a third point: the appellant made no attempt to secure the doors and prevent the complainant from emerging.

The medical report spoke of "10-12% petrol burns affecting the [right] side of her face, [right] side of back, both legs and minor areas both arms and abdomen".

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The magistrate's observations at trial were:

> "There is a marked discolouration on the feet, marked skin discolouration on the feet, ankles and lower legs.
>
> BY THE PROSECUTOR: And these burns, do they go up all over your body or only confined to your legs? ---I received some burns on my back."

This description is consistent with the complainant's evidence and confirms that the burns were due to her walking in the flames rather than that she was herself soaked in petrol. This alone distinguishes the case on the facts from *Poteradzayi's* case *supra.*

In my view, the facts indicate an intention, whether actual or constructive, to commit grievous bodily harm to the complainant. But I am not satisfied that they show even a constructive intent to kill. Even if there is no more than a reasonable doubt in that regard, the appellant should have had the benefit of that doubt.

Accordingly I would substitute for the conviction a conviction for assault with intent to do grievous bodily harm.

The alteration of the conviction means that this Court is at large with regard to sentence. The offence was a very serious one indeed and there can be no doubt that a custodial sentence is appropriate. In my view a proper sentence would be one of two years' imprisonment with labour, of which one year is suspended on the conditions specified by the Regional Magistrate.

1988 (1) ZLR p417

McNALLY JA

Before I conclude, I must remark on a serious impropriety in the prosecution of this case. The State outline contained a passage concerning the evidence that was to be given by one Tsitsi Morrison. That evidence would have been very strong evidence against the appellant had it been led.

However, it was not led. In the circumstances it should not have appeared in the State outline. Alternatively, it should have been deleted so as to be illegible. It is highly prejudicial to an accused person to leave such damning statements in the State outline when the prosecutor knows he is not going to call the evidence.

In the result the appeal succeeds. The conviction for attempted murder is set aside, and there is substituted a conviction for assault with intent to do grievous bodily harm. The sentence is altered to one of two years' imprisonment with labour, of which one year is suspended for three years on condition that the accused is not convicted of an assault, committed within the period of suspension, for which she is sentenced to a period of imprisonment without the option of a fine.

Dumbutshena CJ : I agree

Korsah JA: I agree

A J A Peck, appellant's legal practitioner

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ABRAHAMS v DERBYSHIRE STONE (PVT) LTD & ANOR 1988 (1) ZLR 418 (HC)

Editor's Note:(6)

Court **High Court, Harare**

Reynolds J

Application to set aside arbitrator's award

2, 15 & 29 June 1988

Flynote

Arbitration - arbitrator making assessment when ill and under stress - award consequently containing significant errors and not reflecting arbitrator's true intentions - act of misconduct under s 12 of Arbitration Act [Chapter 12].

Headnote

The applicant was arbitrator in a dispute between the two respondents. Two months after making his award, he signed an affidavit to the effect that at the time of making his determination he had been very ill and under stress, to the extent where he had made several mistakes in the award, and that the award consequently did not reflect his true intentions. He applied for an order that the award be set aside.

In terms of s 12 of the Arbitration Act [*Chapter 12*], the Court could set aside the award only if the arbitrator had misconducted the proceedings or if the award had been improperly procured. There was no suggestion in this case of improper procurement. The award could also be set aside if, in making the mistake in question, the arbitrator has not given effect to his true intentions.

Held, that in the usual sense "misconduct" connotes some form of procedural or judicial impropriety which has resulted in a substantial miscarriage of justice. In this case, the applicant had not given fair consideration to the matter, continuing, despite his incapacity, to attempt to come to a conclusion and eventually making an award which contained several significant errors. He thus committed an act of misconduct justifying the Court's intervention.

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Held, further, that the arbitrator had made a substantial mistake in the proceedings, causing him to express his award in a way which he did not intend. A failure to correct the errors and to allow a proper consideration of the factors submitted would lead to manifest and serious injustice.

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Cases cited:

Estate Milne v *Donohue Investments* (Pty) Ltd 1967 (2) SA 359 (A)

Cone Textiles (Pvt) Ltd v *Redgment & Ors* 1983 (1) ZLR 88

Dickenson & Brown v *Fisher's Executors* 1915 AD 166

Monticello (Pvt) Ltd v *Edgerton* 1981 ZLR 561; 1982 (1) SA 762 (ZS)

Williams v Wallis & Cox [1914] 2 KB 478

Clark v African Guarantee & Indemnity Co Ltd 1915 CPD 68

Table Bay Harbour Board v *Metropolitan & Suburban Railways Co* (1892) 9 SC 437

Dutch Reformed Church v *Cape Town Council* (1898) 15 SC 14

Phillips v *Phillips* 1930 NPD 246

Delver v *Barnes* (1807) 1 Taunt 48

Re Hall & Hinds (1841) 2 Man & G 847

Hutchinson v *Shepperton* (1849) 13 QB 955

McKenzie NO v *Basha* 1951 (3) SA 783 (N)

Sutherland & Co v *Hannevig Bros Ltd* [1921] 1 KB 336

Donner v *Ehrlich* 1928 WLD 159

Tedder & Tedder v *Grieg & Grieg* (1911) 32 NLR 459

Schneier & London Ltd & Ors v *Gluckman* (1) 1925 WLD 42

M J Gillespie for the applicant

A P de Bourbon SC for the first respondent

A N H Eastwood for the second respondent

Judgment

Reynolds J: This is a motion to set aside the award made by an arbitrator brought by the arbitrator himself. The facts are relatively simple. The second respondent owned a quarry, and in terms of a lease agreement entered into between the two respondents, the first respondent was entitled to extract certain stone and fines from the quarry for the purpose of selling this material to its customers. The various terms and conditions applicable were agreed by the parties, save only that the sums to be paid to the second respondent could not be agreed upon, and this aspect was referred for determination by the present applicant. After deliberating on the matter for nearly twelve months, the applicant published his award on 29 December 1987.

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The applicant signed an affidavit on 18 February 1988, to the effect that at

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the time he had made his determination he had been "extremely unwell and subject to heavy work pressures". He stated that, as a result, he had made various errors in the award which he was unable to resolve, and he requested that the whole of the award be set aside.

