1988 (2)

Zimbabwe Law Reports 1988 [Part 2]

S v MARTIN 1988 (2) ZLR 1 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Criminal appeal

20 June & 4 July 1988

Flynote

Appeal - legal practitioner renouncing agency after appeal set down - appellant not entitled to appear in person - must obtain certificate from Judge of Supreme Court.

Legal practitioner - financial dealings with clients - impropriety of disclosing such dealings to Court - renunciation of agency after appeal noted - duty to advise client of rights of unrepresented appellant.

Headnote

If a legal practitioner is not put in funds after having been engaged to appear on behalf of a client, it is highly undesirable, if not unethical, for him to disclose this fact to the Court. Instead, the practitioner must decide whether or not to continue to act for the client. That decision should be made well before the matter is to be heard, so as to give the client a chance to make other arrangements. If the practitioner decides not to continue, he must, in the case of an appeal to the Supreme Court, renounce his agency in terms of Rule 10(3) of the Supreme Court of Zimbabwe Rules. He should also advise his client that, even though the matter has been set down for hearing, an unrepresented appellant has no automatic right of audience and must obtain a certificate from a judge of the Supreme Court before being entitled to prosecute an appeal in person.

Case cited:

S v Marenga S-32-88 (unreported)

Appellant in person

Mrs *A E Otoo* for the respondent

McNALLY JA

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Judgment

McNally JA: This appeal was set down for hearing in terms of a notice of appeal filed by the appellant's legal representative. Shortly before the date of the hearing, the Registrar enquired about the appellant's heads of argument. He was informed that the legal representatives had not been "put in funds" by their client, but that in order to assist the Court heads of argument would be submitted on the basis that they might be useful to the appellant who had been advised to attend Court personally. In due course, that is to say at 4.17 pm on the Friday before the Monday hearing, anonymous heads of argument appeared before the Registrar.

I am sure that counsel was trying to be helpful. He did not, however, succeed. His conduct betrayed an unacceptable ignorance of the Rules of Court.

In the first place, it seems to me highly undesirable, if not unethical, for lawyers to disclose to the Court the state of their financial dealings with their clients. If the client has no more money, the lawyer must decide whether he will continue to act for the client or not. That decision should be made well before the appeal is due to be heard, so as to give the client a chance if necessary to make other arrangements. If the decision is not to continue, the lawyer must renounce his agency: see the Rules of this Court, SRGN 380 of 1964 Rule 10(3). No renunciation of agency has been notified in this case. Therefore the agency relationship continued, and therefore the lawyer was under an obligation to file his heads of arguments seven days before the hearing, and to appear and argue the appeal.

In the second place - and this is a point which has been made before: see *S v Marenga* S-32-88 - an appellant should not be told: "Go along and do the best you can". An unrepresented criminal appellant (except in certain High Court cases) has no automatic right of audience. Section 10(1) of the Supreme Court of Zimbabwe Act No. 20 of 1981 directs that an unrepresented appellant obtain a certificate from a Judge of this Court before being entitled to prosecute an appeal. The appellant should be so advised at the time of renunciation of agency. Failure to advise him or her is, it seems to me, a breach of duty on the part of a lawyer to his client.

The appeal therefore could not be heard, and we accordingly excused Mr *Zorn*, who very properly appeared to accept our rebuke on behalf of his errant colleague, from further attendance.

However, that was not the end of the matter. In our perusal of the papers we had formed the impression that the convictions were not well founded.

McNALLY JA

Accordingly, and in the exercise of our powers under s 10(4)(a) of the Supreme Court of Zimbabwe Act, we informed Mrs *Otoo*, who appeared for the respondent, that we were considering setting aside the convictions by way of review. We invited her to proceed with the submissions which she had already, as the respondent, prepared.

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[The learned Judge of Appeal considered the facts and evidence, and continued:]

Mrs *Otoo*, who argued valiently in support of the magistrate's findings, failed to convince us of their validity.

It may be that the evidence could have been better presented, or that witnesses could have been questioned more closely on some of the concessions they made. But the evidence as it stands reveals only suspicion.

In the exercise of my review power as aforesaid, and with the concurrence of my brothers MANYARARA and KORSAH, I set aside the convictions and sentence on both counts.

I direct that a copy of this judgment, with particular reference to the first five paragraphs, be sent to the Secretary of the Law Society of Zimbabwe.

S v MUTASA 1988 (2) ZLR 4 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Manyarara JA

Application for leave to appeal

6 June & 5 July 1988

Flynote

Appeal - application for leave to appeal - principles - applicant must show reasonable prospect of success, not merely that he has an arguable case.

Criminal procedure - sentence - Criminal Procedure and Evidence Act [Chapter 59] - s 57I - forfeiture of article by which offence committed - ungraded meat being unlawfully offered for sale - may be declared forfeit.

Headnote

The applicant, a butcher, was found with ungraded and unmarked meat in his butchery. He was subsequently convicted of contravening s 2(1) of the Control of Goods (Distribution of Beef) Regulations S I9 of 1987, which prohibits the selling of ungraded carcasses. The meat was declared forfeit to the State in terms of s 57I of the Criminal Procedure and Evidence Act [*Chapter 59*] and the applicant was fined. On appeal to the High Court the fine was reduced but the forfeiture order upheld. Application was made to the Supreme Court for leave to appeal against the ruling of the High Court. It was argued *inter alia* that the forfeiture order was incompetent since the meat was not an article by means of which the offence was committed, nor was it used in the commission of the offence.

Held, dismissing the application, that before the application could be granted it was necessary for the applicant to show a reasonable prospect of success on appeal. If he has such a prospect, leave to appeal should be granted; if not, it should be refused. It is not enough merely

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to make out a reasonably arguable case.

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Held, further, that the meat was the very substance of the offence of which the applicant was convicted; without it the offence could not have been committed. It was, furthermore, more than clear that meat is covered by the phrase "any article" used in s 57I.

Decision of BARON JA in *S v Tengende & Ors* 1981 ZLR 445 not followed.

Cases cited:

Kajee & Ors v G & G Investment and Finance Corporation (Pty) Ltd 1962 (1) SA 575 (D)

Rademeyer v Steyn 1967 (4) SA 112 (O)

S v Tengende & Ors supra.

R v Baloi 1949 (1) SA 523 (A)

R v Ndhlovu (1) 1980 ZLR 96 (GD)

J Sayce for the applicant

A O Agyemang for the respondent.

Judgment

Dumbutshena CJ: In this matter Mr *Sayce*, who appeared for the applicant, applied for condonation of the late filing of his heads of argument. He said the delay was his own fault and was occasioned by pressure of work: see *Kajee & Ors v G and G Investment and Finance Corporation (Pty) Ltd* 1962 (1) SA 575 (D). Mr *Agyemang*, who appeared for the respondent, did not oppose the application, and the Court condoned the late filing of Mr *Sayce*'s heads of argument. See *Rademeyer v Steyn* 1967 (4) SA 112 (O) (English Headnote).

The applicant was convicted of contravening s 2(1) of the Control of Goods (Distribution of Beef) Regulations, SI 9 of 1978. The section reads:

> "2. (1) Subject to the provisions of sections 3,4 and 5, no person shall sell at, distribute in or consign or deliver to any place within the area specified in the Schedule any carcass or part of a carcass, excluding offal, of cattle unless -
>
> (a) it has been graded and marked in accordance with the provisions of the Cold Storage Commission (Livestock) Regulations, 1986; and
>
> (b) it bears the trade mark of the Cold Storage Commission."

The applicant was found with ungraded and unmarked meat in his butchery. He was found with 5850 kg of ungraded meat, which is prohibited by s 14 of

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the Cold Storage Commission (Livestock) Regulations SI 309 of 1986. Section 14 reads:

> "14. (1) No person shall sell at, distribute in or consign or deliver to, any place within a prescribed area any carcass of livestock -
>
> (a) liable to be graded in terms of the Act, which has not been graded and marked in accordance with the provisions of these regulations; or
>
> (b) slaughtered outside the prescribed area unless it has been graded and marked in accordance with the provisions of these regulations as though it were a carcass of livestock liable to be graded in terms of the Act.
>
> (2) No person doing business as, or in the employ of, a butcher within a prescribed area shall keep on his business premises any carcass of livestock referred to in paragraph (a) or (b) of subsection (1)."

The applicant was sentenced to a fine of $1 500 or, in default of payment, four months' imprisonment with labour. The meat was declared forfeit to the State in terms of s 57I of the Criminal Procedure and Evidence Act [*Chapter 59*].

The applicant appealed to the High Court against both the sentence and the order of forfeiture. The appeal succeeded to this extent. The sentence of a fine of $1 500 was set aside and substituted by a sentence of a fine of $200 or, in default of payment, ten days' imprisonment with labour.

On 18 February 1988 judgment was handed down in the High Court. On 1 March 1988 the applicant applied to a Judge of the High Court for leave to appeal to the Supreme Court against sentence. Leave was refused on 15 March 1988. On 7 April 1988 the applicant lodged an application in this Court for leave to appeal against the sentence. The application was to be heard by a single judge of this Court. Mr *Edkins,* the applicant's legal practitioner, says in his affidavit filed of record that he instructed counsel to draft argument in support of the application. On 6 April 1988 counsel prepared argument and sent it to him. That argument was filed in this Court. At the same time counsel advised his instructing legal practitioner that there existed a further ground of appeal which no-one had thought of before. That necessitated further delay. Mr *Edkins* had to seek fresh instructions from his

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client. After receiving instruction, he told counsel to settle papers for a new application intended to advance the new ground of appeal. Counsel received his brief on Monday 11 or Tuesday 12 April 1988. He was unable to attend to his instructions for the reasons already mentioned until 15 April 1988.

I think that there was no need to make a second application to this Court. It would have been proper to pursue the first application and at the hearing of that application leave could have been sought to add an additional ground of appeal. I am of the view that the judge hearing the

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application for the inclusion of another ground of appeal would have considered the application favourably if counsel had shown sufficient cause for wanting to add a fresh ground of appeal at that stage. The application for leave to file fresh grounds of appeal occasioned unnecessary delay in the prosecution of the first application for leave to appeal.

However, when it is felt necessary to file another application for leave to appeal this should be done in terms of s 17(3) of the Supreme Court of Zimbabwe Act No. 28 of 1981. The subsection reads:

> "(3) A judge of the Supreme Court may extend the time for giving notice of intention to appeal or of submitting an application for leave to appeal, notwithstanding that the time for giving such notice or submitting such application has already expired:
>
> Provided that, where sentence of death has been passed by the High Court, no extension of time shall be granted after the sentence has been confirmed by the President."

In the instant case the only issue which falls to be decided is the appeal's prospect of success. The Court has to decide whether in the circumstances of this case the applicant has good prospects of success.

In this case it would be wrong to follow the approach advocated by BARON JA in *S v Tengende & Ors* 1981 ZLR 445 at 447 A-B, where the learned JUDGE OF APPEAL stated:

> "I prefer therefore to approach the matter by considering, not how good the prospects must be before leave is granted, but how poor they must be before leave is refused. And for this reason I think the test that has been mooted - that the applicant must show reasonable prospects of success - puts the matter too high; in my view leave to appeal should be granted if the applicant makes out a reasonably arguable case."

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To adopt that approach in an application such as the present would be wrong. There are some appeals with no prospects of success which are arguable. This would be such an appeal. Argument can be advanced with equal conviction on whether or not the applicant was wrongly or properly convicted contravening s 2(1)(a) of the Regulations. It can be argued with equal facility that the applicant ought to have been charged in the alternative with contravening s 2(2) of the Regulations. The applicant can argue with a great deal of force that the order of forfeiture was a heavy penalty to pay. The meat declared forfeit was worth $10 000. That is a great deal of money. However, the court *a quo* exercised its discretion judicially when it reduced the fine from $1 500 to $200. In doing so the court *a quo* must have, in assessing the appropriate fine, taken into account the order of forfeiture. What I have sought to prove here is that the criterion of an arguable case may not be the proper test when considering an application for leave to appeal.

In my view the correct approach to adopt when considering an application for leave to appeal should not be based on whether an appeal is arguable or not, but on its prospects of success. Support for this approach is based on sound and persuasive authority. In *R v Baloi* 1949 (1) SA 523 (AD) CENTLIVRES JA (as he then was) stated at 524:

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"In the present case RAMSBOTTOM J granted leave to appeal because

> 'some, at any rate, of the grounds which the accused wishes to raise, or which it is wished to raise on his behalf, seem to me to be fairly arguable.'

That, however, is not the test to be applied. It is true that in *Scott v New Minerva Syndicate Ltd* 1911 AD 369 at p 371, one of the grounds on which an application for leave to appeal was granted was that the case was fairly arguable and that in *R v Wessels* 1933 AD 395 STRATFORD ACJ said that

> 'if the appeal involves a question of law on which the guilt of the accused depends, leave will be granted if that question is an arguable one'.

In both those cases the judgment was *ex tempore,* but, in any event, those cases can, in view of the decision in *R v Nxumalo* 1939 AD 580, no longer be regarded as laying down the true test. In *R v Nafte* 1929 AD 333 at p 338, CURLEWIS JA said:

> 'Whether a point is unarguable or not is somewhat vague and is not very appropriate.'

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The same applies to the word 'arguable' and the phrase 'fairly arguable'. The word 'arguable' is misleading unless it is made clear that it is used 'in the sense that there is substance in the argument advanced on behalf of the applicant' - (per TINDALL AJP in *Beatley's Trustee v Pandor & Co* 1935 TPD 365 at p 366), for there are very few cases which are not arguable in the wide meaning of the word."

In my opinion, the test to be applied when considering an application for leave to appeal under Rule 19(8) of the Rules of the Supreme Court is whether the applicant has a reasonable prospect of success on appeal. If he has, then leave to appeal should be granted. If he has not, then leave to appeal should be refused.

What are the chances of the applicant in the instant case succeeding on appeal? Mr *Agyemang* does not think there is any reasonable prospect of success on appeal because the applicant admitted that he was selling ungraded and unmarked meat. That admission puts the applicant squarely into the ambit of s 2(1)(a) of the Regulations. He was selling ungraded and unmarked meat in a prohibited area.

In my view even if the conviction under s 2(1)(a) could not be upheld, the Attorney-General could still apply for an amendment to the charge and substitute in its place a contravention of subs (2) of s 2. Section 2(2) reads:

" (2) No person doing business as, or in the employ of, a butcher within a specified area shall keep on his business or other premises any carcass or part of a carcass, except offal, of cattle unless -

(a) it has been graded and marked in accordance with the provisions of Cold Storage Commission (Livestock) Regulations, 1986; and

(b) it bears the trade mark of the Cold Storage Commission."

Possession of unmarked and ungraded meat is not denied by the applicant. A conviction in terms of subs (2) of s 2 of the Regulations would therefore be proper.

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I believe in the special circumstances of this case the applicant, who pleaded guilty to contravening s 2(1) of the Regulations and stated in the agreed statement of facts, Exhibit 1, that he was selling the meat, was properly convicted of contravening s 2(1). He also knew what he had been doing with

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the unmarked and ungraded meat in his butchery. He admitted that he was selling it. His admission was proper. Besides, he was keeping on his business premises within a specified area the unmarked and ungraded meat; a fact which brings him into the ambit of subs (2) of s 2.

Mr *Sayce* further contended that the offence for which the applicant was convicted was not one specified in the Seventh Schedule to the Criminal Procedure and Evidence Act [*Chapter 59*]. That is true. But the offence he committed is covered by s 57I of Chapter 59, which also authorises forfeiture. The provisions of section 57I read:

> "57I. (1) court convicting any person of any offence may, without notice to any other person, declare forfeited to the State -
>
> (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
>
> (b) if the conviction is in respect of an offence specified in the Seventh Schedule, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or, in the case of a conviction relating to the theft of any goods, for the conveyance or removal of stolen property;
>
> and which was seized in terms of this Part;
>
> Provided that such forfeiture shall not affect any right referred to in paragraph (a) or (b) of subsection (4) if it is proved that the person who claims such right did not know that the weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or on connexion with the commission of the offence in question or, as the case may be, for the conveyance or removal of stolen property in question, or that he could not prevent such use, and that he may lawfully possess such weapon, instrument, vehicle container or other article, as the case may be."

Mr *Sayce,* however, submitted that the meat declared forfeit did not fall within the ambit of para (a) of s 57I (1) since it was not the means by which the offence was committed, nor was it used in the commission of the offence. There is no force in that submission. The meat was the very substance of the

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offence. Without the unmarked and ungraded meat the offence could not have been committed.

I need not dwell on this point. It is not relevant to the decision in this application. It is more than clear that meat is covered by the phrase "any article" used in s 57I. I need only refer to *R v Ndhlovu* (1) 1980 ZLR 96 at 98H-99F. A reading of that case shows that the phrase "any

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article" is wide enough to include meat.

In my view the court *a quo* properly weighed the combined effect of the forfeiture of the meat, said to be worth $10 000, and a fine of $1 500. It came to the conclusion that the effect of the gravity of that penalty was severe and grossly disproportionate. REYNOLDS J said in his judgment:

> "In the present matter, however, I am of of the view that the loss to the accused must be taken into account to an appreciable extent. Doubtless for this reason, Mr *Agyemang* conceded that the fine passed by the court *a quo* was excessive."

The learned judge *a quo* then proceeded to reduce the sentence of $1 500.

It appears from the papers before this Court that no attempt was made to leave the sentence of a fine as it was and to persuade the court *a quo* to set aside the forfeiture order. I cannot see where the court *a quo* erred in this regard. It exercised its discretion judicially and reduced the sentence imposed by the magistrate's court. The meat was used in the commission of the offence. If it had been left with the applicant it would have been sold to the public. What is more important is that the court *a quo* did not disregard the effect of the forfeiture on the applicant. See *R v Ndhlovu (1) supra* at 103G-104A.

In my judgment the applicant has failed to show that he has reasonable prospects of success on appeal.

Accordingly the application for leave to appeal is refused.

Gubbay JA: I agree.

Manyarara JA: I agree.

Coghlan, Welsh & Guest, appellant's legal representatives.

MAKETO v MEDICAL INVESTMENTS (PVT) LTD & ANOR 1988 (2) ZLR 12 (HC)

Court **High Court, Harare**

Reynolds J

Special plea in abatement

27 June & 6 July 1988

Flynote

Delict - defamation - republication by third party of defamatory statement made by the defendant - statement made to newspaper reporter - defendant liable for subsequent reports of interview.

Headnote

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A person who publishes defamatory matters may be liable not only for the original publication but for any republication of the same matter by others, but only -

(a) where the defendant authorized or intended the repetition;

(b) where there was a moral duty, to the defendant's knowledge, on the other person or persons to repeat the matter; or

(c) where the repetition flows in the ordinary and normal course of events from the original publication.

If a person makes a defamatory statement in the course of an interview with a newspaper reporter, all three of these situations would apply, and the person would be fully liable for any subsequent report of the interview. It commonly occurs that a newspaper will repeat a report of a particular event while it remains newsworthy and the substance of the report would probably be repeated if litigation arises, so a repetition of the original report should be expected by the defendant. It is therefore arguable that he "authorized" the report and it is probable that it was a natural consequence of the original publication as well.

Cases cited:

Speight v Gosnay (1891) 60 LJ QB 231

Argus Printing & Publishing Co Ltd v Weichardt 1940 CPD 453

REYNOLDS J

Kock v Zeeman 1943 OPD 135

Ratcliffe v Evans [1892] 2 QB 524

Vengtas v Nydoo & Ors 1963 (4) SA 358 (D)

Cutler & Anor v McPhail [1962] 2 QB 292; [1962] 2 All ER 474

F Juru, for the plaintiff,

A P de Bourbon, for the respondents.

Judgment

Reynolds J: The plaintiff in this case is a qualified nurse, and she entered into a contract of employment with the first defendant. On the 19 October 1984, the second defendant, who is the Chief Executive Officer of the first defendant, summarily dismissed the plaintiff, and, at the same time, uttered allegedly defamatory words as to her conduct. On 29 October 1984, he held an interview with a newspaper reporter, and is said to have repeated the allegedly defamatory remarks. A report of the interview appeared the following day. On 2 December 1984, another

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newspaper reported an interview with the Secretary for Health, and this report is also said to contain the same defamatory material, emanating from the second respondent.

The plaintiff issued summons against the two defendants on 25 November 1987, claiming, *inter alia*, damages for defamation. The defendants filed a special plea in abatement to the effect that the causes of action of all claims were prescribed in terms of the Prescription Act 1975, in that more than three years had elapsed since the debts, if any, became due.

As I understand, Mr *Guru*, for the plaintiff, it was conceded that claims in respect, both of the original publication and of the newspaper report of 30 October 1984, are indeed prescribed. The only point in dispute lies in respect of the second newspaper report dated 2 December 1984.

It has been held that a person who publishes defamatory matters may be liable not only for the original publication, but for any republication of the same matter by others: *Speight v Gosnay* (1891) 60 LJ QB 231; *Argus Printing & Publishing Co Ltd v Weichardt* 1940 CPD 453; *Kock v Zeeman* 1943 OPD 135. But such consequential liability is usually limited to those instances which were identified by LOPES LJ in *Speight v Gosnay supra* as follows:

(1) where the defendant authorized or intended the repetition;

(2) where there was a moral duty, to the defendant's knowledge, on the other person or persons to repeat the matter; or

(3) where the repetition flows in the ordinary and normal course of events from the original publication.

REYNOLDS J

See, too, *Ratcliffe v Evans* [1892] 2 QB 524; *Vengtas v Nydoo & Ors* 1963 (4) SA 358 (D).

It is my view that if a person makes a defamatory statement against another in the course of an interview with a newspaper reporter, all three of these circumstances apply, and the person concerned would be fully liable for any subsequent report of the interview. This is probably so whether the cause of action is based on the original utterance or the republication, provided that, in the latter event, one of the three circumstances is applicable: *Cutler & Anor v McPhail* [1962] 2 QB 292 at 299; [1962] 2 All ER 474.

The resolution of the present application depends, accordingly, on whether any or all of the three situations referred to apply in respect of the newspaper report of 2 December 1984. I believe that it commonly occurs that a newspaper or newspapers will repeat a report of a particular event with almost inexhaustible persistence provided that it is considered to remain newsworthy. Furthermore, the substance of the report will probably be repeated if litigation follows in due course. In this situation it seems to me that the repetition of the original report should have been expected by the defendant. It is at least arguable that the report in issue here was, in this way, "authorized" by the defendant, and probable that it was a natural consequence of the original publication as well. It would, therefore, be related to and be part of the

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defendant's own statement.

I find, accordingly, that in respect of the newspaper report of 2 December 1984, the "debt" may well have become due on that date, or at the time when the plaintiff became aware of it. I do not believe that I am required to make any more positive a finding than that.

In the result, the plaintiff's claim for damages for defamation as contained in her declaration at paragraphs 6, 7 and 8 are held to be extinguished by prescription in terms of the Prescription Act 1975. The defendant's plea in respect of paragraph 9 of the said declaration is dismissed. The defendant has been substantially successful in this matter, and is awarded the costs of this special plea.

Hove, Mutasa & Associates, plaintiff's legal practitioners

Atherstone & Cook, defendants' legal practitioners

ZVIRAWA v MAKONI & ANOR 1988 (2) ZLR 15 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

McNally JA, Manyarara JA & Korsah JA

Civil appeal

20 June & 7 July 1988

Flynote

Practice and procedure - sale in execution - application to set aside on grounds that price realised is unreasonably low - market price - ascertainment of.

Headnote

A piece of immovable property belonging to the appellant was sold to the first respondent in execution of a default judgment obtained against the appellant by the first respondent. The appellant applied unsuccessfully to the High Court to have the sale set aside on the grounds that the price realised was unreasonably low. In support of his contention he placed before the court an unsworn valuation by an estate agent.

Held, that the estate agent's report, however well informed, did not assist in the ascertainment of the market price, if only because it did not indicate the upper and lower limits upon which he arrived at the valuation he did. Little weight could be attached to that valuation in the face of the cogent evidence of a price reached in open competition at an auction sale which was properly advertised and conducted.

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Case cited:

Lalla v Bhura 1973 (2) RLR 280 (GD).

C S Wernberg for the appellant

J Sayce for the first respondent

No appearance for the second respondent.

Judgment

Manyarara JA: The appellant has appealed against the dismissal of his

MANYARARA JA

application to the High Court to set aside the sale in execution by public auction of certain immovable property belonging to him.

The facts are that the property, being Stand No. 7398 Mangwende Drive, East Highfield, was attached and sold in execution of a default judgment obtained by the first respondent against the appellant in High Court case No. 1779/85. It has not been suggested that the sale was not properly advertised or conducted. The sole contention is that the price of $27 000 realised at the sale was an unreasonably low price. No "other good ground" for the relief prayed has been advanced as provided for by Order 40 Rule 359 of the High Court Rules 1971.

It is common cause that, pursuant to the proper advertisement of the auction, eleven persons attended the sale but only three of them entered bids. One of the bidders, Mr Abel Mhuka, offered $35 000 for the property and there was no opposition to his bid. However, Mr Mhuka was disqualified when it transpired that he was not in a position to pay the price in terms of the requirements specified for the sale.

The property was put up again for auction and the bidding opened at $20 000. The property was eventually knocked down to Mr Moses Paul Mukalonda for $27 000. It was the opinion of the auctioneer that this amount represented a fair market value. The second respondent, the Sheriff of Zimbabwe, satisfied himself that the Rules of Court had been complied with and his report was to that effect.

It was against such a background that the learned judge *a quo* came to the following conclusion:

> "In my view before the applicant can succeed he has to establish the market value of the property. This is no easy task. As DAVIES J pointed out in *Lalla*'s case 1973 (2) RLR 280, that is a matter of opinion in most cases and one opinion in my view does not constitute market value. Where a sale has been properly advertised and well attended the highest price offered is a strong indicator of the market value of the property.
>
> In the present case (the) applicant has placed before the court an unsworn valuation of an estate agent as the basis for his estimated market value of the property in question. In my view the applicant has failed to discharge the *onus* on him to establish that the market value of the property is much higher than that realised by the sale

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and that the property was sold for an unreasonably low sum.

MANYARARA JA

I accordingly dismiss the application with costs."

Both Mr *Wernberg* for the appellant and Mr *Sayce* for the first respondent are agreed that the *onus* of proving that the price realised at the auction was an unreasonably low price rested squarely on the appellant who sought to have the sale set aside: *Lalla v Bhura* 1973 (2) RLR 280 (GD) at 283 C-E.

The unsworn valuation which is among the papers was prepared by Mr Ronald Ian Watson, a chartered surveyor, at the appellant's request. In Mr Watson's opinion, the "unencumbered freehold value" of the property at the time was $37 500.

It is hardly necessary to take into account the unsworn state of the valuation to ascertain its serious weaknesses as the sole basis of the appellant's attack on the price realised at the auction.

It is settled that the market price of property lies between the highest and lowest prices which the property can reasonably be expected to fetch in the open market. It is also settled that what is meant by an unreasonably low price is a price which is substantially less than the market price. See *Lalla v Bhura supra* at 282H, 284 D-H and 287 C-D.

As the learned judge *a quo* indicated in not so many words, Mr Watson's report, however well informed, does not assist in the ascertainment of the market price in this case, if only because it does not indicate the upper and lower limits upon which he arrived at his figure. I believe that the report is caught by the dictum expressed by DAVIES J in *Lalla v Bhura supra* at 285A as follows;

"It seems to me that in general one must hesitate before one accepts the theoretical evidence of a valuator against the specific evidence of a price offered in open competition at an auction sale, properly advertised and properly conducted."

Mr Watson himself indicated in the General Notes to his valuation what "market price" he had in mind in para 3, which says:

"Unless otherwise stated the basis of the valuation is for 'Open Market Value'. 'Open Market Value' is defined as the best price which might be reasonably expected for a property, at that date of valuation, assuming: -

MANYARARA JA

(a) A willing seller;

(b) A reasonable period in which to negotiate the sale;

(c) That values will remain static during the period;

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(d) That the property will be freely disposed of;

(e) That no account will be taken of any higher price that may be paid by a person with a special interest."

I do not think that authority is required for the proposition that the price realised at a forced sale like the present will tend to be lower than that realised in a sale by private treaty. The trite reason is that the bidders at an auction sale will be competing for as low a price as they can possibly pay (a bargain). It follows that little if anything turns on the fact that of the eleven persons who attended the present auction only three entered bids. One could also reasonably take the cue from Mr Watson's valuation that the abortive bid of $35 000 was probably that of a person with some special interest in the property, because that bid was unopposed and the fresh bidding opened at a figure markedly lower than that and Mr Watson's valuation.

There can be no doubt that Mr Watson's valuation was clearly insufficient to discharge the *onus* on the appellant of proving his case to the court's satisfaction. No "other good ground" for setting aside the sale had been advanced. There was no basis for a finding that the figure of $37 500 suggested by Mr Watson was the true market value of the property. The learned judge acted correctly when he attached little weight to that unsworn valuation, standing alone as it did. The cogent evidence before the court was the price of $27 000 reached in open competition at an auction sale which was properly advertised and conducted.

The appeal must be dismissed with costs.

McNally JA: I agree.

Korsah JA: I agree.

D W Aitken & Company, appellant's legal representatives

S v CHIADZWA 1988 (2) ZLR 19 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA and Korsah JA

Appeal against refusal to grant to bail

12 July 1988

Flynote

Criminal procedure - bail - pending trial - factors to consider - onus - when lies on accused.

Headnote

In deciding whether or not to grant an application for bail pending trial, a judge or magistrate must take into account the provisions of s 106(3) of the Criminal Procedure and Evidence Act [*Chapter 59*]. He must also strike a balance between the liberty of the individual concerned and

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the administration of justice, so as to safeguard both.

It is not proper to refuse bail just because the court has set down the date of hearing of the case. Even if the trial date is only a few days away and releasing the accused would create transport or accommodation problems for him, there must be other reasons which, when coupled with a fixed trial date, would compel the court to refuse bail.

Where the police have made allegations which would provide grounds for refusing bail, the *onus* shifts to the accused to show, on a balance of probabilities, that his admission to bail would not prejudice the interests of justice and why it is in the interests of justice that he should be set at liberty before his trial commences or at any other time.

Cases cited:

Lobel v Attorney-General 1956 (1) PH H10 (T); also reported *sub nom Lobel v Claasen NO* 1956 (1) SA 531 (W)

S v Nichas & Anor 1977 (1) SA 257 (C)

S v Hudson 1980 (4) SA 145 (D)

DUMBUTSHENA CJ

E Chatikobo for the appellant.

N Sibanda for the respondent.

Judgment

Dumbutshena CJ: The appellant was indicted in the High Court on a charge of theft of $610 000. His case was set down for hearing on 19 September 1988. He applied to a judge in Chambers for bail. The learned judge refused to grant him bail on three grounds. These were that: (a) the hearing of his case had already been set down; (b) there was a likelihood that the appellant, if admitted to bail, would abscond; and (c) there was a likelihood that he would interfere with witnesses.

The learned judge did not deliver a written judgment, nor did he furnish his reasons for refusing bail when the appellant appealed. Under these circumstances, it is difficult for an appellate court to decide whether he exercised his discretion judicially when striking a balance between the liberty of the individual concerned and the administration of justice, an important exercise when a court considers the merits of refusing or granting bail. Under these circumstances the court must safeguard the liberty of the individual, but it must also safeguard the administration of justice. See *Lobel v Attorney-General* 1956 (1) PH H10 (T) at 20; reported in the SALR *sub nom Lobel v Claasen NO* 1956 (1) SA 531 (W) at 532.

In my view, it is not proper to refuse bail just because the court has set down the date of hearing of the case. It does not seem to me that that approach safeguards the liberty of the accused, who must decide whether to attend his trial when out on bail or to remain in custody for reasons

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beyond his means of control. In the instant case the 19th September 1988 was far away. There may be exceptional cases when the date set down for trial is a few days away and the releasing of the accused would create transport or accommodation problems for him. This reason alone is not good enough. There must be other reasons which, when coupled with a fixed trial date, compel the court to refuse bail.

Mr *Chatikobo*, for the appellant, contended that the learned judge *a quo* erred in holding that the fact that the matter had been set down for hearing was a reason, either on its own or in conjunction with others, for refusing to admit the appellant to bail.

I have already pointed out that the learned judge stated three reasons why he refused bail. Among other reasons it was feared that the appellant would interfere with witnesses or abscond were he to be admitted to bail. The

DUMBUTSHENA CJ

learned judge cannot be said to have isolated the fixing of the date for hearing of the case as the only ground upon which he refused the appellant bail.

In this country the law requires a judge or magistrate who is considering a bail application to take into account the provisions laid down in s 106(3) of the Criminal Procedure and Evidence Act [*Chapter 59*]. Subsection (3) reads:

> "(3) In any case in which the judge or magistrate has power to admit the accused person to bail, he may refuse to admit such person if he considers it likely that if such person were admitted to bail he would -
>
> (a) not stand his trial or appear to undergo the preparatory examination or to receive sentence; or
>
> (b) interfere with the evidence against him; or
>
> (c) commit an offence;
>
> but nothing in this subsection shall be construed as limiting in any way the power of the judge or magistrate to refuse to admit an accused person to bail for any other reason which to him seems good and sufficient. "

Two of the above matters were considered by the judge *a quo*. The third matter, that is, whether if admitted to bail the appellant would "commit an offence" was not considered. Although the likelihood of the appellant committing another offence was not in the mind of the learned judge *a quo*, there is sufficient evidence on the papers which tends to suggest that that likelihood was a real one: after all there was an attempt to bribe the police. I make reference to this below.

I did not understand Mr *Chatikobo* to suggest that the appellant had discharged the *onus* cast upon him to prove that the allegations made by the police were false or would not happen. To succeed the appellant ought to have shown on a balance of probabilities that his admission to bail would not prejudice the interests of justice. He failed to do that. See *S v Nichas & Anor* 1977 (1) SA 257 (C) at 262H; and *S v Hudson* 1980 (4) SA 145 (D) at 146. Certainly the *onus* is on the appellant to show why it is in the interests of justice that he should be set at liberty before his trial commences or at any other time.

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I shall now consider the merits of this appeal, bearing in mind the provisions of s 106(3) of the Code.

DUMBUTSHENA CJ

Although it is difficult for a court of appeal to decide wether the learned judge *a quo* exercised his discretion judicially in a case in which there is no written judgment, in the instant case much assistance is derived from the evidence on the papers. The deponents on both sides dealt in some detail with information on which, I must assume, the learned judge *a quo* based his decision.

The appellant admits that he is charged with the theft of $610 000. He does not admit the offence. He said that the money was the proceeds from the sale of commercial diamonds. It is, however, not denied that the offence is a serious one and that, should he be convicted, he is likely to be sentenced to a long term of imprisonment. Therefore, the likelihood of the appellant attempting to escape from a severe sentence of imprisonment cannot be discounted.

Mr *Chatikobo* argued, without much conviction, that the learned judge *a quo* was wrong in believing that the appellant was likely to abscond. He said that the appellant would not abscond because on 20 May 1988 he was released from custody and remained out of custody until 1 June 1988. For about ten days he was at liberty, yet he did not abscond. There is no reason why he should now abscond.

Mr *Chatikobo* further submitted that the appellant did not have relatives or friends outside Zimbabwe who could offer him asylum. This argument is not supported by the appellant's own evidence. In his affidavit the appellant said he had dealings with three people whose diamonds he sold. The diamonds were sold on behalf of George Abuchi Sultan of Uganda, Moses Bwalya of Zambia, and Makumbu Mbangisa Mbangain of Zaire. These people may not exist. But the appellant says they exist. At least their names purport to come from the countries they are associated with. They do some sort of business together. They are likely to welcome the appellant in their countries. If he has these people to give him refuge, the temptation to escape from a long and severe sentence of imprisonment is all the more attractive. The need will be there, to avoid such a sentence. See *S v Nichas & Anor supra* at 263H.

There is a more serious allegation made by the police. They say the appellant planned to interfere with witnesses. He was therefore more likely to interfere with the evidence against him. Although Mr *Chatikobo* conceded that there was evidence to that effect, he said the appellant denied it. To Mr *Chatikobo* the significant thing was that the alleged interference took place while the appellant was in custody. He argued that even if the allegations were true,

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the appellant's continued incarceration would not be of much assistance to the State in ensuring that the administration of justice was not defeated. This argument is self-defeating because when the appellant is at liberty he has great mobility and will have access to means of

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travel that would easily get him to meet potential witnesses.

The schemes in this regard that the appellant wanted carried out whilst in prison show his resourcefulness. According to Detective Inspector Muwadzuri -

> "On the 14 May 1988, information was received from a very reliable source to effect that Newman CHIADZWA whilst in cells at Harare Central conspired with one Victor MOYO, a known precious stones dealer, to get Michael John BRENNAN arrested by the Central Intelligence Organisation.
>
> The plan which is already underway would be executed as follows:
>
> > Victor MOYO will proceed to Republic of South Africa. Once in Republic of South Africa, he is to arrange for a letter to be written to Michael BRENNAN. Whether the letter will be posted or brought back by Victor MOYO is not very clear at this stage.
> >
> > The letter would be purported to be coming from the South African Agents, "BOSS". The letter would be instructing BRENNAN to attempt to secure the release of jailed spy Odile HARRINGTON from prison at whatever costs. Also to be included in the letter was the fact that should BRENNAN encounter problems in carrying out this assignment, he should not hesitate to enlist the assistance of Assistant Commissioner MURAHWA, an agent of 'BOSS' in Zimbabwe.
>
> The source stated that CHIADZWA hopes to achieve the following should his plan succeed:
>
> > BRENNAN will be arrested and detained for obvious reasons. CHIADZWA hopes BRENNAN will not be able to testify against him when the trial for theft of the $612 000 comes up.
> >
> > CHIADZWA also hopes to have Assistant Commissioner MURAHWA arrested for connections with the Republic of South Africa. He obviously feels that his detention has been caused by

> MURAHWA, hence the vengeance.
>
> For this service, Victor MOYO would be paid $20 000. 00 by CHIADZWA if the assignment fails. If it is successful, that is if BRENNAN and MURAHWA are arrested, Victor MOYO was guaranteed $40 000. 00. The source, who knows Victor MOYO very well, states that this plan was devised when CHIADZWA and MOYO as well as Joseph TODLHA were at Harare Central cells."

Besides this, there is the allegation made by both Assistant Commissioner Augustine John Murahwa, the Officer Commanding the Fraud Squad in Mashonaland, and Detective Inspector Muwadzuri that the appellant tried to offer them a bribe in the sum of $300 000 on 25 April 1988, in order to secure his release. The appellant denies this but says it was the police who suggested it. The appellant says in his Answering Affidavit:

> "4. With specific reference to the issue of bribes mentioned by Mr Muwadzuri, I seek to categorically state that I never offered to give any Police Officer a bribe. The relations between me and the Police Officer were very strained after I had caused action to be instituted before this Honourable Court when the Police had tortured me. The Police were out to get me at any price after this action and if I had said anything which resembled giving a bribe, I would have been charged and brought before the Court immediately.
>
> 5. The truth of the matter is this: - Police Officers George Mafios Muwadzuri, Superintendent Kumire and Detective Inspector Zvavamwe called me to their office and when I had been there, they informed me that they had carefully considered the case against me and they had discovered that the case had been entertained in the first place because their Officer Commanding Assistant Commissioner Murahwa had

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been paid considerable sums of money to assist in the recovery of the money. This happened when I was being held at the Harare Central Police Station cells.

During the course of their investigation, they had seen that there were some ways in which I could be released if I were co-operative. They advised that if I were to give them $200 00, they would make sure that the case against me would be closed and I would be released. I did not comment and I was left in one room and the Police Officers went and discussed the issue in another room. They then

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came back and took me. We then drove to Waterfalls area without us discussing anything. Around Waterfalls, the Police Officers dug a hole of a subsequent (*sic*) size and they covered it partially. We then drove back to the Fraud Squad offices. I was left in one office and the Police Officers later joined me. They advised me that what we had done in the morning was to demonstrate to me that they were very serious about closing the case against me if I were to give them $200 000 to share amongst themselves. They explained to me that if I gave them the money they would arrange for me to lead them now in the company of a senior officer in their Department to the site of the hole they had dug and I was to explain that that is the place I had left the money and that it had been stolen.

6. We discussed the matter but I did not comment on anything. I was then returned to the Police cells at the end of the day. I immediately reported the transactions to the Officer-In-Charge of the Cells and after about an hour or so, two Police Officers came and interviewed me at Cells as regards this (*sic*) transactions. I refer to the Affidavit by my Legal Practitioner A R Chizikani annexed as Annexure 'A'."

Whatever the truth of these allegations is, the important thing is that they are not completely denied. There is some evidence from the police which tends to suggest that there is a likelihood of the appellant interfering with the administration of justice. If the appellant did offer the police a bribe he committed a serious offence or offences. He may face other charges. Is it wise to admit such a person to bail and to set him at liberty? In my view setting him at liberty is likely to defeat the ends of justice and to enable him to interfere with the evidence against him.

In my view, the fact that the appellant has a family, business, was once freed on bail and did not abscond, and is a Zimbabwean citizen by birth whose movements can be curtailed by the surrender of his travel documents, would not deter him from absconding or from interfering with the evidence against him because of the gravity of the crime he is alleged to have committed and the possible severity of the sentence.

I am satisfied that on the facts discussed above the appellant is likely to interfere with the evidence against him or to abscond. Besides, there is no indication on the record of a misdirection, and Mr *Chatikobo* did not attempt to argue that the learned judge *a quo* misdirected himself. It would be improper for this Court to interfere with the exercise of his discretion.

DUMBUTSHENA CJ

For these reasons we dismissed the appeal at the end of hearing argument.

Gubbay JA: I agree

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Korsah JA: I agree

A R Chizikani, appellant's legal practitioner.

CW v COMMISSIONER OF TAXES 1988 (2) ZLR 27 (HC)

Court **High Court, Harare**

Smith J

Tax appeal

17, 18 June 1987 & 13 July 1988

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - ss 16 and 23 - protection against compulsory acquisition of property and against discrimination - tax imposed on persons who had contested payments made for property compulsorily acquired - not a form of discrimination prohibited under s 23 - inadequate compensation under s 16(1)(c) - taxing persons who approach courts in order to determine rights not reasonably justifiable in a democratic society.

Revenue and public finance - Capital Gains Tax Act 1981 - proceeds of sale of shares in foreign companies - whether source of capital gain was in Zimbabwe.

Statutes - interpretation of - principles - retrospectivity - constitution - presumption of constitutionality - meaning - fiscal legislation - extent to which words can be read in or implied - Capital Gains Tax Act 1981 - s 10(f) - proviso thereto - constitutionality of.

Headnote

The appellant company had during the years 1971 to 1976 acquired shares in a number of South African companies. These shares were external securities traded on the Zimbabwe Stock Exchange. In March 1984, trading on the Zimbabwe Stock Exchange in external securities was suspended and two weeks later an amendment was promulgated to the Exchange Control Regulations 1977 allowing the Reserve Bank of Zimbabwe to acquire compulsorily external securities. The appellant's external shares were acquired in this way and a sum of compensation offered. The appellant objected to the amount offered, on the grounds

that it was inadequate because it did not compensate for the 30% premium which had to be paid on the Stock Exchange for such shares. However, following a test case in the Supreme Court, the appellant withdrew its summons claiming the extra 30%.

In 1984 an amendment was made to the Capital Gains Tax Act 1981, exempting from capital gains tax amounts received as compensation for shares compulsorily acquired under the Exchange Control Regulations; but in 1985 a further amendment was made to the Act, withdrawing the exemption in respect of holders of foreign securities who had contested the

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adequacy of the compensation payable. The appellant objected to the notice of assessment for capital gains tax issued in consequence of this legislation, and appealed to the High Court.

It was argued on the appellant's behalf that -

(a) the source of the capital gain made on the sale of the shares was not in Zimbabwe;

(b) the 1985 amendment to the Capital Gains Tax Act 1981 did not have retrospective effect;

(c) the amendment was discriminatory and thus offended against s 23 of the Constitution of Zimbabwe; and

(d) the amendment effectively reduced the compensation received by the appellant and thus offended against s 16 of the Constitution; and the imposition of a tax on those persons who approached the courts to determine their constitutional rights, not being reasonably justifiable in a democratic society, could not be validated by the provisions of s 16(7).

Held, that the source of the proceeds received by a taxpayer from the sale of external shares had to be ascertained by determining the activities of the taxpayer and the place where it is carried on those activities. The appellant's investment transactions were all part of one Zimbabwean enterprise and each investment policy.

Held, further, that there is, in interpreting statutes, a general presumption against retroactivity, unless the statute so provides clearly or by necessary implication. This is all the more so in fiscal legislation. However, when the two amendments to the Capital Gains Tax 1981 were read as one with the principal Act, it was clear that the 1985 amendment had retroactive effect.

Held, further, that although there was no doubt that the amendment to the Capital Gains Tax Act 1981 had the effect of discriminating against persons who contested the payment made for their securities, this is not one of the forms of discrimination that is prohibited by s 23 of the

Constitution, which prohibits discrimination on the basis of race, tribe, place of origin, political opinions, colour or creed.

Held, further, that a person alleging unconstitutionality must establish it; there is no *onus* on the State to show that particular legislation is reasonably justifiable in a democratic society. If legislation can be interpreted so as to fall within the meaning of the Constitution, the courts will assume that the legislature intended to act constitutionally and will uphold the legislation so interpreted. However, it could never have been intended that, once adequate compensation (as required by s 16(1)(c) of the Constitution) had been paid to a person whose property had been compulsorily acquired, the State could erode the compensation by taxing it. Nor could such a provision be justified under s 16(7) as being "reasonably justifiable in a democratic society", as it effectively penalized persons who sought to have their constitutional rights tested in the courts. The 1985 amendment to the Capital Gains Tax Act 1981 was therefore unconstitutional.

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Cases cited:

May & Ors v Reserve Bank of Zimbabwe 1985 (2) ZLR 358 (HC); 1985 (4) SA 185 (ZH)

May & Ors v Reserve Bank of Zimbabwe 1986 (3) SA 107 (ZS)

Income Tax Case No 1395 (1985) 47 SATC 123

CIR v Black (1957) 21 SATC 226; 1957 (3) SA 536 (A)

Lamb v CIR (1955) 20 SATC 1 (A); 1955 (1) SA 270 (A)

Boyd v CIR (1951) 17 SATC 366 (A); 1951 (3) SA 535 (A)

CIR v Lever Bros & Unilever Ltd (1946) 14 SATC 1 (A)

D v Commissioner of Taxes GS-171-79 (unreported)

Principal Immigration Officer v Purshotam 1928 AD 435

Bellairs v Hodnett & Anor 1978 (1) SA 1109 (A)

Lek v Estate Agents Board 1978 (3) SA 160 (C)

Pretorius v Minister of Defence 1980 ZLR 395; 1981 (1) SA 1174 (ZAD)

Canadian Eagle Oil Co Ltd v R [1945] 2 All ER 499 (HL); [1946] AC 119

W T Ramsay Ltd v Inland Revenue Commissioners [1981] 1 All ER 865 (HL)

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

Nelungaloo (Pty) Ltd v Commonwealth & Ors (1948) 75 CLR 495

Patel v Attorney-General 1968 Zambia LR 99

SMITH J

A P de Bourbon SC for the appellant

M J Gillespie for the respondent

Judgment

Smith J: The appellant is a locally registered company which has, as its major source of income, dividends received on share investments. The entire shareholding of the appellant is now held by a trust and the sole trustee is resident in Zimbabwe. During the period 1971 to 1976 the appellant acquired shares in a number of companies which were registered outside Zimbabwe and had their head offices and principal places of business in the Republic of South Africa, with their registers of members being located and maintained outside Zimbabwe (these

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shares are hereinafter referred to as the "External Shares"). None of the said companies had any significant assets inside Zimbabwe and their trading activities were carried on outside Zimbabwe. Dividends on the External Shares were payable outside Zimbabwe at the place of business of the company concerned where the share registers were maintained. All of the External Shares were quoted, and dealt in, on the Johannesburg Stock Exchange. The External Shares were external securities traded on the Zimbabwe Stock Exchange as such. They were purchased through a local stockbroker and paid for by the appellant in local currency to such stockbroker. As required by law, they were held on behalf of the appellant in the name of a nominee which was a local resident.

On 14 March 1984, trading on the Zimbabwe Stock Exchange in external securities, including the External Shares, was suspended. Two weeks later, on 28 March the Exchange Control (Amendment) Regulations 1984 (No. 3) SI 95A of 1984 were promulgated. The effect of these regulations was to insert a new provision, s 12A, in the Exchange Control Regulations 1977. Thereafter, on 27 April 1984, the Reserve Bank of Zimbabwe, acting on behalf of the Minister of Finance, Economic Planning and Development, issued to the appellant in terms of the said s 12A a notice of its intention to acquire compulsorily the External Shares. Subsequently, on 29 May, and again acting in terms of the said s 12A, the Reserve Bank of Zimbabwe directed the transfer of ownership of the External Shares into the name of the Reserve Bank and thus compulsorily acquired the External Shares. The appellant initially objected to this compulsory acquisition but later withdrew its objection. The Reserve Bank of Zimbabwe on 3 June 1984 paid the appellant the sum of $155 756 as compensation for the External Shares compulsorily acquired. The appellant objected to the amount of such compensation on the grounds that it was inadequate, alleging that the 30% of the amount paid as adequate compensation for the External Shares in respect of such premium. After the appellant had issued a summons claiming the

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additional compensation, it was agreed between the appellant and the Reserve Bank of Zimbabwe that the parties would abide by the decision of the courts in a test case on the adequacy of such compensation. The decision of the High Court in such test case is reported in *May v Reserve Bank of Zimbabwe* 1985 (4) SA 185 (ZH) and the decision of the Supreme Court on appeal is reported in *May, Thomas, Cairns & Frogmore v Reserve Bank of Zimbabwe* 1986 (3) SA 107 (ZS). The appellant thereafter withdrew its summons claiming additional compensation for the External Shares which had been compulsorily acquired.

The Capital Gains Tax Act 54 of 1981 came into operation on 1 August 1981. Section 10 of that Act provides for transactions which are exempt from capital gains tax. In his Budget Speech in the House of Assembly on 26 July 1984, the Minister of Finance, Economic Planning and Development announced that it was his intention to exempt from capital gains tax all amounts received as compensation for shares acquired in terms of s 12A of the Exchange Control Regulations 1977. This proposal was implemented by s 16 of the Finance (No. 2) Act, 1984 (No. 24 of 1984) which was promulgated in the *Gazette* of 28 October 1984. This section, which inserted a new paragraph in s 10 of the Capital Gains Tax Act 1981 and was specifically made

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retrospective to 1 April 1984, reads as follows -

> "16. With effect from 1 April 1984, the Capital Gains Tax Act, 1981, is amended in section 10 by the insertion after para (e) of the following paragraph -
>
> '(f) amounts received or accrued on any acquisition of a marketable security by the Minister in terms of s 12A of the Exchange Control Regulations, 1977, published in Rhodesia Government Notice 399 of 19787, as amended by the Exchange Control (Amendment) Regulations, 1984 (No. 3), published in SI 95A of 1984'."

The following year, in his Budget Speech in the House of Assembly on 30 June 1985, the Minister of Finance, Economic Planning and Development indicated that, for revenue and administrative reasons, he intended to withdraw the exemption from capital gains tax in respect of holders of foreign securities who contested the adequacy of the compensation payable on the acquisition of those securities. Financial statements presented at the conclusion of the said Budget Speech on 31 July 1986 showed an actual deficit for the financial year of $981 484 741. The estimated deficit for the financial year 1986/97 was $1 047 971 900. The proposal to withdraw the

SMITH J

exemption was implemented by s 18 of the Finance Act, 1985 (No. 19 of 1985) promulgated in the *Gazette* of 1 November 1985, which reads as follows:

> "18. Section 10 of the Capital Gains Tax Act, 1981, is amended in para (f) by the insertion of the following proviso -
>
> 'Provided that the exemption provided for by this paragraph shall apply only in respect of -
>
> (a) the payment made by the Minister in terms of the said regulations, which was based on the external market price of the securities concerned as at 27 April 1984, or 29 May 1984, whichever was the higher;
>
> (b) those holders of the securities concerned who did not contest such payments in terms of the said regulations'."

In all, external securities belonging to 8017 persons, companies and trusts were compulsorily acquired in 1984 by the Reserve Bank of Zimbabwe in terms of s 12A of the Exchange Control Regulations 1977. A total of $245 037 190,01 was paid as compensation to the sellers of such securities. Of these sellers 475, holding shares in respect of which $74 628 078 was paid, instituted litigation claiming an additional amount of compensation totalling $25 108 755, such extra amount being based upon the existence of a premium on the quoted price of such shares on the Zimbabwe Stock Exchange of approximately 30% of such price.

The effect of the proviso to s 10(f) of the Capital Gains Tax Act 1981 was that the appellant, having lodged an objection to the amount of compensation paid, was now held liable for capital gains tax. Had it not so objected there would have been no such liability for capital gains tax.

On 24 July 1986, the respondent issued a notice of assessment for capital gains tax to the appellant in respect of the year ending 31 March 1985, assessing a capital gains on the sale of

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the external shares and assessing the tax payable as $31 011,90. The appellant lodged an objection against the assessment which was disallowed. Thereupon the appellant appealed to the High Court.

At the commencement of the hearing Mr *de Bourbon* applied to amend the applicant's case in accordance with the notice given on 24 February 1987. The respondent had no objection and the application was accordingly granted.

SMITH J

The submission made by Mr *de Bourbon* fell into four categories which I will deal with *seriatim* .