The first respondent supported the application, but the second respondent did not and raised several points in opposition. The first such point, which I do not think Mr Eastwood advanced with much conviction, was that the applicant had not acted in the capacity of an arbitrator, but rather as "a valuer". This contention stemmed from clause 14 of the agreement to submit to arbitration which is as follows:

> "14 FINALITY
>
> Notwithstanding anything to the contrary in this Submission contained, and notwithstanding the use of any terminology including the word "Arbitrator" and "Award" the parties hereby express the intention that the Arbitrator's function shall be to give a final decision in the matter referred to him and that his function shall be essentially that of a valuer whose valuation shall be final and binding and not subject to any challenge **by either of the parties hereto.**"

The agreement itself is headed "Submission to Arbitration" and the various clauses setting out the terms agreed all refer to "the Arbitrator" and his function and his "Award". The document published by the applicant as being his award is headed :

> In the matter of the Arbitration Act (Cap 12) and of an arbitration between Kenneth McKelvey & Derbyshire Stone (Pvt) Ltd."

The proposition now broached by Mr Eastwood was not raised previously and was not pleaded. The distinction between the two forms of action is considered in some detail in *Estate Milne v Donohue Investments (Pty) Ltd* 1967 (2) SA 359 (A) at 373-4, and in the present matter I am satisfied that this was a valid submission to arbitration in terms of the provisions of the Arbitration Act [*Chapter 12*] ("the Act") and it was not an agreement for valuation.

I will assume, for present purposes, that the provisions of the Act govern the court's jurisdiction in this matter. Section 12 applies, and is as follows:

> "12.(1)The Court may at any time, upon motion, remove any arbitrator or umpire against whom a just ground of recusation is found to exist or

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> who has misconducted the proceedings in connexion with the arbitration.
>
> (2) Where an arbitrator or umpire has misconducted the proceedings or an arbitration or award has been improperly procured, the Court may set the award aside and may award costs against any such arbitrator or

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umpire personally."

It may thus be seen that if this Court is limited to the exercise of its statutory jurisdiction, the only grounds upon which the present applicant's award may be set aside are whether-

(a) he "misconducted the proceedings", or

(b) the arbitration or the award was improperly procured.

There has been no suggestion of any improper procurement, and the determination of this case, therefore, depends upon the meaning to be ascribed to the word "misconduct".

In *Cone Textiles (Pvt) Ltd v Redgment & Ors* 1983 (1) ZLR 88, the court followed the construction placed upon this word in the case of *Dickenson & Brown v Fisher's Executors* 1915 AD 166. In that latter case SOLOMON JA, at 175 and 176, said:

"Now I do not propose to attempt to give any definition of the word 'misconduct', for it is a word which explains itself. And, if it is used in its ordinary sense, I fail to see how there can be any misconduct unless there has been some wrongful or improper conduct on the part of the person whose behaviour is in question.....

Now if the word 'misconduct' is to be construed in its ordinary sense it seems to me impossible to hold that a *bona fide* mistake either of law or of fact made by an arbitrator can be characterised as misconduct, any more than a judge can be said to have misconducted himself if he has given an erroneous decision on a point of law."

As I read the judgment in *Cone Textiles v Redgment supra* the "ordinary" meaning given to the word "misconduct" was one of the grounds upon which the decision was based, and, as such, I am bound by it. If I am incorrect in this, however, it may be remarked, with great respect, that there are also many cases which have extended the meaning of the term to a far wider degree than that adopted in Dickenson's case supra. These include the prior Supreme Court decision of *Monticello (Pvt) Ltd v Edgerton* 1981 ZLR 561 at 565.

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(See, too, Davis *Law & Practice of Arbitration,* 57 & 58; Jacobs *Law of Arbitration in South Africa* p138 et seq, *Russell on Arbitration* p 409). In fact, and as I understand the decisions, most courts appear to have regarded it as misconduct when the arbitrator has been found to be guilty of some form of procedural or judicial impropriety which has resulted in a substantial miscarriage of justice. (See, for example, the formulation by ATKIN J in *Williams v Wallis & Cox* [1914] 2 KB 478 at 485). A variety of expressions are used to justify the Court's interference with the award made and I trust that it is not an over-simplification of the whole question to advance this condensed rationale.

It may also be noted that the courts have usually been solicitous to ensure that they do not attempt to intervene in the parties' desire to have a speedy, cheap and final determination of their difficulties by an umpire of their own choice. The machinery of the law is used mainly to protect and enforce the rights created by arbitration and not to interfere with them. But as is remarked in Mustill & Boyd *Commercial Arbitration* at p 252,

"(t) there are limits to the benevolence with which the courts will approach the arbitrations of commercial men".

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It is certainly difficult to believe that the parties would genuinely wish to be bound by an arbitrator's decision however unjust, absurd or otherwise objectionable it might be. It is also a fact that arbitration is by no means always the "speedy, cheap and final" remedy expected. The instant case affords one example of this. Be this as it may, however, the court's role is, I believe, to give proper effect to the true intentions of the parties, and of the arbitral tribunal as well.

Whether "misconduct" is construed in a wide or narrow sense, however, it is my view that the applicant in the instant case in fact "misconducted the proceedings", and that his award must be set aside for that reason. In *Dickenson & Brown* v *Fishers Executors supra* SOLOMON JA also said:

> " ... in ordinary circumstances, where an arbitrator **has given fair consideration** to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or of fact."

In similiar vein, in *Clark* v *African Guarantee & Indemnity Co Ltd* 1915 CPD 68 at 78, GARDINER J said:

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> "If the arbitrator has taken evidence and has fairly considered it, the Court will not set aside the conclusion he has come to...."

(my emphasis in both excerpts)

There are many other cases which stress the need for the arbitrator to act not only within his authority, but also fairly, and in accordance with the principles of justice. (See, for example, those cases cited in *Russell op cit* at p410). If he does not do so, his failing will amount to misconduct.