SOURCE

The first submission was that the source of the capital gain made by the appellant on the sale of the shares was not in Zimbabwe. It was common cause that all the External Shares related to South African companies in that the share registers were kept in South Africa, dividends were paid in Rand and payable in South Africa, and the shares were quoted and traded on the Johannesburg Stock Exchange. These companies traded and made their profits outside Zimbabwe and it was the profit-earning capacity of the companies which determined what dividends were paid. Mr *de Bourbon* pointed out that the Capital Gains Tax Act 1981 did not have a deeming provision equivalent to s 12(2) of the Income Tax Act [*Chapter 181*]. He submitted that *Income Tax Case No. 1395* (1985) 47 SATC 123 was distinguishable and, in any case, being a judgment of the Special Court for Income Tax Appeals, was not binding on a judge of the High Court.

In that case the Special Court held that the source of the proceeds received by the taxpayer from the sale of its South African shares had to be ascertained by determining the activities of the taxpayer and the place where it carried on those activities. The taxpayer's investment transactions, whether the investments were made in Zimbabwe, South Africa or England, were all part of one (Zimbabwean) enterprise and each investment was an integral part of the taxpayer's overall investment policy. Accordingly, the source of the proceeds of the sale of South African shares was Zimbabwe. Mr *de Bourbon* submitted that the source of the capital gain in this case was the country where the companies concerned carried on their operations and generated or increased the value of the shares of the companies and where the shares were registered. It was the market factors in Sough Africa which had the effect of causing a capital gain. In Zimbabwe the External Shares could no longer be traded on the Zimbabwe Stock Exchange - they were compulsorily acquired by the Reserve Bank, not freely and voluntarily sold and purchased - and the 30% premium which applied due to market factors in Zimbabwe was not realised by the previous owners of the shares when they were expropriated. In support of his argument Mr *de Bourbon* relied, *inter alia*, on *CIR v Black* (1957) 21 SATC 226, *Lamb v CIR* (1955) 20 SATC 1 (A), *Boyd v CIR* (1951) 17 SATC 366 (A) and *CIR v Lever Bros & Unilever Ltd* (1946) 14 SATC 1 (A).

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SMITH J

These cases were all considered in *Income Tax Case No. 1395 supra* as were a number of other cases dealing with the question of "source". Mr *Gillespie* has submitted that although decisions of the Special Court for Income Tax Appeals are not binding on a judge of the High Court they are of considerable persuasive force and should not be departed from unless they are clearly erroneous. I agree with this submission.

Despite the endeavours of Mr *de Bourbon*, I am not satisfied that the decision of the Special Court of *Income Tax Case No. 1395* is incorrect. The conclusions are consistent with those propounded in a number of earlier cases in this country and elsewhere and, in my opinion, are soundly based. The facts in this case are, in my view, analogous to those in *Income Tax Case No. 1395* and in *D v Commissioner of Taxes* GS-171-79. The appellant is a resident of Zimbabwe and its investment-dealing activities were, for all practical purposes, carried on in this country. Accordingly, I find that the income obtained by the appellant from the sale of the External Shares was from a source within Zimbabwe.

RETROSPECTIVITY

Sections 51(5) of the Constitution provides that an Act of Parliament shall come into operation on the day of its publication in the *Gazette* or on such other days as may be specified in or under that or some other Act.

Sections 16 of the Finance (No. 2) Act 1984, which introduced para (f) of s 10 of the Capital Gains Act 1981, specifically provided that the amendment took effect from 1 April 1984. Thus it applied to capital gains acquired from the expropriation of the external shares during the fiscal year beginning 1 April 1984. However s 18 of the Finance Act 1985, which introduced the proviso to para (f), did not contain any provision stating that the amendment was to take effect from the beginning of a specific fiscal year or from a specified date. That Act was published in the *Gazette* of 1 November 1985. Mr *de Bourbon* argued that the amendment made by it should be applied in relation to the fiscal year beginning 1 April 1985 and not the earlier one which began on 1 April 1984.

He referred to a number of cases which enunciated the guide-lines to be followed in determining whether or not any legislative provision should be given retroactive affect.

In *Principal Immigration Officer v Purshotam* 1928 AD 435 at 450 STRATFORD JA said -

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> "The rule of interpretation is well established, it is that where in express terms or by necessary implication (which is much the same thing) the enactment is to have retrospective effect, that effect must be given to it whatever the consequences may be. If, on the other hand, the clear intention to have a retrospective effect cannot be extracted from the words used in their context, then the enactment must not be taken to affect pre-existing rights."

See also *Bellairs v Hodnett & Anor* 1978(1) SA 1109 (A) at 1148 where it was said:

> "There is a general presumption against a statute being construed as having retroactive effect".

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In *Lek v Estate Agents Board* 1978 (3) SA 160 (C) at 169 FRIEDMAN J said:

> "The presumption against retrospectivity does not apply when it must be inferred from the provisions of the Act that the Legislature intended the Act to be retrospective. Such an inference can be drawn when the consequences of holding an Act to be non-retrospective would lead to an absurdity or practical injustice."

In *Pretorius v Minister of Defence* 1980 ZLR 395 at 401; 1981 (1) SA 1174 (ZAD) FIELDSEND CJ at p 1177 referred to -

> "the well recognised principle relied upon in *The Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 at 372 that statutes will not be held to take away existing rights retrospectively unless they so provide expressly or by necessary intendment."

As regards taxing Acts, which is what is under consideration in this case, in *Canadian Eagle Oil Co Ltd v R* [1945] 2 All ER 499 (HL) at 506 and 507 VISCOUNT SIMON LC said:

> "The late ROWLATT J, whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase, said in *Cape Brandy Syndicate v Inland Revenue Commissioners* (7) at p 71:
>
> > '... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'."

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In *W T Ramsay Ltd v Inland Revenue Commissioners* [1981] 1 All ER 865 (HL) LORD WILBERFORCE at pp 870 and 871 restated "some familiar principles" relating to fiscal legislation, the first one being -

> "1. A subject is only to be taxed on clear words, not on 'intendment' or on the 'equity' of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle. What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded."

An analysis of the Capital Gains Tax Act 1981 and the amendments made thereto would assist in the interpretation of the provisions in question. For many years in this country it has been the practice for the Minister responsible for financial affairs to make his "Budget Speech" in the House of Assembly in July and then present the Estimates of Expenditure for the financial year.

Thereafter a Finance Act is introduced which contains the amendments to the various taxing Acts which are intended to give effect to the measures announced in the "Budget Speech". Thus the Finance (No. 2) Act 1984 contains a number of Parts, each of which consists of a section or fasciculus of sections amending a particular taxing Act. Thus part II relates to income tax and contains two sections which amend Chapter I of the Finance Act [*Chapter 179*] and seven section which amend the Income Tax Act [*Chapter 181*]. Part III relates to stamp duties and contains one section which amends Chapter II of the Finance Act [*Chapter 179*]. Part IV relates to sales tax and contains one section which amends Chapter IV of the Finance Act [*Chapter 179*]. Part V relates to capital gains tax and contains one section which amends the Capital Gains Tax Act 1981. For the sake of completeness I would mention that the Finance

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Act [*Chapter 179*] is the Act which prescribes such things as the rates of tax and levels of abatements for the purpose of the various taxing Act, and hence it deals with a number of different taxes such as income tax, stamp duties, sales tax and capital gains tax.

In my view, each separate Part of the relevant Finance Act must be read as one with the principal Act which it amends. Thus Part V of the Finance (No. 2) Act 1984, which contains the s 16 that amended s 10 of the Capital Gains Tax Act 1981 by inserting para (f), must be read as one with, and forming part of, that principal Act. It is not only the new para (f) that becomes part of the

principal Act, but also the introductory words which indicate the date with effect from which the amendment becomes operative.

The proviso inserted by s 18 of the Finance Act 1985 contains two paragraphs. It provides that the exemption shall apply only in respect of -

(a) payments made in terms of s 12A of the Exchange Control Regulations 1977;

(b) those holders of securities who did not contest such payments.

Although the paragraphs are not linked by a conjunction, in my view they must be interpreted as though they were. Para (a) identifies the type of payments affected by the proviso and para (b) identifies the persons affected.

It was agreed by the parties that, when the Minister of Finance, Economic Planning and Development exercised his powers in terms of s 12A of the Exchange Control Regulations 1977, he did not necessarily acquire all the external foreign securities to which that section could apply. He acquired all the "pool shares" as explained in *May v Reserve Bank of Zimbabwe* 1985 (4) SA 185 (ZH). The external or foreign securities which were acquired by a local resident before 1961 and have not been subsequently sold and any such securities which have been acquired after 1984 by way of inheritance or means other than purchase with Zimbabwean currency, are still privately held and could in the future be acquired in terms of s 12A.

Mr *de Bourbon* argued that the proviso should be construed as having prospective effect and applying to those securities only if and when they were expropriated. I cannot accept his submission. To do so would be to strain the language used in the proviso and would lead to an absurdity. Para (a) refers to the external market price of the securities as at 27 April or 29 May 1984. This selection of dates would be meaningless and non-sensical if the exemption were to apply to securities expropriated after 1 April 1985. The market price of securities as at either of those dates would be most unlikely to constitute "adequate compensation" (as is required by s 12A of the Exchange Control Regulations 1977 and s 16(1)(c) of the Constitution) for securities acquired at a much later date. Furthermore, para (b) is worded so as to indicate retroactive effect - it refers to those holders who **did not contest** the payment. If the proviso had been intended to have prospective effect only it would have been phrased in the resent tense as is

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usual in legislation which is "always speaking".

I accordingly reject the submission that the proviso to para (f) of s 10 of the

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Capital Gains Tax Act 1981 did not have retroactive effect.

DISCRIMINATION

There is no doubt that the proviso to s 10(f) of the Capital Gains Tax Act 1981 was intended to, and did in fact, have the effect of discriminating against those holders of securities who contested the payment made for the securities. Those who did not contest the payment were exempt from paying capital gains tax on any gain made on the sale of the securities. Those who did contest the payment lost the exemption.

Section 23 of the Constitution of Zimbabwe provides as follows -

"23. (1) Subject to the provisions of this section -

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) For the purposes of subs (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinion, colour or creed are prejudiced.

(a) by being subjected to a condition, restriction or disability to which persons of another such description are not made subject;

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description, and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour or creed of the persons concerned.

(3) Nothing contained in any law shall be held in contravention of subs (1)(a) to the extent that the law in question relates to any of the following matters -

(a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

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(b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case;

(c) restrictions on entry into or employment in Zimbabwe or on the enjoyment of services provided out of public funds in the case of persons who are neither citizens of Zimbabwe nor regarded by virtue of a

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written law as permanently resident in Zimbabwe;

(d) qualifications, not being qualifications specifically relating to race, tribe, place or origin, political opinions, colour or creed, for service with any public authority or any body corporate established directly by or under an Act of Parliament for a public purpose;

(e) the appreciation of public revenues or other public funds; or

(f) the according to tribespeople to the exclusion of other persons of rights or privileges relating to Tribal Trust Land."

Mr *de Bourbon* submitted that subs (2) of s 23 merely explained the types of discrimination that were forbidden by subs (1) without being exhaustive. The basis or his argument was that where general words are used and then followed by more specific terminology, the specific words do not derogate from the general ones. In my view this argument cannot be sustained. The Income Tax Act [*Chapter 181*] abounds with discriminatory features. Married and single persons are treated differently; farmers and miners are afforded special deductions and advantages. These discriminatory provisions are not covered by subs (3) of s 23 and, if Mr *de Bourbon*'s submission were to be accepted, they would be regarded as unconstitutional. I do not think that could be right. Subsection (2) of s 23 starts with the words "For the purposes of subs (1)". Effect must be given to these words. They cannot be regarded as mere surplusage. In my view, those words are intended to show that subs (2) defines the ambit of the protection afforded by subs (1). To my mind, this interpretation is reinforced by the fact that para (d) of subs (3) refers to "race, tribe, place of origin, political opinions, colour or creed", which are the criteria specified in subs (2). If it had been intended that subs(1) should cover a much broader ambit, as was argued by Mr *de Bourbon*, the specific criteria identified in subs (2) would, or should, have been followed by a word of general meaning to indicate that the criteria so specified were not intended to be an exhaustive list. A similar indication would also have had to be made in para (d) of subs (3).

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The Declaration of Rights set out in the Constitution of Zimbabwe follows, with minor modifications and differentiations to suit the needs of the country concerned, the Bill or Declaration of Rights set out in the constitutions of other former colonies of the United Kingdom. Many of these use a set of criteria very similar to those set out in s 23(2). Some, however, include the word "sex", thereby making it unconstitutional for any law to make a discriminatory provision based on the sex of a person. If Mr *de Bourbon*'s argument were to be accepted, the addition of any further criterion such as this would be unnecessary and mere surplusage because subs (1) by itself would be wide enough and sufficiently all-embracing to cover all forms of discrimination. In fact, if the argument were to be accepted, it would mean that the entire subs (2) was mere surplusage.

The Constitution is an important document that obviously required to be drafted with great care and after much deliberation. Judicial notice can be taken of the fact that it was drawn up only after a long series of meetings over the course of many months at Lancaster House in London. Full effect must be given to each provision. Each provision must have been inserted for a specific purpose. I cannot accept that subs (2) of s 23 was inserted merely for descriptive

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purposes and could have been dispensed with completely. If that had been the intention then it should have been clearly indicated. Accordingly I find that the proviso to para (f) of s 10 of the Capital Gains Tax Act 1981 is not inconsistent with the provisions of s 23 of the Constitution of Zimbabwe.

COMPENSATION/PENALTY

Mr *de Bourbon*'s final submission was that the proviso to para (f) of s 10 of the Capital Gains Tax Act 1981 was unconstitutional in that it contravened the provisions of s 16 of the Constitution. The relevant provisions of that section read as follows -

> "16. (1) No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that -
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> (a) & (b) ... ;
>
> (c) requires the acquiring authority to pay promptly adequate compensation for the acquisition;
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> (d) & (e) ... ;
>
> (2) - (6) ... ;
>
> (7) Nothing contained in or done under the authority of any law shall be held to be in contravention of subs (1) to the extent that the law in question makes provision for the acquisition of any property or any

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> interest or right therein in any of the following cases -
>
> (a) in satisfaction of any tax or rate;
>
> (b) to (o) ... ;
>
> except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

The submission was two-fold. Firstly, the taxing of the amount received by the appellant had the effect of reducing the "compensation" paid to him and therefore he was not paid "adequate compensation" as required by s 16(1)(c) of the Constitution. Secondly, the imposition of a tax on those persons who approached the courts in order to determine their constitutional rights was not reasonably justifiable in a democratic society.

In *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 at 382 GEORGES CJ said:

> "Arguments have also been addressed at some length on the presumption of constitutionality. It is a phrase which appears to me to be pregnant with the possibilities of misunderstanding. Clearly a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted.

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This is one of the senses in which a presumption of constitutionality can be said to arise. On does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution."

Then at the bottom of p 382 and on p 383 he continued:

"Because the person alleging unconstitutionality must establish it, a burden may rest on that person to establish factually that an Act does not

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fall within the ambit of constitutionality. Many neo-Nigerian constitutions permit derogation from the declared rights defined provided that these derogations are, to use the phrase in the Zimbabwean Constitution, 'reasonably justifiable in a democratic society'. Even where the Constitution does not make it clear where the *onus* lies as the Zimbabwe Constitution does, the *onus* lies on the challenger to prove that the legislation is not reasonably justifiable in a democratic society and not on the State to show that it is. In that sense there is a presumption of constitutionality. As LORD FRASER OF TULLYBELTON stated in *Attorney-General & Anor v Antigua Times Ltd* [1975] 3 All ER 81 at 90:

> 'In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passes by the Parliament of Antigua were reasonably required.'

In that sense the presumption represents no more than the Court adopting the view that a legislature, elected by universal adult suffrage and liable to be defeated in an election, must be presumed to be a good judge of what is reasonably required or reasonably justifiable in a democratic society. But situations can arise even in such societies in which majorities oppress minorities, and so the Declaration of Rights prescribes limits within which rights may be restricted. It is only in cases where it is clear that the restriction is oppressive that the Court will interfere."

The object of compensation was succinctly summarised by DIXON J in *Nelungaloo (Pty) Ltd v The Commonwealth & Ors* [1948] 75 CLR 495 at 571-572 as follows:

"Now 'compensation' is a very well-understood expression. It is true that its meaning has been developed in relation to the compulsory acquisition of land. But the purpose of compensation is the same, whether the property taken is real or personal. It is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived. Compensation *prima facie* means recompense for loss, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As the object is to find

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the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it."

In *May, Thomas, Cairns & Frogmore v Reserve Bank of Zimbabwe supra* the Supreme Court held that the compensation in terms of s 12A of the Exchange Control Regulations 1977 paid to

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those persons whose securities had been compulsorily acquired was "adequate compensation" as required by s 16(1)(c) of the Constitution. However, as stated by DIXON J in *Nelungaloo's* case *supra*, the purpose of compensation is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived.

In the case of the appellant, whilst the State has, with one hand, placed the full money equivalent of the securities in his hands, it has, with the other hand, taken back part of that compensation by way of capital gains tax.

It could never have been the intention that once adequate compensation had been paid to a person whose property had been compulsorily acquired, the State could erode the compensation in any way. If that were permissible, the protection afforded by s 16(1)(c) of the Constitution could be easily circumvented. A special tax could be imposed equal to the amount paid as compensation. This would have the effect of making the constitutional right completely illusory. The Constitution is a meaningful document and the protections afforded by the Declaration of Rights must be fully recognized and given effect to. It is not sufficient to recognize the protections, to pay lip service to them, and then to derogate from them. As MAGNUS J said in *Patel v The Attorney-General* 1968 Zambia LR 99 at 116:

> "It has been held that 'the provisions of the Bill of Rights are to be broadly construed (*Grau v US* (6) at p 213), but this is so that they may be 'protected against gradual encroachments that seek to deprive them of their effectiveness' (*ibid*). In other words, a Bill of Right must be broadly construed in favour of the individual rather than in favour of the State (see *Sgro v US* (7) at p 265)."

I am accordingly of the view that the proviso to para (f) of s 10 of the Capital Gains Tax Act 1981 contravenes the requirements of s 16(1)(c) of the Constitution.

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Can that proviso be validated by the provision of s 16(7) of the Constitution? I think not. Without doubt the Capital Gains Tax Act 1981 is an Act such as is referred to in subs (7)(a) of s 16 of the Constitution. Mr *de Bourbon* has submitted that the proviso concerned is a provision which cannot be justified in a democratic society. The *onus* lies on the appellant to establish that submission.

In *Patel's* case *supra* at p 128 *et seq* MAGNUS J said:

> "The learned *Attorney-General* then went on to make a submission which appears to have been accepted by the learned CHIEF JUSTICE in *Kachasu's* case (at p 28 and 29). This was that, when a court applied the test of what is reasonably required in Zambia, then so long as Zambia continues to be a democracy, that which is reasonably required in Zambia must be reasonably justifiable in a democratic society. On the few occasions when this expression has fallen to be interpreted in the equivalent constitutional provision of other countries, such as Nigeria, a similar trend of interpretation has been adopted. I think that the difficulty, and indeed the obscurity, of the expression has somewhat encouraged this approach. I rather suspect that the constitutional draftsman included the expression more for its emotional effect than with any real regard to what it means. However, it is there and has to be given some meaning. As Mr *Cave* submitted with considerable force, if what is reasonably required in Zambia is to be equated with what is reasonably justifiable in a democratic society, the latter part of the subsection would be tautologous and completely unnecessary. If I decided, therefore, that the regulation or what was done under it was reasonably required in Zambia, there would be nothing for me to decide on the issue of whether it was reasonably justifiable. To adopt the view submitted by the learned *Attorney-General* seems to me

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to be begging the question. It involves adopting an axiom, namely that Zambia is a democratic society and to proceed from there to the assumption that 'Zambia' must be equated with 'democratic society'. In rejecting this suggestion, I am not for a moment suggesting that Zambia is not a democratic society, but, for the purpose of the Constitution, I think it is necessary to adopt the objective test of what is reasonably justifiable, not in a particular democratic society, but in any democratic society. I accept the argument that some distinction should be made between a developed society ad one which is still developing, but I think one must be able to say that there are certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society."

SMITH J

With respect, I agree with the views expressed by the learned Judge.

Mr *Gillespie* submitted that, when regard is had to the "pith and substance" of the proviso in question, the intention was to raise moneys to finance public expenditure and that was why the exemption from capital gains tax was withdrawn. There was nothing in the Act to show that the real intention was to punish those who contested the quantum of the compensation paid to them, rather than merely to raise the income required from taxation. He submitted that the figures of income and expenditure for the fiscal years concerned showed clearly that the exemption previously extended to holders of securities which had been compulsorily acquired had been withdrawn for tax and administrative purposes. He conceded that the appellant would suffer a burden which those persons who had not contested the quantum of compensation would not. However, there would possibly be some holders of securities who would suffer a capital loss, rather than a capital gain, and such persons would not be penalised. From the figures quoted to establish the financial position of the State in 1985 and 1986 and the budget deficits, there could be no doubt of the necessity to ensure that as much money as could possibly be raised by way of taxation should be brought into the coffers of the State.

However, could the proviso to para (f) of s 10 of the Capital Gains Tax Act 1981 be regarded as being "reasonably justifiable in a democratic state"? I do not think so. Some 8 000 people were affected by the compulsory acquisition of the External Shares. The overwhelming majority of them accepted the compensation offered and were exempted from paying any capital gains tax thereon. Four hundred and seventy-five contested the quantum of compensation offered and subsequently, the exemption from capital gains tax was withdrawn from them and them only. The exemption was clearly and deliberately withdrawn from those who had contested the quantum. This action would be seen by those affected, and by many others, as imposing a penalty on persons who sought to have their constitutional rights tested in the courts of Zimbabwe. That was the main criterion specified to indicate the person affected. In a country which upholds a Declaration of Rights, no barrier should be placed before any person who seeks the protection conferred thereby. Likewise, no penalty should be imposed upon a person who has approached the courts to determine his constitutional rights. In this case, the withdrawal of the exemption does have the effect of penalising all persons who approached, or wanted to approach, the courts in order to determine their constitutional rights. In my opinion, such an act cannot possibly be regarded as being reasonably justifiable in a democratic

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SMITH J

society. Accordingly, I find that s 18 of the Finance Act 1985 is inconsistent with the Constitution. It is therefore unconstitutional and must be regarded as having no force or effect. The appeal is therefore allowed and Assessment No. 200808/IC/C4T/1/86 is set aside.

Gill, Godlonton & Gerrans, appellant's legal practitioners

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

UZANDE v KATSANDE 1988 (2) ZLR 47 (HC)

Court **High Court, Harare**

Reynolds J

Application for rescission of judgment

30 June & 13 July 1988

Flynote

Civil procedure - default judgment - rescission of - common-law principles governing - nature of onus on applicant.

Headnote

Default judgment had been entered against the applicant in favour of the respondent because of the former's non-appearance at court on the date set down for trial. He sought rescission of the judgment, alleging that his legal practitioner (who had, before the trial date, renounced his agency) had misinformed him of the date set down. It was common cause at the application that the matter fell to be determined under the common-law principles governing *restitutio in integrum*.

Held, that an allegation by a litigant that he was unaware of a pending trial would justify *restitutio* only if he could establish "a supremely just cause of ignorance free from all blame whatsoever" (*Voet* 2. 4. 14). The first hurdle is to show that *prima facie* he was blameless. In the present case, his allegations, if true, would establish a "supremely just cause of his ignorance". The second hurdle is to establish, on the balance of probabilities, the truth of his allegations.

Held, further, that the applicant had failed to show, on the balance of probability, that he was genuinely unaware of the date of hearing because of incorrect information supplied by his legal practitioners.

Cases cited:

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Stewart's Assignee v Wall's Trustee & Ors (1881) 3 SC 243;

Childerley Estate Store v Standard Bank of SA Ltd 1924 OPD 163;

Vista Estates (Pvt) Ltd v Animal Breeders Co-op Ltd 1974 (2) RLR 147; 1975 (1) SA 193 (R).

REYNOLDS J

M R D Stonier for the applicant

J Sayce for the respondent.

Judgment

Reynolds J: The present respondent issued summons in July 1986, claiming payment from the present applicant of sums allegedly due in respect of leased premises. The applicant entered appearance to defend, and the matter was eventually set down for trial. On the first day of the hearing, the respondent was granted judgment against the applicant, as the applicant had failed to appear. The applicant now seeks to have that judgment set aside on the grounds that he was not aware of the correct date set-down, having been misinformed of that date by his legal representatives. The applicant produced a copy of a typed letter from the legal representatives to himself in which the incorrect date of set-down had been altered to the correct date in ink. The applicant's affidavit is to the effect that the original which was sent to him did not have the alteration endorsed upon it. He stated that he had lost this original copy of the letter, and had extracted the copy produced from the files of his legal practitioner.

It was common cause that this matter falls for determination under the common law principles governing *restitutio in integrum*, and is not such a matter as is governed by the Rules of the High Court 1971. One of the issues between the parties was whether the applicant should have produced evidence from his legal representative as to whether the letter sent to him had the alteration upon it or not. To consider the respondent's contentions first, Mr *Sayce* argued that a heavy *onus* rested upon the applicant under the common law to establish " *justus error*": *Stewart's Assignee v Wall's Trustees & Ors* (1881) 3 SC 243. He cited *Voet* in this respect to the effect that an allegation by a litigant that he was unaware of a pending trial would justify *restitutio* only if the applicant could establish "a supremely just cause of ignorance free from all blame whatsoever" (2. 4. 14). In addition, it was submitted that, as had been pointed out in *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at 166, the limits of *justus error* are extremely narrow. Mr *Sayce* drew attention to *Vista Estates (Pvt) Ltd v Animal Breeders Co-op Ltd* 1974 (2) RLR 147; 1975 (1) SA 193(R); and he suggested that a similar point had been in issue in that case. The applicant there had alleged that it had received the notice of trial only some days after the event. It was held that the applicant's ignorance as to the date of set-down was due to his own prior "gross negligence", and the application for rescission of the judgment granted was dismissed on that ground.

Mr *Stonier*, for the applicant in the present case, contended that whereas there

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might be a greater *onus* cast on him under the common law than there would be under the Rules of Court, this should not be taken to extremes. He submitted that whereas it might have been better for the applicant to have filed a supporting affidavit from the legal practitioner concerned, his failure to do so did not indicate that he had been negligent or had not shown due cause.

Assuming that this extremely high standard of proof is still applicable, and is warranted today, it is my view that different considerations apply in the present case to those in issue in the other matters adverted to. It seems to me that the *onus* resting on the applicant in the instant case relates to the reasons that account for his default, and not to the method he adopts of pursuing his application for rescission of judgment. In other words, the *onus* here is for the the applicant to establish an extremely good reason for not attending court on the day of the trial. His manner of proving that reason is judged by other standards . There are thus two separate stages of enquiry necessary. An example may help to explain this notion. If the applicant had said that he had not attended court because his wife had asked him to do shopping that day, this would clearly not amount to even a "good" reason, let alone a "blameless" one. This would apply whether or not his statement was true. If, however, he had alleged that the reason for his non-attendance was that he had collapsed and had been rushed to hospital for an emergency operation just as he was leaving for the court building, this, I imagine, would mean, *prima facie*, that he was indeed "free from all blame whatsoever". His method of proving the truth of this allegation, however, would be another matter altogether, and would be judged by a different standard of proof. As applies to any other factual averment, the standard of proof would be the preponderance of probability. On this basis, then, I would hold that the applicant in this case has in fact established, *prima facie*, "a supremely just cause of (his) ignorance" that the trial was due to commence on the day of the set-down. But that, as I have indicated, is not the end of the matter. The truth of the applicant's allegation is in issue. In this respect, I must be satisfied that the applicant has also established, on a balance of probabilities, that the letter sent to him by his legal practitioners did indeed reflect the wrong date for the commencement of the trial.

It is of importance to note that the respondent, in his reply to the applicant's founding affidavit, remarks as follows: -

> "5. Ad PARAGRAPH 5 and 6 I genuinely believe that Applicant has deliberately withheld disclosing that the original letter sent to him

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> by his practitioners bore trial dates as 2nd to the 4th December 1987 because he is aware that such information would clearly show that his excuse for failure to attend trial is false. In the absence of an affidavit by Mr Jeche explaining the stage at which the said letter dated 30th April, 1987 was amended I am totally justified to believe that the trial dates mentioned in the said letter were altered before the letter was posted to the Applicant."

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The applicant's response to this was:

> "Ad paragraph 5
>
> Applicant denies, *in toto*, all the allegations of fact contained in this paragraph. Applicant insists that he received a letter from Mr Jeche dated the 30th April, 1987 which indicated that the trial was supposed to commence on the 3rd December 1987."

It is clear from the foregoing that the respondent alleged that the applicant's excuse for non-attendance was false, and that before that excuse could be accepted, an affidavit from Mr Jeche, the legal practitioner in question, would be necessary, explaining at what stage the alteration was made. The applicant, however, still failed to produce the supporting evidence demanded, and no explanation for this was forthcoming. As I see it, it is probable that Mr Jeche could say only one of three things regarding the letter sent to the applicant: (a) the alteration of date was endorsed on the letter; (b) it was not; (c) he could not remember or say whether it was or not. I do not consider that the applicant's bare assertion in this respect is of much value, and, in the absence of supporting evidence that was available and was specifically required, I consider that the probabilities are against the applicant regarding this aspect.

There are other considerations as to the overall probabilities. The applicant had, despite some earlier delays and difficulties, maintained his defence to the claim against him, and appeared to be ready to go to trial. If this were so, it would be extraordinary for him to be in default deliberately. There are, however, other factors that detract from the cogency of this observation. It was established that the applicant's legal practitioners had renounced agency on 27 November 1987, only a few days before the trial was due to commence. According to the applicant the only notification he had ever received of the date of the hearing was from the letter sent to him by Mr Jeche dated 30 April 1987, that is some seven months before the event. I consider it to be unlikely that there would have been no further discussions regarding the forthcoming

trial over this very long period of time that would not have included mention of the necessary preparations for trial, and also the dates involved. This is particularly likely, in my view, when practitioners are about to renounce agency just before the trial date.

It was alleged by the respondent that the renunciation of agency had been necessary as the practitioners had not been put in funds timeously, and this suggestion was not refuted by the applicant. This fact serves to furnish a possible reason why the applicant did not wish to appear at the hearing on due date. It also provides a possible explanation for the applicant reacting with what amounts to virtual indifference to the fact that judgment had been entered against him. I believe that it would be reasonable to expect a litigant who found himself in the applicant's unhappy position to take urgent and comprehensive measures to remedy the injustice he had suffered. In fact the present application was only filed on 19 May 1988, and the applicant's explanation for this five month delay was:

> "I failed to make an application for rescission of judgment immediately due to the fact that Messrs Chirunda, Chihambakwe & Partners did not send to my legal practitioners all the documents from my file until towards the

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end of April, 1988 ... I could only present my case for rescission of judgment effectively if I had all the papers ..."

Apart from this reason being rather implausible in itself, this lackadaisical sort of reaction is scarcely that of a man severely prejudiced through no fault of his own.

Finally, I am of the view that it is improbable that an original letter would not be endorsed with an alteration that has been made to that letter by the writer. If it was not so altered in the first place, it seem to me to be likely that the writer would thereafter ensure that the recipient became aware of the alteration.

In all the circumstances, I am of the view that applicant has not shown, on a preponderance of probability, that he was genuinely unaware of the date of the hearing of the main action due to incorrect information having been supplied to him by his legal practitioners.

In the result the application is dismissed with costs.

Chirunda, Chihambakwe & Partners, applicant's legal practitioners

Sawyer & Mkushi, respondent's legal practitioners

1988 (2) ZLR p52

BENMAC MANUFACTURING CO (PVT) LTD v ANGELIQUE ENTERPRISES (PVT) LTD 1988 (2) ZLR 52 (HC)

Court **High Court, Harare**

Reynolds J

Interlocutory application

11 & 15 July 1988

Flynote

Legal practitioner - ethics - conflict of interest - practitioner acting for opposing parties - propriety and desirability of such a course - application for order that practitioner withdraw because of conflict of interest - powers of court.

Costs - de bonis propriis - legal practitioner negligently misinforming client, resulting in unnecessary application - wasted costs borne by practitioner.

Headnote

The managing director of the defendant company, during the course of the trial between the two parties, approached the Court with a request that counsel for the plaintiff be directed to withdraw as the plaintiff's representative, as counsel had previously represented the defendant in another matter and had thereby acquired confidential and privileged information relevant to the present matter. The defendant had been involved in a dispute with another company and counsel had been approached to accept a general retainer for the defendant. He had declined,

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but when approached again accepted, when assured that the two cases were unrelated, and subject to the qualification that he would continue to act for the plaintiff in the present matter. The defendant's legal practitioner failed to convey counsel's qualification to the defendant's managing director, who initially approached the Law Society and later the Ombudsman and the Ministry of Justice for relief.

Plaintiff's counsel argued not only that he had not acted unethically but that

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the court would not be empowered to require him to withdraw from the case.

Held, that all legal practitioners are officers of the Court, over whom the Court exercises a jurisdiction to see that practitioners display a very high standard of conduct towards their clients.

Held, further, that it is the Court which must in the long run decide whether the conduct in question is unethical, either as prescribed by statute or as a matter of common law as interpreted and expanded by the courts.

Held, further, that there is nothing inherently improper in a legal practitioner representing opposing parties in different matters, provided that no conflict of interests arises in any matter. The *onus* rested on the defendant in this case to establish that (a) counsel became acquainted with information that could be used to the defendant's disadvantage; and (b) real mischief and real prejudice would in all probability result if counsel were allowed to continue to act. In this case, the allegations made by the defendant were not established.

Held, further, that the existing practices and safeguards employed by practitioners are inadequate, and that it is undesirable that any practitioner should put himself in a position where he may find himself acting both for and against a client in the same or different matters. The only exception to this general rule should be in the most unusual of cases in which the parties themselves have expressly and in writing fully, freely and understandingly consented to that course. It would be a concomitant requirement that full disclosure of the practitioner's role and the possible implications should be made before such a consent is even mooted.

Held, further, that on the information supplied to him the defendant's managing director was justified in pursuing this application. However, that the application was made at all was due to the negligence of his legal practitioner, who should bear the wasted costs *de bonis propriis*.

Cases cited:

R v Hepworth 1928 AD 265

Robinson v van Hulsteyn & Ors 1925 AD 12

Rakusen v Ellis & Ors [1912] 1 ChD 831

A P de Bourbon SC for the plaintiff.

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M T O'Meara for the defendant.

Judgment

Reynolds J: The Managing Director of the defendant company, Mr JD Holland, has brought to my attention certain allegations which are levelled at counsel for the plaintiff. In effect, he has requested that Mr *de Bourbon*

be directed to withdraw as the plaintiff's legal representative in view of the fact that he had previously represented the defendant company in another matter, and, when dealing with that other case, had acquired confidential and privileged information relevant to the present matter. It was contended that in view of the conflict of interests thus arising the defendant would be prejudiced at this present trial.

The background to this application is as follows. The defendant company decided to market a product to be known as "Steamy Shower", and contracted with the plaintiff company to manufacture and supply certain components of this product. A dispute arose between the parties subsequently, and Mr *de Bourbon* was briefed to represent the plaintiff. More or less at the same time, or a little earlier, the defendant was involved in another dispute with a company known as "Albco". The defendant eventually brought actions for damages against both these companies, and its legal practitioners - Scott & Associates - advised it that Mr *de Bourbon* had accepted a retainer for the defendant, and would represent it in both matters. In fact this was not so, and the true position, which appears to be common cause, was that Mr *de Bourbon* originally declined a general retainer for the defendant as he had already been consulted by the present plaintiff. Mr Scott approached him a second time to accept a general retainer, and gave the assurance that there would no conflict of interests as the work involved would be unrelated to the present (Benmac) case. On that basis Mr *de Bourbon* accepted the general retainer, having endorsed on the brief cover, "subject to the qualification stated to Mr Scott concerning the existing dispute in which I have already been consulted by Mr Masterson", (Mr Masterson being the plaintiff's legal practitioner). Thereafter Mr *de Bourbon* carried out certain work on behalf the defendant in the Albco matter. It appears that Mr Scott forgot about the retainer brief and the conditions attached to its acceptance by Mr *de Bourbon*, and as a result, conveyed incorrect information to Mr Holland. It is scarcely surprising, in this situation, that Mr Holland expressed grave concern when he learnt, only a few months before the trial date, that Mr *de Bourbon*, was in fact acting for the plaintiff in the present case. After some discussion, another legal practitioner - Mr Gillespie - was briefed to represent the defendant. He found himself unable to proceed to trial in the circumstances, and applied for a postponement of the matter. This application was held before me, and, despite opposition, the postponement was allowed.

Subsequent to the postponement of the hearing, Mr Holland addressed a letter of complaint to the Law Society of Zimbabwe concerning the conduct of Mr *de Bourbon* and Mr Gillespie in particular, and concerning other

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related matters in more general terms. In the present context, only the complaint regarding Mr *de Bourbon* is of relevance. It appears that Mr Holland's complaint was investigated by the Law Society, and it was decided by this body that no unprofessional conduct had been disclosed. This conclusion was conveyed to Mr Holland, who then approached the Ombudsman and the Ministry of Justice for assistance.

The main trial of this matter commenced before me on 11 July 1988, and I was unaware that there was any difficulty connected with Mr *de Bourbon*'s presence as counsel for the plaintiff. At 2 pm, however, after several witnesses had already given evidence, the Deputy Registrar of this Court produced to me in Chambers a note he had prepared to the effect that Mr Holland wished to object to Mr *de Bourbon* continuing to represent the plaintiff. Counsel were requested by me to explain the position, and I was informed by Mr *O'Meara* that he had agreed to represent the defendant on the merits, but had refused to put forward Mr Holland's application for Mr *de Bourbon* to stand down from the case. As I understood Mr *O'Meara*, he had advised Mr Holland against pursuing that course of action. Mr *de Bourbon* advised me that he would contest the application, and he submitted that the court would not, in any event, be empowered to require that he withdraw from the case. As it happens, that particular aspect does not necessitate examination for the purposes of this judgment, either as to whether the correct procedure has been adopted in placing this application before the court, or as to the Court's jurisdiction in this respect. But I would suggest, nonetheless, that I believe that this Court may exercise wide powers in regulating the conduct of the trials over which it presides. The celebrated *dictum* of CURLEWS JA in *R v Hepworth* 1928 AD 265 is pertinent, where the learned judge said:

> "A judge ... has not only to direct and control the proceedings according to recognised rules of procedure, but to see that justice is done. "

If, for example, it were to be established that a particular legal practitioner had been guilty of some serious misconduct in his dealings with the case under trial, it would be unconscionable and wholly contrary to normal concepts of justice to permit him to continue with the matter. Furthermore, and it was expressed by WESSELS JA in *Robinson v van Hulsteyn & Ors* 1925 AD 12 at 21:

> "According to our law, a solicitor is an officer of the Court; the Court exercises a jurisdiction over him and will see that in the conduct of his

> professional work he displays towards the Court and towards his clients a very high standard of conduct."

It is not necessary to dwell on that aspect of this matter at any great length, save only to remark that in the Zimbabwean context, with the fused Bar and Side-Bar, it is my view that all legal practitioners appearing are officers of the Court and subject to the jurisdiction of the Court.

At the resumed hearing, Mr Scott, the defendant's legal practitioner, rose and addressed the Court. He made it clear that he was acting under Mr Holland's instructions, and that he was not putting forward the application in his capacity as legal adviser to Mr Holland. In fact, a letter

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written by Mr Scott to Mr *de Bourbon* was produced subsequently in which he had said,

> "I would really like you to believe that I did do all in my power to discourage John Holland from insisting that you withdraw from the matter."

Mr Scott also made it clear to this court that he accepted full responsibility for the mistake that had arisen regarding Mr *de Bourbon*'s role in the two matters concerning the defendant. Indeed he stated unequivocally that he was entirely to blame for the present dissension, and that he was not trying to minimise the extent of his error, only to explain it.

Mr Scott stated that it was his view that Mr *de Bourbon* would not have had access to any material, during the course of his dealing with the Albco case, which could prejudice the defendant in the present trial.

It must also be mentioned that Mr Gillespie had also written to Mr *de Bourbon*, in connection with the original application for postponement, and he then said:

> "I believed that I was putting, on instructions, a submission, in the most guarded of terms, relating purely to a subjective view of Holland's. I made no attempt to argue or support his belief, nor did I extend the submission. . . I had already conceded in the morning that you acted properly throughout."

I think that it may safely be deduced from this that Mr Gillespie had put forward Mr Holland's views only as part of his duty to comply with his client's instructions, and not as part of his own submissions in support of any

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claim of impropriety against Mr *de Bourbon*. Indeed, I believe that it may be assumed that he, too, had advised Mr Holland against pursuing that line of attack against Mr *de Bourbon*.

It appears from the foregoing that Mr Holland was advised by Messrs Scott, Gillespie and *O'Meara*, and by the Law Society as well, that Mr *de Bourbon* had acted properly. Despite all this advice, he is still unconvinced, and firmly adheres to the view that the defendant company has been gravely prejudiced by Mr *de Bourbon*'s conduct.

I think that it is necessary at this stage to examine the position regarding counsel acting for opposing parties in Zimbabwe. As I understand it, legal practitioners here rely to a large extent on the authoritative work of Lewis *Legal Ethics* in determining the standards of ethical conduct which govern their practice of the law. This work relates almost exclusively to the duties of "attorneys", as opposed to "advocates", towards their clients. But, as already mentioned, with the fused Bar and Side-Bar situation in Zimbabwe, this distinction is not truly applicable, despite the existence of a *de facto* Bar in Harare. In general terms, I believe that the code of professional conduct in the English legal system is also very similar to that in Zimbabwe. This is set out in some detail in *Halsbury's Laws of England* 4 ed Vol 3 under the heading "Barristers", at p 586 *et seq*.

A careful perusal of the various principles of professional ethics as contained in these works has satisfied me that Mr *de Bourbon* has not offended against any of those stated rules of

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conduct. It is, however, my view that it is the Court in the long run which must decide whether the conduct in question is objectionable, either as prescribed by statute, or as a matter of common law as interpreted and expanded by the courts.

The essence of this objection, as I see it, is that it is alleged that Mr *de Bourbon*: (a) was acting for and against the defendant at the same time in two different actions; and (b) whilst dealing with both matters, had access to and acquired information that could be used or manipulated to the prejudice of the defendant.

To deal with the first of these complaints, I do not think that there is anything inherently improper in a legal practitioner representing opposing parties in different matters, subject to certain stringent safeguards being employed. Indeed, it happens frequently that this situation arises concerning single transactions, such as in conveyancing and leasing matters. The parties may

each have engaged the particular legal practitioner on other occasions, and neither would like a stranger to handle their affairs. It may also happen that, by employing the one practitioner, a considerable saving of expenses is effected by both parties. Considerations of this nature sometimes justify a single practitioner handling opposing parties, and I do not think that the principle would differ where there are two or more transactions, provided that no conflict of interests arise in any matter. It is this aspect that is of importance in the present dispute.

It is clear, in my view, that the *onus* of establishing this claim lies in the defendant. The position is referred to in *Robinson v van Hulsteyn & Ors supra* at 21 & 22, as follows:

> "... the Court will restrain a solicitor in whom confidences have been reposed by a client from acting against such client where it is made clear to the Court, in the words of COZENS HARDY MR
>
> > 'that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act'."

Again at p 23, the report of this judgment reads:

> "He must show to the Court that the respondents did in fact become acquainted with his secrets and that they used the confidential information reposed in them to his detriment."

Reference was also made to the judgment of FLETCHER-MOULTON LJ in *Rakusen v Ellis & Ors* [1912] 1 ChD 831 at 841 where it said: -

> "As a general rule the Court will not interfere unless there be a case where mischief is rightly anticipated. I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove, but where there is such a probability of mischief that the Court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life it ought to interfere and say that a solicitor shall not act."

In applying this principle to the present case, it is my view that is incumbent on the defendant to establish that (a) Mr *de Bourbon* did in fact become acquainted with information that could be used to his, the defendant's, disadvantage; and (b) that "real mischief and real prejudice will in

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all probability result" if he is allowed to continue to act. Having examined Mr

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Holland's statement and the other documents produced to me in depth, I cannot locate any substantive instance that would support the defendant's claim. The general allegation is there, the specific fact is missing.

In contrast, Mr *de Bourbon* has stated, in positive terms, that

> "whilst there might be some similarity as to the calculation of damages in the two cases, the causes of action in the two cases and the basis upon which damages can be awarded are quite different. From my dealings with the Albco matter I was and am quite satisfied that no conflict of interests arises. I have had reference to what is set out in para 49 on p 49-50 of Lewis *Legal Ethics*, and I am satisfied that there is nothing in the rule against conflict of interests which requires me to decline to act for Benmac. There is no information that I have acquired in the course of my dealing with the Albco matter that would be of any assistance in presenting the case on behalf of Benmac. Indeed, my recollection of the Albco matter is that I was advising Angelique as to how to quantify its claim against Albco, and no more."

In these circumstances, I find that the allegations made by Mr Holland have not been established, and the application made must be refused.

Despite this finding, I can fully understand and sympathise with the alarm and concern experienced and expressed by Mr Holland at finding himself in the situation he did. I would agree with Mr Scott's own assessment of the matter that he was to blame for the problems that arose. Mr Scott's blameworthiness, however, also serves to indicate, in my view, the inadequacies of the existing practices and safeguards that have been adopted and applied by the practitioners. I entertain grave doubts as to whether any practitioner, in a divided or a fused profession, should ever put himself in the position whereby he may find himself acting both for and against a client in the same or in different matters. The only exception to this general rule, in my opinion, should be in the most unusual of cases in which the **parties** have expressly, and in writing, fully, freely and understandingly consented to that course. It would be a concomitant requirement that full disclosure of the practitioner's role and the possible implications should be made before such consent is even mooted.

To turn, finally, to the question of the wasted costs consequent upon this application, as has already been adverted to, Mr Scott has accepted full liability for the error that occurred in this matter. I consider that Mr Holland

REYNOLDS J

was justified in pursuing his application in the circumstances, and it is only after a full examination of the available facts that I have been able to come to a conclusion. I also consider that Mr Scott's lack of care indicates a serious degree of negligence warranting an order of costs *de bonis propriis*.

In the result, the application will be refused. The defendant's legal practitioner will bear the

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wasted costs *de bonis propriis*.

Coghlan, Welsh & Guest, plaintiff's legal practitioners

Scott & Associates, defendant's legal practitioners

HACKIM v HACKIM 1988 (2) ZLR 61 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Manyarara JA & Korsah JA

Civil appeal

18 & 19 July 1988

Flynote

Family law - child -custody - variation of custody order - grounds for - removal of child from jurisdiction - non-custodian parent refusing to consent to removal - when court will overrule non-custodian parent - sex of child - to what extent decisive in choosing which parent should have custody.

Headnote

A parent who applies for variation of a custody order in respect of his or her child must show good cause for the variation sought, but there is no *onus* on him or her to show that there has been a change in the circumstances of the parties or any misbehaviour or shortcoming on the part of the other parent or that the child is suffering injury or prejudice under the existing order. All that he or she must do is satisfy the court, on a balance of probabilities, that it is in the best interests of the child to make the variation rather than maintain the status quo. If this should appear to be the case, the court should not hesitate to vary its order, however inadequate the non-custodian parent's explanation might be for consenting to the custody order in the first place. The court should nevertheless not easily deprive the custodian parent of custody where there is little justification for doing so.

In considering what is in the best interests of the child, the court should take into account such factors as the sex, age, health and the educational and religious needs of the child, the social and financial position of each parent, his or her character, temperament and past behaviour towards the child, and, if the child has reached the age of discretion, his or her personal preferences. It is desirable for the court to see and hear the

DUMBUTSHENA CJ

parties and their witnesses. With regard to the sex of the child, there is no principle of law that a son is better off with his father than with his mother or that a girl should be with her mother. The

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sex of the child is merely one of the considerations to be borne in mind.

The mere fact that a non-custodian parent does not like the custodian parent's wish to emigrate with the child may not of itself be sufficient to warrant a variation of the order. A custodian parent who is not at fault should not be deprived of custody solely because he or she wants to remove the child from the jurisdiction. The predominant consideration is the welfare of the child; the fact that the custodian parent wishes to emigrate can only influence the success of an application for variation if the court is of the opinion that the child's interests would suffer were he or she to be removed from the jurisdiction.

Cases cited:

Manning v Manning 1975 (4) SA 659 (T)

Bailey v Bailey 1979 (3) SA 128 (A)

P(*L M*) (*otherwise E*) v *P (G E)* [1970] 3 All ER 659 (CA)

W v W & C [1968] 3 All ER 408 (CA)

Re *C (A)* (*an infant*), *C v C* [1970] 1 All ER 309 (CA)

A P de Bourbon SC for the appellant.

M J Gillespie for the respondent.

Judgment

Dumbutshena CJ: On 25 April 1979 the appellant and the respondent were married to each other in London, England. A son, Ronen, was born to them on 17 May 1979.

In time the parties came to live in Zimbabwe. Things did not work well in their marital relationship. On 16 July 1986 the appellant petitioned for divorce and was granted a decree of divorce by the High Court in unopposed proceedings. Before that day the parties had agreed to and signed a consent paper governing matters such as custody, maintenance and other ancillary matters. The consent paper was by agreement made an order of the court on 16 July 1986.

In terms of the consent paper the appellant was granted custody of the child. The respondent was granted reasonable access to the child. The terms of access include: (a) the right to spend alternate weekends with the child from 1600 hours on Friday until 1800 hours on Monday; and (b) the right to stay with the child during alternate school holidays.

DUMBUTSHENA CJ

More importantly for the purposes of this appeal, there was a restriction placed on the removal of the child from the jurisdiction. Paragraph 10 of the consent paper stated in clear words: -

> "Save and except for the purpose of *bona fide* school holidays or for the purpose of receiving urgent medical

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attention, neither party shall remove or permit the child to be removed from Zimbabwe without prior written consent of the other, which consent shall not unreasonably withheld."

It can be assumed that both the appellant and the respondent observed the provisions of the consent paper until some time in 1987. The appellant started at that time to talk about her intention to move to the United State of America with the child. She was good enough to discuss her intention with the respondent. He was not impressed. She said she wished to go to the United States in September 1987.

As a result of the appellant's disclosures the respondent petitioned the High Court in case No. HC 68/87 for an interdict stopping her from going to Boston with the child. When both parties had filed their affidavits, the respondent withdrew his petition and tendered costs to the appellant. She visited the United States with the child and returned to Zimbabwe. The respondent again petitioned the High Court. He asked for a temporary interdict preventing the appellant from removing the child from the jurisdiction pending the determination of an application for the variation of the order of custody. He had not yet applied for such variation of the custody order. The petition was opposed. He was, however, granted a temporary interdict on condition that he brought his action within one month.

The respondent proceeded further in case No. HC 1446/88 in which he asked the High Court to make an order compelling the appellant to deliver to him Ronen's passport and to grant him permission to travel with him to Israel on 15 April 1988. On 14 April 1988 the appellant applied to the High Court for the child not to be removed from Zimbabwe, pending the determination of the custody application, without the court's prior permission.

In case No. HC 1597/88 the respondent applied for the variation of the custody order contained in the consent paper. The appellant cross-applied for permission to remove Ronen from the jurisdiction. On 19 May 1988 the learned JUDGE PRESIDENT heard the applications. The custody order was varied granting custody of the minor child, Ronen, to the respondent. The appellant's application to remove the child out of the jurisdiction was refused.

DUMBUTSHENA CJ

Now the appellant appeals to this Court. By notice of motion she applied to this Court for an order to set down this appeal as a matter of urgency. We granted her leave to set down the appeal as a matter of urgency.

The appellant appeals against the whole judgment of the court *a quo*. She wants the original custody order to be restored as well as leave to remove the child permanently from Zimbabwe to the United States.

I must confess I find it difficult to deal with matters of this nature because they touch the tenderest nerves of human emotions, family relationships. The atmosphere is sometimes charged with emotions which generate intense hatred. Each parent loves his or her child. To part with the child is difficult to bear. This is the position in this case. However, the Court can only grant custody to one of the parents. In most cases, if the original custody order is left alone,

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in time the parents come to live with the new arrangements.

In the instant case there was a consent paper. It appears for some time each parent accepted with grace the part apportioned to him or her in terms of the consent paper until the above suspicions were brought out in the circumstances mentioned above. Then things went sour, hence the flurry of applications made to the High Court.

After anxiously listening to counsels' submissions, and at the end of hearing argument, we made the following order:

> "Recognising the importance of this appeal to both the appellant and the respondent and the interests of the minor child, and having given agonising thought to the effect of our decision, we have resolved the appeal as follows:
>
> (a) The appeal is allowed with costs of appeal.
>
> (b) The order of the court below is altered to read:
>
> The petitioner's application for a variation order of custody is dismissed. The respondent's application for authority to remove the minor child from Zimbabwe without the petitioner's consent be and is hereby granted.'
>
> The order that each party shall bear his or her own costs, including the costs which were reserved on 14 April 1988, is confirmed."

Now we give our reasons for making the above order.

DUMBUTSHENA CJ

In his judgment the learned JUDGE PRESIDENT set out the principles he applied in the exercise of his discretion. He said:

> "In order for the petitioner to succeed he must show good cause for the variation which he seeks: *Manning v Manning* 1975 (4) SA 659 (T). In that case, FRANKLIN J, dealing with the question of the *onus* resting on the applicant in a case such as the present one, had this to say at 661 D-E:
>
> > 'In a case of this nature the *onus* is on the applicant to show good cause for the variation, but there is no *onus* on him to show that there has been a change in the circumstances of the parties or shortcoming on the part of the respondent, or that the child is suffering injury or prejudice under the existing order. All he has to do is to satisfy the Court, upon a balance of probabilities, that it is in the best interests of the child to make the variation."
>
> In an earlier case, *du Preez v du Preez* 1969 (3) SA 529, MILLER J had this to say at 532 B-D:
>
> > 'She has to show what has been generally described as "good cause" for variation of the Court's order. But when the paramountcy of the child's welfare in such a conflict between the parents is borne in mind, it is obvious that the burden upon the applicant dare not be magnified. She may be held to have shown good cause for variation of the order even if no new facts or circumstances have arisen in the interim, provided it appears clearly to the Court that the child's interests would be better served by varying the order than by maintaining the *status quo*. If this should appear to be the case, the Court ought not to hesitate to vary its order, however inadequate her explanation might be for consenting to the order in the first place. . .'
>
> Those are the principles which I shall apply in this case in determining whether the variation sought by the petitioner shall be granted."

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I would like to note in passing that the facts in *Manning v Manning* 1975 (4) SA 659 (T), are distinguished from the facts in the present case. In *Manning's* case, by the time the final order was made by FRANKLIN J the child was already living with the applicant.

However, after saying what is contained in the passage properly cited above by the learned JUDGE PRESIDENT, FRANKLIN J went on to say at 661 F-H:

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> "I may add that disobedience of an existing order of Court is a factor to be taken into account against the spouse concerned. See, on the above principles, Hahlo *Law of Husband and Wife in South Africa* 3 ed pp 463-464.
>
> In considering what is in the best interests of the child all the circumstances are taken into account, for example:
>
> > The sex, age, health, and the educational and religious needs of the child.
> >
> > The social and financial position of each parent, his or her character, temperament and past behaviour towards the child.
>
> Where the child reaches the age of discretion its personal preferences may also weigh with the Court. The question in each case is which of the spouses would best care not only for the physical well-being of the child, but for its moral, cultural and religious development. See Hahlo *op cit* pp 453-454."

FRANKLIN J further remarked on the same page: "It is normally desirable in cases of dispute regarding the custody of children for the court to see and hear the parties and their witnesses". This is important in cases in which every important allegation on the papers is disputed. In this case there were allegations of unfitness made against the appellant by the respondent. In the same breath the appellant made uncomplimentary remarks about the respondent. It would have been preferable to have heard oral evidence before resolving the issues of custody and leave to remove the child from the jurisdiction.

I agree with the court *a quo* that the only reason why the application for variation was brought was the intention of the appellant to emigrate to the United States with the child. I do not, however, believe that that reason alone was sufficient to cause the court *a quo* to vary the order of custody. I am of the view it was not right to determine the application on "the basis that the main ground upon which the petitioner relies is the decision of the respondent to emigrate with the child to the United States of America permanently", as was stated in the judgment.

In my view in cases of this nature the proper approach to the question of *onus* must be one that is broad and wide. It should include the showing, on a balance of probabilities, the changed circumstances of the parties, or any behaviour or shortcomings of the parties, if those circumstances, behaviour

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or shortcomings impinge on the welfare or interests of the child. In determining an application for variation of a custody order these changed circumstances matter. It is not wrong, in my view, for the applicant who seeks variation to show that there has been a change in the

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circumstances of the parties or misbehaviour or shortcomings on the part of the respondent, or that the child is suffering injury or prejudice under the existing order. There may be cases in which circumstances have so altered that the variation of an order of custody becomes compelling because the welfare of the minor child is intertwined with those changed circumstances.

The mere fact that a non-custodian parent does not like the fact that the custodian parent wants to emigrate with the child may not, standing by itself, be sufficient to warrant a variation of the order. In saying this I am mindful of what was said by TRENGOVE JA in *Bailey v Bailey* 1979 (3) SA 128 (AD) at 135H-136C. The learned JUDGE OF APPEAL stated:

> "In approaching a problem of this nature the Court is, of course, primarily concerned with the welfare of the children, that is the paramount consideration. Just as in custody cases, so also in disputes arising out of custody orders, the welfare of the children is the predominant consideration which should weigh with the Court (*Shawzin v Laufer* 1968 (4) SA 657 (A) at 662G-H). In *du Preez v du Preez* 1969 (3) SA 529 (D) MILLER J referred to the effect of the burden upon an applicant to show "good cause" for a variation of a custody order, and at 532 C-G of the report, he made the following observations with which I respectfully agree, namely:
>
> > 'But when the paramountcy of the child's welfare in such a conflict between the parents is borne in mind, it is obvious that the burden upon the applicant (who in this instance happened to be the non-custodian parent) dare not be magnified. She may be held to have shown good cause for variation of the order, even if no new facts or circumstances have arisen in the interim, provided it appears clearly to the Court that the child's interests would be better served by varying the order than by maintaining the *status quo*. If this should appear to be the case, the Court ought not to hesitate to vary its order, however inadequate her explanation might be for consenting to the order in the first place, or however adamantly the respondent may insist that the limitation is one which he, as custodian parent, deems to be desirable. This is not to say that the opinion and desires of the custodian parent are to be ignored or pushed aside: **indeed, the Court takes upon itself a grave**

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> **responsibility if it decides to override the custodian parent's decision as to what is best in the interests of his child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian parent's decision and the emotions and impulses which have contributed to it'."**

The above emphasis is mine. I do so in order to emphasise the fact that the Court should not easily deprive the custodian parent of the child without giving serious consideration to the best interests of the child who will be affected by the variation of the custody order.

I believe that the proper approach to the variation of custody orders should be one that is a little afraid of depriving the custodian parent of the child when it is clear to the court that there is little justification for doing so. A custodian parent who is not at fault should not be deprived of the custody of the child solely because he or she wants to remove the child from the jurisdiction. In order to vary the order there must be something more than the mere fact of removal from the jurisdiction.

I, however, share the opinion expressed, in a concurring judgment, by SACHS LJ in *P (LM)* (*otherwise E*) v *P* (*G E*) [1970] 3 All ER 659 (CA) at 622h. He said, and I agree with him:

> "When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in

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> the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as WINN LJ has pointed out, produce considerable strains which would be unfair not only to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child nay choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

The facts in *P (L M) v P (G E) supra* were these. A young couple got married. A son was born to them. After some time the wife obtained a decree of

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divorce on an undefended petition on the ground of cruelty. She was granted an order of custody of their son. There was no dispute on this either. There was a provision of access by the father. Both the custody and access arrangements worked well. The mother remarried. The mother and the son lived as a family of the stepfather. When she was expecting a child of the new husband, she applied to the court for leave to take the son out of the jurisdiction to New Zealand. The stepfather had lived in New Zealand for eighteen months. He had friends there. He also had prospects of employment there. A particular friend agreed to lend him his bungalow when he was away at sea, as he was going to be most of the time. It was held:

> "(i) Leave to take the son to New Zealand would be granted for that course was in the best interests of the son's welfare which was the primary consideration, there being no fear that arrangements for his protection, support and upbringing were inadequate and having regard also to the uncontested order in favour of custody by the mother and its satisfactory working, the need to avoid a sacrifice by the mother and the stepfather which might in the long term endure to the detriment of the son, the absence of blame in the mother for break-up of the marriage. . . "

See the Headnote.

The approach followed in *P (L M) v P (G E) supra* appeals to me. I believe that in cases such as the instant one, the interest of the child must be a primary consideration which the court must take into account before varying an order of custody. The fact that the custodian parent wants to emigrate can only influence the success of an application for variation of the order if the court is of the opinion that the interests of the child would suffer were he to be removed from the jurisdiction.

The court *a quo* was not considering a new custody application. Custody of Ronen was granted by the High Court to the appellant with the agreement of the respondent. When he agreed, the respondent was aware of all the allegations he made against the appellant in his petition. If they are true he ought not to have agreed to the awarding of the custody of the child to the appellant. In my opinion, for him to shake off his consent he must show on a balance of probabilities that circumstances have altered and not only show that the custodian parent intends to remove permanently the child from Zimbabwe.

I say this because the respondent must have thought of the custody of his son

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a number of times. I also assume that he consulted his legal practitioners and instructed them to settle the consent paper which he afterwards signed. He never complained before the appellant told him of her intention to emigrate to the United States. She must have been keeping Ronen well. It is Ronen whose welfare is paramount.

I find support in what was said by WINN LJ in *P (L M) v P (G E) supra* at 660j:

> "It seems to me that in approaching this very finely balanced problem - which involves a difficult and sad decision - the court should have regard primarily to the welfare of the child. Just as in disputed custody cases, so in a case which substantially is concerned with the subsequent issues resulting from the making of a custody order. It seems to me personally that the welfare of the child is the primary consideration which should weigh with the court. Further, it is to be regarded, I think, as a very dominant factor in such a dispute that there has been an order (which in fact was not resisted) for custody in favour of the one parent, in this case the mother, and that there is every indication that the custody thus ordered has been working satisfactorily in every respect; and that although, naturally, the other parent will feel - and the father does feel - that the access permitted to him is not all that he would wish, in no other respect is it suggested in the slightest degree that the custody arrangements have been anything but entirely beneficial to the child and satisfactory in general to the parties concerned."

Ronen has been living with his mother. It is the mother who has a permanent home here in Zimbabwe. The father never had any house in Zimbabwe even after the divorce. Soon after the divorce he used to live, while in Harare, in the appellant's house. After he left he shared accommodation with his friends. It may be that is what he prefers. But is it good for Ronen? The respondent has not proferred any future arrangements for the accommodation of both himself and his son. He has not said how he intends to care for Ronen. He has no house in Zimbabwe. His substantial business interests are in South Africa.

The appellant is in a different position. She has arranged to live with Ronen in a friend's flat in Boston. She has mapped out a future for her son. She knows and has enquired about Hebrew schools. She has money - a substantial sum of money. She has arranged to teach music.

Ought the Court to interfere with the mode of life chosen by the parent who

DUMBUTSHENA CJ

has custody of the minor child? I think not. It would be wrong for the Court to interfere.

It is common cause that Ronen cares for his father a great deal. The appellant says so. As a child who was affected by the parent's divorce, he would wish they had never divorced. But they did. And they came to some agreement as to his care and upbringing. That he wants to go to the United States is clear from the papers. He appreciates the advantages and disadvantages of going and living there. He after all visited the United States with his mother. He said he enjoyed it. He felt, according to the social worker, Norma Hall, that the United States offered "a lot socially and educationally and he was not against the move".

Ronen will no doubt miss his father. But the appellant says he can be with his father during the

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long summer holidays. He can still visit Israel with his father. His father is a man of means. In his search for business he, according to the papers, traverses the world. He can afford once in a while to visit his son in the United States or couple such visits with business.

I agree that Ronen will not have close contact with his father. He won't have, when he needs it, his father's advice which he would otherwise have were he living in Zimbabwe. However, the appellant has agreed to arrangements which will to some extent, soothe the wounds inflicted by the move to the United States and the long distance separating father from son.

The learned JUDGE PRESIDENT laid stress on the need for Ronen, a son, to be with his father. He said:

> "This is perhaps not surprising because it seems to me that the boy has reached the age when he requires the care and guidance of his father more than that of his mother. In any event, his father is better able to meet the cost of his medical, educational and material welfare than his mother whose future in the United States is highly speculative and uncertain. In the circumstances, I am satisfied that the petitioner has shown good cause for the variation of the court order because it is quite clear to me that the child's interests would be better served by varying the order than by maintaining the *status quo*. It is in the best interests of the minor child to remain in Zimbabwe with his father."

The general principle that a son is better off with his father used to be accepted by the Courts of England and Wales. In *W v W and C* [1968] 3 All ER 408

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(CA) LORD DENNING said at 409C:

> "I feel it is right to be guided by the general principle that a boy of this age, some eight years of age, is, on the whole, other things being equal, better to be with his father."

And SACHS LJ said at 409I:

> "One starts in this particular case with two obvious facts: firstly, that Andrew is a son aged eight and has just reached that age when it is normally best for a son to be with his father. . . ".

These passages were cited by FRANKLIN J in *Manning v Manning supra* at 662 G-H. The learned judge did say, however, at 663A: "Our Courts, so far as I am aware, have never adopted this general principle, and have preferred to judge each case on its own particular facts. . . ". This is the view followed in this country.

In England and Wales the courts did not follow the view expressed by LORD DENNING MR and SACHS LJ. In Re *C (A)* (*an infant*), *C* [1970] 1 All ER 309 (CA) HARMAN LJ said (at 311f) of this general principle:

> "I do not at all agree with expressions of opinion which have fallen, perhaps *per incuriam*, from judges that a boy should, as a matter of **principle**, be with his father - just as much as I disagree with the other 'principle', which has altogether been abandoned, that a girl under three should, as a matter of principle, be with her mother. Other things being equal, these things may be so, but there is no principle involved in either. They are merely considerations which must weigh with the judge where the scales are nicely balanced."

In the same case EDMUND DAVIES LJ said in a concurring judgment, after citing what was

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said by LORD DENNING MR and SACHS LJ in *W v W and C supra* at 313a:

> "If *W v W and C* is to be regarded as authority for the proposition that there is a **principle** that a boy of eight should, all other things being equal, always be left in the custody of his father, then that is a view with which, with profound respect, I cannot agree. The decision must depend on who the father is, who the mother is, what they are prepared to do, and all the circumstances of the case. There is no such 'principle', in my judgment;

DUMBUTSHENA CJ

> the age and sex of the child are but part of the considerations to be borne in mind."

In deciding this appeal I have ignored the general principle stated in the judgment *a quo* and have searchingly tried to establish whether the father is better than the mother in her care and upbringing of Ronen or in her plans and arrangements for Ronen's future either in Zimbabwe, as the father prefers, or in the United States, as the mother has planned. I have found that the father, as pointed out above, has done nothing to prove to the Court that he has accommodation suitable for his son, has a person to look after him while he is out of Zimbabwe on business and, more importantly, that he has planned for his son's education. I am not saying that he is incapable of providing these things. It may be that in future he may show that he is willing and able to plan his son's upbringing. He may then offer a perfect and better home but he has failed on a balance of probabilities to show a willingness to do so now. He might, for all I know, be a loving and caring father. He may be an affectionate father and my be responsible enough and fit to bring up his son, Ronen. As WINN LJ said in *P (L M) v P (G E) supra* at 661 e-f:

> "It is not because of any defect of the father, but merely for the sake of the child's own welfare and future, that I myself have come to the definite conclusion, notwithstanding the very serious nature of the problem and the finely balanced considerations to which regard must be had, that in this particular case the learned county court judge came to a conclusion which I am prepared to describe myself as the wrong conclusion, although he did so in judicial exercise of the discretion entrusted to him."

It is for these reasons that we allowed the appeal with costs and made the order we did.

Manyarara JA: I agree.

Korsah JA: I agree.

Kantor & Immerman, appellant's legal representatives

D W Aitken & Co, respondent's legal representatives

S v MUTIZWA & ORS 1988 (2) ZLR 74 (SC)

Court **Supreme Court, Harare**

Korsah JA (in Chambers, in terms of s 9A of the Supreme Court of Zimbabwe Act 1981)

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Application for leave to appeal in person

19 July 1988

Flynote

Criminal law - malicious injury to property - mens rea - bona fide belief that act done was lawful - may rebut presumption of malice.

Headnote

The appellants were members of the youth wing of the ruling political party. They were members of a group of about 100 people who went to stop building operations by the complainant in their grazing area in their communal land. They acted as they did because they had been instructed by party and government officials to prevent squatters settling in their are and cutting down trees. They believed they had a right to protect their grazing area from the depredations of squatters.

Held, that on a charge of malicious injury to property the infliction of intentional wrongful injury to the property of another raises a presumption of malice, which may be rebutted by showing a *bona fide* belief that the act done was lawful. It is not necessary for the accused to show that such a belief was reasonable, although the reasonableness or otherwise of the belief provides cogent evidence as to whether it was held *bona fide*. In the present case, it was eminently reasonable for the appellants to believe that they had a legal right to remove the structures that had been erected in their grazing area and the presumption of malice was accordingly rebutted.

Cases cited:

S v Thompson & Strydom 1964 (1)PH H4

Shahmohamed v Hendriks & Ors 1920 AD 151

KORSAH JA

R v Mashanga 1924 AD 11

S v Banet 1973 (1) RLR 335 (AD); 1973 (4) SA 430 (RAD)

S v Beale 1981 ZLR 269 (AD)

Judgment

Korsah JA: In this matter the Attorney-General has given notice, in terms of s 9A of the Supreme Court of Zimbabwe Act 1981 as amended, that he does not support the convictions of the appellants.

The appellants pleaded not guilty to eleven counts charging them with malicious injury to property. They were convicted on five counts and each was sentenced to pay a fine of $300 or, in default of payment, serve six months' imprisonment with labour. They were acquitted and

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discharged on the other counts. They have appealed against both conviction and sentence.

The State submits that, having regard to the evidence disclosed in the record, the convictions with regard to counts 2, 3 and 6 cannot be supported, and that in respect of counts 4 and 8 the learned trial magistrate erred in not considering and applying the law relating to the defence of a *bona fide* claim of right raised by the appellants.

The appellants were all members of the ZANU (PF) Youth at Zimburu Village in Chinamhora. On 20 May 1984 they were in a group of about one hundred people who went to stop the building operations of the complainants in the grazing area of the appellants. In some cases poles erected by some of the complainants were uprooted, and in others brick work was removed and piled in a heap. They acted as they did because they had been instructed by the Chairman of the Branch and his Executive, the Councillor, and the Land Development Officers to stop squatters settling in their grazing area and prevent the cutting down of trees. And they believed that they had the right to protect their grazing area from the depredations of squatters. They also denied destroying either the poles or the bricks removed.

[The learned Judge of Appeal considered the evidence on each count, and continued:]

The State conceded that there was sufficient evidence to support a finding that the group did cause damage to the complainant's hut; but submitted that on a charge of malicious injury to property it must be proved beyond reasonable doubt that an accused person did not only act unlawfully, but did so with full knowledge that he was not legally entitled to cause such damage. Therefore, in cases where the lawfulness of the act done is in issue, unlawful

KORSAH JA

damage done to another's property may be excused if there is a *bona fide* belief that the act done was lawful.

Support for this submission is derived from the decision in *S v Thompson & Strydom* 1964 (1) PH H4, wherein the following words from the judgment of INNES CJ in *Shahmohamed v Hendriks & Ors* 1920 AD 151 at 158 were quoted with approval:

> "Malicious injury to property is, by law, a crime; but, speaking generally, it would be a sufficient defence to a criminal charge to show that the injury complained of had been committed in the *bona fide* assertion of a right - whether the belief in the existence of that right was legally correct or not. Because the state of mind of the accused would negative malice, which is an essential element of the crime, see *Conradie v Kloppers* 10 SC 189. ..."

The learned CHIEF JUSTICE also explained in *R v Mashanga* 1924 AD 11 at 12 that -

> "... to constitute the crime of malicious injury to property, malice is a necessary element. But by that is meant legal malice, not necessarily personal spite against the owner of the injured property. All that is necessary in our law to the constitution of the crime is an intentional wrongful injury to the property of another. Upon proof of the wrongful intention the Court will presume malice, that presumption may be rebutted, but until displaced it stands."

If, therefore, there is evidence on record that the appellants genuinely believed that there was legal justification for protecting their grazing area by demolishing structures erected thereon by

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strangers, as they had been instructed to do by the Chairman and his Executive, the Councillor, and the Agricultural Extension Officers, then the presumption of malice is rebutted.

Although it is not necessary that to constitute a defence *bona fide* belief should be reasonable, the following remarks of BEADLE CJ in *S v Banet* 1973 (1) RLR 335(AD); 1973 (4) SA 430 at 433H, must weigh with us:

> "It will only be in the isolated case, however, where the distinction between *bona fide* and a reasonable belief will be of any significance, because in the vast majority of cases the most cogent evidence as to the *bona fides* of a man's belief will be whether or not it was a reasonable

> one. It will only be in the isolated case ... where there will be room for finding that the belief, though unreasonable, was nonetheless *bona fide*."

The record shows that the appellants admitted what they did in some cases and challenged other allegations levelled at them because in those instances they did not physically join in the demolition. Of course, the fact that they were not physically involved in the destruction of those structures does not exonerate them from liability. They were members of a group of persons who set out to demolish structures erected in their grazing area and, as such, made common purpose with all other members of the group in the demolition of those structures and are guilty as *socii criminis*, if there is no other defence available to them. Thus the fact that they did not physically participate in the destruction of some structures does not avail them as defences to those counts in which they deny involvement.

However, it seems to me to be eminently reasonable for a man to believe that he has a right in law, in the protection of his rights in the grazing area for his cattle, to demolish structures erected thereon which threaten to destroy or deprive him of any interest he may have in the grazing area. The appellants, from the instructions given to them by the Chairman of the Branch and his Executive, the Councillor, and the Land Development Officers to stop squatters settling in their grazing area and prevent the cutting down of trees, were fortified in their belief that they were legally entitled to remove the structures which had been erected in their grazing area. And as GOLDIN AJA points out in *S v Beale* 1981 ZLR 269 at 272A:

> "... what is decisive is not the lawfulness of what was done but whether the accused believed he was entitled to do it (see *R v Bhaya* 1953 (3) SA 143 (N) at 148-9; *S v Marshall* 1967 (1) SA 171 (O) at 174)."

The State submitted, rightly in my view, that the appellants, having led evidence and laid a foundation to the existence of *bona fide* claim of right, rebutted the presumption of malice which arises from the fact of the destruction of the structures erected by the complainants in the grazing area of the appellants. In the result, the State failed to establish that element of malice which is necessary to support a conviction on a charge of malicious injury to property.

As this defence was a general defence raised by the appellants to all the counts preferred against them, it seems to me unnecessary to go into the evidence on the remaining charges.

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KORSAH JA

The concessions by the State were well made and the convictions are quashed and the sentences imposed set aside.

My brother **Gubbay** agrees.

S v MOYO 1988 (2) ZLR 79 (HC)

Court **High Court, Harare**

Greenland J

Criminal review

20 July 1988

Flynote

Criminal procedure (sentence) **-** Precious Stones Trade Act 1978 **-** mandatory minimum sentence unless special reasons exist **-** undue delay in bringing accused to trial **-** whether may amount to a special reason.

Headnote

The accused was convicted of an offence under the Precious Stones Trade Act 1978, the section under which he was convicted being one which carried a mandatory minimum sentence of three years' imprisonment unless special reasons were found to exist. The offence took place in June 1984, but the accused was not brought to trial until September 1987 and was finally convicted and sentenced on 20 April 1988. In March 1985 the accused had been sentenced on a charge of theft to 5 years' imprisonment, of which 18 months were suspended. It was argued on the accused's behalf that the lengthy delay in bringing him to trial amounted to "special reasons", within the meaning of the Act; had he been brought to trial timeously and been sentenced to the mandatory minimum sentence under the Act, in all probability the sentence on the theft charge would have been modified.

Held, that "special reasons", under the Precious Stones Trade Act, are factors arising either out of the commission of the offence or peculiar to the offender, which are out of the ordinary either in their degree or their nature. The excessive delay in bringing the accused to trial was a factor peculiar to him which was out of the ordinary in its degree. Had he been tried within a reasonable time, as is required by the Constitution, it was likely that the total punishment would have been reduced, because a

GREENLAND J

court will always have regard to the cumulative effect of punishment. By bringing him to trial so

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late, the State effectively deprived him of the opportunity of having the magistrate in a proper position to sentence. The actual sentence was thus extraordinary in the degree of punishment inflicted; special reasons accordingly existed.

Cases cited:

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

S v Mbewe & Ors 1988 (1) ZLR 7 (HC)

S v Makaurire HB-134-84 (unreported)

Judgment

Greenland J: In this case the accused was convicted of contravening s 3(1) of the Precious Stones Act, ie possession of emeralds valued at $1 170,00.

The Acting Attorney-General submits:

> "Patrick Moyo, the applicant, was charged with an offence against the Precious Stones Trade Act 1978, the alleged offence having been committed on 15 June 1984. The accused was not brought to trial until 11 September 1987 and was not finally convicted and sentenced until 29 April 1988. On that date, the magistrate sentenced the accused to the minimum statutory terms of 3 years' imprisonment after having found that no special reasons existed.
>
> On 26 March 1985, the applicant had been sentenced for theft to a term of 5 years' imprisonment with labour, of which 11/2 years was suspended.
>
> The applicant now complains that he should have been sentenced to less than the statutory minimum term of imprisonment for his offence against the Precious Stones Trade Act, because the unexplained delay in bringing him to trial amounted to special reasons. He argues that, but for the delay, the magistrate who sentenced him for theft would have taken into account the sentence he would then have been serving for the Precious Stones Trade Act offence, and, further, that he would have benefitted by the 1988 amnesty. If such a delay can amount to special reasons, then his complaint is well founded.
>
> The expressions "special reasons" and "special circumstances", which mean the same thing (see *R v da Costa Silva* 1956 R&N 369 at 372C per BEADLE J, as he then was), have been considered in a number of cases,

> most recently in *S v Mbewe & Ors* HH-27-88*(1). A concise statement of their meaning is found in *S v Makaurire* HB-134-84:
>
> > 'Special reasons are factors arising either out of the commission of the offence or peculiar to the offender, which are out of the ordinary, either in their degree or their nature."
>
> In my submission, the delay in the applicant's case does amount to special reasons, as a factor peculiar to the offender which is out of the ordinary in its degree. That a man is already in custody for a certain time is a factor which must always be taken into account by a sentencing court. By bringing him to trial so late, the State effectively deprived the applicant of the opportunity of having the magistrate in a proper position to sentence. As a result, he has been sentenced to serve a period of 3 years cumulative upon the 5 year sentence. Such a sentence is extraordinary in the degree of punishment inflicted upon the applicant. Accordingly, special reasons existed."

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On the question of the delay in bringing the accused to trial his legal practitioner submits:

> "It is respectfully submitted that special reasons exist in this case why the mandatory minimum sentence should not be imposed. The special reasons are that the alleged offence was committed in June 1984. The accused was imprisoned on 26 March 1985 for theft, having been sentenced to 5 years' imprisonment with labour, of which 11/2 years were suspended. The inexplicable delay in bringing the accused to trial on the present charge has unduly prejudiced the accused in two ways:
>
> (a) in assessing sentence on the theft charge, the magistrate would have taken into account the 3 year mandatory sentence imposed or to be imposed for the present offence, and would in all probability have suspended a larger portion of the sentence imposed on the theft charge;
>
> (b) had the accused been brought to trial timeously he would have benefitted from recent amnesty, and would in all likelihood have been released in terms of the amnesty.
>
> The accused was not to blame for the delay - for some unknown reason the State only brought the accused to trial when he had almost completed his sentence in respect of the theft charge."

GREENLAND J

I am in broad agreement with the submissions of State and defence counsel. Had the accused been tried within a reasonable time, as required by the Constitution, it is likely that the total punishment would have been reduced because a court will always have regard to the cumulative effect of punishment. The sentence can now only be rectified in terms of a purely value judgment. This Court is greatly influenced by the extremely unsatisfactory feature of not bringing the accused to trial for a period of nearly four years. Against that, this was not a petty violation of the law and his moral blameworthiness was high. The sentence is set aside and substituted as follows:

> "one years' imprisonment with labour. The special reason for not imposing the mandatory minimum sentence is that the accused's trial was unreasonably delayed for a period of nearly four years."

Ebrahim J agrees.

GUMBO v SUNGANAYI MOTORWAYS (PVT) LTD 1988 (2) ZLR 83 (HC)

Court **High Court, Harare**

Reynolds J

Special plea in abatement

25 & 27 July 1988

Flynote

Prescription - Prescription Act 1975 - calculation of periods of prescription - when prescription period begins

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to run **-** delict **-** claims for damages for negligence **-** debt not due until quantified and demand made.

Headnote

In terms of s 15(1) of the Prescription Act No. 31 of 1975, prescription begins to run as soon as a debt is due. Section 28 of the Interpretation Act [*Chapter 1*] applies to the calculation of periods of prescription in terms of the Prescription Act. Where a "debt" becomes due on a particular day, that day, is excluded from the reckoning, but the last day of the prescription period is included.

Debts often become due at the same time as they arise, but this is not necessarily so; in the case of a claim for damages for injuries caused by the defendant's negligence, the debt would not become due until it had been quantified and demand made of the defendant.

Cases cited:

Apalamah v Santam Insurance Co Ltd & Anor 1975 (2) SA 229 (D)

M J Gillespie for the plaintiff

J B Colegrave for the defendant.

Judgment

Reynolds J: The plaintiff in this matter was injured in a motor vehicle accident on 3 February 1985 and he sustained certain injuries as a result. He alleged that the defendant was responsible for his injuries and issued summons for the recovery of consequential damages. This summons was

REYNOLDS J

served on the defendant on 3 February 1988. The defendant has now, by means of a special plea in abatement, raised the defence that this claim is prescribed in terms of the Prescription Act No. 31 of 1975.

The only issue arising is whether the period of prescription is to be computed in terms of the common law - (and if so, by which particular process) - or whether the period of time is to be calculated in terms of s 28 of the Interpretation Act [*Chapter 1*]. The difference is important, for, depending upon the method of computation adopted, the "debt" in question here has either become prescribed or it has not.

It is my view that the Interpretation Act applies here, for it effectively codifies the common law where applicable, and there is no room to consider the common law at all. Section 14(d) of the Prescription Act provides that the period of prescription for this type of "debt" is three years. Section 15(1) of the same Act Reads:

"... prescription shall commence to run as soon as a debt is due."

It seems apparent to me that, in the present context, the "debt", or damages proved, became

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due on the day of the collision.

The relevant portions of the Interpretation Act reads:

> "(2) Where in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period.
>
> (3) Where in an enactment a period of time is expressed to end on, or to be reckoned to, a particular day, that day shall be included in the period."

I consider that these provisions must be read together, and they cater fully for the period specified by the Prescription Act; that is, the day of the collision should be excluded from the reckoning, but the last day of the period should be included. Applying this method of computation to the facts of the present case, the period of prescription commenced to run on the 4 February 1985, and would have been completed by 3 February 1988 at the earliest. The service of the summons, therefore, fell within the three year period.

Although the point was not raised in argument, it is also of note, in my view, that certain sections of the Prescription Act refer to obligations "arising"

from various causes. Although a debt often becomes due at the same time as it arises, this does not necessarily follow. See *Apalamah v Santam Insurance Ltd & Anor* 1975 (2) SA 229(D) at 232E. In the present matter I consider that the plaintiff's claim for damages would not become due until it had been quantified, and demand made of the defendant. On this construction as well, therefore, the claim was not prescribed when the summons was served.

In the result the special plea raised will be dismissed with costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Granger & Harvey, defendant's legal practitioners

S v ZINDOGA 1988 (2) ZLR 86 (SC)

Court **Supreme Court, Harare**

Gubbay JA, Manyarara JA & Korsah JA

Criminal appeal

26 July & 8 August 1988

Flynote

Criminal procedure (sentence) - theft - restitution - extent to which mitigating - suspended sentence -

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conditions of restitution and good behaviour **-** impropriety of combining such conditions in relation to a single portion of sentence.

Headnote

Full restitution, in crimes such as theft, particularly in the case of a first offender, is a weighty mitigating factor. Where the accused is in a position to make restitution, two competing interests arise, between which a balance must be struck. On the one hand, there is the interest which the public has in the avoidance of loss by the victims of the crime; the trial court's duty is to provide an incentive to the accused in the manner of its punishment to make good that loss. On the other hand, there is the public interest in the passing of a sentence which will deter others from perpetrating such offences. The impression should not be created that the making of restitution will almost invariably be regarded as countering the dishonest transaction to the extent of resulting in a non-custodial punishment. Each case must be judged on its merits. Restitution and other mitigatory features should be weighed against the nature of the offence and any aggravating features.

Where the accused is a first offender, it is improper to attach two conditions to the suspension of a single portion of the sentence. It would thus be improper to suspend a portion of the sentence on condition of both good conduct and restitution. For one thing, where partial restitution is made, the suspended period should be reduced proportionally. For another, if restitutions is not made, the effect may be that the accused serves the

GUBBAY JA

whole period of imprisonment, in spite of complying with the condition relating to good conduct.

Cases cited:

S v Tichana AD-68-79 (not reported)

S v Spence AD-73-79 (not reported)

R v Zindoga 1980 ZLR 86 (AD)

S v Marere S-87-86 (not reported)

S v Wakiri 1981 ZLR 51 (AD)

S v Bajilla 1981 ZLR 150 (AD)

S v Moyo 1977 (2) RLR 77 (GD)

S v Zumbika 1978 RLR 192 (GD); 1978 (3) SA 155 (R)

S v Katevera 1979 RLR 196 (GD); 1979 (3) SA 666 (R)

M J Gillespie for the appellant

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Y Omerjee for the respondent

Judgment

Gubbay JA: The appellant was employed in the capacity of a senior clerk by the Ministry of Foreign Affairs. In 1983 he was posted to the Zimbabwe Trade Mission in Johannesburg. For a young man, then in his early twenties, the appellant's conditions of service while working in South Africa were favourable. He was accommodated at an hotel at the expense of the Zimbabwe Government, and in addition was paid a salary ranging between R1 013 to R1 500 per month.

The head of the Zimbabwe Trade Mission in Johannesburg at the relevant time was Mr Leonard Hawkins. Appreciating that the appellant had joined what was virtually a white personnel and that life in South Africa would inevitably present many problems for him, Hawkins went out of his way to forge a close and confidential relationship with the appellant. He stressed his willingness to offer advice and assistance in any personal difficulty which might confront the appellant.

The appellant was regarded as the Trade Mission's accountant. His duties consisted in the main of maintaining the books of account, including the income and expenditure schedules and master receipt books; the banking of daily takings; the purchase of stationery; and the performance of certain administrative chores.

Hawkins assessed the appellant as a trustworthy and conscientious worker. Regrettably he was mistaken, for over the period extending from 13 April

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GUBBAY JA

1984 to 19 December 1984 the appellant on 27 separate occasions stole monies from the Trade Mission, totalling R19 743,03.

A few of the unlawful abstractions came to light just before Christmas 1984 when Hawkins was informed by a bank official that there was a discrepancy between the top and duplicate copies of a deposit slip relating to monies credited to the Trade Mission's account. On checking the bank statement for that current month Hawkins discovered that three deposits recorded thereon were for lesser sums than those entered upon the income schedule. The under-banking amounted to R4 400. He queried the discrepancy with the appellant, who admitted stealing the money, asserting that he had succumbed to temptation. The appellant exhibited contrition and offered to make good the loss. This he did by depositing the December shortfall into the Trade Mission's account on 7 January 1985. Hawkins, however, felt duty bound to report the appellant's transgression to the Permanent Secretary in the Ministry.

In March 1985 the Ministry dispatched Claude Ruwende to Johannesburg to carry out an audit. Having examined the books of account of the Trade Mission, he found that on 24 occasions prior to December 1984 the appellant had under-banked monies amounting to R14 745,03.

The appellant was indicted before the High Court on 27 charges of theft. He pleaded not guilty. He raised what can only be termed a vexatious defence in the fact of unassailable evidence

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which linked him directly to the thefts. Moreover, in the course of the trial he launched a totally unjustified attack upon the integrity and honesty of Hawkins, the person who had befriended him and shown so much concern for his interests. He even denied that it was he who had repaid the R4 400.

Not surprisingly the trial court experienced no difficulty in convicting the appellant, of whom it was stated in the judgment: "To him lying is almost as natural as breathing". After a careful examination of all matters relating to sentence, SAMATTA J, taking the counts as one, ordered the appellant, who had an unblemished record, to serve six years' imprisonment with labour. The learned judge appears to have suspended two years of that period for five years upon the condition of future good behaviour and on the further condition that repayment of $13 051,86 (the equivalent of R14 745,03) be effected to the Ministry of Foreign Affairs by 31 October 1987. The precise formula of the suspension has not been clearly transcribed in the record of the proceedings, but seems to be as I have indicated, and it is not in dispute that

GUBBAY JA

the effective sentence was one of four years' imprisonment with labour.

It is sentence only that is presently complained of by the appellant. He has now met the condition of restitution.

Save for his having made restitution, there is little to be said for the appellant. Any contrition that was shown initially to Hawkins was effectively negatived by the manner in which the spurious defence was conducted, involving as it did the unwarranted aspersions on the good character of Hawkins. But that aside, much aggravation attended the commission of the thefts. The appellant stole on very many occasions over an extended period of eight months. He was motivated by greed and self-aggrandisement. He was exposed to no greater degree of temptation that that which every person encounters whose duty it is to deal with his employer's funds. He sorely abused his position of trust, and by his misappropriations tarnished the good name and reputation of the Trade Mission in a foreign land. Moreover, the unlawful diversion of the monies to his own pocket inevitably caused this country a loss of much-wanted foreign currency. And it matters not whether the amount of Rands stolen were remitted from Zimbabwe to South Africa or earned by the Trade Mission there. If the former were the case, then the shortfall would need to be met from this country's foreign reserves; if the latter, the purpose to which it was intended that the funds were to be utilised would have been adversely affected, certainly in part. Thus restitution in local currency, while obviously the most appropriate order for the trial court to have made, since it was offered by the appellant, will not restore the loss of foreign exchange.

Full restitution in crimes such as theft, particularly in the case of a first offender, is rightly regarded as a weighty mitigating factor. Of this there is no doubt. I need only refer to such cases as *S v Tichana* AD-68-79, *S v Spence* AD-73-79, *R v Zindoga* 1980 ZLR 86 (AD) at 88 D-F, and the recent remarks of the learned CHIEF JUSTICE in *S v Marere* S-87-86.

Since the appellant's compliance with the order to make restitution is the only substantive

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feature of mitigation, the question for this Court to determine is whether he ought to have been subjected to an effective period of imprisonment as long as four years. Stated otherwise, did the learned judge, in the formulation of his sentence, place sufficient emphasis on what in the event has proved to be a genuine offer to make restitution?

Where an accused person is in a position to make restitution, two competing

GUBBAY JA

interests arise and a balance must be struck between them: On the other hand, there is the interest which the public has in the avoidance of loss by the victims of the crime; and it is the court's duty, where possible, to provide an incentive to the accused person in the manner of its punishment to make good that loss. On the other hand, there is the public interest in the passing of a sentence which will deter others from perpetrating such offences.

The impression must not be permitted to go abroad that the making of restitution will almost invariably be regarded as countering the dishonest transgression to the extent of resulting in a non-custodial punishment. Each case must be adjudged on its own merits, and the mitigatory feature of restitution taken in conjunction with others which reduce the moral blameworthiness of the miscreant, are to be weighed against the nature of the offence and any aggravating features which relate to it.

In this case, I am not prepared to interfere with the overall sentence of six years' imprisonment with labour. I consider it as somewhat on the high side and would have preferred the imposition of one year less. But, looked at primarily as a punishment for what was a serious and prevalent offence, it cannot, in my opinion, be criticised as being disturbingly inappropriate. See *S v Wakiri* 1981 ZLR 51 (AD) at 53A.

What I do say, however, is that, having restituted in full, the appellant does not deserve to be incarcerated for four years. To leave the sentence in its present form would be to give insufficient credit to the appellant's efforts in making good the loss he caused the Trade Mission. If such a sentence as this were allowed to stand, it could be viewed by the criminally-minded as a disincentive to make restitution.

It has been stated that where an accused is a first offender it is improper to attach two conditions to the suspension of a single portion of the sentence. As observed by BARON JA in *S v Bajilla* 1981 ZLR 150 (AD) at 151 B-D:

> "The impropriety creeps in, however, if one attaches a second condition in a case where one would in the ordinary course have suspended a portion of the sentence on the condition only of future good behaviour. For instance, where an accused person pleads guilty to theft, even of a substantial sum of money by means of a calculated course of conduct, and proves to be a first offender, one would normally impose a sentence of imprisonment and suspended a portion on the condition only of future good behaviour; if in addition there is imposed the condition that the

GUBBAY JA

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accused make restitution, and if in fact he is unable to do so, then the effect may be that he serves the whole of the period of imprisonment imposed and the leniency which the mitigating factors would normally attract is lost."

There is, I think, an added objection: if the accused should breach the condition of future good behaviour by the commission of an offence specified in the order, then either the full period of the suspended sentence is put into operation or, if he is able to show good cause, the full period may be further suspended. But it is not permissible to further suspend a portion of the suspended sentence or to bring a portion of the suspended sentence into effect. See *S v Moyo* 1977 (2) RLR 77 (GD) at 78 G-H. But where there is attached to that suspended period the additional condition of repayment, then in the event of the accused making a partial restitution such period would fall to be reduced in proportion to the amount of money actually paid. See s 337 (2d) of the Criminal Procedure and Evidence Act [*Chapter 59*]; and also *S v Zumbika* 1978 RLR 192 (GD) at 194F-195A; 1978 (3) SA 155 at 156; and *S v Katevera* 1979 RLR 196 (GD) at 198 D-G; 1979 (3) SA 666 at 668.

It seems to me therefore that to attach these two conditions to the **same** period of the suspended sentence could result in a conflict of the principles relating to the imposition of suspended sentences.

Accordingly, I would allow the appeal and substitute the following sentence for that imposed by the High Court:

"Six years' imprisonment with labour, of which period -

(i) eighteen months' imprisonment with labour is suspended for five years on condition that the accused is not convicted of any offence involving dishonesty committed within that period and for which he is sentenced to imprisonment without the option of **a fine; and**

(ii) two years' imprisonment with labour is suspended on condition that the accused repays the Ministry of Foreign Affairs the sum of $13 051,86 by 31 October 1987."

Manyarara JA: I agree.

Korsah JA: I agree.

Winterton, Holmes & Hill, appellant's legal representatives

DD TRANSPORT (PVT) LTD v ABBOT 1988 (2) ZLR 92 (SC)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil appeal

1 August 1988

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Flynote

Practice and procedure - pleadings - admissions made in pleading - withdrawal of admissions - when permissible - "non-admission" - when may be employed.

Headnote

The effect of making a formal admission in pleadings is that the opposing party need not adduce evidence to prove the admitted fact, while it is incompetent for the party making the admission to adduce evidence to contradict it. Where an admission has been made in error, the court has a very wide discretion to relieve the party concerned from the consequences of that error by granting an amendment of the pleading.

Such an amendment will not be granted simply for the asking, for it is an indulgence and not a right. The court will require a reasonable explanation of both the circumstances in which the admission was made and the reasons why the party seeks to resile from it. If withdrawal of the admission will cause prejudice or injustice to the other party to the extent that a special order for costs will not compensate him, the court will refuse the application. In this regard, the test to be applied is whether the other party would be placed in a worse position by the amendment being granted than he would have been had the pleading, in its amended form, been filed in the first instance. This might occur, for instance, if the only person who can give evidence about the facts that were erroneously admitted had since died or had left the country and his whereabouts were unknown. The court must also be satisfied that the amendment sought is *bona fide*.

A party pleading to a declaration or a claim in reconvention must deal with

GUBBAY JA

every allegation made, by admitting or denying it, by stating that he has no knowledge concerning it, or by confessing and avoiding it.*(2) A non-admission (where the pleader avers that he has no knowledge of the facts alleged, does not admit them and puts the other party to the proof of them) made where it is obvious that where the pleader does have knowledge of the facts is untruthful pleading. A non-admission may only be employed if the pleader has a good reason for doing so.

Cases cited:

Gordon v Tarnow 1947 (3) SA 525 (A)

Moresby-White v Moresby-White 1972 (1) RLR 199 (AD); 1972 (3) SA 222

Zarug v Parvathie NO 1962 (3) SA 872 (D).

Amod v SA Mutual Fire & General Insurance Co Ltd 1971 (2) SA 611 (N)

Rishton v Rishton 1912 TPD 718

Moolman v Estate Moolman & Anor 1927 CPD 27

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Trans-Drakenberg Bank Ltd v Combined Engineering (Pty) Ltd & Anor 1967 (3) SA 632 (D)

Whittaker v Roos & Anor 1911 TPD 1092

Fish Hoek Village Management Board v Romain 1932 CPD 304

Wilson v SA Railways & Harbours 1981 (3) SA 1016 (C)

J B Colegrave, for the appellant

H I Bisset, for the respondent

Judgment

Gubbay JA: This is an appeal from the High Court consequent upon the grant of leave. The plaintiff, the present respondent, sued the defendant, now the appellant, for payment of the sum of $7 650, being the damages he sustained through the negligence of the defendant's employees when transporting his boat-trailer from Harare to Bulawayo.

In para 3 of the declaration, as read with para 2 of the further particulars, the plaintiff averred that the contract to transport the boat-trailer was entered into early in July 1984 in the course of a telephone conversation between himself and the defendant's manager, Mr Terrence King, who acted for the defendant. He averred further in para 4, as amplified by para 3 of the further particulars, that the boat-trailer was delivered by one Turnbull to the defendant's driver at the premises of Lomagundi Service Station, Harare,

three days after the afore-mentioned telephone conversation; that somewhere near Gweru, at a place and time to him unknown, the boat-trailer had fallen from the the defendant's vehicle on which it was being conveyed and was extensively damaged; and that thereafter it had never been returned or tendered to him by the defendant.

The defendant in para 2 of its plea denied that it ever entered into the agreement alleged, and that -

> "(b) the said Terence King who purported to enter into such agreement on the defendant's behalf was in any way authorised by the defendant to do so."

It also denied in para 3 the allegations relating to the delivery of the boat-trailer, that it had fallen and sustained damage while being conveyed, and that it had never been returned or tendered to the plaintiff.

The plaintiff considered it necessary to respond to para 2 of the plea. In para 1(1) of his replication he alleged that King, in his capacity as manager of the defendant's branch office in Bulawayo, had ostensible authority to enter into the contract he did and that the defendant was bound "in terms of the agreement admittedly entered into between the plaintiff and the said King". In para 1(2) the plaintiff specified, *inter alia*, the following facts as giving rise to the

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ostensible authority:

"(b) the said King was and held himself out as an agent and servant of the defendant;

(c) the plaintiff contracted with the said king in his said capacity in good faith."

In para 1(3) it was alleged:

"At no time during the negotiations between the plaintiff and the said King did the said King indicate that the goods were to be transported at owner's risk."

It is para 2(b) and 3 of the rejoinder which followed that grounded the plaintiff's objection. They read:

"(b) In relation to the agreement relied upon by the plaintiff, the defendant has no knowledge of the facts alleged in sub-paras (b) and (c) of this paragraph and puts the plaintiff to the proof thereof."

GUBBAY JA

And:

"3. Ad para 3 of the plaintiff's replication:

The defendant has no knowledge of the said negotiations and without making any admission in that regard repeats para 2 of its plea."

The plaintiff's legal practitioners were quick to bring to the notice of their opposition that the rejoinder involved the withdrawal of an admission, which was impermissible without the leave of the court. In their letter of complaint the point was stated thus:

"Your client's plea and the replication were both drawn upon the basis that the defendant admitted King had contracted (or, to use the words of the pleas, 'purported to contract') with Mr Abbot as alleged but had no authority so to contract: *vide* 2 (b) in the plea which is to the effect that 'the defendant denies that . . (b) the said **Terence King who purported to enter into such contract on the defendants behalf** was in any way authorised by the defendant to do so ..." (the emphasis is our own). If what was intended was to deny that King did what the plaintiff alleged (we do not believe this was the case) or to put our client to the proof of his averment in that regard this should have been but was not said in the plea. Para 2(b) and 3 of the rejoinder conflict with, or withdraw, the admission mentioned above."

Upon the defendant's failure to remove the cause of the complaint, the plaintiff instituted an application to strike out only para 2(b) of the rejoinder. The defendant reacted by applying to amend its plea in two respects: First, and most importantly, by withdrawing the admission contained in para 2(b) and replacing it with the following non-admission:

"(b) (The defendant) has no knowledge of any agreement as alleged between the plaintiff and the said King, does not admit the same and puts the plaintiff to the proof thereof, and, in any event, avers that, if King did enter into such agreement, which is not admitted, he was not in any way authorised by the defendant to do so;"

and, secondly, by substituting for its denial in para 3 of the allegations contained in para 4 of the declaration as further particularised, another non-admission:

"The defendant has no knowledge of the facts alleged, does not admit them and puts the plaintiff to the proof

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thereof."

GUBBAY JA

The affidavit of the legal practitioner who drew the defendants plea and rejoinder, Mr MT O'Meara, was filed in support of the application. It was to the effect that his instructions from the defendant gave him no authority to make any admissions as to the fact of the agreement as alleged by the plaintiff between himself and King; that he had not intended to admit to it, nor did he appreciate that properly construed para 2(b) of the plea would amount to such an admission; that he was mistaken in his understanding of the correct meaning or significance attaching to the use of the word "purported"; and that he ought properly to have pleaded a non-admission of the agreement between the plaintiff and King. With regard to the second amendment, it was said that a non-admission and not a denial should have been pleaded in order for the plaintiff to know properly the case he has to meet.

A replying affidavit from the plaintiff was filed in opposition to the application to amend. Paras 3, 4 and 5 thereof read:

"3. I have no wish to impugn the integrity of Mr O'Meara. However if the contents of Mr O'Meara's affidavit are correct (and in the premise already stated I have no reason to question them) I say that the instructions which he received are incorrect; this arises from the facts set for the below.

4. I say that at all material times prior to the institution of this action it was accepted by the defendant that its agent and servant King had contracted on the the defendant's behalf to transport my trailer as alleged. The only matter in issue was whether or not King had ostensible authority (or any authority) to contract with me.

5. In proof of what I have stated in para 4 *supra* I say that:

(a) Shortly after I had been informed of the damage to my trailer I was told by King himself to get the trailer repaired by a firm called General Construction in Bulawayo.

(b) On the same day as King issued the order (in the defendant's name) for the repair be General Construction, a man whose name I do not recall but who was the then Group Accountant of the defendant, informed me he had instructed that the work be stopped, or not commenced.

(c) The said Group Accountant told me that King had no authority to issue the order (for the repair) because the damage would have to be met by the defendant's insurer. At no time was it said by him that King had not been authorised to undertake the carriage of the trailer.

GUBBAY JA

(d) Some ten days after the events mentioned above I received a letter from a Mr A C Readings, the defendant's Manager, which is annexed and marked 'A' and which letter is wholly inconsistent with a denial of liability.

(e) At no time until after this action was threatened by my legal practitioners of record was liability denied, nor was there any denial that King had contracted (or 'purported to contract') with me. In this regard I

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> am aware of the contents of the subsequent correspondence between my legal practitioners and the defendant's agent Minet Insurance Brokers (Private) Limited whose letter dated 15 January last (copy annexed hereto and marked 'B') is equally inconsistent with the allegations that King lacked authority to bind the company and that he had not contracted with me."

Notwithstanding the obvious materiality of this affidavit, and especially the content of para 5, the defendant did not avail itself of the opportunity to answer. Accordingly, all the facts alleged by the plaintiff went undisputed.

The opposing applications came before MANYARARA J (as he then was). He ordered that the defendant's application to amend its plea be dismissed with costs and that para 2(b) and para 3 (in respect of which no relief was sought by the plaintiff) of the defendant's rejoinder be struck out with costs.

In support of the appeal Mr *Colegrave* submitted that the learned judge had erred in refusing to allow the defendant to amend its plea so as to reflect that it had no knowledge of the alleged contract between the plaintiff and King.

Undoubtedly, the use of the word "purported" in para 2(b) of the plea resulted in the making of an admission that an agreement between the plaintiff and King to transport the boat-trailer from Harare to Bulawayo was entered into.

The effect of a formal admission made in pleadings was underscored in *Gordon v Tarnow* 1947 (3) SA 525 (AD) where DAVIS AJA at 531-532 said:

> "But this admission in the plea is of the greatest importance, for it is what *Wigmore* (paras 2588-2590) calls a 'judicial admission' (of the *confessio judicialis* of *Voet* (42.2.6)) which is conclusive, rendering it unnecessary for the other party to adduce evidence to prove the admitted fact, and incompetent for the party making it to adduce evidence to contradict it. (See also *Phipson* 7 ed p 18)). *Wigmore loc cit*, speaking of judicial

GUBBAY JA

> admissions in general, refers to the Court's discretion to relieve a party from the consequences of an admission made in error. it does not seem to me that such a discretion could be exercised, in a case where the admission has been made in a pleading, in any other way than by granting an amendment of that pleading."

These *dicta* were approved by MACDONALD ACJ (as he then was) in *Moresby-White v Moresby-White* 1972 (1) RLR 199 (AD) at 203E-H; 1972 (3) SA 222 (RAD) at 224.

An amendment which involves the withdrawal of an admission will not be granted by the court simply for the asking, for it is an indulgence and not a right. See *Zarug v Paravathie NO* 1962 (3) SA 872 (D) at 876C. Before the court will exercise its discretion in favour of the desired amendment it will require a reasonable explanation, of both the circumstances under which the pleader came to make the admission and the reasons why it is sought to resile from it. If persuaded that to allow the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order for costs will not compensate him, it will refuse the application. See *Amod v SA Mutual Fire and General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614H-615A; Beck's *Theory and Principles of Pleadings in Civil Actions* 5 ed para 83 p 191. And, of course, the court will have to be satisfied that the amendment sought is a *bona fide* one. The

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question must always be posed: "Is the applicant acting *mala fide* in seeing to withdraw his admission?". See *Rishton v Rishton* 1912 TPD 718 at 722; *Moolman v Estate Moolman & Anor* 1927 CPD 27 at 29; *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd & Anor* 1967 (3) SA 632 (D) at 642A.

The general and broad approach to be adopted by the court in determining whether to allow the withdrawal of an admission, and one which has been followed time without number over the past seventy years or so, is that enunciated by WESSELS J in *Whittaker v Roos & Anor* 1911 TPD 1092 at 1102-1103:

> "This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. it is presumed that when a defendant pleads to a declaration he knows

GUBBAY JA

> what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. but we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties."

These, then, are the principles to be applied by a court concerned with an application to amend a plea which would, if granted, have the effect of withdrawing an admission.

In concluding that the defendant's application to amend para 2(b) of the plea was not made in good faith, the learned judge *a quo* rejected the explanations proferred by Mr O'Meara that he had no instructions to make the admission and that he had failed to appreciate the precise significance attaching to the word "purported". He reasoned that when counsel is instructed by a professional colleague to draw a pleading nothing is left to speculation or chance and that "after counsel has studied his written instructions he will normally consult in chambers with the legal practitioner instructing him in the presence of the lay client, to ensure that all three participants are of one mind as to what counsel is required to do".