In the present matter, and as already mentioned, the applicant has made it clear that at the time he made his final assessment, he was ill and under stress. Despite this incapacity, he continued to attempt to come to his conclusions in the matter, and eventually he made an award which, on his own evidence, contained several significant errors. In this situation, it is my view that the applicant could not have been able to apply his mind properly to the proceedings. Nor could his mistakes have been *bona fide.* He would, accordingly, have committed an act of misconduct justifying the intervention of the Court.

If I am incorrect in this conclusion, however, there is, in my view, a further reason which requires that this arbitration be set aside.

In *Cone Textiles v Redgment supra,* the learned CHIEF JUSTICE also indicated that it was in his view that both English and South African law construed the term "misconduct" in much the same sense, but he added that there were limited exceptions to this general pattern which he said were "perculiar to English law". One such exception was stated to be "an admitted mistake of law or fact by the arbitrator". Mr *Gillespie* pointed out that this last mentioned opinion was orbiter, and that it appeared that the court had not been referred to authority to the opposite

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effect in other jurisdictions. (See such cases as *Table Bay Harbour v Metropolitan & Suburban Railways Co* (1892) 9 SC 437 at 439; *Dutch Reformed Church v Cape Town Council* (1898) 15 SC 14; *Phillips v Phillips* 1930 NPD 246; and *Jacobs op cit* 147- 9).

The general principle that a bona fide mistake made by the arbitrator does not form a ground for the intervention of the Court is well established (See *Dickenson & Brown v Fisher's Executors supra; Mustill & Boyd op cit* 503, and the other cases there cited). It is often stated, however, that an exception

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to this general proposition occurs when the mistake made is admitted by the arbitrator. It is difficult to trace the basis of this concept, and the only cogent explanation that may be extracted from the cases which commends itself to me that is making the mistake in question the arbitrator has not given effect to his true intentions. In other words, he has not made the award he intended to make. (*Russell op cit* 401). It is obvious that only the arbitrator himself will have knowledge of his actual intentions, and if the type of mistake made is consistent with his allegation that his true decision was not given, the way is then open for the Court to intervene. As LORD MANSFIELD put it in the very old case of *Delver* v *Barnes* (1807) 1 Taunt 18 at 52,

> "it is not his award, that is not his true judgment"

(See, to, Re *Hall & Hinds* (1841) 2 Man & G 847; *Hutchinson* v *Shepperton* (1849) 13QB 955; *Mc Kenzie NO* v *Basha* 1951 (3) SA 783 (N) at 787)

Other than in this scene, however, a mistake admitted by an arbitrator is, I believe, no different from a mistake that is not so admitted. Thus a *bona fide* and material error, whether admitted or not, does not normally constitute a ground for setting aside an award, always providing that the arbitrator has applied his mind properly to the proceedings: *Sutherland* v *Hannevig Bros Ltd* [1921] 1 KB 336; *Donner* v *Ehrilich* 1928 WLD 159; *Tedder & Tedder* v *Grieg & Grieg* (1911) 32 NLR 459.

The only other form of mistake which it has been held would permit judicial interference is that the arbitrator's error is so gross that it in fact amounts to misconduct: *Dickenson & Brown* v *Fisher's Executors supra; Schneier & London ltd & Ors* v *Gluckman* 1925 WLD 12. I do not believe that this applies in this case.

In the present case, then, it is my view that the award made by the applicant may only be set aside if:

(a) the procedure adopted or the award made by him was in breach of that agreed to by the parties;

(b) he was guilty of misconduct in terms of s12 of the Act; or

(c) he made a substantial mistake in the proceedings which caused him to express his award in a way which he did not intend.

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As to the first of these possibilities, and apart from the errors which have been specified, there has been no suggestion that the applicant conducted the

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proceedings other than in terms of his mandate. This aspect, therefore, need not be considered further. The second possible ground has already been examined, and it remains only to consider whether the third possibility applies or not. The applicant here has itemized the errors he alleges were made, and these are adequately collated in Mr *Eastwood's* heads of argument as follows:

> "6. The errors of fact contended for are -
>
> a) that the Applicant failed to give "proper or full consideration" to the price paid by the Second Respondent for the farms: Applicant's founding affidavit, para 11 at page 3.
>
> b) The return afforded the Second Respondent on the "award" is too high: para 14 at page 4.
>
> c) The Applicant should have taken into account depreciation on the buildings: para 15.1 at page 4.
>
> d) The Applicant now has information that certain quarry buildings belong to the Second Respondent rather than the First Respondent and this would tend to increase the award: 15.2.1 at page 5.
>
> e) The usual return in the mining industry is 5% rather than the awarded 3% : 15.2.2 at page 5"

It does not appear to be disputed that these errors were made, and it seems to me that they were material. A proper assessment of the factors applicable would have resulted in a significant difference in the ultimate award. The applicant has sworn to the fact that, due to his incapacity, his award does not reflect his true intentions. This assertion has not, in my view, been effectively controverted. A failure to correct the errors made, and to allow a proper consideration of the factors submitted would, in my view, lead to manifest and serious injustice.

There has been some suggestion that the applicant in this case was biased in favour of one party, in view of his personal relationships connected with that party. As a result of this allegation, the applicant has stated that his main motive in bringing the present action "was and is to vindicate (his) reputation". I do not consider that such motivation is relevant to these proceedings, but I am able to comment, nonetheless, that there is nothing before me to suggest that the applicant has formed any close or untoward relationship with anyone connected with this matter.

What is relevant is whether the applicant has indeed been actuated by partiality, interest or bias. I have found no evidence of this in any way, and

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REYNOLDS J

I do not accept, as was suggested, that any such inference may be drawn from the fact that the application made an erroneous award.

The applicant has offered to bear the wasted costs of the second respondent if the application is successful. In my view, however, the applicant misconducted the arbitration proceedings, and the stance adopted by each of the respondents was fully justified. In these circumstances I consider that the applicant is liable for the costs of both respondents was fully justified. In these circumstances I consider that the applicant is liable for the costs of both respondents, and it is ordered accordingly.

In the result, the application that the award made in this matter be set aside succeeds, and there will be an Order in terms of the amended draft. As explained, the applicant will bear the costs.

Honey & Blancekenberg, applicant's legal practitioners

Condy Chadwick & Elliott, first respondent's legal practitioners

Kantor & Immerman, second respondent's legal practitioners

PUBLIC SERVICE COMMISSION & ANOR v TSOMONDO 1988 (1) ZLR 427 (SC)

Court **Supreme Court, Harare**

Annotations **Link to Case Annotations**

Dumbutshena CJ, McNally JA & Korsah JA

Civil appeal

24 May & 30 June 1988

Flynote

Public service - Public Service (Officers) (Misconduct and Discharge) Regulations 1986 - suspension of officer without pay - requirement for officer to be given opportunity to reply to allegations before being suspended - extent of powers of Public Service Commission to authorize departures from Regulations - when commission may determine guilt of officer on the papers and without oral evidence - impropriety of Commissin relying on undisclosed evidence when determining guilt of officer.

Headnote

The respondent was an under secretary in the Ministry of Transport and held the post of Controller of Road Motor Transportation. In March 1987 he recieved a letter from the Principal Establishment Officer in the Ministry, advising him that the appellant Commission had, in terms

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of s 6(c) of the Public Service (Officers) (Misconduct and Discharge) Regulations 1986 (SI 161 of 1986), decided to suspend him from duty without pay on the grounds that he was suspected of having committed an act of misconduct. There was no hint as to what that act of misconduct might be until a month later, when the respondent recieved a letter alleging that he had accepted two bribes in return for the issue of certain road service permits. He wrote back, denying the allegations were given and were replied to. The respondent initiated proceedings to have the suspension set aside, but postponed them pending the holding of an inquiry in terms of the Regulations. However, the Commission having decided that there was not a material dispute of fact such as to warrant an inquiry, no inquiry was

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held. Nevertheless, the Commission found the respondent guilty of misconduct. The papers on which the Commission relied included an unsworn statement allegedly made by the person who bribed the respondent and an affidavit from a legal practitioner alleging that four of his clients had made similar allegations to him about the respondent. The acting Chairman of the Commission also intimated that they had considered "sundry other reports" available to the Commission. The respondent applied for and was granted orders setting aside the determination that he was guilty of misconduct and directing that an inquiry be held. The Commission appealed.

Held, that under the Regulations an officer in the Public Service cannot be suspended without pay until the head of office in which the officer is employed has appraised the of officer of the allegations against him and given him an opportunity to reply to the allegations and until his head of department has considered both the allegations and his reply. This procedure applies equally where the officer is, as in this case, himself a head of office.

Held, further, that the Commission's power given by s 24 of the Regulations to depart from the provisions of the Regulations is not an absolute power, but one that may be exercised only if the Commission is satisfed that the officer would not be prejudiced thereby. There was no possible basis in this case for the Commission to be so satisfied.

Held, further, that white the Regulations do not in terms state that reasons for the proposed action must be given, it follows, if he is to tee given the right of reply to an allegation of misconduct, that he is entitled to be informed of the allegation against him in a fashion sufficiently detailed to enable him to make a meaningful reply.

Held, further, that the Commission could not reasonably have come to the conclusion that this was a case which it could resolve on the papers before it. There were clearly material disputes of fact and questions of credibility.

Held, further, that insofar as the Commission relied on undisclosed evidence from undisclosed sources about undisclosed matters, it deprived the respondent of the opportunity of replying to that evidence and ignored the proviso to s 7(c) of the Regulations, which requires that he be given such an opportunity.

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Cases cited:

Postmasburg Motors (Earns) Bpk v Peens & Ors 1970 (2) SA 35 (NC)

Zimbabwe Sun Hotels v Lawn 1988 (1) ZLR 143 (SC)

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Schmidt & Anor v Secretary of State for Home Affairs [1969] 1 All ER 904

Council of Civil Service Unions & Ors v Minister for the Civil Service [1984] 3 All ER 935 (HL)

Chikosi v Chairman, Public Service Commission HH-193-88 (unreported)

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

Austin & Anor v Minister of State (Security) & Anor S - 130-86 (not yet reported)

Jeffery v President, SA Medical & Dental Council 1987 (1) SA 387 (C)

Room Hire Co (Pty)Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

Da Mata v Otto 1972 (3) SA 858 (A)

Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (A)

Hall v Chairman, Public Service Commission & Ors HH-518-87 (unreported)

M J Gillespie for the first appellant

B Q P Simelane for the second appellant

M R D Stonier for the respondent

Judgment

McNALLY JA: These were two applications on notice of motion before the

High Court Both were made by the present respondent. I will refer to him as "the Officer". I will refer to the appellants as "the Commission" and "the

Minister" respectively.

In the first application the Officer sought an order setting aside his suspension from service in the Ministry of Transport. In the second application he sought an order setting aside a determination that he was guilty of misconduct and a further order that an inquiry be held into the question.

The second application was successful. It is not at all clear what happened in regard to the first application. No mention of it is made in the final Court rder signed by the Deputy Registrar.

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In the body of the judgement handed down by the learned judge (HH-432-87) there is a positive statement at p 8 which reads:

> "In the result the Order suspending the officer is set aside. The respondents are ordered to pay the costs."

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However, the judgment goes on to enquire whether "the initial wrong done was cured by the subsequent notification of the charge of misconduct a month later". The learned judge then seems to conclude that it was not so cured. But then this part of the judgment ends:

> "However the Applicant condoned the Respondent's breach of the Regulations by his agreement that the next stage commence. That agreement saves the suspension form that date.
>
> I turn now to Matter No. 2089/87."

None of this is repeated or clarified at the end of the judgment, and, as I have already indicated, none of it appears in the order produced by the Deputy Registrar. I do not know what was said when the judgment was handed down in Court, but I suspect that nothing was said about the suspension. See generally *Postmasburg Motors (Edms) Bpk v Peens & Ors* 1970 (2) SA 35 (NC) at 39.

There has been no attempt by either party to have the judgment varied or clarified. Mr *Gillespie*, for the Commission, says that his client assumed it had been successful on the suspension issue, if only from some unspecified date after the date on which the suspension was ordered. Mr*, Stonier* for the Officer, presented argument in support of what he calls "the findings of the learned Judge in the *Court a quo* that the suspension of the Respondent was unlawful".