Mr *Colegrave* submitted that there was no justification for not accepting that Mr O'Meara had made an honest mistake in pleading as he did. I agree with him (as did Mr *Bisset* for the plaintiff) that the learned judge went too far. The meticulous method of preparing pleadings he referred to is only put into practice where the drawing of the pleading is of a complex nature. Where that function is comparatively straightforward, as in this case, counsel usually does not require to confer with anyone. Written instructions from the legal practitioner suffice. Furthermore, in his replying affidavit, the plaintiff fairly indicated that it was not his wish to impugn Mr O'Meara's integrity.

The proper approach was to accept that Mr O'Meara had not been authorised to admit the existence of any agreement between the plaintiff and King and determine whether the instruction to him to plead a non-admission or a denial, for that is what it must be assumed to

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have been, was in fact honest.

Mr O'Meara's affidavit takes that enquiry no further. It was for the defendant to say that it gave instructions to Mr O'Meara, through its legal practitioners,

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which were not only to the effect alleged but also true to the best of its belief. It failed to take the court into its confidence concerning the truth or otherwise of its instructions. As it neglected to answer the plaintiff's affidavit, its *bona fide* fell to be tested against the facts deposed to by him in para 5 thereof.

Quite apart form the undisputed allegation that the defendant's Group Accountant informed the plaintiff that the damage to the boat-trailer would have to be met by its insurers, which was an admission of liability, a perusal of the two annexed letters, both written months before the action was instituted, completely bear out the plaintiff's claim that the defendant, at the very least, accepted that the real dispute turned on whether King was authorised by it, whether ostensibly or otherwise, to enter into the contract on its behalf. The fact of his having contracted with the plaintiff was never in issue.

In the letter of 2 July 1984 the defendant's company manager wrote to the plaintiff: "... we request you forward us your claim plus three quotes for the repair of same (ie the boat-trailer). On the receipt of these documents we will then pass this to our Insurance Company for further action". From this wording an acknowledgement of liability seem implicit.

And on 15 January 1985, the insurance company, as agent for the defendant, in replying to an earlier letter from the plaintiff's legal practitioners, stated:

> "What we are saying, however, (is) that this is a private deal between Mr King and Mr Abbot ...
>
> It would appear at this stage ... that Mr King was acting outside the scope of his employment."

That contention can only have been derived from information provided by the defendant, and is inconsistent with a lack of knowledge on the latter's part as to whether the plaintiff and King had entered into the contract in question.

In the result the application to withdraw the admission contained in para 2(b) of the plea came far short of the standard of *bona fides* required.

The learned judge *a quo* also considered that to allow the withdrawal of the admission would cause prejudice or injustice to the plaintiff, not compensable by a special order for costs. But, having found that the application was not *bona fide*, it was unnecessary for him to determine the point. Since he did

GUBBAY JA

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so, however, it is as well that I deal with it, particularly as I take a view different from his.

The test to be applied is whether the plaintiff would be placed in a worse position than he would have been if para 2(b) of the plea in its amended form had been filed in the first instance. See *Moolman v Estate Moolman & Anor* *supra* at 29; *Fish Hoek Village Management Board v Romain* 1932 CPD 304 at 307; *Amod's* case *supra* at 614A. Mr *Colegrave* was correct in his submission that the plaintiff would not be so prejudiced, for the grant of the amendment would merely involve him in personally testifying to having entered into the contract with King over the telephone. The type of situation envisaged by the requirements, which springs to mind, is that where the only person who can speak to the facts admitted has since died or has left the country and his whereabouts are no longer known.

In dismissing the defendant's application *in toto* the learned judge must be deemed to have declined permission to amend the denial contained in para 3 of the plea - with reference to the allegations made in para 4 of the declaration as particularised - to a non-admission. Although no reasons were given by him for that decision, I consider it to have been correct. What the defendant was seeking to do was to replace a dishonest denial with a non-admission, which was hardly less dishonest. It is abundantly clear from the plaintiff's affidavit, and from the letters annexed thereto, that the defendant was aware that the boat-trailer had suffered damage *en route* from Harare to Bulawayo. It is also inconceivable that the defendant has no knowledge of the delivery of the boat-trailer made to its driver at the premised of Lomagundi Service Station, whether it is still in its possession, and whether it failed to return or tender its return to the plaintiff.

I am satisfied that the defendant had knowledge of the facts which it was called upon to deal with. It was not placed in the position, through ignorance, of being unable to confess and avoid the allegations in para 4 of the declaration. A non-admission may only be employed where the pleader has a good reason for not complying with the basic rule which is to admit, deny or confess and avoid. Where it is obvious that he has knowledge of the facts a non-admission will amount to untruthful pleading. See Beck *op cit* para 39 at p 72; *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1018 A-B.

These remarks apply with equal force to para 3 of the rejoinder, even though the plaintiff did not apply to strike it out and the defendant to amend it.

GUBBAY JA

It was for these reasons that at the conclusion of argument this Court was of the opinion that the appeal was devoid of merit. Accordingly it was dismissed with costs.

Dumbutshena CJ: I agree.

Korsah JA: I agree.

Coghlan & Welsh, appellant's legal representatives

Webb, Low & Barry, respondent's legal representatives

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S v T 1988 (2) ZLR 103 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil appeal

8 August 1988

Flynote

Family law - paternity - presumptions in respect of - presumption against illegitimacy - rebuttable on balance of probabilities - presumption of fatherhood where intercourse admitted - onus on alleged father to rebut paternity.

Headnote

The respondent was married to one X She and X were estranged, and during the period of estrangement, she had an affair with the appellant. This affair came to an end when she discovered that he was married to another woman. Towards the end of her period of association with the appellant, the respondent and her former husband effected a reconciliation and the two resumed marital relations. Some months later a child was born to the respondent. The child was carried to full term. Had it been fathered by the respondent's husband, its birth date would have made it eight weeks premature. However, in respect of the respondent's association with the appellant, the birth date corresponded with a full term child. Apart form the coincidence as to dates, the child was found to have a strong resemblance to the appellant. The appellant, though denying paternity, admitted intercourse during the relevant period. The respondent obtained an order that the appellant pay maintenance in respect of the child and against this order an appeal was brought.

Held, that in this case there were two competing presumptions of law. The first was that against illegitimacy, that is, a presumption that the husband is father of any children born to the wife during the subsistence of the marriage. There is no requirement that the woman seeking to rebut this presumption be corroborated; the standard of proof required is that

KORSAH JA

which is acceptable in all civil cases, a preponderance of probabilities. Even weak evidence against legitimacy must prevail if there is no other evidence to counterbalance it. Here, the evidence regarding the date of birth and the fact that the child was carried to full term tended to show that it was more probable than not that the child was not the offspring of the respondent's marriage. The second presumption is that if a man admits intercourse he is presumed to be father of the child born thereafter. The *onus* is on him to show that he could not possibly be the

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father; and the appellant had failed to discharge this *onus*.

Cases cited:

Wiehman v Simon NO 1938 AD 447

Mackay v Ballot 1921 TPD 430

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

The appellant in person

The respondent in person

Judgment

Korsah JA: This is an appeal against the determination by the Maintenance Court at Harare that the appellant is the father of the child, J born of the respondent; or rather, to put it more accurately, that the appellant had failed to shift the *onus* which rested on him to show that, despite his admission that he had indulged in sexual intercourse with the respondent, he could not possibly be the father of the child, J The consequential order that the appellant was thus liable to maintain the said child at the rate of $30 per month is not the subject of appeal.

The history of the matter is this: The respondent and X were married according to the customary law of Zimbabwe. They had a child as to whose paternity no doubt arises. After the dissolution of this union, the respondent met and fell in love with the appellant in May 1983. Their love affair lasted until the end of August of the same year. What brought their love affair to an end was the realisation by the respondent that the appellant was a married man. She last had sexual intercourse with the appellant between the last week of August and the first week of September 1983.

Meanwhile, late in August 1983, the respondent paid a visit to Bulawayo, where she ran into her former husband, X, who expressed a desire for a reconciliation. In due course a reconciliation was effected and the first act of sexual intercourse between the respondent and X occurred in October 1983.

KORSAH JA

The respondent saw her doctor in November 1983 and was informed that she was two months pregnant. She explained that knowledge of her pregnancy dawned late because she had previously been using a contraceptive known as "depo provera", whose effect on her was to stop menstruation. The absence of the menstrual period was thus, to her, no indication of pregnancy. She expressed her doubts to her doctor as to the correctness of his diagnosis, but the child, J, was born, having been carried full term, on 14 June 1984. In respect of her association with X, the child J would have been delivered prematurely by about eight weeks. And in respect of her association with the appellant, the child J would have been delivered after being carried full term.

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The respondent testified that when X learnt of her pregnancy, in the belief that he was the sire of J, he went to pay the remainder of her lobola out of abundance of joy. But after the birth of J came the realisation that J bore no resemblance to X, but rather to the appellant, and X denied paternity of the child.

The respondent, after her reconciliation with X, neither saw nor informed the appellant of her pregnancy until some two weeks after the birth of J; for she must have hoped and prayed that the father of the child would be X, or, at the very least, that there be no semblance between the child and the appellant. Unfortunately this was not to be.

When X denied paternity and refused to maintain J, the respondent took J, who was then about two weeks old, to see the appellant. According to the respondent, the appellant, appreciating the striking resemblance between him and the child, admitted paternity. It is common ground that on that day the appellant gave the respondent a cheque for $50 for the maintenance of J and has since, from time to time, accorded the respondent financial support in the maintenance of J Such support, however, proved irregular and it was the desire to place maintenance on a more regular footing which prompted the respondent's application in the Maintenance Court.

The appellant stressed that after the termination of their friendship at the end of August 1983, he had not seen the respondent until she brought J to his workplace and informed him that X had denied paternity and refused to look after J The appellant said he gave the respondent financial support out of compassion and as a friend of the family, and not because he was admitting paternity. But the appellant did not deny having sexual intercourse with the respondent during a period that was relevant to the gestation of J

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It also appears from the record that J was named after an aunt of the appellant and that the appellant had taken the child home to introduce her to his sisters. Of course, the appellant denies that it was his aunt who gave J her name, and explains that he took the child home because the respondent dumped the child at his workplace and he was obliged to take her home.

While these pieces of evidence are not the *indicia* by which paternity may be established, taken together with the appellant's admission of intercourse with the respondent at the relevant period, they tend to support the assertion by the respondent that the appellant is aware that he is the father of J The appellant, however, alleged that it is X who fathered J

During the course of proceedings the matter was adjourned, at the request of the appellant, to have blood tests conducted, in the hope that it might assist in resolving the issue of paternity. The judgment of the trial court recalls a minute dated 9 December 1985 from the Blood Transfusion Services which indicates that the appellant called on them on that day to book an appointment with Dr Emmanuel for blood culture analysis typing. Regrettably, the appellant did not honour that appointment, and no explanation for his failure to do so appears on the record. The trial court had no choice but to look to the evidence before it for a resolution of the paternity issue.

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As I see it, there are called into play two competing presumptions of law: firstly, there is the presumption against illegitimacy, according to which there is a presumption that one husband is the father of any children of the wife born during the subsistence of the marriage, which presumption will prevail in the absence of evidence to the contrary.

It was for some time the view of the South African Courts, as expressed in *Wiehman v Simon NO* 1938 AD 447 at 450, approving the following statement of STRATFORD J in *Mackay v Ballot* 1921 TPD 430 at 432, that -

> "In paternity cases the law requires that the mother's story cannot prevail against the defendant's denial unless it is corroborated. By corroboration I understand that some evidence must be given in addition to the woman's which, in some degree, is consistent with her story and inconsistent with the innocence of the defendant."

But doubts were raised as to whether the above *dictum* was correct statement of the law until TRENGOVE JA in *Mayer v Williams* 1981 (3) SA 348 at 351 F-H laid the spectre of the rule to final rest. The learned JUDGE OF APPEAL

KORSAH JA

expressed himself thus:

> "In my view the time has arrived to dispense with the rule as formulated in *Mackay v Ballot supra*. I have come to this conclusion for the following reasons:
>
> (a) the rule is based on a misunderstanding of Roman-Dutch procedure in action of this nature: see *Davel v Swanepoel* 1954 (1) SA 383 (A) at 388; F P van den Heever *Breach of Promise and Seduction in SA Law* at 51-59; Schmidt *Bewysreg* at 48;
>
> (b) it seems to me an anomaly that 'in any field of investigation a greater certainty of proof may be required where civil rights are in issue than when a person is being tried criminally' (see *R v W* 1949 (3) SA 772 (A) at 779-80);
>
> (c) the rule as formulated is, in my view, inappropriate in our modern system of civil trial procedure (see F P van den Heever *op cit* at 59; Hoffman *SA Law of Evidence* 2 ed at 410); and
>
> (d) the rule appears to have been excluded by the provisions of s 16 of Act 25 of 1965."

Section 19 of the Civil Evidence Act [*Chapter 41*] of Zimbabwe recites that -

> "It shall be lawful for the court by which any suit is tried to find on any issue of fact, and in respect of such finding to give judgment for or against any party to such suit, on the evidence of any single, competent and credible witness."

The presumption is, therefore, rebuttable in any civil proceedings by evidence which tends to show that it is more probable than not that the person is illegitimate or legitimate, as the case may be. And in order to rebut the presumption it is not necessary to prove the fact beyond reasonable doubt or to apply the cautionary rule of evidence. The standard of proof required is that which is acceptable in all civil case - a preponderance of probabilities. Thus even weak evidence against legitimacy must prevail if there is no other evidence to counterbalance it.

The second presumption is that there is a presumption that if a man -

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"... admits, in or out of court, intercourse with the complainant, at whatever time, the admission raises the presumption that the intercourse

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resulted in the pregnancy and the man is the father of the child born thereafter; the *onus* then rests on the man to establish, that despite the admission made, he could not possible have paternity of the child ascribed to him."

See *The Law of Parent and Child* by E Spiro 4 ed at p 438.

The evidence rightly accepted by the trial court was that the child J was born on 14 June 1984, after it had been carried full term. The appellant and the respondent last copulated between the last week in August and the first week in September of 1983. The respondent and X performed their first act of sexual intercourse, after their reconciliation, in October 1983. The learned trial magistrate reasoned that if J had been the offspring of the marriage between the respondent and X, J would have been delivered prematurely. Since J was not a premature baby, there was evidence which tended to show that it is more probable than not that J is not an offspring of the marriage.

Now there was an admission by the appellant, both in and out of court, that shortly before the respondent and her husband re-married he had sexual intercourse with the respondent. The period given for the last act of copulation between the appellant and the respondent would result in J being born after having been carried full term. And J was born after having been carried full term.

Moreover, the learned trial magistrate had occasion to see J in court, and he remarked:

"Whilst this court is not qualified to compare or judge paternity by facial looks, I do not hesitate to state that the child looks like the respondent."

This Court also had occasion to see the child J, and there is not doubt that she is the spitting image of the appellant.

The appellant counters the striking resemblance between him and the child with the argument that there may be several citizens of Zimbabwe who may be mistaken for him. I do not doubt that, but it is highly unlikely that the respondent has been having sexual intercourse only with people who look like the appellant, an no such person was indicated by him.

Even ignoring the striking resemblance between the appellant and J, upon the evidence before the trial court, the finding by the learned trial magistrate that

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the appellant had failed to establish that, despite the admission made by him, he could not possible be the father of J, is unexceptionable.

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The appeal is accordingly dismissed. Each party is to bear its own costs.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

ZULU v STERLING PRODUCTS INTERNATIONAL LTD 1988 (2) ZLR 110 (HC)

Court **High Court, Harare**

Greenland J

Application on notice of motion

30 June & 10 August 1988

Flynote

Employment - Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 - s 3 - suspension pending termination of contract of employment - application for termination of employment sent to wrong official - whether legislation complied with - application to be made "forthwith" - meaning of.

Headnote

The applicant was suspended from her employment with the respondent. On the same day, the respondent wrote a letter to a named official at the Ministry of Labour, applying for an order terminating the applicant's contract of employment. Section 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations required that following suspension such an application should be made "forthwith" to a labour relations officer. The official to whom the respondent wrote was not a labour relations officer, but a regional hearing officer.

Some five months after the date of suspension, a labour relations officer referred the matter to the Labour Relations Board, but there was no indication of how that officer became seized of the matter.

The applicant applied for reinstatement in her employment. It was argued that the Regulations had not been complied with, in that the application was deliberately made to the wrong official and was not made "forthwith", and that the suspension was accordingly a nullity.

Held, that for the suspension to be valid, there must be compliance with the Regulations. The enquiry is not so much whether there has been "substantial" compliance with the Regulations, as argued by the respon-

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dent, but rather whether there had been compliance. Here, the prescribed procedure had not been followed. The application was made to the wrong officer, a regional hearing officer and a labour relations officer having entirely different functions under the legislation. Further, the application was not made "forthwith". The suspension was therefore unlawful and the applicant was entitled to reinstatement.*(3)

Cases cited:

Schierhout v Minister of Justice 1926 AD 99

Madzima v Municipality of Chinhoyi HH-270-87 (unreported)

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

Stoop v Lichtenburg Town Council 1952 (2) SA 72 (T)

Ntini v Jongwe Printing & Publishing Co (Pvt) Ltd HH-623-87 (unreported)

R v Mdondo & Ors 1938 SR 77

R v West & Wild 1953 SR 199; 1953 (2) SA 675 (SR)

Sleightholme Farms (Pvt) Ltd v National Farmers Union Mutual Insurance Society Ltd 1966 RLR 467; 1967 (1) SA 13 (R)

Maharaj & Ors v Rampersad 1964 (4) SA 638 (A)

Rondalia Versekeringskorporasie van SA Bpk v Lemmer 1966 (2) SA 245 (A)

Springs Town Council v Macdonald 1968 (2) SA 114 (T)

Zimbabwe Sun Hotels (Pvt) Ltd v Lawn 1988 (1) ZLR 143 (SC)

A P de Bourbon SC for the applicant

M J Gillespie for the respondent

Judgment

Greenland J: On 30 June 1988, the following order was granted by this Court:

> "It is ordered that (a) the respondent reinstate the applicant to the position she occupied with full pay and benefits as from the date of suspension from employment; and (b) that the respondent bear the costs of this application."

Herewith are the reasons for that order.

By letter dated 29 July 1987, the respondent, as employer, advised the applicant, as employee, as follows:

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GREENLAND J

> "This letter will advise you that with immediate effect you are suspended from employment with the company without pay pending the outcome ... request to the Ministry of Labour for your dismissal on the grounds of purloining a confidential company document ..."

The question to be decided is whether or not this act of summary suspension accords with, and is not in breach of, s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations SI 371/1985. The section reads:

> "3. Where an employer has good cause to believe that an employee is guilty of -
>
> (a) any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract;
>
> ...
>
> (d) theft or fraud;
>
> ...
>
> the employer may suspend such employee without pay and other benefits and shall **forthwith apply to a labour relations officer for an order** or determination terminating the contract of employment.
>
> (2) Upon application **the labour relations officer shall investigate the matter** and may, according to the circumstances of the case -
>
> (a) serve a determination or order on the employee concerned terminating his contract of employment if the grounds for his suspension are proved **to the satisfaction of the labour relations officer;** or
>
> (b) serve a determination or order on the employer concerned to remove the suspension ... and to reinstate such employee if the grounds for his suspension are not proved **to the satisfaction of the labour relations officer.**
>
> (3) A determination or order served in terms of paragraph (4) of subsection (2) may provide for back-pay ... and compensation ... incurred by such suspension.
>
> (4) The provisions of Part III of the Labour Relations (General) Regulations, 1985, shall apply in relation to any appeal from a determination or order served in terms of subsection (2)."

(My emphasis.)

As is clearly apparent the sections quoted above prescribe, in peremptory terms, the procedure whereby a summary suspension may be legally sanc-

tioned or set aside. It is clear that it is to a **labour relations officer** that the matter has to referred. That officer is then seized with the matter and is charged with the duty of determining the matter after a compulsory investigation by himself. There can be no basis for interpreting those clear and unambiguous provisions otherwise.

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The facts reveal that on the same day that the letter of suspension quoted above was written, the respondent wrote a letter referring the matter in terms of s 3 of the Regulations for decision in terms of subs(2) thereof. The letter was addressed thus:

> "Mrs Goromonzi,
>
> Ministry of Labour. ...
>
> ...
>
> Dear Mrs Goromonzi,
>
> ...

There can be no doubt therefore that, of all the officials employed in various capacities in the Ministry, it was to a Mrs Goromonzi that the matter was specifically referred for investigation and determination.

The papers, however, reveal that Mrs Goromonzi is not a labour relations officer but an "Acting Regional Hearing Officer". The respondent, itself, in affidavits filed, refers to Mrs Goromonzi as "the Acting Regional Hearing Officer". Its general manager deposes:

> "On the 29th July, 1987 the parties appeared before the Acting Regional Hearing Officer-Mashonaland, Mrs Goromonzi. . . "

The respondent therefore would have been under no illusions as to the status of Mrs Goromonzi and must be taken to have purposely referred the matter to an Acting Regional Hearing Officer instead of to a labour relations officer. During the motion proceedings this aspect was specifically put to the respondent's counsel and in its ruling the Court stated:

> "Respondent having declined an opportunity to specifically deal with the issue of non compliance with the Regulations and not having demonstrated compliance therewith, it is clear that s 3 was not complied with in suspension. Non compliance with a governing statute renders the suspension a nullity."

GREENLAND J

Support for this latter proposition is to be found in *Schierhout v Minister of Justice* 1926 AD 99; *Madzima v Municipality of Chinoyi* HH-270-87; *Roger v Durban Corporation* 1950 (1) SA 65 (D); *Stoop v Lichtenburg Town Council* 1952 (2) SA 72 (T).

Although these precedents were concerned really with the question of termination of an employment contract, the relevant *ratio decidendi* applies *a fortiori* to summary suspension with a view to dismissal regulated by statute. As stated in the case of *Ntini v Jongwe Printing & Publishing Co (Pvt) Ltd* H-H-623-87:

> "In such circumstances it can be said that the contract of employment is governed by statute, not in its entirety but certainly as regards an essential part thereof ie termination. Therefore termination by a party to the contract, to be of force and effect, must be in compliance with the Statute."

For the purposes of this case, substitute "suspension with a view to termination" for "termination". Respondent's counsel was forced to submit that there was "substantial"

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compliance with the Regulations. Whatever this might mean, it is not what the respondent claimed ar attempted to prove. The relevant evidence is to be found in the affidavit of its General Manager. That evidence is to the effect that "notification of this suspension was confirmed in writing with a covering letter to Mrs Goromonzi". No facts, factors or circumstances are advanced or demonstrated to support the proposition that by so doing the respondent either intended to "apply to a labour relations officer" or that this eventually necessarily followed thereon. There is simply no basis on which this Court can now infer that the procedure prescribed in s 3 of the Regulations was, in fact, complied with despite the erroneous referral by the respondent. It should always be remembered that s 3 of the Regulations stipulates that upon suspension the application must be made **forthwith**. The only evidence relevant to this issue is that it is common cause that a labour relations officer referred the matter to the Labour Relations Board on 14 January 1988, some five months after the date of suspension. Because of the 5 month time gap it is not possible to infer that there was *de facto* application to him **forthwith**, via Mrs Goromonzi. One can only speculate as to how and why this officer **eventually** came to be handling the matter.

Although the word "forthwith" is not as peremptory as "immediately" it does mean "within a reasonable time" or "without unreasonable delay": *R* v

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GREENLAND J

Mdondo & Ors 1938 SR 77; *R v West and Wild* 1953 SR 199; 1953 (2) SA 677-8; *Sleightholme Farms (Pvt) Ltd v National Farmers Union Mutual Insurance Society Ltd* 1966 RLR 467; 1967 (1) SA 16 (R).

To my mind the correct approach is as stated in *Maharaj & Ors v Rampersad* 1964 (4) SA 638(A) at 646:

> "The enquiry, I suggest, is not so much whether there has been 'exact' 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith."

To my mind, where the prescribed procedure has not been followed, a Court can hold that there has been compliance only if the intention of the legislature has, in fact, been given effect and precedents such as *Rondalia Versekeringskorporasie van Suid-Afrika Bpk v Lemmer* 1966 (2) SA 245 (AD), which sanction "substantial" compliance, must be read accordingly. This is because it is trite that a Court has no power to alter, amend or frustrate the clearly expressed intention of the legislature.

On the papers it is not possible to hold that there was compliance. Section 3 of the Regulations prescribes in peremptory terms a crucial step in the procedure for terminating an employment contract. It stipulates that an application be made "forthwith". This has not been demonstrated. It stipulates that the application be made to a particular officer. This was certainly not done. In terms of the Act a labour relations officer and an Acting Regional Hearing Officer are essentially different officers with specified and particular functions. There appears to be no good reason why the Court should not follow the approach in *Springs Town Council v Macdonald* 1968 (2) SA 114 at 120E:

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"In the cases of *R v Noorbhai* 1945 AD 58 and *Nochomowitz v Bellville Liquor Licensing Board & Anor* 1956 (2) SA 228 (AD) at 235, the following statement in Maxwells' *Interpretation of Statutes* 8 ed p 321, (11 ed p 364) was quoted with approval:

> 'Where powers, rights or immunities are granted with the direction that certain regulations, formalities or conditions, shall be complied with, it seems neither unjust or inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the Legislature'."

GREENLAND J

As it is common cause that the applicant never accepted the unlawful suspension and always tendered her services she is entitled to re-instatement: *Schierhout v Minister of Justice supra; Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* S-17-88.*(4)

It is for these reasons that the order was granted.

In regard to the second issue involving the question of contempt it is unnecessary to amplify my reasons as the applicant indicated she was not pressing the issue.

Winterton, Holmes & Hill, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

PHILIPS ELECTRICAL (PVT) LTD v GWANZURA 1988 (2) ZLR 117 (HC)

Court **High Court, Harare**

Reynolds J

Petition for interdict

7 July & 10 August

Flynote

Practice and procedure - interdict - interim interdict granted prohibiting publication of defamatory matter - final interdict applied for on notice of motion - material disputes of fact on papers before Court - balance of interests in favour of petitioner - interim interdict extended until further order of Court.

Costs - incorrect procedure followed - final order an indulgence on part of Court - costs awarded against successful party.

Headnote

Following a dispute with the petitioner, his former employer, the respondent published letters defamatory of the petitioner, who applied for and obtained a rule *nisi* which operated as a temporary interdict and called on the respondent to show cause why a final order should not be

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made requiring the respondent to abstain from publishing any other matter defamatory of the petitioner. On the return day, the respondent did not deny publishing defamatory material, but raised the defence of justification.

Held, that the elements necessary for the granting of a temporary interdict are:

(a) a *prima facie* right;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;

(c) that the balance of convenience favours the granting of on interim interdict; and

(d) that the applicant has no other satisfactory remedy.

For the granting of a final interdict, however, the applicant must show that

he has a clear right of action against the respondent; and as there was a dispute of fact in the present matter which could not be resolved on the papers a final interdict could not be granted.

Held, further, that this did not preclude the Court from granting relief other than that actually sought. The Court had four courses available:

(1) to discharge the rule *nisi*;

(2) to order the petitioner to go to trial;

(3) to order oral evidence to be taken; or

(4) to continue the interim interdict until a further order of the Court.

To discharge the rule would be arbitrary and smack of expedience rather than justice. To proceed afresh by way of trial action would be unnecessarily time-consuming, possibly undesired, and an additional and unwarranted expense.

Held, further, that *prima facie* the petitioner's rights had been infringed and the mere pleading of a defence by the respondent was not sufficient to avoid the granting of an interdict. On the question of whether there was a well-grounded apprehension of irreparable harm if the interim relief was not granted, the potential harm to the petitioner could be considerable and irreparable, whereas that to the respondent was, at best, negligible. Finally, where an injury which could give rise to a claim in law is apprehended, the potential victim is not compelled to wait for the damage and sue afterwards for compensation, but can move the court to prevent any damage being done. Balancing the interests of the petitioner against those of the respondent, the petitioner's interests far outweighed the respondent's. It was, therefore, both desirable and necessary to continue the interim interdict until a further order of the Court.

Held, further, that as the petitioner had adopted the wrong procedure and as it had been

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granted an indulgence in terms of the order made, it should bear the costs of the proceedings.

Cases cited:

Bonnard v Perryman [1891] 2 ChD 284

Setlogelo v Setlogelo 1914 AD 221

Cleghorn & Harris Ltd v National Union of Distributive Workers 1940 CPD 409

Beukes v Crous & Anor 1975 (4) SA 215 (NC);

Ndauti v Kgami & Ors 1948 (3) SA 27 (W)

Nienaber v Stuckey 1946 AD 1049

Buthelezi v Poorter & Ors 1975 (4) SA 608 (W)

de Villiers v Soetsane 1975 (1) SA 360 (E)

Fourie v Uys 1957 (2) SA 125 (C)

REYNOLDS J

Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D)

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 ALL ER 504 (HL);

Fellowes & Anor v Fisher [1975] 2 ALL ER 829 (CA)

McSweeney v Berryman [1980] 2 NZLR 168

Beecham Group Ltd v B-M Group (Pty) Ltd 1977 (1) SA 50 (T);

Laws & Ors v Florinplace Ltd & Anor [1981] 1 ALL ER 659 (ChD)

Cutsforth & Ors v Mansfield Inns Ltd [1986] 1 ALL ER 577 (QBD)

Church of Scientology in SA v Reader's Digest Association SA (Pty) Ltd 1980 (4) SA 313 (C)

Heilbron v Blignaut 1931 WLD 167

Weil v Hardy 1906 NLR 192

R Y Phillips for the petitioner

C Mutzuris for the respondent

Judgment

Reynolds J: After just over a year's service in the employ of the petitioner, the respondent was

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suspended from his duties on allegations of -

"(1) gross incompetence or inefficiency in the performance of his work;

(2) lack of skill which the employee expressly or impliedly held himself out to possess;

(3) conduct inconsistent with the performance of the express or implied conditions of his contract; and

(4) wilful disobedience to a lawful order given by the employer."

The respondent contested the validity of the suspension and a hearing was eventually held by a Labour Relations Officer, who came to the conclusion that the respondent should be paid for the period he had been under suspension, but that he should, nonetheless, resign from his employment as from a specified date. Between the time of his suspension and the determination by the Labour Relations Officer, the respondent wrote and published two letters concerning the petitioner's policies, practices and conduct, which are alleged by the petitioner to be defamatory of it. A third and similar letter was published by the respondent some three weeks after the determination of the Labour Relations Officer, by which time he had left the employ of the petitioner. The first two letters were dispatched to a limited number of persons, although the list of addressees included prominent and influential public figures. The third missive consisted of a plea for financial assistance to meet "legal charges", and was addressed to "all Members of Parliament and Senators". This circular expressed "thanks in advance" for what was

anticipated would be the addressees' "favourable response and revolutionary action". The concluding words were, "the struggle will be protracted and difficult, but VICTORY IS CERTAIN". The respondent had also stated in this letter that he would be "sending [you] details of all the problems that we have been encountering at this company".

The petitioner ignored the first two letters of the respondent as the question of the respondent's dismissal was then before the Labour Relations Officer, but after noting the decision of that officer, and after having had sight of the third letter, it decided that it was "essential to put a stop to the respondent's activities in order to protect its reputation in the eyes of the community" (para 15 of the petition). As an initial step, the petitioner appealed against the ruling of the Labour Relations Officer. The outcome of this was that the original determination of the Labour Relations Officer was, apparently, considered to be erroneous, and the ruling made was withdrawn by the Deputy Chief Labour Relations Officer.

The petitioner then applied to this Court for and was granted a rule *nisi* which operated as a temporary interdict, and called upon the respondent to show cause why a financial prohibitory order should not be made requiring him to abstain from publishing any other matter defamatory of the petitioner. The present hearing is the return day of this rule.

The respondent did not dispute that the material he had published was defamatory of the petitioner, but he raised the defence of justification, claiming that the publications complained of were true and for the public interest and benefit. The petitioner, on turn, denied the allegations

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made, and claimed that they were false, malicious and defamatory.

It is immediately apparent that the classic conflict of rights situation is discernible from these facts; that is the right of free speech as against the right of unimpaired reputation. As it was expressed in *Bonnard v Perryman* [1891] 2 ChD 284:

> "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act act is done. the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

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But the right of free speech is subject to the qualification that no other person's rights are violated in the process of exercising the former right. Every individual has an equal right to his good name, dignity and standing in the community. It was in an effort to reconcile these fundamental but opposing principles that certain legal rules were tentatively formulated, and these have been interpreted and developed over the years. Nearly two hundred years ago Van der Linden recorded what he perceived to be the principal and established prerequisites for the granting of an interdict. It is of note that no distinction was drawn between a temporary and a final interdict in that conspectus. See van der Linden's *Institutes*, Juta's translation (1897) 296. In *Setlogelo v Setlogelo* 1914 AD 221, these essentials were stated to be "well-known" by INNES JA, and he enumerated them as:

> "... a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy"

(at 227).

Again it may be noted that no distinction was made between an interim and a final interdict. In fact the learned JUDGE OF APPEAL (as he was then) merely drew attention to the fact that van der Linden had stated that the right of action lay when either a clear right was established, or when it was approved that a *prima facie* right existed, and the applicant would suffer irreparable harm should the continuance of the allegedly injurious conduct not be stopped, whereas the respondent would not suffer such harm. See, too, the 1920 edition of Juta's translation of van der Linden at 141.

The need to distinguish between a temporary interdict *pendente lite* and a final interdict assumed importance and comment in later cases, when practical considerations dictated such a course. See, for example, *Cleghorn & Harris Ltd v National Union of Distributive Workers* 1940 CPD 409; *Beukes v Crous & Anor* 1975 (4) SA 215 (NC) at 219. It seems possible that the English law on similar matters had some bearing on this development: Joubert *LAWSA* para 311. Despite the many unharmonious and confusing judicial and academic interpretations that have been expressed in this regard, our law on the subject appears to be relatively well settled now, and this, with respect, is usefully summarised in Joubert *op cit* para 309 *et seq*. See, too, Burchell *The Law of Defamation in South Africa* at 308-9.

The elements necessary for the granting of a final interdict, as succintly enunciated in *Setlogelo*

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supra have already been adverted to. Those required

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for an interim interdict are categorized in Joubert *op cit* para 323 as:

"(a) a prima facie right;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) that the balance of convenience favours the granting of an interim interdict; and

(d) that the applicant has no other satisfactory remedy."

It is obvious that these prerequisites are inter-related, and the Court will, therefore, exercise its discretion on the matter

> "upon a consideration of all the circumstances and particularly upon a consideration of the probabilities of success of the applicant in the action, and the nature of the injury which the respondent, on the one hand, will suffer if the application is granted and he should ultimately turn out to be right, and that which the applicant, on the other hand, might sustain if the application is refused and he should ultimately turn out to be right. For though there may be no balance of probability that the applicant will succeed in the action it may be proper to grant an interim interdict where the balance of convenience is strongly in favour of doing so, just as it may be proper to refuse the application even where the probabilities are in favour of the applicant if the balance of convenience is against the grant of interim relief."

(per ETTLINGER AJ in *Ndauti v Kgami & Ors*, 1948 (3) SA 27 at 37).

Applying these principles to the present case, the first requirement that must be established by the applicant, as the present petition is for a final order, is that he has a "clear right" of action against the respondent. In order to discharge this onus, he must -

> "satisfy the Court on the **admitted or undisputed** facts by the same balance of probabilities as is required in every civil suit, of the facts necessary for his success in his application"

(per GREENBERG JA in *Nienaber v Stuckey* 1946 AD 1049 at 1054. My emphasis).

In the instant case the facts are **not** "admitted or undisputed". There is no dispute that the material in question was published by the respondent. What

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is in issue, in this particular respect, is whether the facts upon which the material was based were true and for the public benefit. The extent or existence of the applicant's right is, therefore, uncertain: the evidence relating to it is on affidavit, and this is in dispute. This was no bare allegation of a defence by the respondent: he placed in evidence considered and supporting reports of committees specifically concerned with the allegations levelled against the petitioner. Compare *Buthelezi v Poorter & Ors* 1975 (4) SA 608. This being so, our practice is clear; a final order will not be granted on motion if there is a dispute of fact: *Beukes v Crous supra* at 219; *de*

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Villiers v Soetsane 1975 (1) SA 360 (E) at 362E.

It would, in this situation, be competent for this Court to discharge the rule without further ado. There are, however, other considerations which persuade me that an Order to that effect would be arbitrary and based on expediency rather than justice. It seems to me that the approach adopted in *Fourie v Uys* 1957 (2) SA 125 (C) would be preferable and is particularly appropriate to the present situation. In that case HERBSTEIN J said at 127F:

> "One of the objects of interdict proceedings is the preservation of a right until it can finally be determined who is entitled to it. If a person alleges such a right, on motion, for interim relief pending proceedings for such final determination, the Court will, as stated above, in a proper case, grant interim relief. There does not appear to be any reason why the Court should refuse such relief merely because an applicant has applied *ex parte* or on motion for final relief."

See, too, *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D); *Ndauti v Kgami & Ors supra*; and the controversial case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 406C.

As in *Fourie's* case *supra,* the present petitioner had applied for a final interdict, and was granted a rule *nisi* which operated as a temporary interdict pending the determination of the matter. It is apparent from this that GREENLAND J, who issued the rule, was satisfied, at that stage, that a *prima facie* case existed: *Fourie's* case *supra* at 127B.

I am aware that the decision of the House of Lords in the *American Cyanamid* case *supra* has been subjected to criticism both in England and elsewhere. See, for example, LORD DENNING MR in *Fellowes & Anor v Fisher* [1975] 2 ALL ER 829 (CA); *McSweeney v Berryman* [1980] 2 NZLR 168; *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T). But the decision has

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also received strong support from other sources, and despite the assertions of the learned authors Duncan & Neill *Defamation* 2 ed para 19. 07, that "the principle expounded in *Bonnard v Berryman* as to the grant of interlocutory injunctions in actions for defamation has survived the decision in *American Cyanamid*", it has been more generally accepted that the principles enunciated in the *American Cyanamid* case now form part of the law of England (Clerk & Lindsell *Torts* 15 ed para 7-11 at 290; *Laws & Ors v Florinplace Ltd & Anor* [1981] 1 ALL ER 659; *Cutsforth & Ors v Mansfield Inns Ltd* [1986] 1 ALL ER 577 (QBD)

I am in some doubt, however, with respect, whether the primary and governing consideration in our law is or should be the test of damages advocated by the House (at 408B-F), but this element is undoubtedly a material factor, and is of relevance in the instant case. The respondent has not sought damages, and I cannot see that that aspect would apply to him. In fact he only claimed a defence to the action brought against him in that his campaign to put right the allegedly discriminatory and objectionable conduct of the petitioner was justified. If, at any subsequent trial, he were to succeed in establishing the validity of this defence, the result would be a dismissal of that action, together with an appropriate award of costs, and there would be no question of the respondent being awarded damages. Should the petitioner be

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successful, however, and assuming that the Court considered it to be a satisfactory remedy, it would seem to be likely that an award of damages would provide adequate compensation.

There may be some doubt as to the adequacy of such an award of damages to the petitioner, however, and also as to the possibility of recovering that award. In that situation, it is my view that it is an auxilliary and cogent factor that the balance of convenience appears to lie with the petitioner here. By "balance of convenience" is meant the prejudice to the parties depending upon the outcome of the application: *Olympic Passenger Services (Pty) Ltd v Ramlagan supra* at 383F. First and foremost, the whole basis of the petitioner's action would be frustrated should the rule be discharged at this stage. To proceed afresh by way of trial action would seem to be unnecessarily time-consuming, possibly undesired, and an additional and unwarranted expense. In contrast to this, the respondent has averred that he will not repeat the statements complained of, and he would not, therefore, be thwarted or prejudiced in the pursuit or exercise of any purported right. See, too, *Cleghorn & Harris Ltd supra* at 419. Th balance of convenience, accordingly, is heavily in favour of the petitioner. It must also be remarked that if the rule were to be discharged at this juncture, there would be no incentive,

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other than a future claim for damages against him, for the respondent to abide by his promise not to publish defamatory matter concerning the petitioner.

A further consideration is that if the wrong procedure was followed by the petitioner's legal representatives, there seems to be no fitting reason why the petitioner itself should be penalised by this factor. As the decision entailed a difficult and intricate legal problem, the petitioner would be almost completely dependent on the legal advice given. Furthermore, it is at least possible that had the the correct procedure been adopted, the petitioner would have been granted the relief he now seeks (*Fourie v Uys supra* 127G).

It is also, in my view, a relevant observation that much confusion and uncertainty still surrounds the law of defamation, perhaps in particular the field dealing with that "most delicate balance" between competing rights, that is, the right of protection of reputation against the right of freedom of expression: Burchell *op cit* Preface. As a result, the law of defamation is particularly susceptible to modification and development in this area. This concept is expressed in McKerron *The Law of Deficit* 6 ed Preface, as follows:

> "In *Daniels v Daniels* 1958 (1) SA 513 (AD) at 523 SCHREINER JA said: 'I see no good reason to hold that our law of divorce stopped growing when our forebears came to South Africa; the indications are strong that it did not. 'This applies with equal, if not greater, force to the law of delict. It would be a serious reflection on our judiciary if it were otherwise; for no branch of a living system of law can remain static - more particularly this branch, as is shown by the fact that in almost every civilised country today the law governing liability for civil wrongs is the most dynamic branch of the law. In fact, this branch of our law has grown and developed more than any other branch, much of it having been worked out by the courts only in comparatively recent times."

I would, with respect, agree with both learned authors. It is not without reason, therefore, that the possibility of giving alternative relief to that actually requested is mooted.

In addition to the considerations already adverted to, it may also be noted that in *Weil v Hardy*

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1906 NLR 192 VALE CJ came to the decision that, in the circumstances of that case, the temporary interdict granted should be "continued until further Order". In that case as well, then, the Order given amounted to a departure from that requested.

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As a result of the foregoing, I too, as did HERBSTEIN J in *Fourie's* case *supra* pose the question, "what should this Court now do?". The learned judge in that case considered that three possible courses might be taken:

> "(a) to discharge the rule *nisi* with an appropriate order as to the costs (eg the Court, in its discretion, might allow applicant to reclaim the costs of action);
>
> (b) to order the applicant to go to trial, again with an appropriate order as to the costs;
>
> (c) to invoke the aid of Rule of Court 6 (11), (our Rule 159) and hear oral evidence."

I would add, as a fourth possibility, the course adopted in *Weil v Hardy supra.* I believe, however, that before this form of procedure could be adopted, it would be incumbent on the applicant to establish the same requisites as are necessary in any other application for an interim interdict.

I would agree, with respect, with HERBSTEIN J that it is also proper, on the reasoning that the learned judge employed in *Fourie's* case *supra* for this Court to exercise its discretionary powers on the same basis

> "as that upon which interim relief is granted where such relief is asked for *pendente lite*."

(at 127H)

The requisites in that event are, as previously stated, those set out in Joubert *LAWSA* 11 para 323. The first of these is a *prima facie* right. Again adverting to *Fourie's* case *supra* HERBSTEIN J accepted that the applicant;s right in that case had been *prima facie* established despite the fact that evidence to the contrary from the respondent had cast some doubt upon it. Similarly, in the present case, I am prepared to assume that the petitioner's rights have been infringed, despite the possibility that defence raised by the respondent which has not been tested, might be true. This is not to say that I am in any position to decide on the merits of that defence, for I am not. What does influence me in this respect, however, is the *dictum* of COETZEE J in *Buthelezi v Poorter supra* where the learned judge said:

> "the mere pleading of a defence by the respondent will not be sufficient to avoid the granting of an interdict against him. The Court must evaluate the *ipse dixit* of the respondent, and this evaluation involves balancing the interests of the applicant and the respondent."

REYNOLDS J

I would, with respect, agree with this statement. See further, *Church of Scientology in SA v Reader's Digest Association (Pty) Ltd* 1980 (4) SA 313 at 318. In balancing the interests of the

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parties in the present matter, those of the petitioner, in my view, far outweigh those of the respondent. Indeed, and as the respondent has said that he will not re-publish the allegedly defamatory material, his interest causes scarcely any perceptible movement in the scales at all.

The second prerequisite categorized is "a well-grounded apprehension of irreparable harm if the interim relief is not granted". This requisite is, of course, closely associated with the balance of convenience of the parties. Once again, the potential harm that arises in respect of the petitioner may well be considerable and irreparable, whereas that to the respondent is, at best, negligible. In the third communication of the respondent addressed to "all Members of Parliament and Senators", he stated that he would be sending "details of all the problems that we have been encountering at this company". Despite the respondent's protests that he will not put this undertaking into effect and that he will not repeat any of the defamatory matter previously published, I still believe that there exists a reasonable possibility that he may do so.

The third requisite specified by Joubert *op cit* is "the balance of convenience". This has already been considered, and need not be repeated.

The last category listed is the absence of any other adequate remedy being available to the applicant. In *Heilbron v Blignaut* 1932 WLD 167 at 169, GREENBERG J (as he then was) said:

> "If an injury which could give rise to a claim in law is apprehended then I think it is clear law that the person against whom the injury is about to be committed is not compelled to wait for the damage and sue afterwards for compensation, but can move the court to prevent any damage being done to him."

I would, with respect, agree with this statement of the law.

When considering all these factors together, I am left in no doubt that it is both desirable and necessary to take a course of action other than to adopt the the facile and superficial expedient of simply discharging the rule. The course that commends itself to me in the present circumstances is that selected by the Court in *Weil v Hardy supra.* This, in my view, is preferable to referring

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the matter to trial, for that has not been requested, and it seems to me to be somewhat superficial to order persons to go to trial when they do not want to do so. It will also have the effect of encouraging the respondent to maintain his resolve not to publish any further defamatory matter of the petitioner.

As a measure of explanation and clarification, it is intended that effect of the Order that will follow will be that the petitioner will remain protected until any subsequent Order to the contrary is made by this Court. The respondent may, if he so chooses, at any time hereafter, make specific application for the discharge of the rule that binds him.

In considering the question of the costs, it has been found that the petitioner adopted incorrect procedures in initiating these proceedings. Had this not been so, it may have been that the respondent would not have contested the application. Furthermore, I consider that the petitioner

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has been granted an indulgence in terms of the Order that follows.

In the result the rule will be extended until the further Order of this Court. For the reasons given, the petitioner will bear the costs of these proceedings.

Scanlen & Holderness, petitioner's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

BULAWAYO BOTTLERS (PVT) LTD v MINISTER OF LABOUR, MANPOWER PLANNING AND SOCIAL WELFARE & ORS 1988 (2) ZLR 129 (HC)

Court **High Court, Bulawayo**

Muchechetere J

Petition for declaratory order

8 July & 19 August 1988

Flynote

Administrative law - waiver of rights - whether attendance at quasi - judicial proceedings which are void precludes subsequent challenge to validity of those proceedings.

Practice and procedure - declaratory order - whether may be sought when remedy available by other procedures.

Statutes - Labour Relations Act 1985 and Labour Relations (General) Regulations 1985 **-** proviso to s 17(4) of Regulations - appeal against determination by a labour relations officer - whether failure by officer hearing appeal to reduce a verbal determination to writing invalidates his decision - re-hearing of appeal - not valid unless previous proceedings set aside.

Headnote

In October 1986 the petitioner suspended without pay the third respondent, who was then in its employ, and applied through the Industrial Relations Office in Bulawayo for his dismissal. In August 1987 a labour relations officer, acting under the provisions of the Labour Relations Act 1985, ordered the third petitioner's reinstatement, but the petitioner appealed to the Regional Hearing Officer against that order. The Regional Hearing Officer, a Mr Dube, heard the matter on 12 October 1987 and verbally informed the parties that he approved the dismissal of the third petitioner. He did not, however, reduce his verbal advice to writing, as required by the proviso to s 17(4) of the Labour Relations (General) Regulations 1985, because, before he could do so, he was suspended

from his duties and prohibited from attending his place of work.

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While Mr Dube was under suspension, the petitioner was told to attend a further hearing of the same appeal before another Regional Hearing Officer. This hearing took place in November 1987 before a Mr Chinduta, who issued a determination reversing Mr Dube's decision. The petitioner sought an order from the Court declaring Mr Chinduta's decision to be null and void.

Held, that the proceedings before Mr Dube were complete because a determination was made and communicated to both parties. The requirements to reduce the determination to writing was a mere formality, the relevant provisions of the Regulations being directory rather than peremptory.*(5)

Held, further, that if the hearing by Mr Dube was incomplete because of the failure to reduce the determination to writing, the matter remained a part-heard one. It would be irregular and *ultra vires* for Mr Chinduta to rehear the matter unless Mr Dube was unable to do so because of death or resignation; a suspended employee is still employed. In the event that Mr Dube was unable to complete the case, the proceedings would have to be set aside before Mr Chinduta could deal with it.

Held, further, that there was nothing to prevent the petitioner from applying for a declaratory order, even if it was open to him to commence review proceedings, provided that the Court was satisfied that the petitioner was a person interested in an existing, future of contingent right or obligation and that the case was a proper one for the exercise of its discretion in granting the order. The petitioner met these requirements. The fact that an applicant could have commenced review or other proceedings is a consideration which the court takes into account when considering whether declaratory proceedings were proper. In this case, it was not really open to the petitioner to commence review proceedings because that would have amounted to an acceptance by it that the re-hearing by Mr Chinduta was regular or lawful. The proper application was for a declaratory order.

Held, further, that the petitioner could not, by attending the invalid re-hearing of the appeal, be held to have waived its right to challenge the validity of that re-hearing. There cannot be a waiver of a right to object to a nullity.

1988 (2) ZLR p131

MUCHECHETERE J

Cases cited:

Sutter v Scheepers 1932 AD 165

Anti-Corrosion Engineering (Pty) Ltd v Sanlam 1975 (1) SA 897 (C)

Zimbabwe Sun Hotels (Pvt) Ltd v Lawn 1988 (1) ZLR 143 (SC)

Estate Geekie v Union Government & Anor 1948 (2) SA 494 (N)

Art Printers v Regional Hearing Officer & Anor HH-168-87 (unreported)

Standard Bank of SA Ltd v Trust Bank of Africa Ltd 1968 (1) SA 102 (T)

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Adbro Investment Co Ltd v Minister of the Interior & Ors 1961 (3) SA 283 (T)

Ex p *Nell* 1963 (1) SA 754 (A)

Reineke v Incorporated General Insurances Ltd 1974 (2) SA 84 (A)

Bayat & Ors v Hansa & Anor 1955 (3) SA 547 (N)

A H Denbury for the petitioner

M Perry for the first and second respondent

R Moyo-Majwabu for the third respondent

Judgment

Muchechetere J: The petitioner seeks confirmation of the rule *nisi* issued by this Honourable Court on 30 May 1988. The rule *nisi* mainly called upon the respondent to show cause why:

> "(a) The determination issued by the second respondent on 20 November 1987, and the Order made by the second respondent on 16 May 1988, should not be declared null and void and of no force and effect; and
>
> (b) The respondent should not be held jointly and severally liable for the costs of this petition."

The facts in the matter are that on 15 October 1986 the petitioner suspended without pay the third respondent who was then in its employ and subsequently applied through the first respondent's Industrial Relations Office in Bulawayo for his dismissal. On 6 August 1987 a labour relations officer issued a determination under the Labour Relations Act 1985 No. 16 of 1985 in terms of which the petitioner was ordered to reinstate the third respondent with full pay and leave benefits with effect from 15 October 1986. On 14 August 1987 the petitioner appealed against that determination to the Regional Hearing Officer in terms of the said Act and at the same time applied for a suspension of the determination. The Regional Hearing Officer suspended the determination by his letter to the third respondent dated 17 August 1987.

MUCHECHETERE J

On 12 October 1987 the petitioner's appeal was heard by the Regional Hearing Officer, one FNC Dube. The petitioner alleges that at the conclusion of the hearing Mr Dube issued a verbal determination upholding its appeal and approving the dismissal of the third respondent with effect from the date of his suspension. For reasons unconnected with the hearing of the petitioner's appeal, Mr Dube was subsequently suspended from his duties as Regional Hearing Officer and was unable to reduce his verbal order to a written determination as was required by the first proviso to s 17(4) of the Labour Relations (General) Regulations 1985 SI 368 1985.

On or about 11 November 1987, while Mr Dube was under suspension, the petitioner received a notice from the Industrial Relations Office to attend a further hearing of the same appeal before another Regional Hearing Officer. On 18 November 1987 the petitioner's representative, together with the third respondent's, attended the further hearing before one W Chinduta. Mr Chinduta thereafter issued another determination in the matter on 20 November 1987, which, as

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it turned out, was a reversal of Mr Dube's decision. Thereafter the petitioner, through its legal practitioners, had correspondence with the Chief Industrial Relations Officer, Bulawayo, the third respondent's legal practitioners and the first respondent's office in both Bulawayo and Harare, wherein it maintained that the determination of Mr Chinduta was null and void because it was *ultra vires* the Act and Regulations. The petitioner's legal practitioners also wrote to the Secretary of the Labour Relations Board indicating that the hearing of Mr Chinduta should never have been held and that the parties should stand by the determination of Mr Dube. They argued that Mr Dube be called upon to put his determination in writing.

The Principal Labour Relations Officer, Bulawayo, replied on 19 January 1988 stating that Mr Dube's determination was not in terms of the law. He explained that for it to have been in terms of the law it had to be in writing and in triplicate with each party to the dispute getting its copy. The Principal Labour Relations Officer also stated that it was not possible to call upon Mr Dube to reduce his determination to writing because the terms of his suspension by the Public Service Commission prevented him from attending his place of work under any circumstances. He added that it was because of this that he had requested that another Regional Hearing Officer be seconded to complete all cases that had not been completed by Mr Dube, which cases included that of the petitioner and the third respondent. He also added that the seconded Regional Hearing Officer, Mr Chinduta, decided to re-hear the case from "scratch and notified the parties to attend". The Principal Labour Relations Officer ended by stating that Mr Chinduta's determination was

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lawful and binding, that the petitioner should have appealed against it if he disagreed with it and, further, that in the absence of such appeal the petitioner was violating the law. He also informed the third respondent's legal practitioners of his decision.