Since Mr *Gillespie,* despite his contention, presented a detailed argument before us on the question of the validity of the suspension, I think we must treat the question of suspension as being in issue. We cannot leave it unresolved with each side thinking that it has won. Both counsel have asked us to decide the issue.

The facts of the cases are these. The Officer was from September 1980 and

up to the time these events took place, the Controller of Road Motor Trans-

portation in the Ministry of Transport, with the rank of Under Secretary.

On 3 March 1987 the Officer received a letter signed by the Principal Establishment Officer in his Ministry, advising him that the Commission had decided in terms of s 6(c) of the Public Service (Officers) (Misconduct and Discharge) Regulations 1986 that- .

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> " . . . you are suspended from duty with effect from today in that you are suspected of having committed an act of misconduct as defined in the First Schedule to the [above] Regulations."

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It may be noted that there is no word of what the act of misconduct was, nor is it even alleged that he has committed such an act-merely that he is suspected of having done so. The letter went on to advice him of his various rights and that suspension meant suspension without pay. It also stated that-

" You will be informed of the charges and allegations against you once investigations have been completed."

It is not disputed that prior to receipt of that letter there was no hint of the allegations to be made. Nor were any details provided until he received a further letter dated 2 April 1987. He received it on 3 April 1987. It alleged he had accepted two bribes from a named person in the amounts of $500 and $1 000 in return for which he issued to the person certain road service permits.

The letter alleged the bribes were accepted "between 1983 and 1986".

The Officer wrote to the Commission on 9 April 1987 after taking legal advice. He challenged the validity of his suspension. He denied in some detail the allegation that he had accepted bribes, or been offered bribes.

On 21 May 1987 he instituted proceedings to have the suspension set aside. On 4 June 1987, when the matter was set down for hearing, it was postponed by consent. The Officer's lawyers believed that it would be appropriate for an inquiry to be held in terms of the Regulations before the question of suspension was finalised. Certain further particulars of the allegations were given and replied to. The Officer then waited to be advised of the details of the inquiry to be held.

Instead, he was advised on 19 June 1987 that he had been found guilty of misconduct on 15 June 1987, the Commission having decided that there was not a material dispute of fact such as to warrant an inquiry. This decision prompted the second Notice of Motion dated 25 June 1987, seeking to set aside the finding of misconduct and to demand an inquiry. In reply, the Acting Chairman of the Commission denied the need for an inquiry, asserted that the Commission had been able to resolve the dispute on the papers before it and annexed an unsworn statement allegedly made by the person concerned, together with an affidavit by a legal practitioner alleging that four of his clients at one time or another had made similar allegations to him about

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the Officer. These documents are dated 24 March 1987 and 3 July 1987 respectively.

It is necessary at this stage to set out in some detail the provisions of the Public Service (Officers) (Misconduct and Discharge) Regulations 1986 which I will refer to as "the Regulations". They were published in SI 129 of i 986 and republished with corrections as SI 161 of 1986. They were thus in force at all times material to this case.

There is a definitions section, in which the following definitions are relevant:

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" 'head of department' means-

(a) where a ministry is divided into provinces the provincial officer; or

(b) the principal establishment officer; or

(c) . . . ;"

and

"'head of office' means-

the senior member of the of ice concerned **or such other officer as may** be designated by the Commission to be the head of office for the purposes of these regulations" (my emphasis).

I now set out the provisions of ss 4-13 inclusive and s 24 of the regulations. Sections 4-13 fall into Part I of the Regulations, under the heading "Determination of Allegations of Misconduct". They read as follows:

"4. Where an allegation of misconduct is made against an officer, the head of office in which the officer is employed-

(a) shall forthwith call upon the officer to reply, in writing, within seven days to the allegation of misconduct against him, and

(b) shall-

(i) within seven days of his having received the officer's reply;

(ii) if the officer cannot be located or if he refuses or fails to reply within the specified period of seven days, forthwith; submit to the head of department a report in the form set out in the Second Schedule, and

(c) may, subject to the provisions of section 8, impose a prohibition order against the officer.

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5. Upon receiving the report of the head of office, the head of department-

(a) shall, within seven days of his having received the report, submit the report incorporating his comments therein to the head of Ministry; and

(b) may, subject to the provisions of section 8, impose a prohibition Border against the officer, unless he has already been prohibited, or cancel any prohibition order which may have been imposed; and

(c) may, subject to the provisions of section 8, suspend the officer from service.

6. Upon receiving the report of the head of department, the head of

Ministry-

(a) shall within seven days of his having received the report, forward the report incorporating his comments therein to the Commission, together with any other relevant papers: and

(b) may, subject to the provisions of section 8, impose a prohibition order against the officer, unless he

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has already been prohibited, or cancel any prohibition order which may have been imposed and

(c) may, subject to the provisions of section 8, suspend the officer from service.

7. Upon receipt of the report and relevant papers forwarded in terms of paragraph (a) of section 6, the Commission-

(a) shall, unless there is a material dispute of fact which it is unable to resolve on the papers before it, proceed, in terms of section 19, to determine whether or not the officer is guilty of misconduct; or

(b) shall, where there is a material dispute of fact which it is unable to resolve on the papers before it, direct that an inquiry be held in terms of section 16; or

(c) shall, where it deems that further investigation is necessary, direct the head of Ministry or any other person to conduct such further investigation on such terms as it may direct and, at the conclusion of such further investigation, proceed in terms of paragraph (a) or (b) as may be appropriate:

Provided that the officer against whom the allegation is made shall be given an opportunity to reply to any further allegations made against him in the course of such further

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investigation; and

(d) may subject to the provisions of section 8,-suspend the officer from service, unless he has already been suspended, or cancel any suspension or prohibition order which may have been imposed.

8. (1) No officer may be prohibited from attending his place of work or carrying out his duties or suspended from service unless his continued attendance at work or continued performance of duties would-

(a) be conducive to unbecoming or indecorous behaviour, or

(b) seriously impair the proper administration or functioning of the Ministry; or

(c) occasion prejudice to any moneys or property likely to be handled by the officer in the course of his work; or

(d) enable the officer to hinder or interfere with any investigation or evidence relating to the alleged misconduct.

(2) Where a prohibition order is imposed upon an officer, a copy of such order shall be forwarded forthwith to the head of Ministry and the Commission.

9. Where the head of Ministry or the head of department imposes a suspension order, he shall forthwith notify the Commission by a copy of such order of the imposition thereof and the reasons therefor and, upon being so notified, the Commission shall forthwith determine whether the order should be confirmed or cancelled and shall notify the head of Ministry or the head of department, as the case may be, of its decision in that regard.

10. Where an officer has been prohibited from carrying out his duties, he shall-

(a) not attend at his place of work or carry out any duty unless directed to do so by the head of office or the head of department or the head of Ministry, as the case may be;

(b) continue to be entitled to his full salary in respect of the period of prohibition.

11. (1) Where an officer has been suspended from service, he shall-

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(a) not attend at his place of work or carry out any duty unless directed to do so by the Commission after consultation with the head of Ministry;

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(b) not be entitled to his salary in respect of the period of suspension;

(c) be entitled, upon notifying the Commission and the head of Ministry, to take up other employment for the duration of his suspension from service.

(2) Notwithstanding the provisions of paragraph (b) of subsection

(1), the Commission, having regard to the officer's financial circumstances and whether he has taken up other employment, may-

(a) direct that he shall, during the period of suspension, be paid such allowance, not exceeding the amount of his salary, as the Commission may determine: and

(b) increase or decrease the amount of or cancel the payment of any allowance paid in terms of paragraph (a); and

(c) where the officer is found guilty of misconduct, direct that the full amount of any allowance paid to him in terms of paragraph(a)or such part of that amount as the Commission may determine be recovered from him.

12. A prohibition order shall lapse after the expiry of a period of fourteen days unless sooner cancelled by the head of office, the head of department, the head of Ministry or the Commission, as the case may be:

Provided that a prohibition order may not be cancelled by an officer who is junior to the officer who imposed the order.

13. A suspension order may be cancelled at any time only by the Commission and shall be deemed to be cancelled where the officer is found not guilty of misconduct."

Section 24 is in Part III-General-of the Regulations, and it reads as

follows:

" 24. Notwithstanding anything to the contrary contained in these regulations, the Commission may at any time-

(a) appoint any person or persons to discharge the disciplinary functions conferred upon a head of Ministry in terms of these regulations;

(b) depart from, or authorize a departure from, any provision of these regulations, if it is satisfied that the case of the officer concerned would not be prejudiced thereby."

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The first thing to be noted is the general scheme of the Regulations. It is evident that ss 4 to 7 provide a series of consecutive steps which must be taken when an allegation of misconduct is made against an officer. There is no dispute that the allegation we are concerned with is an allegation of misconduct as defined. There is equally no dispute that the Officer is an officer as

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defined.

There is an obvious benefit in this procedure for an officer against whom an allegation of misconduct is made. He is given an opportunity to reply to the allegations against him before he can be suspended without pay. The Regulations use the phrase "prohibition order" to cover what the common law would call "suspension on full pay" and the word "suspension" to mean "suspension without pay". Under the common law a suspended employee is entitled to his pay *(Zimbabwe Sun Hotels vLawn S* - 17-88 not yet reported* (7)). On the other hand, an employee who is not an officer in the Public Service

and whose conditions are governed by the provisions of SI 371 of 1985 may be suspended without pay where his employer has good cause to believe that he has been guilty of specified misconduct.

It is clearly therefore a significant benefit for an officer of the Public Service that he cannot be deprived of his salary until he has had an opportunity to reply to the allegations against him and until his head of department has considered both the allegations and his reply. He has a "legitimate expectation" that that benefit will not be denied him, as that phrase is used in cases approving the decision of LORD DENNNG MR in *Schmidt & Anor v Secretary of State for Home Affairs* [1969] 1 AII ER 904 at 909, such as *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 943-944. Indeed he has more: he has a right under the Regulations.

Now, there is no doubt that the Officer was denied that benefit. The first thing to happen to him was that he was suspended without pay-accused and suspended all in one breath. Accused, moreover, in the vaguest of terms, that there was "suspicion" of "misconduct".

Mr Gillespie advanced a number of arguments designed to justify that action:

First of all, he said it has always been competent to suspend an officer pending inquiry. This does not seem to me to be correct, insofar as "suspended" is taken to mean "suspended without pay". It is true that the

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Public Services Act 1931, in s 26, allowed the immediate suspension of an officer "to whom an offence is imputed" "from the further exercise of his functions and from drawing his salary". The position remained broadly the same until 1971. But from 1971 onwards, regulations made in terms of the Public Services Act No. 23 of 1971 have made provision similar to that which exists at present. See RGN 583 of 1971; RGN 667 of 1971; and SI 561 of 1979 - all of which provide for an initial "prohibition".

Mr *Gillespie* also relies by analogy on the corresponding provisions in the Defence Act *([Chapter 94], s* 17) and the Police Act *([Chapter 98], s* 53). However, it is not at all clear to me that "suspension" in those sections means "suspension without pay". In the absence of any definition I would assume that it has its common law meaning.

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But whatever the position may be, an analogy is only an analogy. The position in terms of the relevant Regulations governing an officer in the Public Service is clear. He is entitled to the benefit of the procedure laid down in s 4 of SI 161 of 1986. That procedure requires certain steps to be taken, and a certain time to lapse, before suspension (without pay) can be resorted to. Whether the procedure was different in earlier years, or is different for policemen and soldiers, is immaterial.

Mr *Gillespie's* next submission is that the procedures set out in ss 4 to 7 of the Regulations have to be telescoped where, as here, the Officer is himself a "head of office". Section 4, he says, can have no application. One must start with s 5 because the Officer's superior is not a head of office but head of department. A head of department has the power to suspend (without pay) whereas a head of office has only the power to prohibit.