The petitioner's legal practitioners responded with a letter dated 22 January 1988 maintaining that Mr Chinduta's determination was invalid mainly for the reasons already given above. The Principal Labour Relations Officer did not reply but on 23 may 1988 the petitioner was served with an "Order to Rectify an Unfair Labour Practice", presumably under s 111 of the Labour Relations Act. In terms of the order, the petitioner must have, in order to avoid prosecution, re-instated the respondent with full pay and benefits by 31 May 1988. The order is registrable with the Registrar of the High Court in terms of s 113(3) and (4) of the Act and once registered has the effect of a civil judgment against the petitioner.

The petitioner in its petition reiterates the averments made by its legal practitioners in the aforementioned letters and maintains that the determination of Mr Chinduta, arising as it did from an unlawful second hearing of the appeal, is void and that, accordingly, the order served on the petitioner is also void and of no force and effect.

The first and second respondents opposed the application and in this connection filed an affidavit by Mr Chinduta. He was seconded to the Bulawayo office to replace some of his colleagues who had been suspended from duty. Amongst those suspended was Mr Dube. He does not challenge most of the petitioner's allegations. However, in connection with the hearing

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of the appeal between the petitioner and third respondent by Mr Dube on 12 October 1987, and the petitioner's allegations in connection with the outcome thereof, he states as follows:

"4. Save to admit that the Petitioner's appeal was set down for hearing on 12 October 1987 I have no knowledge of the rest of the contents of this paragraph.

5. I may explain that on 16 November 1987 I was temporarily seconded to our Bulawayo office to replace some of my colleagues who had been suspended from duty. It was during that time that the appeal involving the Petitioner and the Third Respondent was referred to me by another colleague, Mrs J K Mehlo. She informed me at the time that the appeal had apparently been heard on 12 October 1987 by Mr F N C Dube as he had diarised the matter for

that date. I confirmed the diarisation from his diary myself. However the file of papers relating to the appeal did not contain any notes or other information to confirm that a hearing had in fact taken place or the extent to which such a hearing had progressed. There was also no indication of any conclusion that the officer had arrived at. Whether or not such notes, if any existed, had been removed prior to my taking over the matter I am in no position to say. What was uppermost in my mind at the time was to re-hear all unconcluded matters and any fresh ones that would be submitted to me during my time there.

6. I recall that at the commencement of the proceedings before me the Petitioner was represented by a Mr Sydney Mazwi, an employee of the Petitioner and former Labour Relations Officer of First Respondent. Third Respondent was represented by a legal practitioner, one Mr Naik of Ben Baron and Partners. Neither of these two representatives, nor indeed anyone for that matter, advised me that the appeal had already been heard and that a verbal "determination" had been made. No objection of any nature was taken to the proceedings, and the same proceeded normally until I made my written determination annexed to the Petitioner's petition as "E".

7. I further recall that the aforementioned Mr Sydney Mazwi came to my office after his company had received my determination and enquired whether I would grant him leave to appeal against my determination to the Labour Relations Board, to which I replied that I would give favourable consideration to such an application. However, I never received the application.

8. Consequently, I repeat that I have no knowledge of any previous determination having been made by Mr FNC Dube with regard to the appeal that came before me as this fact was never brought to my attention at any stage. I have taken the trouble of enquiring at our Harare Head Office when the said Mr Dube was suspended from duty and was shown a copy of the letter communicating the suspension. The letter dated 30 October 1987. My only comment in this regard is that if Mr Dube did give a verbal "determination" on 12 October 1987 then he had more than ample time within which to comply with the provisions of the labour Act and Regulations which require determinations to be reduced to writing on appropriate forms and forwarded to all the parties concerned."

Mr Chindota concludes his affidavit by stating that he is not aware, neither has he ever been aware, that his hearing and determination of the appeal

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between the petitioner and the third respondent was unlawful and he does not believe that it is so.

The third respondent also does not challenge most of the petitioner's above allegations on the matter. In connection with the hearing of the appeal by Mr Dube on 12 October 1987 he however states the following:

> "4. I was present on 12 October 1987 when this matter came before the Regional Hearing Officer, Mr F N C Dube. I can state positively that Mr Dube only heard the matter but never made a ruling. Mr Dube merely stated during the hearing that my chances of winning the case on appeal were slim and that he was going to investigate the case further by visiting Shannon Restaurant the following day and thereafter made a determination. In fact Shannon Restaurant is the customer whom the Petitioner alleges that there is a criminal charge in connection with 100 empty cases and I was prosecuted and acquitted on that charge.
>
> 5. Mr Dube had stated at the hearing that he would send his determination in writing to me. I waited for several days and did not receive any determination from Mr Dube."

The petitioner filed an answering affidavit by its personnel manager one Sydney Mazwi. In it he states that the position regarding the previous appeal before Mr Dube was common knowledge and that it was referred to at the hearing before Mr Chinduta. Mr Mazwi annexed to his affidavit a copy of a letter dated 11 November 1987 by the third respondent's legal practitioners to the Department of Industrial Relations which was copied to the petitioner in which, amongst other matters, they state: -

> "... As Bulawayo Bottlers were not satisfied with the determination (of 4 August 1987) it appealed. The appeal was heard before Mr F Dube on Monday 12 October 1987. At the conclusion of this appeal, Mr Dube upheld the appeal and decided that Mr Mpofu be dismissed from his employment from the date of his suspension ..."

He states that the contents of the letter which was sent some five days before the re-hearing by Mr Chinduta refutes Mr Chinduta's allegations that he had no knowledge of Mr Dube's previous "determination" and adds that even if he did not see the letter the fact still remains that the appeal was heard before Mr Dube and that a verbal determination was made.

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He adds that the fact that it was not reduced to writing may render the proceedings incomplete but does not nullify them altogether. he also states that he did not object to attending the re-hearing because he did not consider that he had any choice in the matter after having been summoned to appear. He however denies that by attending the re-hearing he waived the petitioner's right to object to the re-hearing.

Mr Mazwi also stated that he has no recollection of Mr Chinduta's allegation that he, Mazwi, sought, on behalf of the petitioner, leave to appeal against the decision of Mr Chinduta. He states that he, at that stage, instructed the petitioner's legal practitioner to take the matter up and that they made the point that the re-hearing should never have taken place - a sentiment with which he agreed.

In connection with the third respondent's affidavit Mr Mazwi points out that para 4 thereof contradicts in certain respects the said letter of 11 November 1987 and in particular the above

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quoted passage.

The first issue to resolve is whether there existed real and substantial disputes of fact which could not be resolved on the papers before the Court. Although there were some disputes of fact both counsel for the respondents did not submit that they could not be resolved on the papers before the Court. In my view, those disputes of fact are capable of being resolved on the papers.

The first dispute is whether there was, in fact, a hearing of an appeal by Mr Dube on 12 October 1987. Although Mr *Perry*, for the first and second respondents, in the end conceded that there was a hearing, Mr *Moyo-Majwabu*, for the third respondent, appeared to submit that the hearing on 12 October 1987 was not a proper hearing. He stated that it was an informal or preliminary meeting to simply gather evidence before the Court. It is clear from the letter of 11 November 1987 that the third respondent's legal practitioners (and therefore the third respondent) considered the meeting of 12 November 1987 as a hearing. Further, the third respondent does not in his affidavit dispute that there was a hearing. What he seems to dispute is that a ruling or determination was ever made after the hearing. There was therefore a proper hearing of the appeal by Mr Dube on 12 October 1987. The second dispute of fact is whether there was a verbal determination by Mr Dube after the hearing on 12 November 1987. Again, Mr *Perry*, for the first and second respondents, after taking into consideration the contents of the said letter of 11 November 1987, conceded that Mr Dube made a verbal determination at the end of the hearing and communicated this to the parties.

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Mr *Moyo-Majwabu* appeared to submit that the third respondent stated in his affidavit that Mr Dube never made any ruling. He thereafter went on to maintain what he considered the third respondent stated. It is, however, clear from the contents of that affidavit that at best the third respondent prevaricates on the matter. He admits that Mr Dube informed him that he had no chance in an appeal. In my view, Mr Dube could only have meant that the third respondent had no chance in an appeal against his decision. This implies that he had already verbally informed him of his decision. This view is fortified by the contents of para 5 of the third respondent's affidavit where he states that Mr Dube stated that he would send his determination "in writing" to him. There is a implication that the verbal "determination" had been communicated. Finally the said letter of 11 November 1987 by the third respondent's legal practitioners is conclusive of the fact that a verbal determination was made. Mr *Moyo-Majwabu* did not, in any way, dispute its contents or seek to argue that it misrepresented the third respondent's position on the matter. The conclusion is therefore that after the hearing of the appeal Mr Dube made the verbal determination stated above and communicated it to the parties.

The third dispute of fact is whether Mr Chinduta was aware of the hearing and the verbal determination by Mr Dube before he proceeded to re-hear the appeal himself. Although he seeks to deny any knowledge of the previous hearing, he nevertheless admits that Mr Mehlo informed him that there had been a hearing by Mr Dube because of the diarisation. As he confirmed the diarisation there is really no need for further proof that he became aware that there had been a hearing. However, further proof, it it is needed, comes form the letter of 11

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November 1987 which was sent to the Department or address where Mr Chinduta worked from some five days before he re-heard the appeal. This letter confirmed the hearing as well as the verbal determination. I also consider that in view of the fact that Mrs Mehlo had altered Mr Chinduta to the hearing by Mr Dube it is more likely that Mr Chinduta must have referred to it at the re-hearing, as is stated by Mr Mazwi.

Mr Chinduta must therefore, in my view, have been aware of the hearing and verbal determination by Mr Dube. Gathering from the last sentences in paras 5 and 8 of his affidavit, his attitude at the time was that the matter was incomplete because there was no written determination and that in the circumstances he had to re-hear it.

The next question to resolve is whether the re-hearing by Mr Chinduta was unlawful in the circumstances. Mr *Denbury*, for the petitioner submitted that

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the hearing by Mr Dube was complete because a determination was made and communicated to both parties. What only remained was the mere formality of putting the determination in writing so that it could be formally served on the parties. In the circumstances it was irregular and therefore *ultra vires* from Mr Chinduta to re-hear a matter which had already been completed. In his view the requirement under the terms of the proviso to s 17(4) of the Labour Relations (General) Regulations 1985 to put the determination in writing was a mere written determination for the practical purposes of further appeals if necessary, and not part of the determination itself. This formality could still be complied with by calling on Mr Dube to put his determination in writing and he could do this without the necessity of a further hearing.

I agree with Mr *Denbury* that after Mr Dube gave his verbal determination the hearing became complete. The requirement under the said proviso to reduce the determination into writing is a mere formality which could be fulfilled by Mr Dube being called at any time to reduce his determination into writing and he could do this without the need of a further hearing. However if I am wrong in that, I would then fall back on Mr *Denbury*'s alternative submission, which is that if it was held that the hearing by Mr Dube was incomplete because there was no compliance with the requirement to put the determination into writing, then he would argue that the appeal remained as a part-heard matter and that Mr Chinduta was not entitled to re-hear it before the proceedings were formally set aside.

Anticipating submissions on behalf of the respondents, Mr *Denbury* submitted that it remained a part-heard matter because the failure to comply with the first proviso to s 17(4) to put the determination into writing does not nullify the hearing. This is because, even though the language of the proviso includes the word "shall", a proper construction of the proviso is that its provisions are directory rather than peremptory. In connection with peremptory and directory provisions, see *Sutter v Scheepers* 1932 AD 165 at 173 to 175, where WESSELS JA said:

> "... Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but useful guides. The word "shall" when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances which negative this construction - *Standard Bank Ltd v van Rhyn* 1925 AD

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266.

(1) If a provision is couched in a negative form it is to be regarded as peremptory rather than as a directory mandate. To say that no power

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of attorney shall be accepted by the Deeds Office unless it complies with certain conditions rather discloses an intention to make the conditions peremptory than directory, though even such language is not conclusive.

(2) If a provision is **couched in positive language and there is no sanction added in case the requisites are not carried out** then the presumption is in favour of an intention to make the provision only directory ...

(3) If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud and if there is no explicit statement that the act is to be void if conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(4) The history of the legislation will also afford a clue in some cases"

(the emphasis is mine).

Applying the above I agree with Mr *Denbury* that the proviso is directory. It is couched in a positive rather than a negative language. There is no sanction added in case the requisites are not carried out. If it were interpreted to mean non-compliance with its provisions would made determinations void this would lead to injustice in that it would deprive the victor of a favourable determination and make him start all over again while amounting to a fraud by the loser, who would deny it being a determination just because it had not been put in writing. In the circumstances I agree that non-compliance with the proviso does not make the hearing and determination by Mr Dube void. It would, on Mr *Denbury*'s alternative submission, instead make the matter a part-heard matter.

Mr *Denbury* went further to submit that if his alternative submission that the matter remained as a part-heard was not upheld then he would go on and submit that it was still irregular and therefore *ultra vires* for Mr Chinduta to re-hear the matter unless Mr Dube was unable to conclude the matter because of death or resignation. In those circumstances the proceedings would have had to be formally set aside first. That is the position in situations where a judicial officer such as a magistrate was similarly unable to complete matters and this must equally apply to quasi-judicial officers like Mr Dube and Mr Chinduta. On that see Jones and Buckles' *The Civil Practice of the Magistrates' Court in South Africa* 7 ed Vol 11 p 265, where the following is stated:

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> " ... As a general rule, where the magistrate is unable to complete a part-heard trial his successor should recall the witnesses who have given evidence before the first magistrate, and hear their evidence *de novo*. This applies in the unfortunate event of the magistrate's death before the conclusion of the trial and also where he resigns on grounds of ill-health and cannot complete the case. . ."

In *Anti Corrosion Engineering (Pty) Ltd v Sanlam* 1975 (1) SA 897 (C) it is stated in the headnote that where an appellant who wanted to appeal from a magistrate's court's decision found himself in a position where he could not do that because the magistrate died without his having furnished written reasons for judgment the following two courses were open to him:

> "(1) To note an appeal as best he can (bearing in mind that he would have great difficulty in framing grounds of appeal, specifying the findings of fact or rulings of law appealed against) ...
>
> (2) To apply as soon as reasonably possible to the Supreme Court for an order granting him relief in the unprecedented circumstances in which he found himself as a result of the magistrate's untimely death, ie authorising the filing by the appellant of a notice of appeal against judgment and dispensing with the necessity of specifying therein findings of fact or rulings of law appealed against ..."

In the present case Mr Dube is not incapable of completing the part-heard appeal because he is still alive and he has not resigned. A person who has been suspended is still employed. See *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* S-17-88.*(6) In the circumstances either Mr Dube could have been (and could still be) called upon to put his determination in writing or the parties could have awaited (and could still) await the outcome of his suspension. In the event that he was in the end dismissed or that the third respondent found the position he was in intolerable, it was open to him either to note his appeal to the Board in terms of s 18 of the Regulations or to apply to the Board for an order granting him relief. The third respondent could also have applied to this Court to have the proceedings set aside.

In view of the above I am satisfied that in re-hearing the appeal Mr Chinduta was acting *ultra vires* and that his hearing and determination can therefore be set aside as being void. See *Estate Geekie v Union Government & Anor* 1948 (2) SA 494 (N) at 502.

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Before concluding the matter, I must deal with two other matters which were raised during the submissions. The first is the submission by Mr *Perry* (for the first and second respondents) that the petitioner ought to have brought this matter up as a review and not as a petition seeking a declaration and generally questioning the appropriateness of commencing declaratory procedures. In this connection he cited *Art Printers v The Regional Hearing Office & Anor* HH-168-87, where matters of irregularities or illegalities in a hearing were said to have been properly brought up by way of review proceedings. The second matter is whether the petitioner waived its right to object to the re-hearing of the appeal by having its official attend the re-hearing.

In the first instance it should be pointed out that there is nothing inherently wrong in seeking a declaratory order in this Court and that this Court has the discretion to make declaratory orders: s 14 of the High Court of Zimbabwe Act 1981; and Herbstein and van Winsen *The Civil Practice*

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of Superior Courts of South Africa 3 ed at pp 521 to 526. The fact that remedies other than a declaration of rights are available is a consideration which the Court will take into account in exercising its discretion whether or not to make a declaration of rights. See *Standard Bank of SA Ltd v Trust Bank of Africa Ltd* 1968 (1) SA 102 (T), where the Court held that it was entitled to make a declaration of rights although the plaintiff could have asked for judgment against the defendant. There are really two stages to the inquiry into whether or not the Court should make a declaratory order. The first stage is that the Court must satisfy itself that the petitioner is an "interested" person in an "existing, future or contingent right or obligation". Thereafter, the Court will decide on whether the case is a proper one for the exercise of its discretion. In *Adbro Investment Co Ltd v Minister of the Interior & Ors* 1961(3) SA 283 (T) at 285 WILLIAMSON J said:

> "For a case to be a proper case, in my view, generally speaking it would require to be shown that despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by a respondent. I think that a proper case for purely a declaratory order is not made out if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought."

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See also ex p *Nell* 1963 (1) SA 754 at 759A-B, and *Reineke v Incorporated General Insurances* 1974 (2) SA 84 (AD) at 93.

Further, in connection with commencing declaratory proceedings and waiving of the right object, CANEY J said in *Bayat & Ors v Hansa & Anor* 1955 (3) SA 547 (N) at 551 to 552:

"Applying that case (*Ismail v Motala and Inanda Rural Licensing Board* 1943 NPD 119 in which CARLISLE J applied what INNES CJ said in *Ueckerman v Feinstein* 1909 TS 913 at 920) it seems to me that the present **applicants could not submit to a non-existent jurisdiction and thereby waive the right to review the second respondent's decision** assuming it had decided that the first respondent was not contractually bound to the applicants, as they contend he is. See also *Spencer Bower on Estoppel by Representation*, p 187. In addition it appear to me that **where review proceedings are not open to a party aggrieved by a decision of quasi-judicial body, or if he decides not to review those proceedings, it is nevertheless competent to him in certain circumstances, to obtain a declaration of rights,** and to do so notwithstanding that he has successfully presented his case on the same question before that body. See *Durban North Estates Ltd v Durban Corporation & Ors* 1935 NPD 558, in which a land-owner obtained a declaration that his land was *bona fide* and exclusively used as agricultural and was therefore excluded by the relevant legislation from liability for the general rate, and obtained such a declaration notwithstanding that the Municipal Valuation Appeal Board, after hearing the case of the land-owner on appeal to it from the municipal valuator, had held the contrary in circumstances which precluded, as the Court held, a successful review of its decision"

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(the emphasis is mine).

From the above, my understanding of the law is that there is nothing to prevent the petitioner from applying for and obtaining a declaratory order, even if it was open to him to commence review proceedings, provided that the Court is satisfied that the applicant is an interested person in an existing future of contingent right or obligation and that the case is a proper one for the exercise of its discretion in granting the order. The fact that the applicant could have commenced review or other proceedings is a consideration which the court takes into account when considering whether declaratory proceedings were proper. In this case my view is that it was really not open to the

petitioner to commence review proceedings because that would have been an acceptance by it that the re-hearing by Mr Chinduta was regular or lawful. Its whole position is that the re-hearing was irregular or unlawful and therefore a nullity. The proper application was, therefore, for a declaratory order. However, if I am wrong and the correct position is that the Petitioner could have applied for a review then I would still hold, in accordance with the view expressed in the last quoted passage, that it was optional for it to also apply for a declaratory order. The case *Art Printers v The Regional Hearing Officer & Anor supra,* does not rule out other alternative proceedings. I am satisfied that the petitioner in this case is a person interested in an existing or contingent right - a decision in its favour had purportedly been cancelled by the re-hearing and a declaratory order would confirm or restore it. I am also satisfied that this is a proper case for the exercise of the Court's jurisdiction, in that the matter is not merely of academic interest to the petitioner. A declaratory order in its favour will confirm or restore some right to it and some tangible advantage will therefore be confirmed or restored to it. From the above quoted passage in *Bayat & Ors v Hansa & Anor supra* it is clear that there cannot be a waiver to object to a nullity. In this case the re-hearing by Mr Chinduta is a nullity and the Petitioner could not therefore have waived its right to object to it. Further, in this case the activity of the petitioner after the re-hearing clearly indicates that there was never any intention on its part to waive its rights to object to it.

In the circumstances I am satisfied that the petitioner has made out its case. The rule *nisi* is therefore confirmed.

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

Coghlan & Welsh, first and second respondent's legal practitioners

James, Moyo-Majwabu & Nyoni, third respondent's legal practitioners

WRIGHT v POMONA STONE QUARRIES (PVT) LTD 1988 (2) ZLR 144 (SC)

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Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil appeal

17 June & 26 August 1988

Flynote

Delict - nuisance existing before plaintiff came to live in area - whether right of action exists - increase in extent of nuisance - desirability of oral evidence when defendant denies any such increase - interdict granted in respect of nuisance arising since plaintiff came to area.

Headnote

The respondent carried on quarrying operations in the Pomona area of Harare. These operations had commenced in the late 1940s at a time when the suburb of Pomona did not exist. The appellant moved into his house in Pomona suburb in 1979. The house had belonged to his parents and he had grown up in it. He alleged that since 1981 the level of noise from the quarry, which previously he had been aware of but did not find intrusive, began to increase, in terms of both the level of noise and the time at which it occurred. The defendant denied any increase in the level of the noise, but accepted that there was noise occurring at night due to activities at the quarry which used not to occur.

Held, that, assuming that there was no actionable nuisance at the time the appellant moved into the house in 1979, he would succeed only if he proved on the balance of probabilities that the level of noise had substantially increased. He had failed to establish the degree of persistence of the noise, the locality involved and the times when the noise was heard. If there are material disputes, cases of this nature require oral evidence, because once the defendant disputed the appellant's allegations, there was no other way of determining who was telling the truth.

Held, further, that the noise occurring at night started after the appellant moved into his house, and an interdict would be granted in respect of the activities causing this noise.

DUMBUTSHENA CJ

[*Editor's note*: without specifically deciding the point, the Court appears to have favoured the view of LORD DENNING MR in *Miller & Anor v Jackson & Ors* [1977] QB 966; [1977] 3 All ER 338 (CA) and certain South African authorities that there is a defence where a nuisance existed before the plaintiff came to live with it.]

Cases cited:

de Charmoy v Day Star Hatchery (Pty) Ltd 1967 (4) SA 188 (D)

Howard, Farrar Robinson & Co Ltd v East London Municipality (1908) EDC 149

Miller & Anor v Jackson & Ors supra

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Sturges v Bridgman (1879) 11 ChD 852

Clifford v Hare (1897) 14 SC 255

J Sayce for the appellant

A P de Bourbon SC for the respondent.

Judgment

Dumbutshena CJ: We are told that Pomona Stone Quarries commenced operations in about 1950. The land on which Pomona residential area is now was once a part of the farm. The quarries are situated on Pomona Farm, as they always have been. The farm and the quarries belonged to Ronald Campbell. The subdivision which resulted in the creation of Pomona suburb took place after 1950.

The short history of Pomona Stone Quarries is put succintly in a letter written by the Harare Town Clerk, Mr ECM Kanengoni. Part of the letter reads:

> "... in June 1949 Government authorised Mr Campbell to sub-divide the remaining extent of Pomona subject to certain conditions which, *inter alia*, included the use of a quarry site. In fact, the actual quarrying activities had commenced perhaps before or about 1948. The Pomona Quarry, therefore, enjoys existing user rights within this Rural Agricultural Zone 3 of the operative City of Harare North East (Section 1) Town Planning Scheme."

The appellant, Dr Godfrey Andrew Francis Wright, was born and grew up in a house near the quarry. His parents owned the house at No. 34 Glenelg Avenue, Pomona. He and his wife, Dr Barbara Anne Wright, now own the house. He says the house was built approximately in 1950, but he is not sure when it was completed. He lived in the house as a child. It was only during 1975 and 1976, when he was in residence at the University, that he did not live in the house.

DUMBUTSHENA CJ

In his petition the appellant was supported by a number of residents in Pomona. They all complain of the noise emanating from the quarry. His mother, who now lives at 11 Sunbury Green Close, Borrowdale, says in her affidavit that she moved into the house on 6 June 1950. She also says that from 1950 to 1979, when she lived in what is now the appellant's house, "... the Respondent's quarrying operations became both audible and visible". She says the noise level is now significantly greater and more intrusive than at any time during the period 1950 to 1979. She does not say how she measures the noise level.

The level of noise complained of is a matter of fact and opinion. More so it is a matter of common sense. But it must be measured in order for the Court to give a value judgment. MILLER J in *de Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D) at 192E-F, puts the test as follows:

> "The test, moreover, is an objective one in the sense that not the individual reaction of a delicate or highly sensitive person who truthfully complains that he finds the noise intolerable is to be decisive, but the reaction of "the reasonable man" - one who, according to ordinary standards of comfort and convenience, and without any peculiar sensitivity to the particular noise, would find it, if not quite intolerable, a serious impediment to the

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reasonable enjoyment of his property. (Cf. *Holland v Scott* 2 EDC 307 at 324; *Graham v Dittman & Son* 1917 TPD 288 at 290-1; *Leith v Port Elizabeth Museum Trustees* 1934 EDL 211 at 213-4; *Ferreira v Grant* 1941 WLD 186 at 188-9; *Prinsloo v Shaw* 1938 AD 570 at 575)."

See *S v Fintz* 1975 (1) RLR 69 (AD) at 74D.

That is the test I must apply. It is in the light of this that I now analyse the evidence presented by the parties.

In 1979 the appellant married his wife. Like her husband, Barbara Anne Wright is a medical practitioner. They are joint holders of the house. In the same year they married they took up residence in the house.

The appellant says in his founding affidavit:

"Ever since I can remember I have been aware of the existence of the quarry and of the quarrying operations carried on by (the) Respondent. I have always been aware of a certain amount of noise and disturbance created by these quarrying operations, but as far as I was concerned they

never caused a substantial disturbance until recent years, more particularly in or about 1981."

He says when he married in 1979 "the quarrying operations carried on by (the) Respondent did not create an intrusive disturbance, although as already mentioned I was aware of their existence".

Why does the appellant want to stop the noise at this stage? He says it is because the respondent has extended the area of its operations. In 1981 he noticed that the noise from the quarry appeared to be getting louder and more intrusive. What seemed to worry him at this stage was the noise from the trucks which travel to and from the quarry site. He characterised the noise from the moving trucks as "a dull noise which I can only call a rumbling/puffing noise which sounds somewhat like a train in motion". He then also noticed that the noise of the quarry continued after working hours, sometimes late into the night.

The appellant describes, in para 9 of his founding affidavit, how the noise increased:

"In or about 1982 the character of the noise emanating from the quarry changed. More particularly, late at night we could clearly hear trucks arriving at the quarry site. Their arrival would be followed by an intrusive, high-pitched whining noise which would persist for some thirty minutes, and then we would hear the trucks drive away. It was with the advent of this development that I was for the first time so disturbed that I felt the need to complain. As already mentioned, this particular disturbance persisted late into the night and either prevented us from sleeping or woke us up if we were already asleep. This disturbance occurred on a regular basis. Accordingly I telephoned a Mr Campbell whom I believe to be a Director of the Respondent and complained about the noise. He said that he was not responsible for the noise occurring and that it was the fault of the "cement company" who were delivering cement on the site. In this connection I understood Mr Campbell to be saying that cement was being delivered for (the) Respondent's pre-mixed concrete business. In short, Mr Campbell's response was to deny any responsibility for the nuisance and he made no undertaking to attempt to abate it. This particular category of disturbance still persists today, although the whining noise is now somewhat diminished in volume. We are nevertheless still regularly woken up at night. The frequency of these occurrences varies but on average is 3 to 4 times per

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month. The times at which we are awoken also vary, but we have been awoken on occasions at midnight, at 2 am and 3. 30 am."

The appellant complained to the respondent, on behalf of which Mr Campbell, the Managing Director, denied any responsibility for the nuisance. He did not promise to abate it.

The quarrying operations start prior to 7 o'clock in the morning. The appellant says usually it commences at 6 am. There is the starting noise from the machinery which is "the most disturbing and intrusive noise emanating from the quarry. It sounds like the noise made by a very loud jack-hammer, or a very noisy air compressor. It is an extremely loud, sharp banging noise, not dissimilar to a noisy motor mower". This noise persists throughout the day.

The combination of noises described above continues until approximately 6 pm when the crushing noise ceases, but the drilling noise which, according to the appellant, is "particularly penetrating and intrusive", gets louder "as night falls and as other background noises ... become quieter".

This happens every week-day and every Saturday and almost every Sunday. And sometimes operations at the quarry are carried on over holidays.

The appellant alleges that the respondent's activities contravene s 5 of the Harare (Noise) By-Laws, 1973 (published in RGN 1195 of 1973). It is said the respondent carries on business within the Municipality of Harare and is not exempted from the operation of the by-laws. It is also prohibited from carrying on its quarrying operations on a Sunday and during public holidays and before the hour of 7 am and after the hour of 6 pm on any other day.

Section 5 of the By-Laws reads:

"5. (1) Subject to the provisions of subsections (2) and (3), no person shall, other than on land zoned for industrial, light industrial or special industrial purposes in any scheme, on a Sunday or public holiday, or before the hour of 7 am or after the hour of 6 pm on any other day -

(a) carry on, or cause or permit to be carried on, any business, trade or industry; or

(b) use, or cause or permit to be used, in the course of building, demolition or excavation operations, any machine, machinery, engine, apparatus, tool or contrivance, whether powered or not;

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which disturbs, or which is likely to disturb, the rest, peace and tranquility of any occupier of premises in the neighbourhood.

(2) The prohibition contained in subsection (1) shall not apply in circumstances in which the carrying on such

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business, trade or industry, or the use of such machine, machinery, engine, apparatus, tool or contrivance, is urgently necessary -

(a) to preserve the life, safety or health of any person; or

(b) to preserve property; or

(c) to maintain essential services.

(3) The council may, for good cause, on the written request of any person, grant whole or partial exemption from the prohibition contained in subsection (1), and may -

(a) attach to any such exemption such conditions as it considers desirable; and

(b) withdraw such exemption at any time by notice, in writing."

Although the respondent is not exempted in terms of subs (3) of s 5 of the Harare (Noise) By-Laws, it has an existing user right to use its land as a quarry. Reference is made to the Town Clerk's letter, referred to above. Mr Campbell throws more light on the existence of this right in his replying affidavit. He says in para 19:

"... the Respondent has an existing user right to quarry on the premises, notwithstanding the subsequent zoning which prohibits industrial activities. That right accrued to the Respondent in 1950, and cannot now be taken away. The right of existing users is recognised in the Regional, Town and Country Planning Act 1976. To this extent, the area where the Respondent operates is zoned for industrial use by [the] Respondent for quarrying operations. Quarrying is a recognised industrial use."

Although the appellant raised the issue in his founding affidavit, he conceded in his answering affidavit that the respondent had such right. He said he was merely seeking an order to compel the respondent to carry out its quarrying in a manner consistent with the law and with due regard to the rights of the inhabitants of the area.

What is important for purposes of this case is the fact that the suburb of Pomona developed when the quarrying activities were already in operation.

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Mr *Sayce* contended that the appellant cannot be denied an interdict because he came to Pomona after the quarrying activities had started. He submitted that it was not the law that people who came to the nuisance have no right to an interdict because they have acquiesced the nuisance. See McKerron *The Law of Delict* 7 ed at 233-234; Joubert *The Law of South Africa* Vol 19 para 244; *Howard Farrar, Robinson & Co Ltd v East London Municipality* (1908) EDC 149 at 154.

The contention that it is not a defence to an action for nuisance that the person affected by the nuisance occupied his house or premises when the nuisance was already there or came to the nuisance, finds support in *Miller & Anor v Jackson & Ors* [1977] QB 966 (CA). In that case members of a village club played cricket in the evenings and during the weekends in summer. They had a small cricket ground. They had been playing there since 1905. At that time the ground was surrounded by agricultural fields. The ground was leased to the club by the National Coal Board which in 1965 sold part of the pasture land to the local council who in 1970 sold it to

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land developers. Houses were built nearby so that some cricket balls inevitably fell into the near gardens or against the houses in spite of a six-foot concrete boundary fence.

In 1972 the plaintiffs bought one of the houses which bordered with the cricket ground. They complained of balls falling into their back garden and sometimes causing damage to their house. In 1975 they brought an action claiming damages for negligence and nuisance. The court awarded the plaintiffs damages for personal inconvenience and interference with their past enjoyment of their property and an injunction was also granted.

The defendants appealed. The majority of the court allowed the appeal and refused the injunction. GEOFFREY LANE LJ (as he then was), one of the majority judges, relying on *Sturges v Bridgman* (1879) 11 ChD 852, said at 987A-B, among other things:

> "That decision involved the assumption, which so far as one can discover has never been questioned, that it is no answer to a claim in nuisance for the defendant to show that the plaintiff brought the trouble on his own head by building or coming to live in a house so close to the defendant's premises that he would inevitably be affected by the defendant's activities, where no one had been affected previously ... It may be that this rule works injustice, it may be that one would decide the matter differently in the absence of authority. But we are bound by the decision in *Sturges v Bridgman* 11 ChD 852 and it is not for this court as I see it to alter a rule which has stood for so long."

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A reading of the judgment GEOFFREY LANE LJ seems to show that he was not averse to LORD DENNING'S approach, were it not for the rule in *Sturges v Bridging*.

At 986E-987B GEOFFREY LANE LJ discussed the position of people who come into an already established nuisance. Because of the importance of this question and the manner in which Mr *de Bourbon*, for the respondent, argued for the converse view, I wish once again to put across the reasoning that made GEOFFREY LANE LJ hold against the cricketers, whose predecessors had been playing cricket for seventy years without interruption. It is clear from the passage below that he came to the conclusion he did because of precedent. He posed a question and answered it in this fashion:

> "Put briefly, can the defendants take advantage of the fact that the plaintiffs have put themselves in such a position by coming to occupy a house on the edge of a small cricket field, with the result that what was not a nuisance in the past now becomes a nuisance? If the matter were *res integra*, I confess I should be inclined to find for the defendants. It does not seem just that a long established activity - in itself innocuous - should be brought to an end because someone chooses to build a house nearby and so turn an innocent pastime into an actionable nuisance. Unfortunately, however, the question is not open. In *Sturges v Bridgman*, 11 ChD 852 this very problem arose. The defendant had carried on a confectionery shop with a noisy pestle and mortar for more than 20 years. Although it was noisy, it was far enough away from neighbouring premises not to cause trouble to anyone, until the plaintiff who was a physician, built a consulting room on his own land but immediately adjoining the confectionery shop. The noise and vibrations seriously interfered with the consulting room and became a nuisance to the physician. The defendant contended that he had acquired the right either at common law or under the Prescription Act 1832 by uninterrupted use for more than 20 years to impose the inconvenience. It was held by the Court of Appeal, affirming the judgment of SIR GEORGE JESSEL MR, that use such as this which was, prior to the construction of the consulting room, neither preventable nor actionable, could found a prescriptive right. That decision involved the assumption, which so far as one can discover has never been questioned, that it is no answer to claim in nuisance for the defendant to show that the plaintiff brought the trouble on his own head by building or coming to live in a house so close to the defendant's premises that he would inevitably be affected by

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the defendant's activities, where no one had been affected previously: see

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also *Bliss v Hall* (1838) 4 Bing NC 183. It may be that this rule works injustice, it may be that one would decide the matter differently in the absence of authority. But we are bound by the decision in *Sturges v Bridgman* 11 ChD 852 and it is not for this court as I see it to alter a rule which has stood for so long."

CUMMING-BRUCE LJ agreed with GEOFFREY LANE LJ on this point.

Mr *de Bourbon* urged this Court to follow the minority judgment delivered by LORD DENNING MR He contended that the appellant came upon the nuisance when in 1979 he occupied his parents' house. He can only succeed if he shows on a balance of probabilities that the level of noise since his occupation of his parents' house has increased or the operations have increased because they now work at night.

LORD DENNING MR put his minority views at 980G-981B in this way:

"For over 70 years the game of cricket has been played on this ground to the great benefit of the community as a whole, and to the injury of none. No one could suggest that it was a nuisance to the neighbouring owners simply because an enthusiastic batsman occasionally hit a ball out of the ground for six to the approval of the admiring onlookers. Then I would ask: does it suddenly become a nuisance because one of the neighbours chooses to build a house on the very edge of the ground - in such a position that it may well be struck by the ball on the rare occasion when there is a hit for six? To my mind the answer is plainly No. The building of the house does not convert the playing of cricket into a nuisance when it was not so before. If and in so far as any damage is caused to the house or anyone in it, it is because of the position in which it was built. Suppose that the house had not been built by a developer, but by a private owner. He would be in much the same position as the farmer who previously ut his cows in the field. He could not complain if a batsman hit a six out of the ground, and by a million to one chance it struck a cow or even the farmer himself. He would be in no better position than a spectator at Lord's or the Oval or at a motor rally. At any rate, even if he could claim damages for the loss of the cow or the injury, he could not get an injunction to stop the cricket. If the private owner could not get an injunction neither should a developer or a purchaser from him."

The difference between GEOFFREY LANE and CUMMING-BRUCE LLJ, on the one hand and LORD DENNING MR on the other, is that the majority found

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themselves bound by the precedent and LORD DENNING MR thought that the precedent, that is, *Sturges v Bridgman* "turned on the old law about easements and prescriptions and so forth", whereas *Miller v Jackson* was to be decided on the new law.

In South Africa there is some authority which supports in certain circumstances the fact that there is a defence where a nuisance existed before the plaintiff came to live with it. I refer to *The Cape Law Journal* 1895 at 161. I would like to repeat the passage at 162 because it puts succintly the views of *Strykius* on nuisance. It goes thus:

"With regard to the case of trades, the exercise of which is ordinarily attended with evil smells, the question may arise in how far neighbours are entitled to object. According to Strykius, the answer depends upon the following

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facts: in the first place whether the person who objects came to live in the spot where the trade is exercised after the person exercising it had established himself there, or whether the latter had established himself there subsequently; and in the second place whether or not the spot is in a quarter where that trade had been habitually exercised. (*Strykius*, 5, 3, 29, 30). If anyone goes to live in a spot where the trade had previously been exercised by the person of whom he complains, or customarily by others of the same class, the person who fixes his habitation there has no right to object. (*Strykius*, 5, 3, 32)."

See Joubert *The Law of South Africa* Vol 19 para 224; and *Clifford v Hare* (1897) 14 SC 255 at 261.

In the instant case the respondent worked its quarrying before there were houses in the suburb of Pomona. The appellant's parents built their house in or after 1950. It is not clear exactly when the house was built. If there was any nuisance at that time the residents of Pomona, or those of them who had houses near the quarry, lived with the nuisance. The appellant occupied his parents' house in 1979. I can assume there was no actionable nuisance at that time.

Is there an actionable nuisance now? That is the question the appellant had to answer to the satisfaction of the court below. If his evidence established that the level of the noise has consistently remained the same then he must fail, as he did. If he proved on a balance of probabilities that the level of the noise has substantially increased then he ought to have succeeded.

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As far as the noise that creates the nuisance which he wants to get rid of is concerned, he has failed to establish the degree of the persistence of the noise, the locality involved and the times when the noise is heard. See *de Charmoy v Day Star Hatchery (Pty) Ltd supra* at 192D. It may be that the appellant described the type of noise in sufficient detail, but he did not, however, succeed in adducing evidence to show that the respondent had extended its working hours and that this increased the level of noise to unbearable limits. He deposed to noise which was similar to "a noisy motor mower" which continues until "approximately 6 pm when the crushing noise will usually cease". The drilling noise continues up to 6.45 or 7 pm.

The respondent denied these times and stated that the crushing work began at 6 am and ended at 6.30 pm for six days a week, except for Sunday, and between 6 am and 6 pm seven days a week as far as the drilling was concerned. The noise level, it is said, has been the same for many years.

It is difficult to say whether there has been a variation in the level of noise.

It will not pay to go through all the allegations made by the appellant and the respondent's replies thereto. Suffice it to say that there are material disputes of fact on the paper which cannot be resolved without hearing oral evidence.

In my view, cases of this nature require, if there are material disputes, oral evidence. From the appearance of witnesses, their credibility and truthfulness, the court may be able to judge whether the occupier of land where the nuisance is seated is using his land unreasonably and

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to the detriment of his neighbours.

It may be that had oral evidence been led the appellant would have supported his allegations that the level of noise had increased with the passage of time so as to constitute a nuisance. He might have, had he given oral evidence, established the times when the nuisance started in the morning and ended in the evening.

On the papers, once the respondent disputed the appellant's allegations, that was the end of the matter because there was no way the court *a quo* could have determined who was telling the truth.

As far as this part of the case is concerned, the appeal must fail because the appellant has not proved that the level of the noise emanating from the respondent's quarry, and which he found in the area when he decided to live there, had increased so as to constitute a nuisance.

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The respondent has been trying all along to obtain modern machinery which does not produce as much noise as the present antiquated machinery. The constraints imposed by a lack of foreign currency which have hindered overall development in the country have made it impossible for the respondent to improve the efficiency and smooth operation of its machinery.

The use of the quarry has not been shown to be unreasonable. I believe that it is in the interest of the public that quarrying should continue in the area for the benefit of the country.

What about the noise made by trucks at night? That is different. The noise made by the trucks started in or about 1982, long after the appellant had settled in his house. The noise which is annoying to the appellant happens late at night. It begins with the arrival of trucks. This is followed by an intrusive, high-pitched whining noise which persists for some thirty minutes. The disturbance persists until late at night. The appellant and his family are disturbed in their sleep or cannot sleep.

When Mr Campbell was approached by the appellant all he could say was that he was not responsible for the noise. It was the fault of Circle Cement Ltd which was delivering cement on the site. But the cement was delivered for the respondents pre-mixed concrete business. The cement was delivered on its site. Although the appellant says the whining noise has diminished in volume, the family is still woken up at night. Mr Campbell said in reply to these allegations that:

> "When cement is delivered, it is pumped out by a compressor, and this undoubtedly makes a noise. During the day this compressor noise would not be heard over the other operations at the Respondent's quarry. However, I accept that at night when the other machinery is not operating, the noise of the compressor can be heard. It takes approximately 20 minutes to unload each truck with the compressor."

Mr *de Bourbon* did not mount a strong attack on this allegation which, to say the least, is admitted by Mr Campbell. This noise intrudes into the private life of the appellant. It interferes with the enjoyment of his sleep. It is a nuisance which he did not find there when he moved in. In any event, the respondent can ask Circle Cement Ltd to deliver the cement during the day. If

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Circle Cement is interested in its business it will find some suitable time to deliver cement to the respondent.

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I would, therefore, grant an interdict to restrain the respondent from receiving deliveries of cement during the night.

As far as costs are concerned, the respondent has had substantial success. The appeal has been dismissed in all but part of it which concerns noise made by trucks delivering cement at night and by the pumping out of cement by a compressor when the trucks are being off-loaded. It was common cause that this operation made noise at night when all other operations had ceased.

The justice of the case, as far as costs are concerned, will be met by awarding two-thirds of the costs both in the court *a quo* and on appeal, to the respondent and one-third to the appellant.

Accordingly, I would dismiss the appeal as far as noise emanating from the respondent's operations at the quarry is concerned. I would allow the appeal against noise caused by trucks delivering cement at night and the pumping of the cement from the trucks by use of a compressor at night. To this extent, delivery of cement between the hours of 6.30 pm and 6.30 am is forbidden and an interdict is accordingly granted. The appellant is awarded one-third of the costs, both in the High Court and in this Court; and the respondent is awarded two-thirds of the costs in the court *a quo* and in this Court. The order of the High Court is altered to read:

"(1) The application is dismissed as far as it concerns the nuisance the applicant found when he settled in Pomona in 1979.

(2) The application is allowed as far as as it concerns the nuisance arising from noise emanating from motor vehicles delivering cement at night and off-loading cement at night.

(3) Two-thirds of the costs are awarded to the respondent, and one-third of the costs are awarded to the applicant."

Gubbay JA: I agree.

Korsah JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal representatives.

Coghlan, Welsh & Guest, respondent's legal representatives.

NATIONAL RAILWAYS OF ZIMBABWE CONTRIBUTORY PENSION FUND v EDY 1988 (2)

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ZLR 157 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Manyarara JA

Civil appeal

9 & 26 August 1988

Flynote

Pensions and compensation - contributions to pension fund - refund of on discharge - whether a "benefit payable from a fund" - Pension and Provident Fund Regulations 1976 - s 38(2).

Statutes - interpretation of - principles - words - meaning of - word in one part of statute bearing same meaning in another part.

Headnote

The respondent was a judgment creditor who had obtained a judgment against a person who had been an employee of the National Railways of Zimbabwe. The judgment debtor had, like other permanent staff members, made compulsory contributions from his salary to the Railways Contributory Pension Fund. His employment was terminated following a conviction for theft. The respondent applied for a garnishee order directing the Fund to pay to him the pension fund contributions refundable to the judgment creditor. The fund resisted payment on the ground that the refundable money was a "benefit" and was therefore, by virtue of s 38(2) of the Pension and Provident Fund Regulations RGN 578 of 1976, not liable to judicial attachment. The High Court granted the application.

On appeal, the sole issue was whether a refund of pension contributions was a "benefit", the word itself not being defined in the Regulations or in the enabling Act. It was argued on behalf of the respondent that on the ordinary meaning of the word, and because what the contributor received was what was his all along, the refund of contributions did not constitute a benefit.

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Held, that the relationship between the contributor and the pension fund stood on an entirely different footing that than between, say, a bank and its clients. When the contributor paid his money (a matter in which he had no choice) the money became the property of the Fund, to be used as the fund deemed fit, until the occurrence of contingencies such as retirement, resignation or discharge. South African judicial authorities dealing with similar subject-matter had held that refunds of pension contributions were benefits, and there was no warrant for disregarding those decisions.

Held, further, that the word "benefit", as used in s 18(4) of the Regulations could only refer to the quantum of contributions refundable to a member on resignation. The word also appears in ss 18(2)(d), 38(2) and 39(1), from which it was clear that a refund of contributions is a "benefit". Having regard to the presumption that a word bearing a particular meaning in a particular par of

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an enactment will bear the same meaning in other parts unless there are clear indications to the contrary, it was clear that Parliament, in empowering the Minister to make regulations dealing with the matters referred to in s 36 of the Act, intended the word "benefits" used therein to have the same specialized meaning as in s 18(4).

Cases cited:

R v Takawira & Ors 1965 RLR 162 (AD)

Stellenbosch Farmers' Winery Ltd v Distillers' Corporation (SA) Ltd & Anor 1962 (1) SA 458 (A)

Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd 1984 (3) SA 834 (W)

S v Collop 1981 (1) SA 150 (A)

Schultz & de Jager v Edelstein 1942 CPD 126

Simon NO v Wiehman 1938 CPD 400

Wiehman v Commissioner of Pensions 1938 TPD 573

Minister of the Interior v Machadodorp Investments (Pty) Ltd & Anor 1957 (2) SA 395 (A)

The Master v I L Back & Co Ltd & Ors 1983 (1) SA 986 (A)

H I Bisset for the appellant

D M Campbell for the respondent

Judgment

Gubbay JA: The sole issue in this appeal is simple to formulate yet fairly complex to determine. It is whether the right of a member of the National Railways of Zimbabwe Contributory Pension Fund ("the Fund") to receive a refund of pension contributions, with simple interest at the rate of not less

than two *per centum* per annum, constitutes "a benefit payable from a fund" within the meaning of s 38(2) of the Pension and Provident Fund Regulations 1976 (RGN 578 of 1976) and is, accordingly, not open to judicial attachment.

The Fund, which is a body corporate capable of being sued in its corporate name, was the garnishee in an application brought by the respondent in the High Court for an order directing it to pay him, in his capacity as judgment creditor, the pension contributions refundable by it to the judgment debtor, together with simple interest thereon at the rate of two *per centum per annum,* but not exceeding $4 336,85, being the amount outstanding under the judgment.

As the judgment debtor had joined the permanent staff of the National Railways of Zimbabwe it was compulsory for him, in accordance with the Rules of the Fund, to contribute at the rate of

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eight *per centum* of his pensionable emoluments, such contributions being deducted from his salary and paid by the National Railways of Zimbabwe, together with its own contributions, to the Fund within twenty-one days from the end of the calendar month in respect of which the contributions became payable. However, on 6 August 1986, the judgment debtor's employment with the National Railways of Zimbabwe was terminated on account of his having been convicted of theft and sentenced to undergo a lengthy period of imprisonment. On that date his contributions, together with interest, amounted to approximately $2 800. It was that money, due to be paid to him by the Fund, which prompted the application for attachment.

Payment to the respondent was resisted by the Fund solely on the ground that under Rule 383 of Order 42 of the High Court Rules 1971 it had "good cause for non-payment", the refundable money, in its view, falling to be classified as a "benefit" and so exempt from judicial attachment under s 38(2) of the Regulations.

The learned judge *a quo* disagreed. He held that as the money owed by the Fund to the judgment debtor was admittedly a refund of his pension contributions with interest, it was not "a benefit payable from a fund" and therefore not protected. Accordingly he granted the attachment sought and ordered that the terms of the application be paid by the judgment debtor.

The Pension and Provident Funds Regulations were made by the then Minister of Finance by virtue of the powers granted him under s 36(1) of the Pension and Provident Funds Act 1976, for the better fulfilment of the objects

and purposes of the Act, to give it force and effect, and for its better administration; and in particular, so far as is relevant to this matter, in s 36(2) for -

" (i) ... the prohibition or control of the cession, pledging or hypothecation of benefits payable by a registered fund and the protection of such benefits on insolvency or assignment or from attachment or execution under a judgment or order of a court;

(j) the withholding of any benefits payable by a registered fund where the member concerned -

(i) has borrowed and not fully repaid money from the fund or from his employer and has pledged his rights to benefits from the fund as security therefor;

(ii) has been discharged because of dishonesty which has resulted in his employer suffering loss;

and the person to whom such benefits or portion thereof may be paid."

Section 38(2) of the Regulations reads:

"Save as is otherwise provided in subs (1) -

(a) no right to a benefit payable from a fund shall be capable of being ceded, pledged or hypothecated or be liable to be attached or be subject to any form of execution under a judgment or order of a court; and

(b) any purported cession, pledge or hypothecation of a right to any benefit payable from a fund shall be

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ignored by the trustees."

Neither in the Act nor in the Regulations is the word "benefit" defined. The absence of a statutory definition thus justified Mr *Campbell,* who appeared for the respondent, in placing reliance upon the general principle of interpretation that the ordinary, grammatical meaning of the word or expression, that is, as popularly understood, is to be adopted unless by reason of the context and construction of the enactment some other meaning is apposite. See *R v Takawira & Ors* 1965 RLR 162 (AD) at 166C-D.

Plain words used in a statute must be adhered to and given their literal meaning, unless that meaning is at variance with the intention of the Legislature as shown by the context or such other indicia as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result. See *Stellenbosch Farmers' Winery Ltd v Distillers'*

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Corporation (SA) Ltd & Anor 1962 (1) SA 458 (A) at 476E-F. The same notion was expressed in another way by MARGO J in *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 846:

> "Dictionary definitions of a particular word are very often of fundamental importance in the judicial interpretation of that word in a statute .... Nevertheless, the task of interpretation is not always fulfilled by recourse to a dictionary definition, for what must be ascertained is the meaning of that word in its particular context in the enactment ..."

See also *S v Collop* 1981 (1) SA 150 (A) at 161 E-F; du Plessis *The Interpretation of Statures* para 31 at pp 107-108.

The meaning assigned to the word "benefit" in the *Shorter Oxford English Dictionary* 3 ed at p 169 is -

> "... to do good to, to be of advantage or profit to: to improve ..."

Other dictionaries are to much the same effect: "benefaction", "natural advantages; endowments"' "pecuniary advantage or profit", "pecuniary help in time of sickness, old age, loss of employment or the like". And it was in this sense that DE VILLIERS J in *Schultz & De Jager v Edelstein* 1942 CPD 126 at 132 construed the word in s 141 of the South African Insolvency Act 1936, which penalises any person who "accepts any benefit or the promise or offer of any benefit as a consideration for having refrained from or discontinued ... any proceedings for the sequestration of an estate" - "benefit" not being defined in the section.

Mr *Campbell* went on to urge that in the context of the legislation under consideration, "benefit" (the word is used in the plural as well) means "the advantages and profits" accruing to a member of a fund or to his dependants or nominees by virtue of the rules of the particular fund; and that a refund of contributions with interest upon the termination of service of a member, being a statutory obligation of the fund, has nothing to do with the "benefit" which the fund confers upon its members. It is a word inappropriate to describe the right a member has in law to a refund of his contributions, even though paid with a small amount of interest thereon. The right to such a refund is not the bestowal of a benefit upon him, for he gains no advantage or

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profit thereby; he merely receives what has been his all along.

Per contra, Mr *Bisset,* on behalf of the Fund, argued that the context or subject-matter of this legislation shows that the word "benefit" was intended

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to be used in a sense different from its literal meaning. He made reference to *Simon NO v Wiehman* 1938 CPD 400 and *Wiehman v Commissioner of Pensions* 1938 TPD 573, and to certain provisions in the Act and Regulations which, he claimed, point inexorably to the specialised use of the word.

The *Wiehman* decisions are of importance, for both turned on whether the right of a government employee to a refund of his contributions paid under the Government Service Pensions Act No. 32 of 1936 (South Africa), amounted to a benefit under s 76(1).

The facts, as they appear from the first cited case, were that the plaintiff, in his capacity as father and natural guardian of his minor daughter Hedwig, had sued Wiehman for seduction and lying-in expenses and had been awarded .300 and costs taxed at nearly .225. It had also been ordered that Wiehman should pay .3 per month for the maintenance of the child until it reached the age of eighteen years. The plaintiff then issued a summons against Wiehman for a decree of civil imprisonment. It emerged that Wiehman was possessed of nothing but his right to recover his contributions to the pension fund which he made every month out of his salary as a policemen, for he had been discharged from service as a result of the seduction. DAVIS J refused the application. He said at 401-402:

> "Under s 76(1) of Act 32 of 1936, no right in respect of a pension or other benefit payable under this Act or any other law (**which I take to include contributions made to the pension fund**), shall be capable of being ceded or of being hypothecated, and any such right shall not be liable to be attached or be subject to any form of execution under a judgment or Order of a Court. Now it seems to me that to grant a decree of civil imprisonment against the defendant **when I am satisfied that all he has is a right to a benefit, namely, a return of the contributions**, would be a form of execution, and it seems to me, consequently, that I cannot order the civil imprisonment of the defendant ..."

(the emphasis is mine).

The learned judge alluded to the situation as one in which the Minister of Finance might wish to use his power under s 79 of the Act, and direct that the benefit be paid to Hedwig Simon.

Although the judgment was given without hearing any argument to the contrary, it is obvious that DAVIS J construed the word "benefit" in a

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contextual setting not dissimilar from the present - the right to recover the pension contributions being sanctioned by law.

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But the sequel to the story is, I think, of more assistance to Mr *Bisset*. The suggestion made by DAVIS J having been implemented by the Minister Wiehman applied to the Transvaal Provincial Division for an interdict restraining the Commissioner of Pensions from diverting the refund of his contributions, to which he became entitled in terms of s 21(3) of the Act upon his discharge from the Police Force, to Hedwig Simon. Counsel argued on his behalf that what the Commissioner of Pensions purported to do was impermissible, for the provisions of s 79 applied only to a pension and not to contributions to be refunded to a person discharged from the Service. In rejecting the argument MILLIN J said at 574-575:

> "Now, what I have to decide is whether the money which, as I say, is *prima facie* due to the applicant under s 21(3)(b), by way of refund of his own contributions and his excess contributions to the pension fund, is a pension within the meaning of s 79. If the word 'pension' had not been defined, one would hardly have thought that this was a pension, but s 83 contains a definition of the word 'pension', and it is defined to mean 'any annuity, gratuity, or other benefit'. One is required to apply this definition unless it is inconsistent with the context, and there is nothing in the context of the word 'pension' as used in s 79 to justify me in not applying this definition. Therefore I read 'any pension' in s 79 as meaning 'any annuity, gratuity or other benefit'. The word 'benefit' itself is not defined, and therefore one has to look at the Act as a whole to see whether this can properly be said to be a 'benefit' within the intention of the Legislature.
>
> Speaking without assistance from other parts of the Act except the section which provides for the payment in of contributions, I should be inclined to say that it is a 'benefit'. The relevant section in this respect is s 32. It appears that these contributions to the pensions fund are obligatory; a member is not entitled to elect whether he will pay or not. He must pay, and as soon as he has paid the money ceases to belong to him. It becomes part of the fund, which is controlled as prescribed by the Act, and the person paying in the contribution has no share in that control. Moreover, as Mr *Findlay*, who appeared on behalf of the respondent, has pointed out, the identity of the individual contributions is lost; they are merged into the fund. it cannot in any sense be said that the money paid into the fund remains the money of the person paying it in. His only

> interest in that fund is that he may be entitled to get out of it such moneys as may be prescribed by the Act in particular circumstances. **Now I cannot see why the right granted by the Act to a person to receive a sum equivalent to the amount of the contributions is any less a benefit than the other provision that in certain circumstances ten per cent of the money must be paid in addition to the amount paid in.** I should come to that conclusion if I had no other guidance to the construction of s 21 (3) (b) than the section which deals with the payment in of contributions and what happens to these contributions."

(The emphasis is mine.)

The gravamen of the decision is that once a member pays his contributions into a pension fund they are subsumed into the *corpus* of the fund. The money ceases to be his. It becomes the property of the fund to be dealt with as it deems fit. The relationship between the member and the fund differs *toto caelo* from that of creditor and debtor which exists where, for instance, money is held by a banking institution to the credit of its customer. The member does not acquire any monetary rights against the fund by virtue of the payment of his contributions. The relationship of creditor and debtor only arises upon the occurrence of certain contingencies, such as: (a) normal retiral on attainment of pensionable age; or (b) retiral before attainment of pensionable age on medical grounds, or on grounds of redundancy, retrenchment, or abolition

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of office; or (c) resignation; or (d) dismissal from employment.

While accepting that the decision in *Wiehman v Commissioner of Pensions supra* was correctly decided Mr *Campbell* sought to overcome its impact on the ground that the statute with which the learned judge was concerned, unlike the Zimbabwean legislation, was not permissive and regulatory. It established one particular fund, the manner of its administration, the membership thereof and the rules pertaining thereto.

It is true that the Act and Regulations under consideration govern and regulate every conceivable pension fund or provident fund, but it is apparent that they prescribe many requirements, which the rules of each such registered fund must adhere to. These relate to management and administration, membership, the fund's finances, including the conditions upon which loans may be granted to members, pensionable emoluments, contributions, and the amount or the method of calculation of every benefit payable from the fund. This list is not exhaustive. I see no warrant therefore to disregard the *ratio decidendi* of MILLIN J in *Wiehman v Commissioner of Pensions supra* and I

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respectfully adopt it, for the right of a member who leaves the employment of a participating employer to receive at least a refund of his own contributions with simple interest at the rate of two *per centum per annum* under s 18(2)(a) of the Regulations is, to all intents and purposes, indistinguishable from the right enshrined in s 21(3)(b) of the South African Act, which right was held to be a benefit.

Consequently I consider that the right to a refund of contributions is a right to "a benefit payable from a fund" and so protected against judicial attachment by s 38(2)(a) of the Regulations. I may say that clauses 12.1.8 and 12.1.9 of the Rules of the Fund, which deal respectively with contributions payable to members who resign voluntarily or are dismissed from service, class such refunds as "benefits".

An examination of ss 18(2)(d), 38(2) and 39(1) of the Regulations fortifies me in the conclusion I have reached.

Section 18(2)(d) reads:

> "the rules may provide for the transfer to or receipt from another registered fund of the benefits of a member:
>
> Provided that no provision may be so made for the transfer of such benefits from a pension fund or a retirement annuity fund to a provident fund or the receipt of such benefits by a provident fund from a pension fund or retirement annuity fund."

The circumstances posited are those of a member of a pension fund leaving the service of one participating employer and joining the service of another participating employer, the object of the provision being the avoidance of the prejudice to him of having to commence contributing afresh to the second pension fund at perhaps a late stage of his working life, with a loss of the potential advantages accruing from his contributions to the former pension fund.

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In order to test whether the word "benefits" in subs (d) is to be taken as excluding the right to a refund of the contributions paid, I need only pose this question: "Can such a member resign from his employment, take out his contributions with interest, and transfer the remaining benefits to another pension fund?". The answer is : "No he cannot". There would be no benefits left for him to transfer. A member of a fund, not yet entitled to a pension,

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would have no benefits in the sense of advantages and profits capable of being transferred to another pension fund, and therefore nothing except his contributions to transfer. It seems to me therefore that the enactment of this provision evidences and intention on the part of the law-maker to embrace a refund of a member's own contributions within the phrase "a benefit payable from a fund".

The effect of the previously quoted s 38(2) is to prevent a member from ceding or hypothecating his right to a benefit payable from a fund other than to the fund itself or to the participating employer, for the purpose of giving security for a prescribed type of loan. Clearly the intention of the law-maker was to prevent a member which is indebted to many creditors from preferring one above another by ceding or hypothecating his right to a benefit payable from a fund. If, however, the right to a refund of contributions on resignation is not a benefit, the member would be entitled to cede such right to a favoured creditor to the prejudice of the general body of his creditors. To uphold the respondent's contention would thus lead to an anomalous situation *vis-à-vis* the member who has a right to be paid a pension and the member who has a right to be paid a refund of his contributions. But if neither is entitled to direct that the fund make payment to a third party, but must receive such payment himself, creditors will be able to recover the debts due either by execution or by garnishee proceedings against the institution into which the monies have been paid.

Section 39(1)(b) provides that where the Registrar of Pension and Provident Funds is satisfied that a member of a fund has been discharged because of dishonesty which has resulted in his employer suffering loss, he may authorise the fund to withhold any benefits payable to the member until such time as the loss has been made good. If the respondent's argument is right, its effect would be that since he has been discharged the member is entitled to a refund of his contributions, which, not being a benefit, the Registrar cannot authorise the withholding of payment to him. Put differently, the member would be in a stronger position on discharge than the member who retires upon attaining normal pensionable age or who retires before attaining pensionable age on medical grounds or because his office has been abolished. This could hardly have been the legislative intendment. Whereas, if Mr *Bisset*'s interpretation is correct, no illogicality results.

Finally, s 18(4) of the Act, and in particular provision (a) thereto, is significant to this enquiry. In terms thereof -

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"A registered fund may, if its rules so provide, grant to a member a loan secured by a first mortgage of immoveable property on which a dwelling-house has been or is to be erected for personal residence of the member:

Provided that the loan shall not exceed -

(a) the amount of the benefit to which the member would be entitled if he resigned voluntarily on the date on which the loan was granted, together with seventy-five *per centum* of the market value of the property."

I do not think that the word "benefit" in this proviso can be interpreted in any way other than comprising the *quantum* of contributions which would have been refundable to the member were he to resign voluntarily on the date on which the loan was granted.

In the premise, having regard to the presumption that a word bearing a particular meaning in a particular part of an enactment will bear the same meaning in other parts where it is employed as well - except, or course, if there are clear indications to the contrary - I am satisfied that Parliament, in empowering the Minister to make regulations dealing with the matter referred to in subs (i) and (j) of s 36 intended the word "benefits" used therein to have the same specialized meaning as in the proviso to s 18(4), there being no clear indication to the contrary. See *Minister of the Interior v Machadodorp Investments (Pty) Ltd & Anor* 1957 (2) SA 395 (A) at 404D; and *The Master v I L Back & Co Ltd & Ors* 1983 (1) SA 986 (A) at 1001D.

It is for the reasons mentioned that I find myself in respectful disagreement with the conclusion of the court *a quo*.

I would accordingly allow the appeal with costs and alter the order granted to read:

"The application is dismissed with costs".

Dumbutshena CJ: I agree.

Manyarara JA: I agree.

Webb, Low & Barry, appellant's legal representatives

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

S v FIVE 1988 (2) ZLR 168 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ & Korsah JA

Criminal appeal

28 July & 30 August 1988

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Flynote

Criminal procedure (sentence) - sexual offences - unlawful sexual intercourse with girl under 16 years of age - age difference between accused and complainant - importance of in assessing sentence.

Headnote

In cases involving sexual intercourse with a girl under 16 years of age, in contravention of s 3(a) of the Criminal Law Amendment Act [*Chapter 58*], consideration must be given to the difference in the ages of the accused and the girl when assessing sentence. The disparity between their ages has always been acknowledged as a factor, either of mitigation or aggravation, depending on whether the difference in ages is small or great. It is also a matter notorious enough for judicial notice to be taken that at no time in life, other than in youth, are the sexual passions more easily aroused; but, at the same time, callow youth lacks insight and experience and therefore more readily acts in a foolish manner than does a mature person. Although "statutory rape" is a serious offence, the statute creating the offence provides for the imposition of a fine as an alternative to imprisonment, and such a punishment should be imposed in appropriate cases, such as the present, where the accused was 19 years old, a first offender, in gainful employment, and only five years older than the girt.

Cases cited:

S v Timbanya HH-33-85 (unreported)

S v Mbira HH-506-87 (unreported)

S v Tsuma S-86-84 (unreported)

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S v Julius GS-269-80 (unreported)

S v Gwarada 1981 ZLR 17 (AD); 1981 (2) SA 531 (ZAD)

R v Pretorius 1969 (2) RLR 95; 1969 (3) SA 152 (RAD)

Appellant in person

A O Agyemang for the respondent

Judgment

Korsah JA: The appellant was convicted of having unlawful sexual intercourse with a girl under the age of sixteen years, in contravention of s 3(a) of the Criminal Law Amendment Act [*Chapter 58*]. He was sentenced to a term of eight months' imprisonment with labour, of which five months' imprisonment with labour was suspended on conditions. He appeals against both conviction and sentence.

The appellant was nineteen years of age and employed at the time of the commission of the

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offence. The girl, who for want of an apt description I shall call the complainant, was aged fourteen years and attending school at the time the offence was committed. It was common cause that some time in March 1986 the two fell in love with each other and the complainant commenced visiting the appellant's residence where, on occasions, they indulged in sexual intercourse.

It was also common cause that in June 1986 the complainant ran away form home and teamed up with another girl who was in employment. The other girl abandoned her employment and the two girls set out to look for jobs. When their efforts were not crowned with success, the two girls repaired to the appellant's residence for the night.

In the course of the night the appellant and the complainant once again indulged themselves sexually. After a couple of days, the parents of the girls traced them to the appellant's residence.

The appellant was arrested and he admitted freely to the arresting detail that he had sexual intercourse with the complainant, but that he did not know that she was under the age of sixteen at the time.

Before the trial court, the appellant made the same admissions and raised the same defence. The complainant also informed the court that she did not tell the appellant her age, but that the appellant knew that she was a Form 1 pupil. Her birth certificate disclosed that she was born on 13 March 1972.

The learned trial magistrate, who saw the complainant in court, found that the appellant's belief that the complainant was above the age of sixteen was,

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having regard to the physical appearance of the complainant, not credible. Moreover, the appellant himself admitted that he was reckless as to the age of the complainant, and so he cannot be heard to say that he gave serious consideration to the age of the complainant and believed her to be above the age of consent.

The law is very clear that while a girl under the age of sixteen is perfectly capable of consenting to an act of sexual intercourse with a man, the law has provided that such consent affords no defence to a man on a charge of carnal knowledge of a girl under the age of sixteen. If she did not consent, it would be rape. The age of the complainant having been satisfactorily established, and with the court finding no reasonable foundation for the appellant's belief that the complainant was of the age of consent, the appeal against conviction must fail.

As regard sentence, Mr *Agyemang* submitted, relying on the sentences imposed in *S v Timbanya* HH-33-85, *S v Mbira* HH-506-87 and *S v Tsuma* S-86-84, that the learned trial magistrate did not misdirect himself; and that having carnal knowledge of girls under the age of consent is a serious offence which usually attracts a custodial sentence. In *S v Timbanya supra* the ages of the defendant and his victim are not stated. In *S v Mbira supra* the accused was a married man with children and was fourteen years older than his victim. And in *S v Tsuma*

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supra, the appellant was a schoolteacher who had taught his victim the previous year in Form 1.

The courts, textbook writers and those with a desire to reform the law have, however, often pointed out that in these cases, together with other factors, consideration must be had to the difference in the ages of the defendant and his victim when imposing sentence. For instance, footnote 7 on p 229 of Professor Glanville Williams' *Textbook of Criminal Law* 2 ed reads:

> "In any reform of the law, consideration should be given to confining the paedophiliac offences to cases where there is an appreciable disparity between the ages of the defendant and the victim. CP proposed US Federal Code s 1645 (five-year age difference); AL 1 Model Penal Code s 213.3 (four-year age difference for unlawful sexual intercourse where the failure is over 10). My proposal would be that it should be a defence to a man charged with gross indecency or sexual intercourse with a girl that he was not more than three years older than the girl; this would give partial recognition to prosecution practice."

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I cite the above footnote merely to illustrate that in cases of unlawful sexual intercourse the disparity between the ages of the defendant and his victim has always been acknowledged as a factor, either of mitigation or aggravation, depending on whether the difference in ages is small or great.

At the time of the commission of this offence, the appellant and his victim were in their teens. No more than five years separated their ages. It is a matter notorious enough for judicial notice to be taken that at no time in life, other than in youth, are sexual passions more easily aroused. At the same time, callow youth lacks insight and experience and therefore more readily acts in a foolish manner than a mature person. Realising this, the courts have often stressed the undesirability of sending youthful first offenders to prison, and have commended the imposition of fines as appropriate punishments for youthful first offenders in certain cases even for offences of dishonesty - see *S v Julius* GS-269-80 (unreported), quoted with approval in *S v Gwarada* 1981 ZLR 17 (AD); 1981 (2) SA 531.

Undoubtedly statutory rape is a serious offence. But the statute creating the offence itself provides for the imposition of a fine as an alternative to imprisonment. The penal part of s 3 recites that a person who does any of the things enumerated in the section -

> "... shall be guilty of an offence and liable to a fine not exceeding one thousand dollars or to imprisonment for a period not exceeding five years."

Thus, in an appropriate case, a fine may be imposed instead of imprisonment. And I cannot imagine a more apt case in which a fine is to be preferred to a custodial sentence than one in which the offender is youthful, is hitherto of an unblemished record, and is currently in gainful employment.

The statement of agreed facts put the age of the appellant at the time of the commission of the offence at nineteen. At the time of his trial he had turned twenty. The learned trial magistrate, therefore, misdirected himself when he held that the appellant was twenty and that there was a difference of six years between him and his victim, whereas in reality there was only a difference of five years. The appellant was still in his teens when he committed the offence.

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Notwithstanding this misdirection, having regard to the nature of the offence - it entailed no violence or dishonesty - the personal circumstances of the

KORSAH JA

appellant, his candour from arrest to arraignment, and the fact that a custodial term would effectively terminate his employment, I am of the view that a custodial term was not merited in this case.

One other factor has weighed heavily with us in this case. The appellant was convicted and sentenced on 22 October 1986. Shortly after his conviction he was granted bail pending the determination of his appeal. Almost two years have elapsed since he was convicted and sentenced for this offence. He is currently in gainful employment which will be effectively terminated by a confirmation of the sentence imposed. Bearing in mind that "it is in the interest of society that the injury should be punished at the earliest possible time, and it is in the interest of the offender that he should receive punishment while the memory of his transgression is upon him" - see *R v Pretorius* 1969 (2) RLR 95 at 96 F-G; 1969 (3) SA 152 at 153; - I am of the view that a confirmation of the custodial term imposed will be most inappropriate so late in the day.

In all the circumstances of this case I am of the view that the sentence imposed by the trial court was wrong to such an extent that it invites correction at our hands. I would, therefore, set aside that sentence and substitute the following for it:

The accused is sentenced to pay a fine of $150 or, in default of payment, serve six weeks' imprisonment with labour. In addition, six weeks' imprisonment with labour, the whole of which is suspended for three years on condition that the accused does not within that period commit any offence of a sexual nature for which he is sentenced to a term of imprisonment without the option of a fine.

Dumbutshena CJ: I agree.

VELEMPINI v ENGINEERING SERVICES DEPARTMENT WORKERS' COMMITTEE FOR THE ENGINEERING SERVICES OF THE CITY OF BULAWAYO & ORS 1988 (2) ZLR 173 (HC)

Court **High Court, Bulawayo**

Muchechetere J

Civil trial

24 June & 2 September 1988

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Flynote

Delict - defamation - defamatory matter - what constitutes - lowering plaintiff in estimation of right-thinking members of society generally - extent to which a sectional view may be adopted - shunning and avoiding of plaintiff - not conclusive of matter - public issue - latitude must be allowed for debate.

Headnote

The plaintiff was a senior administrative officer in the Engineering Services Department of the City of Bulawayo. The defendant committee was formed to represent workers employed by the City Council in the plaintiff's department. In August 1987 an article appeared in a Bulawayo newspaper, which stated that workers represented by the defendant committee planned to demonstrate against the Council's two trade unions because of their ineffectiveness in protecting the welfare of Council employees. A spokesman for the Committee was quoted as having said that the plaintiff had challenged the Committee to take the matter to any Minister and that he had not been prepared to talk to the Committee any further. The passage concerning the plaintiff consisted of 28 words; the whole article contained 495 words.

The plaintiff alleged that the passage was false and defamatory of him, in that it implied that he had failed to carry out the requirements of his office and that he was not prepared to comply with the legislation under which the Committee was created thereby holding the legislation and the responsible Minister in contempt. He also alleged in his evidence that the article

had adversely affected his relationships with his superiors in the City Council; that because of the prevailing political climate in Bulawayo friends and relatives began to refuse to associate with him; that because of the suggestion in the article that he was against the present government his wife had threatened to divorce him; and that he was twice interviewed by members of the Central Intelligence Organization and warned to be careful about what he said and did. No other evidence was called in support of his allegations.

Held, that the words complained of were not defamatory *per se*, particularly when read in the context of the article as a whole, which an ordinary reader would understand as merely describing a dispute between the workers and their unions. They could not be read as implying that the plaintiff challenged the relevant legislation.

Held, further, that in distilling the meaning of words from the language used, it is proper for the Court to take into account the prevailing state of public opinion and in doing so to take cognisance of its own knowledge and experience of local conditions. In this connection, the animosity and political tension alleged by the plaintiff were not supported by the Court's own experience.

Held, further, that while the lowering of a person in the estimation of a substantial and respectable portion of the community is sufficient to establish defamation, the persons who allegedly took an interest in what was said about the plaintiff could not be classed as ordinary readers of the article, being either over-critical, suspicious or abnormally sensitive. Further, these persons did not constitute a substantial portion of the community.

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Held, further, that even if it had been satisfactorily established that the plaintiff had been shunned or avoided because of the article, that was not conclusive. Loss of association is merely a pointer to what might be defamation, but the delict consists of the impairment of reputation, not the deprivation of association.

Held, further, that because the article and the words complained of concerned a public issue, latitude must be given to them. Not to do so would stifle debate. The plaintiff, as part of management, should be aware that misrepresentations occur in debates between workers (and their representatives) and management.

Cases cited:

Gluckmann v Holford 1940 TPD 336

National Union of Distributive Workers v Cleghorn & Harris Ltd 1946 AD 984

MUCHECHETERE J

SA Associated Newspapers Ltd v Schoeman 1962 (2) SA 613 (A)

Demmers v Wyllie & Ors 1980 (1) SA 835 (A)

Dorfman v Afrikaanse Pers Publikasies (Edms) Bpk & Andere 1966 (1)PH J9

Prinsloo & Anor v SA Associated Newspapers Ltd & Anor 1959 (2) SA 693 (W)

G A Fichardt Ltd v The Friend Newspapers Ltd 1916 AD 1

Ngcobo v Shembe & Ors 1983 (4) SA 66(D)

Brill v Madeley 1937 TPD 186

Pillay v Irvins (1919) 40 NLR 137

Marruchi v Harris 1943 OPD 15

Naidu v Naidu (1915) 36 NLR 43

Minister of Justice v SA Associated Newspapers Ltd & Anor 1979 (3) SA 466 (C)

Sutter v Brown 1926 AD 155

J K H Stirling for the plaintiff

Defendants in default

Judgment

Muchechetere J: The plaintiff issues summons against the defendants claiming a sum of $20 000,00 as damages for defamation, together with costs of suit.

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The facts in the matter are that the plaintiff is employed as a senior administration officer in the Engineering Services Department of the City of Bulawayo. He has held that post since 1983 but has been in the employ of the City Council of Bulawayo for 18 years. The first defendant (hereinafter referred to as "the Committee") is a workers' committee, duly constituted in terms of the Labour Relations Act No. 16 of 1985 and the other fifteen defendants are members of the Committee. The Committee was formed sometime in July 1987 to represent the City Council's workers who are in the plaintiff's department. The plaintiff, as part of management, does not belong to it but is supposed to consult with it on workers' grievances and other matters affecting them.

On 2 August 1987 there appeared on p 1 of *The Sunday News*, a Bulawayo Newspaper, an article headed "Council Workers hit at Union". Briefly, it is stated in the article that engineering workers who were represented by the Committee had planned to stage a demonstration against the Council's two unions because of their ineffectiveness in protection the welfare of Council employees and a spokesman for the Committee is also quoted as having said:

MUCHECHETERE J

> "Administrator Moffat Velempini has challenged us to take this matter to any Minister and has not been prepared to talk with us any further."

It is the plaintiff's contention that by the words quoted above the defendants meant and were understood to mean that the plaintiff was required to talk to the first defendant and hear and act on complaints from the first defendant and that he refused to do so, thereby failing to carry out the requirements of his office and that he was not prepared to comply with the legislation under which the first defendant was created, thereby holding the legislation and in particular the Government Minister concerned in contempt.

The plaintiff gave evidence in support of his contention and the quantum of damages. He denied that he had ever refused to talk to the first defendant or hear and act on complaints from it. In that connection, he explained that he was informed sometime in July 1987 that the first defendant had just been formed and by the time the above article was published no request had been made by the defendants for a talk with him. After the article appeared in the newspaper the Town Clerk of Bulawayo approached the plaintiff, who was at the time manning a polling stations during the Bulawayo local government elections, and asked him for an explanation. The Town Clerk's expression was not happy at the time. The plaintiff then refuted the allegations about him contained in the article. He followed this with a confidential letter to the Town Clerk on 3 August 1987. A copy of the letter was produced as Exhibit 3. In that letter, he denied ever holding any discussions with the first defendant, and again refuted the remarks attributed to him. He further stated that he took great exception to the statement made by a spokesman of the first defendant and that he considered it a grave defamation of his character and had therefore decided to take legal action against the first defendant and its members. The plaintiff hopes that the Town Clerk accepted his explanation but he considers that his relations with him are not the same as before the article was published. He however did not elaborate on how the relationship now differed. The Director of the plaintiff's department, who is now retired, also asked for an explanation about the article and the plaintiff gave him one. He has also

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appeared not to be pleased by the article his chances of promotion in local and central government have been diminished.

The plaintiff further stated that soon after the article appeared friends and relatives started refusing to associate with him. They told him that the allegations attributed to him endangered the family because of the political situation prevailing in Bulawayo at the time.

They explained that the article had indicated that he did not like the government and because of this he and his family were likely to "disappear",

meaning that government agents angered by his attitude would kill him and his family. The plaintiff further stated that at the time there were political disputes and disagreements between the two major political parties in the country, ZANU (PF) and PF-ZAPU, which resulted in some members of PF-ZAPU, including Members of Parliament belonging to it, being detained. Because of this, the plaintiff, who because of being employed by the City Council of Bulawayo, which was then as now controlled by PF-ZAPU, began to fear for his own life and that of his family. It brought back the bad memories of his detention before independence, that is, before 1980. After his release from detention in 1980 he had vowed never to be again involved in politics. The above article suggested that he had again involved himself in politics and against the present government. This upset the plaintiff's wife so much that she threatened to divorce him. In this connection she sent a letter to the Editor of the Sunday News newspaper, disassociating herself from what was in the above article. She also threatened to disassociate herself from the plaintiff, saying he had become an embarrassment to the family. The plaintiff managed to persuade the Editor not to publish the letter. The plaintiff's wife nevertheless expressed fears that because of the article her children would be kidnapped and that generally the family had been put in danger. From that time she started keeping her finances separately from those of the plaintiff.

The plaintiff considers that the fears expressed by his wife were justified. He explained that at the time there were rumours and stories going the rounds in Bulawayo that people were disappearing at the hands of the Central Intelligence Organisation (CIO). He added that his wife had also been questioned by members of the CIO after the article appeared. To make matters worse, on 4 August 1987 a member of the CIO had interrogated the plaintiff for about an hour, seeking clarification on the article. That CIO man was the person who had led the plaintiff into detention before independence and during the 1987 interrogation he told the plaintiff that his security file with them had been resurrected. The plaintiff gave the CIO man documents refuting the allegations in the article. On 6 August 1987 another CIO man talked to the plaintiff again. This man advised the plaintiff, as a friend, to be more careful in future about what he says and does. Because of those encounters with the CIO the plaintiff wrote a letter to the Town Clerk on 6 August 1987 as follows:

> "SUNDAY NEWS; COUNCIL WORKERS HIT AT UNION.
>
> Further to my letter to you on 3 August 1987 in the above connection I wish to advise that on 4 August, 1987 I

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was visited by a Mr Tauro of the

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> CIO. He questioned me closely on the statement that appeared in the Sunday News for a full hour (12.15 to 1.15 pm.). AT 10 o'clock this morning I received a telephone call from a Mr Gershaun Sibanda a fairly senior person in the CIO making enquiries on the statement that was attributed to me in the press but stating that he was telephoning as a friend. The telephone conversation lasted some 30 to 35 minutes.

I shall keep you informed on further developments in the matter."

The plaintiff further stated that the persons who made the allegations about him in the article were aware of his political background; he did not elaborate on that. And that by making those allegations they were therefore fully aware that they would put the plaintiff into trouble with the Government.

After the article appeared the plaintiff also wrote the next day to the *Sunday News* (Exhibit 5) refuting the statement attributed to him. He refuted the statement in similar terms to those he addressed to the Town Clerk and in the last paragraph of the letter he stated:

> "I am sure that the Government Ministers will see through this stupid attempt by this lunch of corrupt malcontents to defame my character for their selfish ends and treat the statement with the contempt it deserves."

He also instructed his legal practitioners to extract an apology from the defendants. The newspaper published the plaintiff's letter but on 23 August 1987 it also published another article on the matter. In that article the defendants were said to have refused to apologise and repeated the allegations against the plaintiff.

Mr *Stirling*, for the plaintiff, submitted that the averments in the plaintiff's declaration and the *viva voce* evidence by the plaintiff bear out a case for defamation. He also submitted that this was a suitable case for awarding damages in the region of the amount claimed because there was no apology by the defendants.

A publication or communication of a statement which is calculated to bring another person into contempt, or undue ridicule, or which is calculated to diminish the willingness of others to associate with him, or which is calculated to lower the plaintiff in the estimation of right-thinking or reasonable members of society generally is defamatory. See *Gluckmann v Holford* 1940 TPD 336 at 339; *National Union of Distributive Workers v*

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Cleghorn and Harris Ltd 1946 AD 984 at 986-7; *SA Associated Newspapers Ltd v Schoeman* 1962 (2) SA 613 (A) at 617. If the offending statement appears in a book or article, as in this case, then the statement appears in a book or article, as in this case, then the statement must be read in the light of the book or article as a whole. In *Demmers v Wyllie & Ors* 1980 (1) SA 835 (A) at 842H MULLER JA described the reasonable or right-thinking person or man as:

> "... a person who gives a reasonable meaning to the words used within the context of the document as a whole

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and excludes a person who is prepared to give a meaning to these words which cannot reasonably be attributed thereto."

And in distilling this meaning from the language used it is proper to take into account the prevailing state of public opinion. In this connection it is proper for the Court to take cognisance of its own knowledge and experience of local conditions and the state of the prevailing circumstances.

In *Dorfman v Afrikaans Pers Publikasies (Edms) Bpk en Andere* 1966 (1) PH J9 (A) at 45 HOLMES JA said:

"A court deciding whether a newspaper report is defamatory must ask itself what impression the ordinary reader would likely gain from it. In such an inquiry the court must eschew any intellectual analysis of the contents of the report and of its implications, and must also **be careful not to attribute the ordinary reader a tendency towards such analysis or an ability to recall more than an outline overall impression of what he or she has just read. Furthermore, in view of the mass of material in a newspaper it is generally unlikely that the ordinary reader would peruse and ponder a single report in isolation."**

(The emphasis is mine.)

See also Burchell's *The Law of Defamation in South Africa* at pp 84 to 85 where the learned author states:

"The ordinary reader has also been described as a "reasonable", "right-thinking" person of average education and normal intelligence; he is not a man of "morbid or suspicious mind", nor is he "super critical" or "abnormally sensitive". The concept has also been expressed as ... or the fictitious, normal, well-balanced, right-minded and reasonable reader."

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The above test speaks of right-thinking persons **generally** as opposed to the view of a section of the community. See *Prinsloo & Anor v South African Associated Newspapers Ltd & Anor* 1959 (2) SA 693(W); *GA Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 at 9; *SA Associated Newspapers Ltd v Schoeman supra*; *Ngcobo v Shembe & Ors* 1983 (4) SA 66 (D) at 71D-E. But in certain cases the courts have applied the sectional view test: see *Brill v Madeley* 1937 TPD 186; *Pillay v Irvins* (1919) 40 NLR 137; *Marruchi v Harris* 1943 OPD 15; and *Naidu v Naidu* (1915) 36 NLR 43. Burchell *op cit,* after a lengthy examination of the test, ends by saying at pp 101 to 102:

"There can seldom, if ever, be total unanimity. This is reflected in the courts' use of the word 'generally' which implies that absolute unanimity is not insisted upon, but that the next best (ie the general consensus) is adapted. On the other hand taking account of the view of every section of society would be just as impracticable an approach as to look for total unanimity. It is submitted that in South Africa a *via media* is needed and that a sectional view should be adapted in those situations where there is an injury to reputation, even though it is so regarded only by a minority group of persons. **However in deference to the generality of the traditional test and in the interests of practicality, a limitation should be imposed in that these persons, as in the American Law, would have to constitute a substantial and a respectable portion of the community. This limitation would prevent a proliferation of defamation actions where, for example, the feelings of a mere family unit are offended."**

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(The emphasis is mine.)

I agree with the views expressed by the learned author in the above passage and will consider and, if necessary, apply the principle there enunciated in my inquiry in this case.

On what constitutes the lowering in estimation it has been held that imputations against moral character or those that arouse hatred, contempt or ridicule are defamatory if they result in the plaintiff being shunned and avoided. On shunning" and "avoiding" I also agree with what the same learned author said on p 120:

> "It is submitted that to elevate 'shunning and avoiding' to the status of a test is both unhelpful and unnecessary. As was pointed out by STEYN CJ in *South African Associated Newspapers Ltd v Schoeman supra,* it is not on its own defamatory to say that children have measles or chicken-pox,

> or to say of a Catholic that he has become a Protestant, even though his friends will tend to shun him. While the loss of association may be cogent evidence of defamation it is not a primary "test" to be adopted to find the defamatory quality of matter. Loss of association is not in itself indicative of, but merely a pointer to what might be, defamation as Boberg puts it (1962) 79 SALJ 261 at 262): 'That enjoyment of this association (with one's fellows) might be detrimentally affected by an impairment of reputation cannot be doubted, but it is the impairment of reputation which constitutes the delict, not the deprivation of association."

It should also be added that the courts have frequently stressed that in balancing freedom of expression against the protection of reputation, latitude must be allowed for debate on political matter an public issues. In *Minister of Justice v SA Associated Newspapers Ltd & Anor* 1979 (3) SA 466 (C) VAN ZIJL JP said at 475B-C:

> "It is right of every citizen to concern himself with the affairs of the country by expressing his views, approving or disapproving, of the actions of persons concerned directly in the government of the country, and, as long as he does not impute to them improper motives or dishonourable conduct, his words are not defamatory however unfair or unfounded his criticism or condemnation may be."

In my view the article in question concerned a public issue - the rights of employees in the City Council of Bulawayo.

Finally the intention of the perpetrator should also be looked into. In *Sutter v Brown* 1926 AD 155 at 163 INNES CJ said:

> "In defamation, as in all *injuriae*, the intention of the perpetrator is vital. But the court cannot dive into the mind of a defendant, it can only interpret his language as it would be understood by reasonable men: he is assumed to have meant what his language thus interpreted would convey."

After taking into account the above considerations my view is that the words or paragraph complained of in this case are not defamatory of the plaintiff. In the first instance the words or paragraph complained of are not defamatory *per se* and more so when they are read in the light of the whole article where they appear. They consist of about 28 words out of an article containing about

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485 words. In my view it is also apparent after reading the whole article that there was no intention to defame the plaintiff. The article as a whole was an attack by Council workers on their Unions on their failure to present workers' grievances to management. The heading of the article, "Council Workers Hit at Union", is in itself indicative of the intention of its authors. The plaintiff was not an official of the Unions being attacked. He was part of management and his name appears to have come into the article merely as proof that the Unions had not put enough pressure on management to force them to hear the workers' grievances. In my view an ordinary reader would understand the whole article as just a dispute between the workers and their unions. He would not really take in what is said about the plaintiff, because there is very little of it in what is a long article. He would most probably not take in the bit about the plaintiff come out of a sophisticated analysis of the words which, in my view, an ordinary reader would not indulge into.

I also do not consider that the persons mentioned by the plaintiff as having taken special interest in what was said about him in the article, that is, the Town Clerk, the plaintiff's director, the plaintiff's wife, his friends and relatives and the CIO can be considered as ordinary readers. The Town Clerk and the plaintiff's director would tend to be over-critical about what is said about the plaintiff because he is their junior at the employment situation, while the CIO persons would be more likely suspicious of matters said by people if they relate to security. The plaintiff's family would tend to be abnormally sensitive. In the circumstances they could not be classed as ordinary readers. Furthermore, those persons are only sections of the community as opposed to right-thinking persons generally. Even taking the view that a sectional view ought to be applied in this case one comes to the inevitable conclusion that they do not constitute a substantial portion of the community.

Another related matter in this connection is that the plaintiff does not state whether the words he complains of lower him in the estimation of the persons he mentioned In the case of the Town Clerk he imply said that his relations with him were no longer the same and did not elaborate. He said nothing about his director's attitude after his explanation. The director is now said to have left the Council's employ. His relatives and friends were merely alleged to have refused to associate with him, but no proof of this was given and the plaintiff did not elaborate on it. He said his wife threatened to divorce him over the article - an absurd stance if really true - but she was not called to give evidence and the plaintiff did not produce a copy of the letter she is supposed to have written to the newspaper.

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The CIO is only alleged to have warned him to be more careful in what he said in future. There is in all this no real proof of shunning and avoiding as a result of the article. Further there is no proof that the shunning and avoiding, if it was there, was because of the defamatory nature of the article.

Mr *Stirling* also submitted, if I heard him correctly, that the court should take into account that at the time the article appeared there was animosity between the Government, controlled by ZANU

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(PF), on the one hand, and the City Council of Bulawayo, controlled by PF-ZAPU, on the other hand, and that what is attributable to the plaintiff in the article would in the circumstances have been considered in government circles as defiance by the Council, through one of its senior employees, of government policy and legislation on workers' rights. He also submitted that because of that animosity people had "disappeared", as testified to by the plaintiff, and that the article had therefore exposed the plaintiff to a similar danger. To fortify these submissions, Mr *Sterling* pointed to the plaintiff's encounters with members of the CIO.

I do not agree with the above submissions. I was living in Bulawayo at the time the article appeared and I saw no evidence of the animosity testified to and there were no reports of this. The plaintiff gave no examples of what form the animosity took and he did not call either the Town Clerk or one of the City Councillors, the best judges on the situation, to testify on the matter. There were no reports of people "disappearing" at the time and the plaintiff did not in any way substantiate this allegation. As testified to by the plaintiff, local elections were taking place at the time and the major contestants were the two political parties mentioned above. The elections had been sanctioned by government and from all indications they were held peacefully. All the seats contested in Bulawayo area were won by PF-ZAPU or persons sponsored by that political party. Nothing untoward seemed to have happened thereafter and there were no reports of PF-ZAPU members and their supporters "disappearing". It was also the time when the above mentioned political parties were seriously holding discussions on unity and this unity was achieved a few months later. On the plaintiff's discussions with the CIO, my view is that these could not have been triggered by the article or words complained of. This is because my understanding of the role of the CIO is that they involve themselves in matters affecting the security of the state. In my view, the article in question has nothing to do with the security of the state. It is only concerned with the grievances of workers in the Bulawayo City Council.

Even if I am wrong and there was the animosity alleged, I still do not agree that the words complained of, even if they had happened to be true, would

have been considered in government circles in the manner alleged by the plaintiff and further I do not consider that they would son incense government that it would attempt to have the plaintiff "disappear". In the first instance, the plaintiff himself states that government ministers would not consider it in that manner - see above-quoted passage from Exhibit 5. In the second instance, there is really nothing in the words which suggest that the plaintiff does not accept or challenges government legislation on workers' rights. The plaintiff is said to have challenged the defendants to appeal to the Minister on his refusal to talk to them. This, in my view, implies that he considered his attitude on the matter was correct and that the Minister would see it in that way if approached by the defendants. In my view there is no implication there that the plaintiff does not accept or challenges government legislation.

Lastly, I consider that because the article in question and the words complained of concerned a public issue - the rights and grievances of workers in the City of Bulawayo - latitude should be given to them. If that were not done, it would stifle debate on the grievances and rights of

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workers in the Council. The plaintiff is part of Management and as such he must be aware that misrepresentations at times occur in debates between the workers and their representatives, on the one hand, and Management, on the other.

In such debates the parties sometimes make wild allegations against each other and in my view these ought not to be the subject of defamation proceedings.

In my view, the plaintiff is simply over-sensitive to any hint of criticism. He ought not to have brought these proceedings to court but should have sought to correct what he thought was a misrepresentation by the defendants through workers and Management talks.

For reasons I have endeavoured to give, I consider that the plaintiff has failed to establish that he was defamed. The claim is therefore dismissed.

Coghlan & Welsh, plaintiff's legal practitioners

MOYO v SECRETARY FOR JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS 1988 (2) ZLR 185 (HC)

Court **High Court, Harare**

Mtambanengwe J

Application for review of administrative proceedings

21 July & 21 September 1988

Flynote

Administrative law - audi alteram partem rule - inquiry into allegation of misconduct by public servant - officer conducting inquiry required to report findings to higher authority - higher authority empowered to take disciplinary action on basis of those findings - public servant entitled to be heard during inquiry.

Headnote

The applicant was clerk of court at Mbare Magistrates Court. He was suspected of having paid witness expenses to a non-existent witness and suspended from duty. He was charged with misconduct in vague terms which did not specify the witness concerned; he denied the allegation. The respondent then, in terms of s 23(2) of the Public Service (Conditions of Service for Employees) Regulations 1971, appointed an official to inquire into the applicant's alleged misconduct. The inquiry was confined to an examination of certain documents; the applicant was not given an opportunity to be heard. On the basis of the official's report, the respondent advised the applicant that he had been found guilty of misconduct and that he would be discharged from the public service. The applicant sought an order setting aside the respondent's decision and directing the respondent to reconsider the matter. The essence of the applicant's complaint was that the *audi alteram partem* rule had not been observed and that

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he had not been made aware of the specific charge against him.

The respondent's reply was that since the investigating official did not have the power to decide anything, the *audi alteram partem* rule did not apply;

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alternatively, in the way the applicant was dealt with, the rule had not been violated.

Held, that since the very purpose of the inquiry was to enable the deciding authority to come to a decision and the report by the inquiring official constituted the very *causa causans* of that decision, the principles of natural justice applied. Further, a reading of the relevant provisions of the regulations themselves clearly indicated that before disciplinary action is taken against him an employee must be heard.

Held, further, that on the facts the *audi alteram partem* rule had not been observed. The applicant's denial of the vague allegations should have shown the investigating official that a thorough inquiry was needed.

Cases cited:

Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad en Andere 1959 (3) SA 651 (A)

SA Defence & Aid Fund & Anor v Minister of Justice 1967 (1) SA 263 (A)

Dabner v SA Railways & Harbours 1920 AD 583

Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor 1980 (3) SA 476 (T)

Builders Ltd v Union Government 1928 AD 46

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

R v Smith (1844) 5 QB 614

C Mutzuris for the applicant

Miss *Choto* for the respondent

Judgment

Mtambanengwe J: The applicant in this matter seeks an order setting aside respondent's decision which discharged him from service as clerk of the criminal court, Mbare, on 20 November 1987. He also seeks reference of the matter back to respondent for reconsideration in terms of the Public Services (Conditions of Service for Employees) Regulations 1971.

What transpired is as follows. From February 1987 to about 15 May 1987 an internal auditor and another officer of the Ministry of Justice, Legal and Parliamentary Affairs carried out an audit inspection of all the books of accounts at Mbare Magistrates Court, Harare. The applicant was Clerk of Court and the person in possession of the books and to whom all queries were

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referred by the auditors.

During the audit inspection certain apparent discrepancies were found in connection with certain bills of witnesses expenses. Of the 20 such suspi-

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cious bills the applicant was responsible for one while his predecessor was responsible for the rest. The end result of the audit inspection was that the matter was reported to the police and to the Ministry.

By letter dated 18 June 1987 the applicant was suspended from duty with immediate effect. The suspension was curiously enough effected in terms of s 5(c) of the Public Services (Officers) (Misconduct and Discharge) Regulations 1986. I will revert to this later in this judgment. By letter dated 11 September 1987 applicant was charged with misconduct in that:

> "while you were employed in the Magistrate's Court Mbare you carried out your duties in an improper manner, that is to say you made *false entries in the Bill of Witnesses' Expenses* in contravention of the Public Services (Condition of Service for Employees) Regulations of 1971"

(my emphasis).

He was required to, and did, reply within seven days (on 10 September) as follows:

> "... I wish to state that I categorically deny the said allegation put against me, and wish to mention that on the alleged days I made payments to some witnesses in the bill of witness expenses with no knowledge of mine that the alleged witness was suspect when such witness had produced a document requesting for such payment."

On receipt of the above denial by applicant, respondent, in terms of s 23(2) of the 1971 Regulations, appointed an official to inquire into applicant's alleged misconduct.

The "inquiry" carried out by the officer so appointed was confined to an examination of certain documents. The officer's affidavit states:

> "3. I examined the documents relating to the charge, and these comprised of -
>
> (a) the charge against the applicant;
>
> (b) his reply to that charge;
>
> (c) court record book number 67775 from the office of the Clerk of Court, Mbare; and
>
> (d) the audit report prepared by an internal auditor in the Ministry, one Simon Masvanhise.

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> 4. Upon examination of these documents I perceived that the only central issue to my inquiry was whether or not the applicant had made payment of a witness' expenses, one Handidi Zwimba, under lawful written

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authority and in accordance with established procedures. I found no such authority or adherence to established procedures, and accordingly found it unnecessary to call upon the applicant to furnish any evidence before me. I therefore proceeded to make my findings to the Secretary of the Ministry as I was required to do."

Respondent himself states in relation to this "inquiry" (at para 11 of his affidavit):

"11. As will be apparent upon reference to Annexure "B" hereto the officer I appointed limited his inquiry to the documents available to him, and did not consider it necessary to call for any further evidence. I respectfully submit that he did not err in exercising his discretion in the manner that he did."

It was thus on receiving the said officer's report that respondent by letter dated 20 November 1987 discharged the applicant from service. The letter of discharge reads in part as follows:

"I regret to inform you that the Disciplinary Authority having carefully considered your case has determined in terms of s 28(2) of the Public Services (Conditions of Service for Employees) Regulations, 1971 that you be discharged from the service with effect from 4 November 1987."

The letter goes on to say that applicant had been found guilty of misconduct, and to advise him that, in terms of s 29(1) of the Regulations, if aggrieved by the penalty imposed, he could appeal through the Head of Ministry to the Public Service Commission.

The essence of applicant's complaint is that he was not afforded an opportunity to be heard by or to put his case before the officer appointed in terms of the regulations to enquire into his (applicant's) alleged misconduct. In other words, he complains that he was condemned without being heard; the officer on whose report respondent acted, did not, as he should have, observe the *audi alteram partem* rule. Nor, he contends, was he made aware of the specific charge or allegation against him.

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Respondent takes two alternative positions in reply to the complainant. He contends, in the first place, that since the officer he appointed to conduct the enquiry into applicant's alleged misconduct had no power to decide anything the *audi alteram partem* principle did not apply to those proceedings against the applicant. The alternative stance is that if the maxim applies or is held to apply there has not been a violation of it in the way the applicant was dealt with.

The first stand taken by respondent, particularly in argument, is based on cases like *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad en Andere* 1959 (3) SA 651 (A), which held "that a Committee of the Group Areas Board, which was authorised, in terms of the Group Areas Act, to hear evidence and representations, and to make a report to the Minister thereon as to the advisability of the proclamation of group areas, but which had no power to make a decision or order affecting the rights of persons living or owning property in the areas subject to the enquiry, was for this last mentioned purpose not a quasi-judicial body to which the maxim *audi alteram partem* applied."

Rose Innes, in his book *Judicial Review of Administrative Tribunal in South Africa,* says at p 155 that the view in *Cassem's* case *supra* departs from earlier cases in South Africa where the Courts regarded the proceedings of fact-finding and advisory bodies at a preliminary enquiry as

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quasi-judicial and subject to the *audi alteram partem* rule. He concludes his critical discussion of the view in *Cassem's* case by commenting at p 156:

> "Furthermore, it would seem that a referee who is appointed under the Act (Natal Arbitration Act), even if merely to inquire and report and not to decide, must observe a quasi-judicial procedure, for the word "inquire" signifies that, and the *audi alteram partem* rule applies."

See his reference there to the case under the Natal Arbitration Act No. 24 of 1898.

In *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263, BOTHA JA at p 272 C-G makes a distinction, in relation to the application of natural justice, between proceedings of "tribunals which although they do not themselves make a decision affecting rights, are specially created to deal with specific disputes relating to administration or discipline and those of a committee ..... which is not appointed to inquire into any specific dispute, but merely to collect facts". He says, referring to INNES CJ's remarks in *Dabner*

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v SA Railways and Harbours 1920 AD 583 at 598:

> "It is clear from the judgment in *Dabner's* case and the statutory enactments there considered that the very purpose of an enquiry conducted by a tribunal of the kind there in question was to enable the deciding authority to come to a decision on the basis of the tribunal's report and its conclusion on the evidence adduced before it. Such an enquiry, in effect, constitutes, with the deciding authority's decision thereon, one single proceeding, and it would be improper for the deciding authority to base a decision prejudicially affecting rights on anything but the tribunal's report. A report by such a tribunal therefore constitutes the very *causa causans* of the deciding authority's decision as if he had himself conducted the enquiry. That the principles of natural justice should apply in relation to the proceedings of such a tribunal is therefore clear ..."

WILLIAMSON JA, in his dissenting judgment in the same case, says at 276C:

> "There are numerous judicial decisions in our Courts in which consideration of the well-recognized general principle 'that when a statute empowers a public official to give a decision prejudicially affecting the property or liberty of an individual, that individual has a right to be heard before action is taken against him unless the statute expressly or by necessary implication indicates the contrary."

and at 276E-F he says

> "In a recent case in the House of Lords in England of *Ridge v Baldwin & Ors* [1963] 2 All ER 66 LORD MORRIS for example referred to it in the following terms at p 102H -
>
> > 'It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself and in order that he may do so he is to be made aware of the charges or allegations or suggestions which he has to meet; ... here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case.'"

Lastly, *Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor* 1980 (3) SA 476 (T) is another very relevant authority. In that case COLEMAN J, in outlining the basis of the applicability of the *audi alteram partem* maxim to a situation where the Deputy Minister of Agriculture acting

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under statute had ordered confiscation of applicant's property and decided to allow no compensation without giving effect to the maxim, stated at p 484 E-H:

> "... I shall not attempt to place the decisions of the first respondent in either category (ie quasi-judicial or administrative) because on my reading of the authorities, such categorisation is neither necessary nor helpful in an enquiry of this kind.
>
> It is clear that the applicability or otherwise of the maxim to a decision made under a statute is to be determined on a consideration of the subject-matter and specific provision of the relevant statute. In the absence of any contrary indication in the relevant statute, the right to a hearing which is the subject matter of the maxim is enjoyed by any individual whose liberty or property may be prejudicially affected by the decision of a public official acting under a statute ..."

In my view, the statutory provisions with which this matter is concerned leave no room for any doubt that the rules of natural justice must apply in dealings with an employee in relation to misconduct.

Section 11(1)(f)(i) provides that a head of department may discharge an employee serving under him summarily on the grounds of misconduct but subs (2)(c) states -

> "(2) An employee shall not be discharged -
>
> (a) ...;
>
> (b) ...;
>
> (c) on the grounds of misconduct unless the provisions of Part III have been complied with."

Part III of the regulations, from s 21 to s 29, provides the procedure for dealing with an allegation of misconduct and a charge of misconduct. The starting point is an investigation. Section 22(1) says:

> "22. (1) Subject to the provisions of section 26 and subsection (1) of section 27, after an investigation in terms of section 21 into an allegation of misconduct against an employee the disciplinary authority shall ... prefer a charge of misconduct against that employee and call upon him to state in writing within a reasonable period specified by the disciplinary authority *whether he admits or denies the charge.*"

Section 22 (2) provides -

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> "(2) An employee, when called upon to admit or deny a charge of misconduct may offer, together with his admission or denial, an explanation of his attitude in relation to the charge and, additionally or alternatively, a statement indicating the basis of his defence."

Section 23(2) provides -

> "(2) If an employee denies the charge of misconduct preferred against him the disciplinary authority shall hold an inquiry or shall appoint an officer or other person in the employment of the Government to inquire into the alleged

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misconduct of the employee."

Then there are provisions about submission of appointed officers' reports "on the termination of his inquiries" (s 24) and making of findings of misconduct (guilty or not guilty) by the disciplinary authority on receipt of findings and recommendations of the appointed officer or person (s 25).

The most significant point in all these provisions is that the denial of the charge by the employee constitutes a dispute which the disciplinary authority itself must resolve by holding an inquiry or by appointing someone else to hold an inquiry.

On the authorities as I read them there can be no valid argument but that these regulations clearly indicate that before disciplinary action is taken against him an employee has to be heard. This aspect of respondent's stance need not delay me any further. Indeed respondent's counsel was obliged to concede that the regulations, in providing for an inquiry, implied that the *audi alteram partem* rule applied. If I understood the thrust of his argument in this regard, it was that, because the inquiring officer made no decision, therefore, on the basis of decisions like that in *Cassem's* case *supra,* the maxim did not apply. BOTHA JA's statement in *South Africa Defence and Aid*, to which I have referred above, I think disposes of that argument. However, see also Lord Denning's *Discipline of Law* pp 88-96 and WESSELS JA's dissenting judgment in *Builders Ltd v Union Government* 1928 AD 46 at 59 & 61.