I cannot accept this submission for two reasons: in the first place, it ignores the definition of "head of office". It is clear that the Commission may designate a person to be "head of office" in circumstances such as these. It is not intended that the procedures should be telescoped. It is precisely to avoid the telescoping of procedures that provision is made for the designation of a person as "head of of ice".

Secondly, it would be a highly inequitable construction of the Regulations to read them in such a way that a junior officer should be given a right of reply before he can be suspended, but a senior officer should not. The Regulations are clearly meant to apply to all officers in the same way. See s 3: "The provisions of these regulations shall apply to every officer". The Regulations

are unambiguous and equitable. There is no reason to strain after a construction that would achieve inequity.

Mr *Gillespie's* next submission was that the Commission, as an employer, must have the right to suspend an officer because without it the officer suspected of wrong doing could continue his wrongdoing and interfere with evidence and witnesses. The answer to this submission is that the employer has precisely that power. The head of office is empowered to impose a prohibition order" against an accused officer. A prohibition order is in effect suspension on full pay. It achieves virtually everything by way of protection which could be achieved by a suspension order.

There is, I may add, a further indirect indication that it is part of the scheme of the Regulations that an accused officer should have a right of reply before he can be suspended (without pay). This is to be found in s 18. That section provides that an officer who is convicted in the criminal courts of an offence which may be an act of misconduct may be suspended forthwith. But, of course, such an officer has inevitably had a full hearing in the criminal trial. The *audi al teram partem* rule has already been observed. The only remaining issue is an issue of law, namely whether his proven criminal conduct is also an act of misconduct. In such circumstances immediate suspension is not unreasonable.

Mr *Gillespie's* final argument on this aspect of the case was based on the powers granted to

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the Commission in s 24 of the Regulations to depart from the provisions of the Regulations. But that power is not an absolute power It is a power made expressly subject to the condition that it may only be exercised "if it (the Commission) is satisfied that the case of the officer concerned would not be prejudiced thereby".

I cannot think of any possible basis upon which the Commission could have been so satisfied. Certainly no attempt has been made to put before us reasons why the Commission was satisfied.

To deprive a man of his income before he has had an opportunity to reply to the allegations-indeed in this case before he even knew what the allegations were-in such a major departure from the procedures laid down *that prima facie* it cannot fail to prejudice his case. Indeed it is not a question of procedure at all, but of substance.

Nor was there any apparent reason to depart from the procedures provided.

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A "head of office" could have been designated to advise the Officer of the allegation, and to impose a prohibition order. Even if, for some reason, the Commission had found it necessary to act on its own account, it could have made the allegation, called upon the Officer to reply in terms of s 4, and imposed a prohibition order. Insofar as that involved a departure from the regular procedures it could no doubt have been justified in terms of s 24(b).

There would have been no prejudice to the Officer's case. Finally, of course, one must note that the letter did not claim to be written in terms of s 24 of the Regulations.

It does not seem to me that it is even necessary to consider the Officer's constitutional rights under s 18(9) of the Constitution. His rights are defined

in the Statutory Instrument. As long as he is employed he is *prima facie* entitled to his salary. If he is to be deprived of his salary then that deprivation must be justified. The Regulations set out the circumstances in which deprivation of salary is authorised. Those circumstances require:

1. that he be acquainted with the allegations against him;

2. that he be given seven days to reply; and

3. that a report then be made to his head of department.

Only then may he be suspended without pay.

For some reason the Commission did not follow those procedures. It has not bothered to explain why. The language of the letter of 3 March 1987 suggests that it was written partly with the repealed provisions of s 7(1) of SI 561 of 1979 in mind. That section spoke of "suspicion of misconduct" and authorised a fourteen day prohibition order (not suspension) when an officer "is suspected of misconduct". (The Commission made the same mistake in another case-see *Chikosiv Chairman, Public Service Commission & Anor* HH- 193-88, where the letter was

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written two days after judgment was given in the present case)

Thus, without even making an allegation of misconduct against the Officer but merely on suspicion of some unspecified form of misconduct, the Commission appears to have instructed the Principal Establishment Officer to advise him of his suspension (without pay).

The letter in question bears other marks which suggest it was ill-considered. It purports to rely on s 6(c) of the Regulations. Section 6(c) related to the powers of the head of Ministry. Yet the letter is signed by the Principal

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Establishment Officer, who in terms of s 2 of the Regulations is "head of A department" not "head of Ministry". And insofar as he purports to speak on behalf of the Commission, the Commission is not the "head of Ministry" either.

The letter of 2 April 1987 is similarly flawed. It is evident that it too was written with the provision of the repealed S1 561 of 1979 in mind. It speaks of a "Charge of Misconduct". This is the language of the 1979 Regulations. The phrase does not appear in the 1986 Regulations.

It is clear therefore that the Commission was not acting in terms of s 24(b) of the Regulations (S1 161 of 1986) in departing from its normal procedures, as claimed by the Chairman in his affidavit at pare 10 on p 33 of the papers. It was simply acting In error, no doubt following a precedent which had been based on the 1979 Regulations. But even then, as I have explained earlier it should have started with a prohibition order, not a suspension order. By suspending him and failing to advise him of the allegations the Officer was doubly disadvantaged.

The situation is not altogether different from the situation with regard to detainees who are entitled to be informed of the reasons for their detention. In a number of judgments, more particularly *Minister of Home Affairs v Austin & Anor* 1986 (1) ZLR 240 (SC); 1986 (4) SA 281 (ZSC) and **Austin** *& Anor v Minister of State (Security) & Anor* S-130-86 (not yet reported), we have dealt with what should be done when legislation requires that reasons be given.

True, in these Regulations it is not in terms stated that reasons must be given. But it must follow, if an officer is given a right to reply to an allegadon of misconduct, that he is entitled to be informed of the allegation against him in a fashion suffciently detailed to enable him to make a meaningful reply (see the remarks at p 22 of the second *Austin* case *supra).*

The serious step of suspension (without pay) can only follow when the head of department (or more senior official) has considered both the allegations and the reply, and has determined that suspension (without pay) is called for.

To my mind, the learned judge was undoubtedly right in coming to the conclusion that the suspension (without pay) of the Officer was not only fatally irregular (and thus prejudicial to his rights under the Regulations), but also seriously prejudicial to his case.