I turn now to examine respondent's second argument. It is contended in respondent's affidavit at para 9 (p 22 of the papers) that annexure 'D' to applicant's founding affidavit shows that he was aware of the basis and substance of the charge preferred against him. In para 11 it is argued that the fact that the officer appointed to enquire into applicant's alleged misconduct limited his enquiry to the documents available and did not consider it

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necessary to call any further evidence was not an error. The contention, in brief, is that the applicant was fully made aware of the basis of the charge against him and was afforded the opportunity to present his case. He was involved in the internal auditor's investigation; he was invited to and did reply to the charge, that is, that by his four-line denial of the charge he did present his case. Hence it was adequate observation of the *audi alteram partem* rule for the enquiring officer merely to examine the documents including applicant's denial of the charge; respondent did everything that was required.

With respect, I find respondent's contentions completely untenable. In *Ridge v Baldwin & Ors* [1963] 2 All ER 66 LORD REID, in discussing early dismissal cases in relation to the *audi alteram partem* rule, refers to, among others, *R v Smith* (1844) 5 QB 614, where at 622 and 623 LORD DENMAN CJ held -

"that even personal knowledge of the offence was no substitute for hearing the officer: his explanation might disprove criminal motive or intent and bring forward other facts in mitigation, and in any event delaying to hear him would prevent yielding too hastily to first impressions."

It is necessary to analyse the charge as laid against applicant and the other documents relied on, including applicant's reply to the charge to see if it can be said that the applicant was given

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an opportunity to put his case.

First, the auditor's investigation in which he is said to have been involved throughout was very inconclusive (and this was before any charge was preferred against applicant: see the auditor's report to the Police, apparently the same made to respondent).

Secondly, the charge talks of false entries in the Bill of Witnesses Expenses. According to the auditor's report, only one bill of witness expenses is attributed to applicant, and when the charge was preferred against him there was no indication that the adverse information, as sworn to by the auditor in his affidavit or as appears in his report was made available to the applicant. No wonder his reply shows that, though he was aware of the general allegations (no doubt from the investigation), nevertheless he was not aware of the specific allegations against him. He could not therefore have replied meaningfully to the allegation(s). The allegation(s) was (were) framed in very vague and ambiguous terms: it is clear that the applicant did not know what specific case he had to meet. To take his reply to the charge as a

representation by him is to make a mere pretence of affording him the opportunity to present his case.

The affidavit of the auditor is very revealing. According to it, the applicant had some explanation to the query. He insisted (para 5) "that the witness in question must have had a subpoena or a note from the prosecutor indicating that he had attended Court on those dates for him to have paid out". Also see paras 6 & 7 of the same.

The Court Record Book No. 67775 from the Office of the Clerk of Court Mbare, referred to in the enquiring officer's affidavit (p 28, para 5), bears a declaration by a witness (to be paid), and is purportedly signed as provided, by the witness (paid); it **bears**, as provided on the form, the "signature of a witness to the declaration", it is purportedly signed by such a witness and also by the paying officer (applicant). The signatory as witness to the declaration is described as either, "Clerk of the Court/Prosecutor/Magistrate".

The point is that looking at all these documents it is not difficult at all to come to the conclusion that the inquiring officer did not at all appreciate the nature of his duties. If he had applied his mind to the task before him, one of the things that would have readily occurred to him is that the internal auditor's report merely raised a suspicion; it says so in regard to the one bill of witness expenses for which it says applicant was responsible; and it concludes:

> "It is therefore highly suspected that the witness is a fictitious one."

A proper examination of the bill itself as indicated above would have revealed certain obvious queries, a proper resolution of which might or might not have supported applicant's explanation (as indicated) if it had been sought.

Finally, the applicant's denial itself and a proper analysis of the charge of misconduct as framed were crying for explanation, and for the enquiry officer to conclude as he did that "the only

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central issue to my inquiry was whether or not the applicant had made payment of a witness' expenses, one Handidi Zwimba, under lawful written authority and in accordance with established procedures", was to adopt a rather too simplistic approach to the task before him. The conclusion is inescapable that the enquiring officer, in drawing conclusions on the said documents, failed to apply his mind properly or at all to the facts before him, which more than anything else clearly showed a crying need for an in depth enquiry and that applicant had a legitimate

expectation for a proper opportunity of making representations to the officer. He denied him that opportunity.

I have already referred to the internal auditor's affidavit in relation to the explanation given by applicant to his (the auditor's) queries. But I must revert to it if only to emphasise the point made above that the officer did not at all apply his mind to his task and therefore failed to give effect to the maxim *audi alteram partem*. In para 6 the internal auditor states:

> "In exceptional circumstances where a subpoena has not been served on the witness concerned, payment may be made if the public prosecutor charged with the conduct of the matter on trial furnishes written proof that the witness has attended Court (whether or not his name appears on the Court roll for that day). In that event the written statement from the public prosecutor is retained by the Clerk of Court. The public prosecutor also ensures that the witness' name is on his docket."

I make no comment as to the many possibilities suggested by the above comment except to say that officers are known not to do what they are supposed to do. What is important in relation to the application of the *audi alteram partem* rule is that had these adverse comments been put to the applicant following the preferring of the charge against him and had a proper opportunity been afforded him to make representations to the enquiring officer, it is clear that an explanation would have been forthcoming. The very documents on which the inquiring officer relied more than suggested this. They demand an explanation, they demand a hearing of the applicant, yet not even a pretence was made of giving him a hearing. See *Heatherdale Farms & Ors v Deputy Minister of Agriculture & Anor, supra,* at 486E-H.

I was not asked to decide the matter on the basis of the proceedings against applicant initially being instituted under the wrong regulations. The parties agreed that the proper regulations were those published in RGN 529 of 1971. Applicant had also proceeded on the basis of the repealed Public Services (Employees) (Conditions of Service) Regulations 1971. As the proper regulations and the last-mentioned regulations are very similar in their provisions, reference in applicant's affidavit to sections of the wrong regulations is treated as reference to the appropriate sections of the proper regulations.

The conclusion I have reached in this matter is that respondent's decision cannot be allowed to stand. It was made without compliance with the

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MTAMBANENGWE J

regulations and must for that reason be set aside.

I make the following order:

(1) The discharge of applicant made by respondent in terms of his decision dated 20 November 1987 is set aside;

(2) The matter is referred back to respondent to make a proper inquiry into the alleged misconduct of applicant;

(3) The respondent is to pay the costs of this application.

Coghlan, Welsh & Guest, applicant's legal practitioners

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

VENTAB (PVT) & ANOR v GONDO & ANOR 1988 (2) ZLR 197 (HC)

Court **High Court, Harare**

Greenland J

Application on notice of motion

9-12 & 21 September 1988

Flynote

Contract - of service - breach of - remedies - specific performance desirable - whether can be ordered - interdict ordered where it would achieve same object.

Headnote

The first respondent was a teacher employed by the first applicant. The contract of employment was until the end of 1988, subject to one term's notice by either party. Before the expiry of the contract and about 6 weeks before the first respondent's pupils were due to sit important examinations, she obtained more satisfying employment with the second respondent. The first applicant sought an order of specific performance to compel the first respondent to fulfil her contractual obligations.

Held, that traditionally the courts will not order specific performance in a contract of employment because of the futility of attempting to force an employee to bring his personal attention, application, aptitude and skills to bear on the demands of the contract and because of the impossibility of supervision.

Held, further, that although there were compelling reasons in this case why the first respondent

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should be ordered to fulfil her obligations, the difficulty of enforcement remained. The normal alternative remedy of damages would not be viable, since the damage would be suffered primarily by her pupils and was unquantifiable. The appropriate order would be one of an interdict restraining the first respondent from continuing her employment with the second respondent until the end of 1988 or until her pupils had completed their examinations, whichever event occurred first.

GREENLAND J

Cases cited:

Schierhout v Minister of Justice 1926 AD 99

Myers v Abramson 1952 (3) SA 121 (C)

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

Kubheka v Imextra (Pty) Ltd 1975 (4) SA 484 (W)

Pougnet v Ramlakan 1961 (2) SA 163 (D)

Ingle Colonial Broom Co Ltd v Hacking 1914 CPD 495

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

Roberts Construction v Verhoef 1952 (2) SA 300 (W)

Ngwenya v Natalspruit Bantu School Board 1965 (1) SA 692 (W)

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

A J Traicos for the applicants

C Dube for the first respondent

E Manikai for the second respondent

Judgment

Greenland J: This matter is being dealt with on an urgent basis. Counsel on both sides have also indicated that, whatever the decision, an appeal will be mounted. These reasons therefore will be curtailed.

The main issue is whether or not the first applicant is entitled to an order of specific performance against the first respondent (hereinafter referred to simply as "the respondent").

The facts are simple enough. The respondent was employed by the first applicant to teach 'O' and 'A' level geography to students at its education centre. The contract of employment was "for the duration of the academic year ending 31. 12. 88, subject to one College term's notice either

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way".

The respondent is now in clear breach of the contract as she has secured more satisfying employment with the second respondent. The effect of her action is to leave her students unaided at a crucial stage of their tuition. They are due to commence sitting examinations from the end of October 1988, less than six weeks hence.

Counsel are agreed that traditionally courts are not disposed to granting an order of specific performance to enforce a contractual obligation involving **personal services.**

To quote from McQuoid, *The SA Law of Obligations* 2 ed p 117:

GREENLAND J

> "Failure to enter or remain in service constitutes a breach of contract. The employer's remedy is a claim of damages as the courts will not grant an order of specific performance because of the close personal relationship involved and the difficulty of enforcing such an order. *Schierhout v Minister of Justice* 1926 AD 99, 107; *Myers v Abramson* 1952 (3) SA 121 (C); *Grundling v Beyers* 1967 (2) SA 131, 146; *Kubheka v Imextra (Pty) Ltd* 1975 (4) SA 484(W), even where the employer and employee are not likely to come into frequent personal contact *(Pougnet v Ramlakan* 1961 (2) SA 163 (D))."

Christie *The Law of Contract in SA* summarized the position as follows at p 510:

> "It is settled law that no order for the specific performance of a contract of employment will be granted ... These principles are established by a long line of cases."

In addition to those precedents cited above Christie includes: *Ingle Colonial Broom Co Ltd v Hacking* 1914 CPD 495; *Rogers v Durban Corporation* 1950 (1) SA 65 (D); *Roberts Construction v Verhoef* 1952 (2) SA 300 (W) at 305 A; *Ngwenya v Natalspruit Bantu School Board* 1965 (1) SA 692 (W).

It is clear that the reason for this general attitude of the courts is that the court, in a given instance, will recognise the futility, of attempting to force an employee to bring his personal attention, application aptitude and skills to bear on the demands of the contract. Supervision is impossible.

It is clear also that the court has a discretion in the matter which it will exercise judicially. See *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151.

In the present case there is an extremely compelling reason why the respondent should be ordered to fulfil her obligation. The reason is that the pupils involved are certainly being prejudiced in a devastatingly keen way by her action. This pre-exam period is a critical time. Success or failure in the exams is directly dependent upon continued tuition and revision, preferably by the respondent. It is difficult for a court to be seen to be condoning her irresponsible action, especially as this Court is the upper guardian of all minors.

Also there appears to be no reason on record to show, on balance, that the respondent would not submit to an order for specific performance. She has

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GREENLAND J

filed no opposing affidavit. She has advanced no information to show that her continued employment is unworkable. The only indication on this aspect is her letter purporting to give notice in which she states that she "enjoyed" her stay at the college. I am conscious of the letter from her legal practitioners dated 29 August 1988. I am inclined to the view that her mind may change hereafter.

On the totality of the evidence, it is clear that what has induced her present attitude is the fact that she has found more satisfying employment with the second respondent. But for this fact she would still be with the first applicant.

A further relevant factor is that the normal alternative remedy of damages does not suggest itself as viable relief readily available. The damage, as such, is being and will be suffered by the pupils. It is not pecuniary loss. It is the awful damage of defective education, real enough , but difficult to quantify in monetary terms. Simply put, at some future date, the first applicant may be liable to students dissatisfied with the tuition afforded them in terms of their contract with the first applicant. Much depends on examination results.

Weighing all these factors in the balance, and conscious always that the first applicant is essentially entitled to look to this court for relief, I am inclined to grant the application, but for the difficulty of enforcement - in the event of defiance by her. The spectre of contempt proceedings with fines and possible imprisonment should she choose to be obstructive does not suggest itself as either practical or desirable.

It does appear therefore that a more appropriate order is one of interdict. On the facts it is her employment with the second respondent that is the root cause of the problem. There appears no objection to the assumption that but for this fact she would be a normal and responsible person who realises her contractual obligations and her particular responsibility to her pupils. Enforcement of the interdict is assured as it is conceivable that the second respondent would collaborate in its breach.

As summarised by Christie, *op cit* at p 514, an interdict is available as an appropriate remedy as an attempt to achieve the same objective as an order for specific performance. The first applicant is not required to prove loss or injury, only breach or threatened breach.

This court therefore makes no secret of the fact that the order is intended as an attempt to induce the respondent to desist in her present course of conduct

GREENLAND J

and to resume her duties in terms of the noble tenets of the teaching profession.

I am, of course, conscious of the fact that, should she decline what is being indicated to her, the first applicant will have to continue whatever emergency procedures it is employing at present.

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However, this court will not become embroiled in the problems of enforcement as with specific performance.

There are certain other matters which need decision. Mr *Dube* is right in submitting that the second applicant cannot claim relief against the respondent for want of privity of contract on which to base a claim. Mr *Manikai* is right in submitting that the second respondent should not have been joined as a party. There is no privity of contract between the first applicant and the second respondent. The right which the first applicant seeks to enforce is a "personal" contractual right, not a **real** right which can be enforced against the whole world.

In the result the court makes the following order:

(a) First respondent is hereby interdicted forthwith from continuing her employment with the second respondent;

(b) This interdict is to remain in force until 31. 12. 88 or until all the pupils she was teaching have completed their examinations, whichever event occurs first;

(c) Second applicant's application fails and is dismissed;

(d) The application by the first applicant against the second respondent fails and is dismissed with costs;

(e) As between the first applicant and the first respondent, the latter is to bear the costs of the application;

(f) As between the second applicant and the respondents no order is made as to costs;

(g) Second respondent is to be served with a copy of this order.

The reason for not mulcting the second applicant in costs is that he is acting in the capacity of a guardian of a minor who, in the circumstances, is deserving of the court's protection.

Winterton, Holmes & Hill, applicants' legal practitioners

Kantor & Immerman, first respondents' legal practitioners

Gill, Godlonton & Gerrans, second respondents' legal practitioners

FARIA v CLARIDGE 1988 (2) ZLR 202 (HC)

Court **High Court, Bulawayo**

Annotations Link to Case Annotations

Blackie J

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Exception

23 September 1988

Flynote

Family law - divorce - division of assets following - Matrimonial Causes Act 1985 - s 7 - not applicable to marriages dissolved under Matrimonial Causes Act [Chapter 39].

Statutes - interpretation of - presumption against retrospectivity - Matrimonial Causes Act 1985 - s 7 - meaning "at any time thereafter".

Headnote

The plaintiff was formerly married to the defendant, but they were divorced in terms of the Matrimonial Causes Act [*Chapter 39*] in October 1985. That Act was repealed by the Matrimonial Causes Act No. 33 of 1985, which came into effect in February 1986. S7(1) of the new Act provides that "in granting a decree of divorce ... or at any time thereafter" the court may make an order for the division or distribution of the assets of the spouses. The plaintiff, relying on this provision, sough a division of the assets of her former marriage, and in particular sought to have the former matrimonial home transferred into her name. The defendant excepted to the claim on the grounds that the provisions of the new Act do not apply to marriages dissolved under the old Act.

Held, that there was a vast difference between the old and the new Acts in respect of the grounds of divorce and the courts' powers in relation to the proprietary rights of the parties and the maintenance. Under the old Act, divorce was granted on the guilt principle, and maintenance could only be claimed at the time of divorce by the innocent party. The new Act replaces fault with failure and gives the courts wide powers to deal with

BLACKIE J

the assets and maintenance for either party. These powers may be exercised at the time of the divorce or at any time thereafter.

Held, further, that there is a presumption against retrospectivity of legislation. If the legislature had intended persons divorced under the old Act to acquire the rights provided under the new Act, the new Act would have said so expressly and clearly. The grammatical construction and plain meaning of s 7(1) of the new Act showed that it could only apply to a decree of divorce granted under the new Act.

Cases cited:

von Weiligh v Land and Agricultural Bank of SA 1924 TPD 62

Mohamed NO v Union Government 1911 AD 1

R M Smithwick for the plaintiff (respondent)

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H I Bissett for the defendant (excipient)

Judgment

Blackie J: The plaintiff in this action was formerly married to the defendant. She was the wife; the defendant was the husband. She claims a right to certain property in defendant's possession or registered in his name. In her declaration, she advances this claim on several alternative grounds. One of these grounds is set out in para 3, 4 and 5 of the declaration, which read as follows:

> "3. The parties were married to one another, according to the laws of Zimbabwe in and during 1976 and at Bulawayo and were divorced according to the laws of Zimbabwe, in Bulawayo, on the 11th day of October, 1985.
>
> 4. In terms of s 7(1) of the Matrimonial Causes Act 1985 this Honourable Court may order the division, apportionment or distribution of the assets of the parties to the former marriage and, in doing so, may order that any such asset may be transferred from the defendant to the plaintiff.
>
> 5.1. Defendant has substantial moveable assets and has a house situated at 12 Bailey Road, Khumalo, Bulawayo, which is registered in his name notwithstanding the purchase price of $55 000,00 was paid for by the plaintiff.
>
> 5.2 In the premises, the plaintiff is entitled, as aforesaid, to a fair and just distribution of the aforesaid assets and, in particular, is entitled to have the aforesaid house transferred into her name."

In respect of these paragraphs, the plaintiff prays for "a distribution of the

defendant's assets, including transfer of the Stand situated at 12 Bailey Road, Khumalo, Bulawayo into plaintiff's name."

The defendant has excepted to this part of plaintiff's claim as being bad in law and disclosing no cause of action in that -

> "1. *Ex facie* the declaration the parties were divorced from one another in terms of the Matrimonial Causes Act, [*Chapter 39*] before the repeal of the said Act and prior to the effective date of the Matrimonial Causes Act No. 33 of 1985.
>
> 2. Section 7 of the Matrimonial Causes Act No. 33 of 1985 applies only to proceedings instituted and orders made in terms of [that] Act and does not therefore have any application to the parties in this case whose marriage was dissolved in terms of Chapter 39."

The Matrimonial Causes Act No. 33 of 1985 ("the new Act") came into force on 2 February 1986. It repealed the Matrimonial Causes Act [*Chapter 39*] ("the old Act").

Section 7(1) of the new act reads as follows:

> "7. (1) Subject to the provisions of this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, the court may make an order in regard to -
>
> (a) the division, apportionment or distribution of the assets of the spouses including an order that any

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assets be transferred from one spouse to the other;

(b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments in favour of one or other of one spouses or of any child of the marriage."

The plaintiff contends that on a proper interpretation of s 7(1), even if a divorce has been granted under the old Act, the proprietary rights of the parties can now be determined in terms of that section.

I cannot agree with that submission.

There is a presumption in our law against retroactivity:

> "It is a rule of both English and Roman-Dutch Law that a law is presumed not to be retrospective unless such is clearly the intention of the legislature".

BLACKIE J

See *von Weiligh v Land and Agricultural Bank of SA* 1924 TPD 62 at 66 *per* MORICE AJ.

See also *Mohamed v Union Government* 1911 AD 1 at 8 *per* INNES J:

> "... The principle that (in the absence of express provision to the contrary) no statute is presumed to operate retrospectively is one recognised by the civil law as well as by the law of England. The law-giver is presumed to legislate only for the future; and therefore a statute which repeals another is considered not to interfere with vested rights under that other, unless it does so in clear terms. Very frequently, however, the legislature when it repeals one statute and enacts another in its place, inserts a clause in the repealing enactment defining with greater or less elaboration the extent, if any, to which the repeal is to operate retrospectively."

There is a vast difference between the old and new Acts in respect of the grounds of divorce and courts' powers in relation to the proprietary rights of the parties and maintenance for either of them on divorce.

Under the old Act divorce was granted on the guilt principle. It could be granted on any one of a number of grounds (adultery, cruelty, desertion, incurable insanity and long imprisonment), but there had to be an innocent party and a guilty party. Maintenance could only be claimed by the innocent party. The claim for maintenance had to be made at the time of the divorce. The proprietary rights of the parties were dealt with in terms of the common law or any agreement between the parties.

The new Act has changed all this. There are only two grounds for divorce - irreconcilable breakdown and incurable mental illness or continuous unconsciousness. Fault has been replaced by failure. There is no innocent and no guilty spouse. The court is given wide powers (taking into account the factors mentioned in the Act), to deal with the assets of the parties and maintenance for either of them on a broad basis of equity and justice. It may act in this respect either at the time of the granting of the divorce or at any time thereafter.

Compare Hahlo *The South African Law of Husband and Wife* 5 ed p 330.

If s 7 of the new Act were to apply generally to a divorce granted in terms of the old Act, the

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new Act would have created a whole series of new rights to

BLACKIE J

the persons involved in those divorces. For example, an innocent party, who did not claim maintenance at the time of divorce, would now be able to claim it. A guilty" spouse could claim maintenance from an "innocent" one. Property claims between former spouses which had otherwise become prescribed could be revived.

If the legislature had intended persons divorced under the old Act to acquire such rights I would have expected the new Act to have said so expressly and clearly. There is not such clear statement in the Act. Sections 7 and 17 say the opposite.

The grammatical construction and plain meaning of s 7(1) shows that it can only apply to a decree of divorce granted under the new Act. The draftsman has used the present participle in the words "in granting a decree of divorce." That can only mean a divorce granted in terms of a new Act. The words which follow, "or at any time thereafter", are linked grammatically and in meaning with the decree of divorce in the previous phrase. They cannot be stretched to refer to a divorce granted under the old Act without doing violence to their obvious meaning.

Section 17 deals with the repeal of the old Act and the savings in respect of existing rights. That section says this:

> "17. (1) The Matrimonial Causes Act [*Chapter 39*] hereinafter called the repealed Act, is repealed.
>
> (2) Notwithstanding the provisions of subs (1) -
>
> (a) ...
>
> (b) any order for the division of assets or maintenance which was made in terms of the repealed Act shall be deemed to have been made under the relevant provision of this Act."

The significance of that section is that in dealing with the position of spouses divorced under the old Act, the legislature has made provision only for those cases where there is an existing order of Court. Where there is such an order of court, it must relate to maintenance or a division of assets.

Plaintiff's claim does not fall within the provisions of s 19(2)(b). As I see the law, her claim is clearly excipiable.

BLACKIE J

The exception is allowed with costs. Paragraphs 4 and 5 of the declaration and the relief claimed under para (a) of the prayer are struck out.

Coghlan & Welsh, plaintiff's legal practitioners

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Webb, Low & Barry, defendant's legal practitioners

S v KATSUWA & ORS 1988 (2) ZLR 208 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Criminal appeal

19 September & 3 October 1988

Flynote

Appeals - appeal noted against conviction in order to have matter heard by Supreme Court - impropriety of.

Headnote

An appeal from the magistrates court against sentence only should be heard in the High Court. The practice of lodging an appeal against conviction as well so as to have the matter determined by the Supreme Court, where it is patent that the appeal against conviction has no prospects of success, is to be deplored.

G S Wernberg for the appellants

Mrs *A E Otoo* for the respondent

Judgment

Korsah JA: The appellants pleaded guilty to, and were convicted of, the theft of four head of cattle. Each of them was sentenced to a term of four years' imprisonment with labour with one year's imprisonment with labour suspended on the usual conditions. They all appealed against both conviction and sentence. At the last minute, however, the appeals against conviction were abandoned, leaving only the appeals against sentence.

Appeals against sentence only imposed by a magistrate's court are properly cognisable in the High Court. The practice of lodging an appeal against both conviction and sentence so as to have the matter determined by the Supreme Court, where it is patent that the appeal against conviction has no prospects of success, is deplored.

KORSAH JA

[The remainder of this judgment is not material to this report - *Editor*]

McNally JA: I agree.

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Manyarara JA: I agree.

Ziyambi & Partners, appellants' legal representatives

SONGORE v OLIVINE INDUSTRIES (PVT) LTD 1988 (2) ZLR 210 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Civil appeal

21 September & 3 October 1988

Flynote

Practice and procedure - default judgment-rescission of - "good and sufficient cause" therefor - requirements.

Headnote

Default judgment may be given even if the attempt to enter appearance is only a day or two out of time. While the courts are inclined to frown on plaintiffs who snatch at their judgments, the impression must not be given that the Rules may be flouted with impunity or that rescission of a default judgment given in such circumstances will be granted on request. An acceptable reason must be given for the delay. A defendant who admits that he was negligent in his tardiness may nonetheless be granted rescission if he shows *bona fides*; indeed, the court might be unjustified in condemning him for a very short delay, although his explanation for it is inadequate, if the defendant were found to be acting *bona fide* and had a *prima facie* defence. To show this it is normally sufficient for the defendant to set out averments which, if established at the trial, would entitle him to the relief asked for. However, a bald general denial of liability may not be enough to show *bona fides* and, particularly where there is a suspicion that the defence is not made *bona fide*, more specific allegations of fact will be required.

Cases cited:

Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd & Anor S-16-88 (unreported)

Muller v Braes S-51-86 (unreported)

Roland & Anor v McDonnell S-133-86 (not yet reported)

Stevenson v Broadley NO 1972 (2) RLR 467 (GD).

McNALLY JA

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D P Carter for the appellant

R M Fitches for the respondent

Judgment

McNally JA: The respondent (whom I will call "the plaintiff") was granted judgment in default of appearance against the appellant (whom I will call "the defendant") in the sum of $7 438,35 plus interest and costs. The claim was in respect of "goods sold and delivered to defendant during September 1986 to January 1987, and which amount, despite written demand, defendant fails and/or refuses to pay".

The defendant applied for rescission of judgment before a judge of the High Court and was unsuccessful. He now appeals.

Rule 63 of the High Court Rules governs the situation, and the meaning of "good and sufficient cause" in that Rule has been interpreted time and again. I refer to such cases as: *Barclays Bank of Zimbabwe Limited v CC International (Pvt) Ltd & Anor* S-C 16-86; *Muller v Braes* S-51-86; and *Roland & Anor v McDonnell* S-133-86 (to be reported in 1986 (2) ZLR).

The attempt to enter appearance in this case was only two days out of time. Nonetheless, in terms of Rule 58, the defendant was deemed to be barred and default judgment was taken in terms of Rule 57.

While the courts are inclined to frown on plaintiffs who "snatch at their judgments" the impression must not be gained that the Rules may be flouted with impunity and that as long as you are only a day or two late rescission will be granted on request. A reason for the delay must be given and it must be an acceptable reason. A defendant who admits that he was negligent in his tardiness may nonetheless be found to merit rescission if he shows *bona fides*. But one who puts forward a "reason" which is an insult to the intelligence of the court may have more difficulty in satisfying the court of his good faith.

The defendant in this case says he was away from home on 6 May 1987 when the summons was served, apparently by being handed to his fourteen-year-old daughter. He came home, he says, on 9 May. He makes the following statements in his affidavits:

1. "On 9 May 1987 I was given a copy of the summons in this matter by my daughter and I was led to believe that the summons had been served on that date".

2. "I was not aware that summons had been served on 6 May 1987

because I was away from home and it was not brought to my attention by the person who received service on my behalf that summons had been served on 6 May 1987".

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3. "Summons was served on my daughter Evelyn, who is only fourteen years old. I only saw the summons on 9 May 1987 and I was not advised as to the date when summons had been served".

That is the kind of explanation which I regard as a insult to the intelligence of the Court. The first paragraph implies that his daughter told him it had been served that day. Why would she say that (or lead him to believe that, if there is any difference in meaning between the phrases) if she knew perfectly well that she had had it since the 6th?

The third passage contradicts the first. He is now saying that his daughter did not tell him (or lead him to believe) that it had been served on the 9th. She simply did not tell him when it had been served. Why, one wonders, did he not ask her?

This so-called explanation is totally unsatisfactory.

Even assuming that he thought the summons had been served on 9 May 1987 (a Saturday), it was evident that he was required to enter an appearance to defend within eight days. That is clearly written on the face of the summons. An ordinary person, not being aware of the provisions of Rule 4A of the High Court Rules, might well assume that he must do something during the course of the following week, that is, between Monday the 11th and Friday the 15th, or at latest by Monday the 18th. Had he entered appearance on any of those dates he would in fact have been in time. What does he say about this?

> "I then contacted my legal practitioners of record, and instructed them to defend the matter. My legal practitioners filed a notice of appearance to defend the matter on 20 May 1987."

Note the exquisite evasiveness of the word "then".

If these passages were drafted by a legal practitioner then I would suggest that he was failing in his duty to the Court and to the client. The Court should not be asked to believe this kind of nonsense, and the client should be told that a candid and comprehensible explanation is required if he is to obtain the indulgence he seeks.

1988 (2) ZLR p213

McNALLY JA

One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence. If I were convinced that the defendant in this case was *bona fide* and had a *prima facie* defence, then I might be unjustified in condemning him for so short a delay, despite the inadequacy of his explanation. I turn therefore to consider his defence, and I bear in mind Mr *Carter's* reference to the decision of BEADLE CJ in *Stevenson v Broadley NO* 1972 (2) RLR 467 where the learned CHIEF JUSTICE said that in view of the delay of only four or five days "I would not consider that the application should be refused unless I thought the applicant's case was hopeless".

The defence on the face of it is not an impossible one. It is that the person who owes the money is not the defendant, Mr Songore but Mr Songore's company Ruvangu Enterprises (Pvt) Ltd. One notes that the plaintiff is apparently a wholesaler and that the defendant is apparently a retailer/wholesaler.

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Before I go further, I think it is necessary to say something about the kind of allegations one may expect from an applicant for rescission of judgment. The effect of the cases is summed up at p 371 of the third edition of Herbstein and van Winsen *The Civil Practice of the Superior Courts in SA* as follows:

> "The applicant must show that he has a *bona fide* defence to the plaintiff's claim, it being sufficient if he sets out averments which, if established at the trial, would entitle him to the relief asked for; he need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour."

It is dangerous to generalise, and each case differs from others, but nonetheless I think it must be said that bald general allegations of fact may not be enough in ever case to show *bona fides*. It might be argued that "I do not owe the money" is "an averment which, if established at the trial, would entitle him to relief asked for". In most cases, and particularly where there is a suspicion that the defence is not *bona fide*, more specific allegations of fact will be required. With those introductory remarks I turn to the facts of this case.

I begin with the summons. It cites the defendant as "JMT Songore, t/a Ruana Enterprises, Wholesalers and Retailers" and goes on to call him "JMT Songore, whose full and further names are to the plaintiff unknown, a businessman carrying on business under the style or firm of Ruvangu Enterprises, Wholesalers and Retailers, Nyazura".

McNALLY JA

The summons then sets out the claim as being for "the sum of $7 438,35 being the amount due and owing by defendant to plaintiff for goods sold and delivered to defendant during September 1986 to January 1987 and which amount, despite written demand, defendant fails and/or refuses to pay". There is a further claim for interest and costs.

It is worth noting that there is a clear allegation that the goods were sold and delivered to the defendant, Mr Songore. It is also worth noting that a written demand for payment by Mr Songore is alleged to have been made before summons was issued. No explanation is offered as to why he did not reply, pointing out that they were proposing to sue the wrong person.

In his affidavit Mr Songore says:

1. that he is a director of Ruvangu Enterprises (Pvt) Ltd;
2. that he had an account with the plaintiff prior to 1982;
3. that Ruvangu Enterprises (Pvt) Ltd was formed and registered in 1983 and it took over his business as well as his account with the plaintiff;
4. that he advised the plaintiff in 1983 that he had ceased trading as a single trader and that all his business activities had been taken over by Ruvangu Enterprises (Pvt) Ltd;
5. that from 1983 to date (the affidavit was sworn on 3 July 1987) Ruvangu Enterprises (Pvt) Ltd had been trading with the plaintiff and all the cheques which were received by the plaintiff during this period were issued by Ruvangu Enterprises (Pvt) Ltd.

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It transpired that this affidavit was factually incorrect in that Ruvangu Enterprises (Pvt) Ltd was not formed until 6 January 1984. I must confess that I do not find this discrepancy to be proof of *mala fides*. It is simply another indication of the deponent's carelessness about detail.

What is far more important to my mind is the deponent's failure to deal with the most important point of all. To whom did the plaintiff address its invoices, accounts and delivery notes?

It is apparent from the form of the summons that they were at all relevant times addressed to Mr Songore. Therefore, it is apparent that the plaintiff at all times continued to deal with him and to regard him as the customer, despite what he may have told the plaintiff in 1983. (We do not know who he told, what he said, or whether or not it was in writing.)

McNALLY JA

The plaintiff is entitled to choose with whom it does business. It cannot simply be told to deal with Ruvangu Enterprises (Pvt) Ltd It must agree to do so, either specifically (which is not alleged) or by conduct. The obvious way in which it would agree by conduct would have been by altering the name on its books to show the company as its customer. Had it done so, the accounts etcetera would have been sent to the company and the company would have been sued. That is why it was vital for the defendant to allege that the accounts were addressed to the company. He has not done so. We must assume therefore that they were not. They were addressed to the person who sued.

This is not just a technical point. A wholesaler in the position of the plaintiff might well require personal guarantees from the directors before agreeing to deal with a company. The change of customer is not just a formality.

The allegation that all payments were made by company cheques is of no consequence. The plaintiff is interested only in being paid. It does not care who pays. The fact that Mr Songore paid by cheques drawn by Ruvangu Enterprises (Pvt) Ltd does not mean that the company is the customer. It proves nothing. The customer is the person to whom they sold and delivered the goods, and sent the accounts. That person, they claim, was the defendant. Nothing he has said supports his denial.

On the facts of this case, therefore, I consider that the only way the defendant could have established his *bona fides* would have been to produce an invoice, a delivery note, or, best of all, a statement of account from the plaintiff addressed to Ruvangu Enterprises (Pvt) Ltd His failure to do so pints inevitably to the conclusion that, whatever he may have wanted to do, he did not in fact arrange with the plaintiff that he was to cease to be their customer and that the company would take his place.

I must say in conclusion that it is perhaps fortunate for the plaintiff that I have found that the defendant has failed to discharge the *onus*. The plaintiff's affidavit is almost as inadequate ad the defendant's. It fails to deal squarely with the allegation that payments were made by cheques drawn by Ruvangu Enterprises (Pvt) Ltd It fails also to deal squarely with the allegation that the plaintiff was told in 1983 that Ruvangu Enterprises (Pvt) Ltd had taken over from the defendant. It speaks vaguely and misleadingly about "the corporate veil" and about the

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defendant's perjurious allegations, when these allegations were *prima facie* mistaken rather than perjurious. Simple factual allegations which could have been made were not made. I hasten to add that

McNALLY JA

none of these criticisms apply to those who appeared before us. They did not draft the affidavits.

In my view, the court *a quo* properly concluded that the defendant had failed to show good and sufficient cause. I would dismiss the appeal with costs.

Manyarara JA: I agree.

Korsah JA: I agree.

Scanlen & Holderness, appellant's legal representatives

Gill, Godlonton & Gerrans, respondent's legal representatives

LAW SOCIETY OF ZIMBABWE v VAN WYK 1988 (2) ZLR 217 (SC)

Court **Supreme Court, Harare**

Gubbay ACJ, McNally JA & Manyarara JA

Civil appeal

20 September & 4 October 1988

Flynote

Legal practitioner - admission of - amendment to s3(1) of Legal Practitioners (General) Regulations 1983 - applicant having obtained relevant degree before 31 December 1985 but not applying for admission until after that date - whether entitled to admission.

Statutes - interpretation of - principles - implied repeal of earlier statute by amending legislation - when may be presumed.

Headnote

The respondent had applied for admission as a legal practitioner. He had obtained a law degree in South Africa on 22 March 1984. Although he would, by virtue of s 3(1)(h) of the Legal Practitioners (General) Regulations 1983, have been entitled to apply for registration as a legal practitioner without having to write the local examinations, if he had made application before 31 December 1985, he neglected to make his application until July 1986. On 6 December 1985 s 3(1) of the Regulations was amended by the insertion of a new para (i) to follow para (h). This

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provided that a person who applied for registration before 31 July 1986 and "before the 31st December, 1985, had passed all the examinations necessary to obtain [an appropriate] degree..., which degree... he [had] since obtained" was entitled to apply for registration without having to write the local examinations.

The respondent's application was granted, the judge *a quo* (REYNOLDS J) holding that the effect of the amendment was to extend the time within which the respondent was entitled to apply for registration. The judge also took the view that a narrow construction of the legislation would cause undue hardship to the respondent, who at worst had been guilty of

a procedural irregularity. The Law Society appealed, arguing that the amendment did not extend the time within which a person in the respondent's position might apply for registration, but merely extended the concession provided by the preceding paragraph in the subsection to two specified groups of persons.

Held, that two enactments had to be read together. The later one must not be construed as repealing the earlier one unless it expressly altered the provisions of the earlier one, or such alteration was a necessary, and not merely a possible, inference of the later enactment. If both enactments can reasonably be construed in such a way that both can be given effect to, that must be done. The 1985 amendment did not expressly repeal the earlier provision; and the two paragraphs were not manifestly inconsistent but could, without straining the language, be construed in a way that would give effect to the provisions of both.

Held, further, that the sole consequence of the amendment was to add two further categories of citizens to those entitled to register, namely -

(i) the citizen who before 31 December 1985 had passed the relevant examinations but had not before that date obtained the degree or certificate;

(ii) the citizen who since 31 December 1985 had passed supplementary examinations enabling him to obtain the relevant degree or certificate before 31 July 1986.

The amendment did not cover those persons who had obtained their degrees before 31 December 1985 and the respondent accordingly was no longer entitled to apply for registration without having to write the local examinations.

Cases cited:

Ex p *Southey* HB-240-86 (not reported)

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

Kent NO v SA Railways & Anor 1946 AD 398

R v Tucker 1953 (3) SA 150 (A)

Government of the Republic of South Africa & Anor v Government of Kwazulu & Anor 1983 (1)

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SA 164 (A)

National Railways of Zimbabwe v National Railways of Zimbabwe Contributory Pension Fund 1985 (1) ZLR 161; 1985 (3) SA 838 (ZS)

Mrs *S Brighton* for the appellant

D Matyszak for the respondent

GUBBAY ACJ

Judgment

Gubbay ACJ: On 28 July 1986 the respondent, to whom I shall refer as "the petitioner", applied to the High Court for registration as a legal practitioner. The appellant, the Law Society of Zimbabwe, opposed the grant of the application on the ground that the requirements of s 3(1)(i)(i) of the Legal Practitioners (General) Regulations 1983, as amended by s 2 of SI 360/85, had not been met.

The matter came before REYNOLDS J on 25 September 1986. After taking time to consider the arguments addressed to him, the learned judge effectively granted the application with costs, albeit the order made was not in the proper form. It is against the substance of that order that this appeal is now brought.

The petitioner is a citizen of Zimbabwe. He commenced study for the Bachelor of Laws Degree at the University of the Witwatersrand, Johannesburg, prior to 22 May 1981, and the succeeded in obtaining that degree on 22 March 1984. Unquestionably, therefore, prior to 31 December 1985 he was a person entitled to apply for registration as a legal practitioner by virtue of sub-para (h)(ii) F to s 3(1) of the Regulations. The whole para reads:

> "(h) in the case of a person who applies for registration before 31 December 1985, that the applicant -
>
> (i) ...
>
> (ii) is a citizen of Zimbabwe and has -
>
> A. obtained the BL degree of the University of Zimbabwe or a foreign law degree and has been admitted to practise in a designated foreign country as an advocate, barrister, attorney or solicitor, or in a capacity equivalent to that of a legal practitioner in Zimbabwe; or
>
> B. obtained a foreign law degree and has had the practical experience specified in the First Schedule; or
>
> C. been admitted to practise and has practised in a designated foreign country for not less than one years as an advocate, barrister, attorney or solicitor, or in a capacity equivalent to that of a legal practitioner in Zimbabwe; or
>
> D. obtained the BL degree of the University if Zimbabwe and has had the practical experience specified in the First Schedule; or
>
> E. been admitted to practise in a designated foreign country as an advocate, barrister, attorney

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or solicitor, or in a capacity

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equivalent to that of a legal practitioner in Zimbabwe, and has had the practical experience specified in the First Schedule; or

F. obtained a degree or certificate in law granted by a university in a designated foreign country, and would be entitled to be admitted to practise the profession of law in that designated foreign country but for the fact that -

I. he is not a resident of that designated foreign country; and, additionally or alternatively,

II. he has not passed an examination in a language other than English."

"Designated foreign country" is defined in s 2 of the Regulations to mean -

"... a country or part thereof, other than Zimbabwe , in which the common law is Roman-Dutch or English, and English is an official language."

The Republic of South Africa accordingly qualified as such a country.

The petitioner did not utilize the concession afforded him by this interim provision of not having to write the local examinations, although he had in excess of eighteen months in which to apply for registration.

On 6 December 1985 the Minister of Justice, Legal and Parliamentary Affairs, under SI 360 of 1985, amended s 3 of the Regulations by the insertion in subs (1) after para (h) of the following para:

"(1) in the case of a person who applies for registration before 31 July 1986, that the applicant is a citizen of Zimbabwe and -

(i) before 31 December 1985, had passed all the examinations necessary to obtain a degree or certificate referred to in subs (ii) of para (h), which degree or certificate he has since obtained, and that the applicant satisfied all the other appropriate requirements of the said subs (ii); or

(ii) since 31 December 1985, has passed supplementary examinations which he was granted permission to write in order to supplement or complete final examinations which he wrote, or would, but for special circumstances, have written, before 31 December 1985, and which have enabled him to obtain a degree

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or certificate referred to in subs (ii) of para (h) and that the applicant satisfies the other appropriate requirements of the said subs (ii)."

The point in issue is whether the phrase "which degree or certificate he has since obtained" in para (i)(i) above related to the date 31 December 1985, in the sense that the degree or certificate must have been obtained subsequent to 31 December 1985 and not before, or whether it means that the degree or certificate was obtained after all the examinations necessary to obtain it were passed and does not refer to the date 31 December 1985; stated otherwise, and as urged by the petitioner's counsel, that the amendment extended the time within which a citizen of Zimbabwe may apply for registration as a legal practitioner to 31 July 1986, notwithstanding that he was qualified to make such an application before 31 December 1985.

It was the latter contention that found favour with the learned judge *a quo*. He expressed the opinion that the intention behind SI 360/1985, which interpretation accorded with reason, justice and legal principle, was to ensure that the applicant "had passed all the examinations necessary to obtain the degree or certificate referred to ..." and that all the other requirements were also satisfied. He pointed out further that it would be highly inconvenient to the petitioner, and unreasonable and unjust as well, to deny him the right to apply for registration solely because, in a technical sense, he had failed or neglected to produce the proof that he was qualified within the specified time, and to hold otherwise would amount to an unduly narrow and legalistic construction. Finally, he stressed that to decline to register the petitioner, who at worst had been guilty of a procedural irregularity, would be extremely prejudicial in that he would be required to pass additional examinations.

With due deference to the learned judge the existence of hardship or inequity being caused to the petitioner were the provision to be interpreted in the manner contended for by the Law Society was beside the point. The essential question was the meaning to be assigned to para (i)(i) in the context of s 3(1) as a whole and with particular regard to the significance attaching to the fact that para (i) of s 3(1) was added later as an amendment to the Regulations by s 2 of SI 360 of 1985.

A different conclusion was reached by KORSAH J (as he then was) sitting in the Bulawayo High Court in the identical application of *Vaughan Rex Henry Southey* HB-240-86 (not reported), the judgment in which was delivered a few weeks after that of REYNOLDS J, but without knowledge of it.

GUBBAY ACJ

KORSAH J held that s 2 of SI 360 of 1985 did not extend the period of limitation within which a person qualified is to apply for registration. Its purpose was merely to grant the concession to the two specified groups of persons referred to therein so as to eliminate the hardship that would befall them, "and not to open the floodgates for those who, although qualified to apply for registration before 31 December 1985, had spurned the opportunity or slept on their rights". The

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ratio decidendi of the learned judge appears form the following passage in the judgment: -

> "... s 2 of SI 360 of 1985 did not expressly repeal para (h)(ii) of s 3 of the earlier Regulations, but rather amended it by the insertion of a provision granting a concession to a specific group of persons who had not been provided for. In such circumstances, as SMITH J said in *Kutner v Phillips* [1891] 2 QB 267 at 272, quoted with approval by LORD SANDS in *Aberdeen Suburban Tramways Co v Aberdeen Magistrates* [1927] SC 683 at 689:
>
> > 'Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied.'
>
> Section 17 of the Interpretation Act [*Chapter 1*] also stipulates that -
>
> > 'Where an enactment amends or adds to another enactment, the amending enactment shall, so far as is consistent with the tenor thereof, be construed as one with the amended enactment and as forming part thereof."
>
> In my judgement, it is possible to give effect to both the original provision under s 3(i)(h) of SI 124 of 1983 and the amendment effected by SI 360 of 1985, when the earlier enactment is understood to encompass all persons who, before 31 December 1985, had obtained the requisite degree to apply for registration, and the latter amendment is taken to allow persons who, although they had passed all the necessary examinations to obtain a degree before 31 December 1985, had not, by that date, been awarded their degrees and could not, therefore, apply for registration before 31 December 1985.
>
> ...
>
> If, as already demonstrated, the two provisions can co-exist, then it follows that the Legislature, by making this amendment, did not substitute the date 31 July 1986 for 31 December 1985."

The learned judge's approach to the construction of paras (h)(ii) and (i)(i) commends itself to me and I consider it to be correct.

GUBBAY ACJ

The real gravamen of the argument advanced on behalf of the petitioner, however much it was disguised, was that para (h)(ii) of s 3(1) of the Regulations was impliedly repealed by s 2 of SI 360 of 1985.

The authorities show that an implied repeal of a statutory provision is not lightly to be presumed. In the words of KOTZE AJA in *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 400:

> "It is only when the language used in the subsequent measure is so manifestly inconsistent with that employed in the former legislation that there is a repugnance and contradiction, so that the one conflicts with the other, that we are justified in coming to the conclusion that the earlier Act has been repealed by the later one."

That *dictum* has been subsequently referred to with approval in many decisions. See, for instance, *Kent NO v SA Railways & Anor* 1946 AD 398 at 405; *R v Tucker* 1953 (3) SA 150 (AD) at 162D-F; *Government of the Republic of South Africa & Anor v Government of Kwazulu & Anor* 1983 (1) SA 164 (AD) at 200D-F.

The principle is that enactments must be read together and the later one must not be so construed as to repeal the provisions of an earlier one unless it expressly alters the provisions

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of the earlier one, or such alteration is a necessary, and not merely a possible, inference of the later enactment. If, however, the earlier and later enactments can reasonably be construed in such a way that both can be given effect to, that must be done.

An application of this principle of interpretation satisfies me that para (h)(ii) and (i) of s 3(1) are not manifestly inconsistent with one another but may reasonably be construed, without straining the language, in a manner which gives effect to the provisions of each paragraph. The sole consequence of the amendment brought about by SI 360 of 1985 was to add two different categories of Zimbabwean citizens. They were:

(i) the citizen who before 31 December 1985 has passed all the examinations necessary to obtain one of the prescribed degrees or certificates in law, which degree or certificate **had not been obtained** prior to 31 December 1985 - in contra-distinction to the citizen who before 31 December 1985 **has obtained** one of the prescribed degrees or certificated in law; and

(ii) the citizen who since 31 December 1985 had passed supplementary examinations which enabled him to obtain one of the prescribed degrees or certificates in law prior to 31 July 1986.

It follows that, in my opinion, the phrase "has since obtained" in para (i)(i) does not refer to the time when the applicant passed his examinations. It refers to the date 31 December 1985. In other words, the effect of the amendment was not to extend the time within which a person may apply for registration as a legal practitioner whether he was qualified to make such an application before or after 31 December.

Mrs *Brighton* informed this Court that if the appeal were to succeed the Law Society was not inclined to seek an order for costs against the respondent. That, if I may say so, was a generous attitude to adopt.

In the result, the appeal is allowed and the order of the court *a quo* is altered to read: -

"The petition is dismissed".

Manyarara JA: I agree

McNally JA: I would have preferred not to sit in this appeal because of the fact that the Statutory Instrument under consideration, SI 360 of 1985, was promulgated in consequence of a recommendation made in the Interim Report of the Committee to Enquire into the Qualifications for Registration as a Legal Practitioner, a Committee of which I was Chairman. See para 7.3 and Annexure B of the Interim Report. However, it was not convenient for me to recuse myself. I was not asked by either side to do so, and it did not seem to me at the time that it was

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necessary for me to do so.

There is no doubt in my mind, as reference to para 5a of Annexure B to the Interim Report will confirm that it was the intention of the Committee to extend the benefit of the amendment to persons who completed their examinations successfully at the end of the 1985 academic year and who then graduated in December 1985. It was thought that such people might have difficulty in applying for registration after, say, 14 December, if that was the date of graduation, and before 31 December. It was borne in mind that for a significant part of that period many lawyers' offices were closed.

McNALLY JA

It is equally clear to me that it was not the intention of the Committee to benefit people in the position of the respondent who had had plenty of time before 31 December 1985 to regularise their position, but had failed to do so.

Nonetheless it seems to me that if the Statutory Instrument were to be construed so as to cover those who actually graduated and "obtained their degrees" in December 1985, then it would inevitably , if accidentally, cover persons in the position of the respondent.

The reason for this may be simply stated : in order to make the amendment cover those who obtained their degrees in mid-December 1985, the word "since" in the phrase "which degree or certificate he has since obtained" must be interpreted to mean "since passing all the examinations". If it means "since 31 December" it would exclude the December graduates. If it means "since passing all the examinations" it would include the December graduates and (by chance) earlier graduates like the respondent.

However, I am aware of the danger of relying on the intention of a Committee as evidence of the meaning of a Statutory Instrument. I referred to that danger in *National Railways of Zimbabwe v Railways Contributory Pension Fund* 1985 (1) ZLR 161; 1985 (3) SA 838 at 845A. I accept therefore that the opinion and intention of the Committee is irrelevant and inadmissible.

Looking at the plain meaning of the word "since" in the context in which it appears, I am compelled to agree with the learned ACTING CHIEF JUSTICE that there is no ambiguity. The amendment did not cover those people who obtained their degrees before 31 December 1985. Therefore it did not cover, even unintentionally, persons in the position of the respondent.

For these reasons I concur in the decision of the ACTING CHIEF JUSTICE.

Brighton & Cole Bowen, appellant's legal representatives

D W Aitken & Co, repondent's legal representatives.

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S v CHAERERA 1988 (2) ZLR 226 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Criminal appeal

23 September & 4 October 1988

Flynote

Criminal procedure - trial - unrepresented accused facing mandatory minimum sentence - need for trial court to explain to accused what minimum sentence was and meaning of special circumstances - legal aid - when court should consider granting of - whether lack of representation infringes constitutional right to a fair trial.

Headnote

The appellant had been convicted of possessing rhinoceros horns and sentenced to pay a fine of $2 000. The penalty section under the Parks and Wild Life Act 1975, as amended, in fact provided for a mandatory minimum sentence of a fine of $15 000 or five years' imprisonment, so on review the case was remitted to the magistrate for sentencing afresh. At the resumed hearing, the magistrate, after asking the appellant if he had any special reasons why the mandatory sentence should not be passed and receiving a negative reply, proceeded to pass that sentence. The appellant, who was unrepresented at both hearings, appealed.

Held, remitting the case to the magistrate again for a hearing on the question of special circumstances, that the magistrate should have gone much further than he did in advising the appellant why the case had been remitted, what the minimum penalty was, how that penalty could be avoided only by proof of special circumstances, and what special circumstances were. He should also have asked the appellant whether he had considered legal representation.

Held, further, that in cases of this nature, and in cases where the accused person cannot afford legal representation, it may well be that the court should consider the granting of legal aid.

McNALLY JA

Quaere, whether the provisions of s 18 of the Constitution, which relate to the right to a fair trial, were infringed by the fact that the appellant was unrepresented.

Cases cited:

S v Zvinyenge & Ors S-99-87 (not yet reported)

S v Khanyile & Ors 1988 (3) SA 795 (N)

S v Hoareau S-143-88 (unreported).

Mrs *S Moyo* for the appellant

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M Jones for the respondent

Judgment

McNally JA: This is an appeal against conviction and sentence arising out of a charge of possessing rhinoceros horns. The appellant, who was unrepresented, pleaded guilty to the possession of two such horns valued at $14 500 at the Chinhoyi Magistrates Court.

The charge was framed as a contravention of s 36(1)(b) of the Parks and Wild Life Act No. 14 of 1975. As I pointed out in *S v Zvinyenge & Ors* S-99-87 (not yet reported), such a charge can easily mislead an accused person, and indeed a magistrate, into thinking that the penalty is that provided in s 115(1)(a), namely "a fine not exceeding $2 000 or imprisonment not exceeding two years or both such fine and such imprisonment".

That indeed is how the magistrate read it, and he imposed a fine of $2 000, which the appellant paid. However, on review it was pointed out that the new s 115(4a) provides "notwithstanding any other provision of this section" for a mandatory minimum sentence, subject to a finding of special circumstances. The mandatory minimum is a fine of $15 000 or five years' imprisonment.*(7) The sentence was set aside and the matter was remitted by the High Court for sentencing afresh.

Unfortunately nothing was said by the remitting judge about special circumstances or about how the further proceedings should be conducted.