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McNALLY JA

Once it is accepted that the suspension was wrongful, it is difficult to see how anything which occurred subsequently could put the matter right. In particular I cannot see how an agreement to postpone the matter by consent on 4 June 1987 can be interpreted as a condonation by the Officer of the Commission's breach of the Regulations.

It seems to me that the Commission has acted irregularly and its action must be declared to be of no force and effect. It must regularise its own position. Up to now it has not done so. It has claimed that there is nothing to regularise.

I turn now to deal with the second notice of motion in which the Officer claims that the Commission had no right to make a finding of misconduct without holding an inquiry.

Once again one looks to the Regulations: s 7 deals with the situation in clear terms. An inquiry must be held "where there is a material dispute of fact which it (the Commission) is unable to resolve on the papers before it".

In the present case there is a dispute of fact: the Commission says the Officer took bribes; he says he did not. The dispute could hardly be more material.

The Commission has purported to resolve this dispute by believing the pieces of paper which say he did take bribes, and disbelieving the piece of paper which says he did not. Indeed, the one piece of paper containing the hearsay gossip sworn to by the legal practitioner is dated after the date of the Commission's finding. They may therefore have relied only on the other piece of paper, an unsworn statement purportedly written by an accomplice.

The Commission may, on the other hand, have relied on documents as yet unrevealed. In pare 15 of the affidavit of the Acting Chairman of the Commission he says the Commission -

> " . . . carefully considered Applicant's allegations in conjunction with all the relevant papers before it including the annexed statement of one Mr (the informant) **as well as sundry other reports available to it " (my emphasis).**

Insofar as the Commission relied on undisclosed evidence from undisclosed sources about undisclosed matter, l would cite the words of BERMAN J *in* Jeffery v President, SA Medical & Dental Council 1987 (1) SA 387 (C) at 392G:

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> " . . . in consequence he was never afforded the opportunity of dealing with it or altering or influencing the impression of him (and of his conduct) that this evidence might have left on the minds of the members of the tribunal."

(For "tribunal" in this case read "Commission').

I may add that the proviso to s 7(c) of Regulations reads:

> "Provided that the officer against whom the allegation is made shall be given an opportunity to reply to any further allegations made against him in the course of such further investigations."

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This seems to have been ignored.

I must confess to a feeling of utter astonishment that the Commission could

ever believe that it could resolve this dispute on the papers without hearing

evidence. I do not hesitate to say that its decision is -

> ". . . so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it:"

per LORD DIPLOCK in C C S U *v Minister for the Civil Service supra* at 951 a b.

It has always been the view of the courts that they can only entertain proceedings on motion (ie on the papers) where there is no genuine dispute of fact. See eg Herbstein and Van Winsen *The Civil Practice of the Superior Courts of South Africa* 3 ed at the foot of p 61. There may, of course, be argument about whether there is in reality a dispute of fact, and if so whether it is material.

But in this case there is clearly a dispute of fact and it is clearly material. It clearly involves questions of credibility. It is trite law that, as was said by MURRAY AJP *in Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162 -

> "Inasmuch as the ascertainment of the true facts is effected by the trial Judge on considerations not only of probability but also of credibility of witnessess giving evidence *viva voce,* it has been emphasised repeatedly

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> that (except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed on contrary affidavits, in disregard of the additional advantages of *viva voce* evidence . . ."

And see Da Mata v OttoNO 1972 (3) SA 858 (A) at 865 G-H and *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634-635.

I have no doubt whatever that this is a case in which the Commission should have proceeded to an inquiry and should not have concluded that it could resolve the dispute on the papers. It could not reasonably have come to the conclusion to which it did come.

While one understands and sympathises with a desire to weed out miscreants in the Public Service, it must surely be accepted chat persons accused of misconduct should be treated fairly and properly; both generally in terms of Their constitutional right to fair treatment, and specifically in terms of their rights under the Regulations. In this case the respondent's rights have been dented trim et every stage. (I note that similar findings have been made in the High Court *in Hall* (HH-518-87), Ramhewa (HH- 178-88)*(8) and *Chikosi* (HH 193-88) although these cases have not reached the Supreme Court).

As far as the order of this Court is concerned, I think that although we must dismiss the appeal, we must to an extent amend the order of the Court a *quo.* I agree this is not a proper case for an award of attorney and client costs.

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As regards the question of suspension the order needs to be clarified. The words used by the learned judge at p 8 of the judgment, set out at the beginning of this judgment, are appropriate.

As regards the finding of misconduct, it seems to me with respect undesirable that the Court should seek to instruct the parties as to what they should do in the future. I am satisfied that the Commission had no right to determine in the way chat it did that the Officer was guilty of misconduct. All chat the court need do in those circumstances is to set aside the determination. What the parties do after that is for them to decide.

Accordingly I would make the following order:

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1. The appeal is dismissed with costs.

2. The order of the Court *a quo is* clarified and amended to read as follows:

    (a) in matter No. HC 1662 of 1987, the order suspending the officer is set aside, the respondent to pay the costs;

    (b) in matter No. HC 2089 of 1987, the determination by the First Respondent on 15 June 1987 that the Applicant is guilty of misconduct is set aside with costs.

Dumbutshena CJ: I agree.

Korsah JA : I agree.

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

Atherstone & Cook, respondent's legal practitioners

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Endnotes

1 (Popup - Popup)

See the preceding case in this volume - Editor.

2 (Popup - Popup)

See *Kombayi* v *Berkhout* at p 53 of this volume - Editor.

3 (Popup - Popup)

Which no longer is part of the law in England, having been abolished by s 11(1) of the Civil Evidence Act 1968 - *Editor*.

4 (Popup - Popup)

This judgment has been varied on appeal.

5 (Popup - Popup)

See van t'Hoff v van t'Hoff & Ors (1) supra in this volume - Editor.

6 (Popup - Popup)

This judgment was overturned on appeal.

7 (Popup - Popup)

See p143 in this volume -Editor.

8 (Popup - Popup)

See Ramhewa *v Secretary of the Public Service Commission* above in this

H volume-*Editor.*

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