On 1 September 1987 the appellant was called back to court. The record of what took place is as follows, and it may be noted that the appellant was still unrepresented:

McNALLY JA

"BY COURT:

Do you recall that on 12/6/87 when I sentenced you I did explain that the proceedings will be sent to the High Court to the Review Judge within 7 days? The record was placed before Hid Lordship Mr Justice Reynolds. The conviction has been confirmed but the sentence was set aside. The record is now remitted to me to pass a fresh sentence. Before I do this I wish to ask you a few questions.

Q. Do you still admit to the essential elements of the offence?

A. Yes.

Q. Do you have anything to tell the Court now?

A. Nothing.

Q. Do you have any special reasons why the mandatory sentence should not be passed?

A. I have nothing to say.

Q. Do you have any more mitigations to offer to the Court besides what you said to me last time? Or do you have any addition to make to your mitigation?

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A. I have nothing to add or subtract from what I said.

Q. Do you now appreciate that this is a very serious offence?

A. Yes I do.

Q. Are you sure you have no other reasons to offer to the Court or special reasons?

A. I do not have any."

Only then did the court reveal to the appellant that the mandatory minimum was a fine of $15 000 or, in default of payment, five years' imprisonment with labour,*(8) which sentence he at one proceeded to impose (although I note that the file cover reads: "$5 000 or IDP 2 years' IWL").

I appreciate the point that has been made in a recent article in *Legal Forum* Vol I p 15, that the *onus* of proof of special circumstances in this statute is placed on the accused. I am not, however, concerned so much about *onus* as I am about due process, that is to say, about the right of an accused person to a fair trial. I draw attention, without comment, to the recent judgment of DIDCOTT J in *S v Khanyile & Ors* 1988 (3) SA 795 (N), and to the provisions of s 18 of the Constitution of Zimbabwe.

McNALLY JA

I am satisfied that in the circumstances of this case the magistrate should have gone much further than he did in advising the appellant why the case had been remitted, what the minimum penalty was, and how that penalty could only be avoided by proof of special circumstances. He should have gone on to explain what special circumstances were. Finally, in view of the position the appellant held as a hotel manager, he should have asked him whether he had considered legal representation. A man who can pay a $2 000 fine can surely afford to be legally represented, especially when the alternative is to pay another $13 000.

The appellant's version of his recall to the court shows even more clearly how little he understood. His affidavit in support of the Notice of Motion for a re-hearing reads in part:

> "I sat and waited for an hour and thirty minutes after which I was called into court. The magistrate asked me if I had anything to say. I asked him 'About what?' and he said 'About the June case'. I told him I'd paid the fine and so far as I knew that ended the matter. However he then told me the case had been returned from Harare and that the High Court had imposed a $15 000 fine or five years".

It may well be, in matters of this nature, and in cases where the accused person cannot afford legal representation, that the court should consider the granting of legal aid. However, I do not propose to make any pronouncement of a general nature in a case such as this which can be dealt with on its own facts.

In this case I am satisfied, on the basis of the appellant's own affidavit, that he has made a proper admission of possession in that he has admitted both physical *detentio* and knowledge of what it was he had in his possession. There is no basis therefore for interfering with the plea of guilty. (Compare the very recent decision of this Court in *S v Hoareau* S-143-88, not yet

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circulated).

I consider, however, that the sentence should once again be set aside and the matter remitted for full and proper consideration of the question of special circumstances, including, insofar as it may be necessary, the leading of evidence on the subject. I assume, in view of the fact that the appellant has been represented on appeal, that he will be represented at the re-hearing. If he cannot afford it, he is entitled to apply for legal aid under the provisions of s 3 of the Legal Assistance and Representation Act [*Chapter 66*], as amended.

McNALLY JA

I may say that Mr *Jones*, who appeared for the State, did not oppose remittal and indeed concede that the investigation of special circumstances was inadequate. Mrs *Moyo*, who appeared for the appellant, in turn conceded that in view of the admissions by her client on affidavit she could not dispute the verdict.

Accordingly, the conviction is confirmed but the sentence is set aside and the matter is remitted once again for a proper hearing on the question of special circumstances, after which the magistrate will impose sentence afresh.

Manyarara JA: I agree.

Korsah JA: I agree.

Brighton & Cole Bowen, appellant's legal representatives

S v CHIKWENYERE 1988 (2) ZLR 231 (SC)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ & McNally JA

Criminal appeal

3 August & 12 October 1988

Flynote

Criminal law - traffic cases - negligent driving - allegation that accused proceeded against red traffic light - effect of such allegation - conviction possible if accused shown to have driven through amber light - duties of drivers at robot-controlled intersections - traffic lights - presumption as to working of.

Headnote

The appellant was charged with negligent driving, following a collision at a robot-controlled intersection. The only particular of negligence supplied was that he had driven through a red

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robot. No conclusive evidence was led to show that the light was red against the appellant when he went through it. No evidence was led as to the width of the intersection or the length of the phases of the traffic lights. The appellant, though denying that the light was red, admitted that it was amber when he went through. He also admitted that that set of lights had a phase when the lights showed red in all directions. It was accepted by the trial court that the complainant, who had been stationary because the lights were red against her, moved into the intersection when they changed to green.

Held, that if the only question to be decided was whether the appellant was proved to have crossed the stop-line when the light was red, he would have to be acquitted. However, that was not the end of the matter: particularity supplied was sufficient to cover the lesser alternative allegation that the appellant entered the intersection when the light was amber in circumstances which endangered intersecting traffic and that he did not take due precautions. Proof of this is not proof of a new or different particular of negligence; it is more accurate to see it as proof of

McNALLY JA

part of the negligence alleged, or a lesser degree thereof.

Held, further, that given the situation in which he eventually found himself, the appellant was called upon to give an exculpatory explanation which was reasonably possibly true in answer to both of these questions:

(1) why, if he lawfully crossed on the amber light, was he still in the intersection when the complainant moved forward on the green light?

(2) why, in the light of his duty in that situation to take all precautions, did he not attempt to warn or to avoid the complainant when she moved into the intersection?

The appellant failed completely even to suggest an answer to these questions.

Held, further, that there is a rebuttable presumption that when traffic lights are green in one direction they are red facing the other direction.

Quaere, whether the complainant was contributorily negligent, there being no inflexible rule that a driver who has a green signal in his favour is never required to look to the right or left as he proceeds through the intersection.

Cases cited:

Netherlands Insurance Co of SA Ltd v Brummer 1978 (4) SA 824 (A)

S v Mandela & Anor 1974 (4) SA 878 (A)

R v Bruins 1944 AD 131

R v Scott-Crossley 1969 (2) RLR 270; 1969 (4) SA 49 (RAD)

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R v Kroukamp 1927 TPD 412

R v Barnard 1937 CPD 190

Walton v Rondalia Assurance Corporation of SA Ltd 1972 (2) SA 777 (D)

Doorgha & Ors v Parity Insurance Co Ltd 1963 (3) SA 365 (D)

Gomes v Visser 1971 (1) SA 276 (T)

D Naik for the appellant

S B Chauke for the respondent

Judgment

McNally JA: On 3 December 1987 the appellant was convicted in the Magistrate's Court, Western Commonage, of contravening s 43(1)(a) of the Road Traffic Act 1976 and was sentenced to a fine of $160 or, in default of payment, two months' imprisonment with labour.

The allegation was that he had driven a motor vehicle negligently a year earlier, namely on 2 December 1986, at a robot-controlled intersection at

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McNALLY JA

Twelfth Avenue/Main Street, Bulawayo.

The broad facts of the matter were not in dispute. The appellant was driving a bus north along Main Street. The complainant was driving a car east along Twelfth Avenue. Weather conditions were rainy. Visibility was poor. The complainant had her side windows closed and they were misted up.

When the complainant reached the traffic lights they were red against her and she stopped. That fact is not disputed. There is some dispute as to which lane she was in, and as to whether there was another car beside her or behind her. I am not convinced that these disputes make any difference. The essential fact is that when the lights turned green she moved into the intersection, and when she was some way across it the appellant came from her right and hit her.

The appellant does not dispute this. He says he was driving his bus full of passengers in rainy conditions as he approached the robot. The light was green. As he got closer the light turned amber. He was then about 2-3 metres away from the intersection, travelling at about 20-25 km/h. He was unable to stop and was afraid to apply brakes because of the conditions. So after a brief and gentle application of brakes he decided to continue. The collision occurred as he was on his way out of the intersection. He could see out of his side windows.

The particulars of negligence supplied were simply that the appellant had driven through a red robot.

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If the only question to be decided was whether or not the State had proved beyond a reasonable doubt that the appellant crossed the stop line at the intersection when the light facing him was red, I would agree that the appellant should have been acquitted.

The fact is that there is no conclusive evidence that that light was red. The appellant, though he was not regarded as a good witness, denied it. He said it was amber. The complainant did not see him. The only other witness was a man driving in the opposite direction to the appellant. The light was red for him, and he stopped, and the complainant began to move, and then the accident took place in front of him. But he had not consciously observed the bus driven by the appellant before the collision. He could not say positively that it had entered the intersection after the light turned red.

McNALLY JA

And finally there was no evidence of the width of the intersection or of the length of the phases of the traffic lights, as there was for example in *Netherlands Insurance Co of SA Ltd v Brummer* 1978 (4) SA 824 (A) at 827.

But it seems to me that this is not the end of the matter.

I consider that the particularity supplied is sufficient to cover the lesser alternative allegation that he entered the intersection when the light was amber in circumstances in which there was a danger of collision with vehicles lawfully entering the intersection at right angles to him, and that in regard to such vehicles he failed to keep a proper look-out or failed to take avoiding action when a collision was imminent, or failed to hoot.

I appreciate that this interpretation of the particulars supplied may be of critical importance. It is often said that the State is bound by its particulars. See for example *S v Mandela & Anor* 1974 (4) SA 878 (A) at 882E; *R v Bruins* 1944 AD 131 at 135; and *R v Scott-Crossley* 1969 (2) RLR 270 at 275; 1969 (4) SA 49 (RAD) at 52D. This latter passage reads:

> "There is authority in South Africa for the view that where the Crown supplies particulars of negligence in a charge of negligent driving, it is not entitled to rely on acts of negligence falling outside those particulars without an amendment to the charge, and a conviction based on a ground of negligence not covered by the particulars may be set aside on appeal unless the accused has suffered no prejudice."

In the present case the particular of negligence was supplied somewhat informally. Indeed it appears only in the summary of the State case, where it is stated:

> "The bus coming along Main Street proceeded against a red traffic light ..."

To proceed against a red traffic light is not in itself an act of negligence. It is an offence involving a contravention of s 48(2) of the Roads and Road Traffic (Traffic Signs) Regulations RGN 573/1973, which reads:

> "When the red lens of the signal face of any robot is illuminate, then subject to the provisions of subsection 6 (which are of no relevance in the present case) no vehicle facing such signal face shall cross the stop line."

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McNALLY JA

There may be occasions when it is perfectly safe to proceed against a red traffic robot. To do so will be an offence, but not an offence involving negligence. (The same has been said often enough about exceeding a speed limit).

Thus, when a charge of negligent driving is accompanied by the allegation that the alleged offender proceeded across an intersection "against a red traffic light", the allegation must amount to an assertion that he entered the intersection when it was unsafe, given the state of the lights and the presence of intersecting traffic, to do so. The fact that he may have crossed the stop line moments before the robot went red will not necessarily save him if it is shown that by entering the intersection when he did he created a danger which he did not take due precautions to avoid. There is no magical difference between crossing just before the light turns red and crossing just after it turns red.

In this context it is worth recording what RGN 573 of 1973 has to say about the rights and duties of a motorist facing an amber light. Section 48(4) reads as follows:

> "When the amber lens of the signal face of any robot is illuminated as part of the light sequence prescribed by subs(1) of s 47, no vehicle facing such signal face shall cross the stop line:
>
> Provided that if, when the amber lens becomes illuminated, any such vehicle is so close to the stop line that it cannot be brought to a halt safely behind the stop line, it may cross the stop line **subject to all due precautions being taken**"

(my emphasis).

In short what I am saying is this: the State has set out to prove the appellant's negligence on the basis that he drove through a red robot, thus endangering intersecting traffic. If the State fails to prove that the robot was red as he crossed the stop line, that is not the end of the case. It may prove that he drove through an ember light in circumstances which endangered intersecting traffic and that he did not take due precautions. Such proof is not proof of a new or different particular of negligence. It is more accurate to see it as proof of part of the negligence alleged, or a lesser degree thereof.

The situation is therefore distinguishable from that in the case of *R v Kroukamp* 1927 TPD 412. In that case the accused was charged with reckless

McNALLY JA

or negligent driving on Main Road, Langlaagte. On seeking particulars he was advised that "the alleged negligence or recklessness consisted in running down the complainant on a portion of Main Road which was closed for repairs". The accused concentrated his defence on attempting to show the road was not under repair, or at any rate that it was not barricaded off. He was convicted, not because he had run over the complainant on a portion of the road under repair, but because he knocked the complainant down at a time when the complainant was walking

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along the road with his back to the approaching lorry, and in that he did not sound his hooter.

The court on review concluded that he had been prejudiced and misled in his defence by the particulars supplied. The proceedings were set aside, subject to the State's right to proceed afresh. See also *R v Barnard* 1937 CPD 190.

In the present case I accept that the State has failed to prove that the appellant entered the intersection when the light was red against him. But on his own admission he entered the intersection when the light was amber against him. Moreover, on his own admission in evidence there is a phase, with these particular robots, when the lights are red in all directions. This is clear from his answers in cross-examination at p 11 of the record as follows:

> "How do robots operate? - Red, green, amber.
> If it is red the other is green, is that so? - Yes.
> When they changed red at the first instance what would be the colour on the other side? - Red for some seconds before it turns green."

In other words, even if he was partly across the intersection before the lights against him turned red he would still have had a safely margin because the complainant would still have been held up by a red light facing her. So the probability is that if he did not cross when the light was red, he crossed on a late amber.

The very fact that he was still in the intersection when the complainant moved forward when the light facing her turned green calls for an explanation form him. I accept the statement in Cooper *Motor Law* Vol 2 at p 86 that -

> "In effect a green signal at a robot-controlled intersection confers on a driver who has the green signal in his favour a right of way, but it is not an inflexible rule that such a driver is never required to look to the right or left as he proceeds through the intersection."

McNALLY JA

We are not here concerned with the question whether or not the complainant was contributorily negligent, and I make no comment in that regard.

I also accept the statement on the same page of Cooper relying on *Walton v Rondalia Assurance Corporation of SA Ltd* 1972 (2) SA 777, that -

> "Accordingly a driver entering shortly after a robot turns to amber is entitled to assume, in the absence of any indication to the contrary, that the traffic facing the red signal will not enter the intersection until it receives the green signal."

The complainant in this case did not move until she received the green signal. There is no doubt about that, although the appellant tried faintly at one point to suggest that she must have moved off too early.

We are thus dealing with the sort of situation which faced CANEY J in *Doorgha v Parity Insurance Co Ltd* 1963 (3) SA 365 at 366, when he said:

> "*A fortiori*, if he enters the intersection when the lights facing him are amber ... or if they turn amber whilst he is in

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this situation, he must have regard to the possibility that motorists, waiting for the lights to turn green in their favour, will advance across his course immediately they do so."

I conclude that, given the situation in which he eventually found himself, the appellant is called upon to give an exculpatory explanation which is reasonably possibly true in answer to both of the following questions:

1. "Why, if you lawfully crossed on the amber light, where you still in the intersection when the complainant moved forward on the green light?";

2. "Why, in the light of your duty in that situation to take all due precautions, did you not attempt to warn or to avoid the complainant when she moved into the intersection?".

The appellant failed completely even to suggest an answer to those two questions. It is noteworthy that when asked at the scene by the independent witness, Hickman, what had happened he said "he had proceeded because the brakes had failed, because of the wet, damp weather". When he came to court he said the lights turned amber when he was 2-3 metres away from the stop line and it would have been dangerous to brake sharply. He did not suggest that the brakes had failed. He was travelling between 25 and 30 km/h and he

did not suggest that anything obstructed or delayed him in the intersection. Nor did he suggest that he sought to warn the complainant by hooting or in any other way, or to avoid her by braking or swerving.

I may say that at no stage was it suggested that the lights were not in working order. The evidence of Mr Hickman, however, confirms what is, in the light of such cases as *Gomes v Visser* 1971 (1) SA 276, a rebuttable presumption, that when the lights in one direction are green they are red facing the other direction.

It seems to me that the appellant's negligence was established in that he entered the robot-controlled intersection either against the red light or on "late amber" (despite his evidence that it changed to amber when he was 2-3 metres away) and that, having made the initial potentially dangerous move, he failed to take any or adequate precautions to avoid an accident with a person in the position of the complainant who entered the intersection when the light changed in her favour.

Thus in the final analysis, although I find myself unable to uphold the magistrate's conclusion that the appellant entered the intersection in the face of a red light, I find that no substantial miscarriage of justice has in fact occurred - see s 11(2) of Act 28 of 1981.

There was no criticism of the sentence imposed.

Accordingly I would dismiss the appeal.

Dumbutshena CJ: I agree.

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Ben Baron & Partners, appellant's legal representatives

MANICA FREIGHT SERVICES ZIMBABWE LTD v ZIMBABWE INDUSTRIAL CONSULTANCY CO (PVT) LTD 1988 (2) ZLR 239 (HC)

Court **High Court, Harare**

Gibson J

6 & 12 October 1988

Flynote

Practice and procedure - summary judgment - affidavit in support thereof - not confined to allegations contained in declaration - documents in support of statements in affidavit - may be attached to affidavit.

Headnote

In an application for summary judgment, the applicant is not limited, in his supporting affidavit, to dealing with the allegations contained in his declaration. Documentary evidence is regarded as one of the best methods of verifying the truth, and there is nothing in the Rules of the High Court which suggests that the best method of verification is prohibited on pain of having the document struck out with costs. It is therefore permissible to attach supporting documents to the affidavit in support of the application for summary judgment, even if such documents were not annexed to the original declaration.

Cases cited:

Shepstone v Shepstone 1974 (2) SA 462 (N)

Central News Agency v Cilliers 1971 (4) SA 351 (NC)

Ncqula v Muller's Book Shop 1960 (4) SA 300 (E)

Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd & Ors 1967 (1) SA 466 (D)

Kosak & Co (Pty) Ltd v Keller & Anor 1962 (1) SA 441 (W)

Venetian Blind Enterprises (Pvt) Ltd v Venture Cruises Boatel (Pvt) Ltd 1973 (1) RLR 229 (GD): 1973 (3) SA 575 (R)

Beresford Land Plan (Pvt) Ltd v Urquhart 1975 (1) RLR 260 (AD); 1975 (3) SA 619 (RAD)

GIBSON J

J Sayce for the applicant

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C Jeche for the respondent.

Judgment

Gibson J: This is an application for summary judgment for the payment of the sum of $74 883,15 together with interest and costs. The parties will be referred to as in the main action.

In his summons, the plaintiff (applicant) has averred that between October 1987 and February 1988 it undertook some clearing and forwarding operations for the defendant (respondent) at the defendant's request. The cost of these operations amounted to $90 583,15. The sum claimed is the result of a subsequent crediting of a sum of $15 700 in favour of the defendant by the plaintiff.

The defendant resists the application and argues that he has a good *prima facie* defence to the claim and that he is therefore entitled to proceed to trial. The thrust of the defence, as disclosed in the affidavit of Mr Sam Banda, the General Manager of the defendant, is that the defendant is not liable because it was only acting as an agent for a disclosed principal, the AFC. He argues, therefore, that the plaintiff should look to the AFC, rather than the defendant, for due satisfaction of its debt. The defence further argues that it has fully disclosed its defence and the facts relied upon. Counsel cites the cases of *Shepstone v Shepstone* 1974 (2) SA 462 (N) and the *Central News Agency v Cilliers* 1971 (4) SA 351 (NC). The headnote in *Ncqula v Muller's Book Shop* 1960 (4) SA 300 (E), cited by the defendant, states:

> "Where the respondent, a bookseller, had sued the appellant, who had been the principal of a secondary school, for school books supplied to him, he having received the book-fees paid by the pupils, but the evidence established that the appellant had informed the respondent that he had authority to open the account for the school committee and the respondent had opened the account on that basis.
>
> *Held*, that the appellant was not personally liable when there was evidence that he was acting as an agent for a disclosed principal."

At p 304A JENNETT AJP states:

> "The result is that the respondent has failed to prove that appellant was personally liable when there is evidence which shows *prima facie* that the appellant opened the account as agent for a disclosed principal."

GIBSON J

That is clear enough.

But in this case the matter does not rest there, because the plaintiff's case is that the provisions of Clause 12 of the Standard Trading Conditions, which form part of the agreement with the defendant entitles the plaintiff to look to the agent as well as others for satisfaction of the debt.

The general statement of law above is thus qualified in the present case. Clause 12 of the Standard Trading Conditions states:

> "The Senders, Owners, and Consignees and **their agents,** if any, shall be liable for any duty, tax, impost ... of whatsoever nature levied by the authorities at any port or place, for or in connection with the goods and for any payment, fines, expenses, loss or damage incurred by the Company. ... In all cases the account for these items ...

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shall be paid in full and no deductions shall be be made there from for any purposes whatsoever."

(My emphasis).

In his founding affidavit, Mr Sebborn, the National Executive of the plaintiff's company, states that the plaintiff's claim is payable without deduction and that the plaintiff is entitled to recover from the defendant on grounds of commercial practice and common sense.

The plaintiff claims that in any event this defence has not been raised until now; and that in any event the defence is contradicted by the letters written at the time: see Annexure B, in which the defendant clearly acknowledged the debt it undertook to pay.

In his submissions, Mr *Jeche*, for the defendant, argued that it is established law, that, in applications of this nature, judgment can only be granted upon allegations contained in the summons and that all annexures in the affidavit of Mr Sebborn have therefore no relevance in this application. He argued that the contract and other annexures to the applicant's affidavit must be struck out as being irrelevant. He cites, among others, the case of *Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd & Ors* 1967 (1) SA 466 (D). In this case, in an application for summary judgment, documents were attached to the affidavit in support of the application, but were not referred to in the affidavit, in breach of the Rule that required liquid documents to be attached to the affidavit in support of an application for summary judgment. This is what

GIBSON J

MILNE P said at p 468:

> "I am persuaded that the application must be refused for want of compliance ... with Rule (32) ... The documents of 1st April, 1964 ought to have been identified in the affidavit made by ... being those upon which the plaintiff founded his case."

This decision is clearly distinguishable and does not therefore apply on the present facts.

The other case cited is one of this Court, *Venetian Blind Enterprises (Pvt) Ltd v Venture Cruises Boatel (Pvt) Ltd* 1973 (1) RLR 229; 1973 (3) SA 575 (R). The headnote sets out the facts as follows:

> "In an application for summary judgment for an amount alleged to be due under a written contract the Defendant in its affidavit denied the existence of a valid agreement. In reply the Plaintiff annexed to its affidavit a letter from the Defendant in which it sought cancellation of a binding contract.
>
> *Held*: As the letter was not relevant to the proceedings, that it could not be considered in deciding whether the Defence alleged was *bona fide*. Summary judgment was refused."

But perhaps GOLDIN J's view, that the letter ought to be struck out as irrelevant, may have been largely influenced by the fact that the letter was produced to discredit the writer's denial of the existence of the contract.

I note that the learned Judge purported to follow the reasoning in some of the cases which were considered and rejected in the case of *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) RLR 260, in particular, *Kosak & Co (Pty) Ltd v Keller & Anor* 1962 (1) SA 441 (W). I think he makes it

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clear (at p 577) that his major concern was the fear that the nature of the proceedings for summary judgment should not be saddled with a "decision concerning credibility which has to be reached on conflicting evidence ..." Therefore, the Judge held, an affidavit containing evidence, whether in detail or not, will lead to that evidence being struck out. This decision has been overruled by the *Beresford* case. I therefore follow the view of MACDONALD ACJ (as he then was) and LEWIS AJP (as he then was) at p 275 of the *Beresford* case *supra,* that -

GIBSON J

> "I regret that the decision of GALGUT J in *Kosak & Co supra* ... must not be taken as correctly reflecting the practice to be followed in Rhodesia in proceedings for summary judgment. In our Courts the English decisions must be regarded as a correct statement of the practice to be followed."

Mr *Jeche's* contention that the *Beresford* case is irrelevant in this case is not tenable. The argument that the decision was concerned with interpreting the Rules regulating applications for summary judgment in the Magistrates Court is right in part, but this submission overlooks the fact that the principle laid in *Beresford* case was a broad statement of policy, governing the construction of a phrase which occurs in the Rules under consideration. The Rule under consideration in the *Beresford* case is contained in Order 14 Rule 2 which states in part -

> "... a copy of an affidavit, made by himself or by any other person who can swear positively to the facts -
>
> (i) verifying the cause of action ...;
>
> (ii) and stating that in his belief there is no *bona fide* defence to the action ..."

This rather prolix language is put more succintly in Rule 64 of the High Court Rules, the Rule under scrutiny:

> "... the plaintiff on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed if any, and stating that in his belief there is no *bona fide* defence to the action ..."

These two Rules carry much the same meaning, so the interpretation put on the words in the *Beresford* case is equally applicable to the words of Rule 64. The opinion expressed conveys a general statement as to the meaning. The remarks of MACDONALD ACJ in the *Beresford* case *supra* at p 268, explain the sense behind the construction:

> "In a large number of cases it would indeed be sufficient for the plaintiff to do no more that refer to the facts alleged in the declaration or particulars to the summons (this will often be the position where the declaration or particulars to the summons have been amplified by further particulars). But it is possible to think of cases where it is most desirable for the plaintiff, in his pursuit of summary judgment, to swear to the truth of the facts other than those alleged in the declaration or particulars to the

GIBSON J

> summons. A simple example which occurs commonly in practice will illustrate this: The plaintiff in his declaration may, for example, rely upon a written contract and may or may not annex a copy of it to his declaration. Whether or not he does so, he is unquestionably entitled, in verifying his cause of action, to annex to his affidavit the

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> original contract. No better way of verifying an essential element of the cause of action exists. There is certainly nothing in the wording of the Rule which suggests that the best method of verification is prohibited on pain of having the annexure struck out with costs. Nor is it possible to think of any reason why the Rule should contain such a prohibition. Primary evidence in the form of a document is, for obvious reasons, regarded as one of the best methods of verifying the truth ..."

Lower down at p 269 the learned Judge explains himself further and says:

> "These remarks accord with common sense and make it quite clear that a written acknowledgement of the debt claimed 'or anything else to show that the defence is for mere purposes of delay' far from being inadmissible, constitute a very important part of the plaintiff's application."

Accordingly, I reject the respondent's argument that paras 4-5 of Mr Sebborn's affidavit be struck out together with Annexures A-D attached thereto. I think that allowing these annexures to stand is to enable the Court to have positive proof, beyond doubt, of the plaintiff's view or opinion that the defendant has no valid defence in law, which is not inherently and seriously unconvincing. Annexure A was the letter of demand, and B the defendant's reply in which the defendant acknowledged the debt. These documents furnish proof from which I can safely infer that the position taken by the respondent today is merely put forward for delay. The attachment of these documents lends greater weight to the plaintiff's deposition in the affidavit. It is powerful corroboration of the plaintiff's say-so. Regarding Annexure C, the Standard Conditions of Trading attached to the contract, Rule 64 allows the applicant to swear an affidavit which verifies the cause of action and the amount claimed. It is difficult to conceive of any better way of verifying the cause of action or the amount claimed than by furnishing documentary proof thereof.

Annexure C clearly gives the plaintiff the entitlement to choose the party to proceed against, whether the consignee, the owner or any agent or either. This provision in the Annexure C deals very firmly with the defendant's technical plea that as agent of a disclosed principle, he is not liable.

GIBSON J

Accordingly I have no doubt in dismissing the claim to strike out the paragraphs referred to above.

I therefore grant summary judgment in the sum prayed with costs.

Chirunda, Chihambakwe & Partners, applicant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

ROYDEN FARMS (PVT) LTD v LEVY 1988 (2) ZLR 246 (HC)

Court **High Court, Harare**

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Reynolds J

Application for interdict

6 & 12 October 1988

Flynote

Costs - dispute of fact on merits of case - true facts not ascertainable on papers - unnecessary to determine issues to conclude case - no order made as to costs.

Headnote

Where there is a dispute as to the merits of an action but, although it is not possible to ascertain the true facts on the papers, the case can be settled without determining which of the parties is right, it is appropriate for the Court to make no order as to the costs.

Cases cited:

Painter v Strauss 1951 (3) SA 307 (O)

Marona v Blackbeard (1904) 21 SC 436

Setlogelo v Setlogelo 1914 AD 221

Browne and Whitehead v Lewis (1916) 115 LT 913

Read v SA Medical & Dental Council 1949 (3) SA 997 (T)

Bedeaux v McChesney 1939 WLD 128

J Sayce for the applicant

J B Colegrave for the respondent

Judgment

Reynolds J: A dispute arose between the parties as to the right of the respondent to occupy a portion of a farm leased to the applicant. At the commencement of the hearing, Mr *Sayce*, for the applicant, stated that the respondent had vacated the area in question, and all that remained in issue was the question of legal costs. During the course of his address, however,

REYNOLDS J

Mr *Sayce* decided to persist in the original application for an interdict after all. This stance has the effect of resurrecting the respondent's claim that the respondent was acting as a director of a company, and that he has, therefore, been incorrectly cited in his personal capacity.

In my view both these issues may be disposed of in short order. In regard to the capacity in which the respondent was acting, the applicant has stated that the respondent in person had given instructions for the area in question to be fenced off, and had at no time indicated that he

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was acting in any capacity other than a personal one. As far as he was concerned there was nothing to suggest that the respondent was a director in any company at all. This assertion is denied by the respondent who has stated that it was known that he was acting as representative of the company concerned. I would agree with Mr *Sayce* in this respect that it is immaterial whether the respondent acted in a personal or a representative capacity: he is liable personally in either event. See *Painter v Strauss* 1951 (3) SA 307 (O) at 317G: *Marona v Blackbeard* (1904) 21 SC 436. He has accordingly, been correctly cited.

regard to the application for an interdict, the prerequisites for the granting of a final order are well known. These essentials were succintly stated by INNES JA (as he then was) in *Setlogelo v Setlogelo* 1914 AD 221 at 227 to be -

> "... a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

For an interdict to be granted in regard to future actions, it is obvious that the injury complained of must be continuing or be likely to be continued.

In the present matter the respondent has vacated the property, and has given the assurance that he will not enter upon it lawfully again during the subsistence of the applicant's lease. There is no reason to doubt the respondent's *bona fides* in this respect, and in these circumstances I do not consider that the applicant may "reasonably apprehend" a repetition of the events that led to him bringing this action. The application for an interdict against the respondent is, accordingly, dismissed.

The only matter remaining for consideration is that of the costs of the application. There is a dispute of fact as to the merits of the application. It is not possible to ascertain the true facts on the papers. There is authority for the proposition that, in this event, the Court has a discretion to direct that there

REYNOLDS J

be no order as to costs. In *Browne & Whitehead v Lewis* (1916) 115 LT 913, SCRUTTON LJ said:

> "It was agreed that the Judge who has decided that a claim succeeds or fails on a particular ground cannot be required to go on an determine other alleged grounds merely in order to settle the liability for costs. And if he need not determine the issues, I think that the fact that he has not determined them is a ground on which he may refuse to make any order by which one side or the other bears the costs of those issues. It is not necessary to decide whether he has power to make any such order as to the costs of the issues which he has not decided; it is enough to say, as I have come to the conclusion, that the facts of his not having decided them and not knowing which side is right as to them is sufficient ground for his refusing to make an order as to them, leaving each side to bear them."

See, too, *Read v SA Medical & Dental Council* 1949 (3) SA 997 at 1027; *Bedeaux v McChesney* 1939 WLD 128 at 132.

I would, with respect, agree with that course of action. In the result, and in addition to the

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orders already made, there will be no order as to costs.

Kantor & Immerman, applicant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

S v NDEBELE 1988 (2) ZLR 249 (HC)

Court **High Court, Bulawayo**

Muchechetere J

Criminal review

14 October 1988

Flynote

Criminal procedure - courts - record of proceedings - requirement to keep full and comprehensive record - effect of failure to do so - amendment of record - effect of informal amendments - prosecutor - duties of - concessions by - impropriety of accepting unjustified or unsupportable allegations by defence.

Criminal procedure (sentence) - road traffic cases - previous convictions over ten years old - not to be ignored - all convictions to be taken into account had disregarded only after judicious examination.

Headnote

All courts are courts of record and are required to keep full and comprehensive records of all proceedings. Failure to do so amounts to gross irregularity. In addition, ss 163(4), 190 and 255(3) of the Criminal Procedure and Evidence Act [*Chapter 59*] specifically require a magistrate to record the matters there mentioned. The need to keep a record is obvious: in the absence of such a record, how is a review or appellate tribunal to assess the correctness and validity of any proceedings placed before it? There also exists a prohibition against correction or reconstruction of the record, except in accordance with defined rules and only in exceptional cases.

Although a prosecutor is *dominus litis,* he is not entitled thereby to accept as evidence allegations which are unjustified or unsupported by the probabilities or other evidence. Like a magistrate, he is required to bring his mind to bear on the case before him and to exercise his discretion within the framework of his role and the law. He is not entitled to make

concessions merely to get rid of a case. On the question of evidence in mitigation, he is required to adopt the same stance; he cannot stand passively by and let the accused present a one-sided picture. To do so is a failure to discharge his duties correctly.

Where an accused person pleads guilty before a magistrate and the prosecutor accepts the

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plea, it is the magistrate's duty to determine which of paras (a) or (b) of s 255(2) of the Criminal Procedure and Evidence Act is the more appropriate procedure to adopt. The prosecutor may oust that discretion by categorically and unequivocably electing to proceed on a certain charge, but the view that the magistrate is an automated slot machine, designed to dispense a required item at the request of the State or the defence, is patently wrong.

A note of caution should be sounded against the mechanical application by sentencing authorities of the practice, in road traffic cases, of disregarding convictions ten or more years old. Sections 45(4) and 46(4) of the Road Traffic Act 1976 require a court convicting any person of contravening those sections to take into account any previous convictions for the same or similar offences committed at any time within the previous ten years, while ss 54 and 55 entitle a court to take into account any previous convictions in respect of any offence under the Act. Having regard to those provisions and the interests that the legislature seeks to safeguard through the enforcement of the Road Traffic Act, all previous convictions, regardless of their age, which are connected with the driving of motor vehicles, are to be taken into account and should be disregarded only after a judicious examination had a judicial appreciation of their relevance.

Cases cited:

S v Besser 1968 (1) SA 377 (SWA)

S v K 1974 (3) SA 857 (C)

R v Khumalo 1947 (4) SA 156 (N)

R v Sikumba 1955 (3) SA 125 (E)

S v Maxaku 1973 (4) SA 248 (C)

Pheiffer v Landdros, Warrenton 1977 (4) SA 127 (N)

R v Parmanand 1954 (3) SA 833 (A)

R v Neto 1965 RLR 656 (AD)

S v Mavuma 1964 (1) SA 369 (N)

S v Brandt 1972 (4) SA 70 (NC)

S v Booi 1972 (4) SA 68 (NC)

S v Mtetwa & Ors 1964 (4) SA 528 (N)

S v Mkize 1962 (2) SA 457 (N)

MUCHECHETERE J

Ex p *Magade*: in re *R v Magade* 1948 (1) SA 109 (E)

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S v Daniel HH-467-83 (unreported)

S v Tladi 1978 (2) SA 476 (O)

R v Cowan 1969 (2) RLR 18 (GD); 1969 (2) SA 581 (R)

S v Powell 1981 ZLR 508 (SC)

S v Njaba 1966 (3) SA 140 (A)

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

S v Mpofu 1983 (2) ZLR 118 (HC)

S v Chakanetsa 1981 ZLR 48 (AD); 1981 (1) SA 876 (ZA)

S v Fusirayi 1981 ZLR 56 (AD); 1981 (2) SA 634 (ZA)

S v Gora GS-277-81 (unreported)

S v Smith 1971 (4) SA 419 (T)

S v Wall 1981 ZLR 261 (GD)

S v Zishumba 1983 (1) ZLR 10 (HC)

S v Mabhurukwa HH-258-82 (unreported)

R v Evans 1924 CPD 232

R v Hepworth 1928 AD 265

S v Chingwana & Ors 1976 (1) RLR 349 (AD); 1976 (4) SA 26 RA)

Judgment

Muchechetere J: This matter was forwarded for review with comments by the scrutinising Regional Magistrate, raising various issues which are dealt with in the judgment. I referred the matter to the Attorney-General and his views support conclusions I have arrived at.

The accused in this case was charged with, and he pleaded guilty to, driving along a road whilst he was intoxicated to the extent of being incapable of exercising proper control of his vehicle. It appears that on 10 October 1985 at about 8.30 pm he was driving along Third Avenue Extension, Bulawayo, when suddenly without any reason to do so, he veered off the road and collided with a tree. As a result of the impact, the front left fender of his vehicle was ripped off, the windscreen shattered and the nearside rear wheel deflated. Police attending the scene found it impossible to communicate with the accused who was suspected of being drunk. Blood samples were obtained and submitted for analysis. They were found to contain 88 mg of ethyl alcohol per 100 ml of blood.

It is not clear at what time in relation to the accident the sample were taken for analysis.

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On these facts the accused was arraigned and required to plead to a charge of contravening s 46(1) of the Road Traffic Act No. 48 of 1976.

MUCHECHETERE J

What actually transpired in the court below is far from clear as the record of proceedings is garbled and rife with inconsistencies. The various components of that record will be quoted to indicate the extent of the irregularities contained therein.

(a) INDICTMENT

The charge alleges quite clearly that the accused wrongfully and unlawfully drove a motor vehicle whilst being so intoxicated as to be unable to properly control it.

In the appropriate section of the charge sheet the following appears:

> "The prisoner being arraigned, pleaded
> G. 255(2)(a)
>
> Judgment - Guilty (deleted)
> Not guilty under s 46(1)
> Road Traffic Act, but guilty
> S 45(1) Road Traffic Act.
>
> Sentence - $100 or i/d 25 days iwl."

(Emphasis supplied.)

The record implies in no uncertain terms that the accused pleaded guilty to driving whilst being incapacitated to the extent of being incapable of exercising proper control; and the court then elected to deal with the matter in terms of s 255(2)(a) of the Criminal Procedure and Evidence Act [*Chapter 59*] (hereinafter referred to as "the Code").

At some point, the magistrate felt obliged to acquit him of the charge to which he had pleaded and convicted him of the lesser charge of contravening s 45(1).

(b) RECORD OF PROCEEDINGS

These long-hand and, presumably, contemporaneous notes of the magistrate suggest that the charge was put to the accused who pleaded **not guilty to contravening s 46(1) and guilty to s 45(1).**

The magistrate immediately opted to proceed in terms on s 255(2)(b) of the Code. The prosecutor at this point accepted the plea to the lesser charge. The facts, recounted at the opening of this judgment, were put to the accused who accepted them without demur. The elements of the charge - presumably,

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s 45(1) - were put to the accused who understood and admitted them all. In particular he admitted that he veered off the road and caused the damage alleged; that he was under the influence of alcohol or drugs; that he was unable to advance any defence or to otherwise mitigate his conduct.

At this stage the magistrate enquired from the prosecutor whether s 46(1) of s 45(1) was the more appropriate charge. In the light of what earlier went on this question is strikingly incongruous. The prosecutor, however, intimated that the facts and the blood analysis report supported the latter charge. This alleged concession too is decidedly inappropriate as the facts and accused's admissions suggest the contrary.

(c) JUDGMENT

The record of the magistrate's reasons for judgment serve only to confound an already confusing matter. The reasons are as follows:

> "The accused is charged with ... contravening **s 46(1)** ... **He has pleaded to the charge ... The State** proceeded under s 255(2)(b) of the Code. The essential elements were put to the accused ... [and he] admitted them. I am satisfied that the accused pleaded correctly. He is found **not guilty of contravening s 46(1) but guilty of contravening s 45(1)"**

(Emphasis supplied).

(d) SENTENCE

In his reasons for sentence the magistrate found, in accused's favour, that the accident was not due to the accused's intoxicated state, without stating any other cause for the accident.

He went on to say that the accused's behaviour was not that of a "man who did not know what he was doing". That is hardly a point essential to a determination of moral blameworthiness for a contravention of either s 46(1) or s 45(1). It is also at odds with the facts admitted by accused.

He went on further to find that accused had actually gone forward to the police to report the matter. The correctness of this claim is in doubt in the light of the agreed facts; and in any event, there is hardly anything mitigatory in the accused complying with the provisions of s 64 of the Act with which it was his **duty** to comply.

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In aggravation, he found that the offence was clearly a prevalent one and he accordingly imposed what he was pleased to term a "stiff penalty" of a fine of $100.

It is also to be noted that although all these proceedings took place at one time, the magistrate found it necessary to use three pens at least; judging from the different shades of ink evidence in the record. The scrutinising Regional Magistrate also found that certain amendments were effected **after** he had referred the record back to the trial court for comment.

All courts are courts of record and are required to keep full and comprehensive records of all proceedings. The proposition is self-evident and accords with reason and justice. In *S v Besser*

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1968 (1) SA 377 (SWA), the court held that a failure to keep a proper record of any proceedings or any part thereof amounted to a gross irregularity cognisable under the court's powers of review as envisaged in provisions such as s 27 (1) (c) of the High Court Act No. 29 of 1981. In addition s 163(4), 190 and 255(3) of the Code compel him to record those matters mentioned in them.

See also: *S v K* 1974 (3) SA 857 (C); *R v Khumalo* 1947 (4) SA 156 (N); *R v Sikumba* 1955 (3) SA 125 (E) at 128; *S v Maxaku* 1973 (4) SA 248 (C); *Pheiffer v Landdros, Warrenton* 1977 (4) SA 127; *R v Parmanand* 1954 (3) SA 833 (A); and *R v Neto* 1965 RLR 656.

The need to do is quite obvious. In the absence of such a record how is a review or appellate tribunal to assess the correctness and validity of any proceedings placed before it for adjudication? The instant case is an eloquent expression of the importance of such a rule and the necessity for strict compliance therewith.

The rationale for the rules prohibiting review and appellate tribunals from having recourse to matters extraneous to the actual record becomes clear, as does the prohibition against the correction, and reconstruction of records except in accordance with defined rules and in only exceptional cases. See *S v Mavuma* 1964 (1) SA 369 (N); *S v Brandt* 1972 (4) SA 70 (NC); *S v Booi* 1972 (4) SA 68 (NC); *S v Mtetwa & Ors* 1964 (4) SA 29 (N); *S v K supra*; *S v Mkize* 1962 (2) SA 457 (N); Ex p *Magade*: in re *R v Magade* 1948 (1)SA 109 (E).

The contradictory and inconsistent record of what allegedly transpired in the court below amounts in the view of this court to a gross irregularity and the

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proceedings cannot therefore be regarded as according with real and substantial justice.

There is, however, sufficient material before the court to enable it to conclude without prejudice to the accused that he was at least guilty of the offence for which he was ultimately convicted. The proceedings in that respect are accordingly confirmed. See *S v Daniel* HH-467-83; *S v Tladi* 1978 (2) SA 476 (O); 1969 (2) ZLR 18; *R v Cowan* 1969 (2) SA 581 (R); *S v Powell* 1981 ZLR 508 (SC).

The sentence is plainly inadequate, based as it is on numerous misdirections by the magistrate in his assessment of the relevant factors. It is to be noted that in assessing sentence the trial magistrate specifically ignored the accused's previous convictions because of their age.

This court feels constrained to sound a note of caution against the mechanical applications of the rule adopted and applied by all sentencing authorities in respect of the previous convictions of persons appearing before them where these convictions are approximately ten or more years old. Sections 45(4) and 46(4) of the Road Traffic Act require a court convicting any person of contravening any of those sections to take into account any previous convictions for the same or similar offences committed at any time within the ten years preceding the second or third conviction, and to impose lengthier terms of prohibition from driving. Sections 54 and 55 of the Act also entitle a court, in appropriate cases, to take into account any previous convictions in

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respect of any offence in terms of the Act or any other law which is connected with the driving of a motor vehicle on any road, and to prohibit the person convicted by it of a later offence from driving for certain periods.

Having regard to these provisions and the interests that the legislature seeks to safeguard through the enforcement of the Road Traffic Act, the court holds that all previous convictions, regardless of their age which are connected with the driving of motor vehicles, are to be taken into account and disregarded only after a judicious examination and a judicial appreciation of their relevance.

For that reason too, the proceedings cannot be confirmed as according with the real and substantial justice. Since the prosecutor in this matter bears to some extent the responsibility for the unfortunate chain of events, and in view of his failure to call for the rectification of the obvious errors in the proceedings, this court cannot bring this case within the principles which

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justify remittal to the court a quo for the proceedings to be dealt with afresh. See *S v K supra* at 859; *S v Njaba* 1966 (3) SA 140 (A); *S v de Jager* 1965 (2) SA 612 (A).

In addition, s 29(2)(b)(ii) of the High Court Act does not permit the imposition of a penalty sentence which is more severe than that which is set aside.

In addition to these irregularities, the magistrate clearly misconceived the scope of his functions and the matters placed before him for adjudication. He appears to have been totally confused in relation to what charge was being put to the accused; what was being admitted by the accused; what procedures he was required to adopt, and what factors he was required to take into account. The prosecutor in his turn, appears to have been equally misinformed on these matters.

It is true that a prosecutor is *dominus litis* in respect of the conduct of the proceedings up to the stage when the accused pleads. But he is not entitled thereby to accept as evidence facts which are unjustified or unsupported by the probabilities or other evidence. He, too, is required to bring his mind to bear on the case before him and to exercise his discretion within the framework of his role and the law. He cannot make concessions merely for the purpose of getting rid of a case. See *S v Mpofu* 1983 (2) ZLR 118; *S v Chakanetsa* 1981 ZLR 48; 1981 (1) SA 876 (ZA); and *S v Fusirayi* 1981 ZLR 56; 1981 (2) SA 634 (ZA).

On the question of evidence in mitigation too, he is required to adopt the same stance: he cannot stand passively by and let accused present a one-sided picture. See *S v Gora* GS-277-81; *S v Fusirayi supra*; and *S v Smith* 1971 (4) SA 419 (T).

In the instant case the prosecutor fell far short of discharging his duties adequately.

The magistrate stated in his judgment and in a letter later directed to the scrutinising Regional Magistrate that, since the State accepted the plea and since the State elected to proceed in terms of s 255(2)(b), he felt obliged to accept and adopt that approach. At the outset it must be

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stated that that view is wrong on two counts: firstly, the record does not corroborate the magistrate completely and, secondly, the weight of authority is decidedly against the magistrate.

MUCHECHETERE J

It is always the magistrate's duty to determine whether para (a) or (b) of s 255(2) is the more appropriate procedure to adopt. See *S v Wall* 1981 ZLR 261; *S v Zishumba* 1983 (1) ZLR 10; *S v Mabhurukwa* HH-258-82.

In both *Fusirayi's* case and *Powell's* case, there are *dicta* to the effect that a magistrate is entitled always to inform the accused or his representatives and the prosecutor that he is unable to accept the facts advanced and to require that they be proved. The prosecutor may oust that discretion by categorically and unequivocally electing to proceed on a certain charge, but the view that the magistrate is an automated slot machine, designed simply to dispense the required item at the request of the State or defence, is patently incorrect. See *R v Evans* 1924 CPD 232; *R v Hepworth* 1928 AD 265 at 267; *S v Chingwana & Ors* 1976 (1)RLR 349; 1976 (4) SA 26 (RA).

It is axiomatic that a judicial officer's functions encompass, not only the duty to ensure that the innocent do not get convicted but also the duty to ensure that the guilty do not escape by reason of irregularities, oversights and mistakes in the conduct of the proceedings.

In the instant case not only did the trial magistrate fail to do justice, he has candidly admitted that he failed to do so.

In all circumstances whilst confirming the conviction, I, for the reasons already given, decline to certify the proceedings as being in accordance with real and substantial justice.

Sansole J agrees.

TENGENDE v REGISTRAR OF COMPANIES 1988 (2) ZLR 258 (SC)

Court **Supreme Court, Harare**

Gubbay JA, Manyarara JA & Korsah JA

Civil appeal

18 October 1988

Flynote

Company law - directors - disqualification for appointment as - person with criminal record applying for leave for appointment as director - applicant shown to have been dishonest in application for firearms licence - relevance of.

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Headnote

The appellant had applied to the High Court for leave to be appointed as a director of companies. His petition was necessary, because by virtue of a conviction for theft, for which he had been sentenced to five years' imprisonment, he was disqualified by s 150(1)(d) of the Companies Act [*Chapter 190*] from being appointed a director without the leave of the court. He claimed that since his release from prison he had conducted himself in a law-abiding manner, and produced affidavits from business colleagues to that effect. However, it was also shown that after his release from prison he had applied for a firearms licence. In answer to the unambiguous question on the application form, "Have you ever been convicted of any offence (YES/NO)?", he had written "foreign currency", an allusion to a conviction under the Exchange Control Regulations. He had failed to mention his conviction for theft or his three convictions for assault. The application for appointment as a director was dismissed and the appellant appealed to the Supreme Court.

Held, that the object of s 150(1)(d) of the Companies Act is that, for the protection of shareholders and the public generally, the management of companies should not be in the hands of unscrupulous or disreputable men. A conviction for theft is at least *prima facie* evidence that the person concerned is of such a nature. Before granting an application, the

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court must, in the end, be satisfied that the applicant has rehabilitated himself, in the sense that he is worthy of trust in carrying out the functions which he is seeking to undertake.

Held, further, that to lie, as the appellant had done, in an application for the exercise of a discretion in one's favour effectively contradicted all protestations of honesty by him and his assertions of respectability, and created a great deal of doubt that he could be trusted with the honest management of a company.

Cases cited:

Ex p *Boland* 1967 RLR 170 (GD); 1967 (3) SA 655 (R)

Ex p *Richman* 1965 RLR 489; 1966 (1) SA 84 (R)

Ex p *Rosen* 1969 (1) RLR 154 (GD)

Ex p *K* 1971 (4) SA 289 (D)

Ex p *Barron* 1977 (3) SA 1099 (C)

R M Fitches, for the appellant

E Chatikobo, for the respondent

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Judgment

Manyarara JA: On 2 March 1988 the High Court (GIBSON J) dismissed the appellant's petition for leave to be appointed a director of companies in terms of the Companies Act [*Chapter 190*]. His appeal to this Court failed.

The petition was necessitated by s 150(1)(d) of the Act, which disqualifies from being appointed a director of a company without the leave of the court -

> "... any person who has at any time been convicted (whether in Zimbabwe or elsewhere) of theft, fraud, forgery or uttering a forged document or perjury and has been sentenced therefor to serve a term of imprisonment without the option of a fine or to a fine exceeding one hundred dollars;"

The appellant's record was this:

February 1972:	1.	Four months' imprisonment with hard labour for assault with intent to do grievous bodily harm.
	2.	$40 or one month's imprisonment for making a false report to the police, contrary to the Miscellaneous Offences Act 1964.

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December 1979:	$10 for common assault.
June 1981	Theft (2 counts) - 5 years' imprisonment with labour.
July 1981	$30 or ten days' imprisonment with labour for assault.
July 1982	$1000 or six months' imprisonment with labour for "selling foreign currency", contrary to the Exchange Control Act [*Chapter 170*] and the Regulations made thereunder.

The relevant averments contained in the founding affidavit were these: -

> "That your Petitioner in July 1982 (the precise date he cannot recall) was convicted by this Honourable Court on two counts of theft and sentenced to 5 years' imprisonment with labour.
>
> That notwithstanding the fact that your Petitioner was unsuccessful in his appeal against conviction and sentence, and in his Petitions to the Honourable President of Zimbabwe, your Petitioner still maintains that he was innocent of the offences for which he was sentenced.
>
> That upon his release and because of certain resources still available to your Petitioner, your Petitioner pursued certain business interests shortly after which the interests in question came to an end.

That the companies formed were:

(a) The Bag Centre (Pvt) Ltd;

(b) Varimi Agricultural Supplies (Pvt) Ltd; and

(c) National Stationers and Supplies (Pvt) Ltd.

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That your Petitioner was ignorant, although he appreciates this does not constitute an excuse, of the provisions of s 150(1)(d) of the Companies Act [*Chapter 190*], as read with s 150 (3) of that Act. It was only when the Officer Commanding Fraud Squad required your Petitioner to attend upon his offices to explain his conduct that your Petitioner became aware that he was in breach of the provisions of the Companies Act aforesaid.

That upon learning of this your Petitioner consulted his Legal Practitioners who were instructed to write immediately to the Secretaries of the Company requesting that he was immediately removed as a Director

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from the Companies aforesaid by virtue of the provisions of the Companies Act aforesaid."

The appellant prayed for the relief he claimed on the following ground:

"That your Petitioner has since his release from prison conducted himself in a respectable and orderly manner and annexes hereto affidavits from the Secretary of the Companies namely, Stewart Harley Rodger and one of the persons with whom your Petitioner is now in business, namely, Nigel Butler, both of whom confirm that in their opinion your Petitioner is a fit and proper person to be appointed the Director of a company, and that in his dealings with the company has conducted himself to-date in a responsible and businesslike manner. The affidavits are marked 'A' and 'B', respectively."

The appellant verified on oath that the facts contained in his founding affidavit were to the best of his knowledge and belief true and correct.

It was the convictions for the crimes of violence which led to the disclosure of the appellant's full background by an unsuspected source.

In June 1987 the appellant had applied for a firearms certificate. A copy of the application form which he had completed is annexed to the affidavit of the Controller of Firearms. The unambiguous question asked at p 3 of the form is: "Have you ever been convicted of any offence (YES/NO)? If yes, supply details of the offence/s and sentence/s".

The vague reply given by the appellant to that question was simply "Foreign Currency", with no mention of any sentence having been imposed on him for the offence. That portion of the form is followed immediately by a declaration signed by the appellant to the effect that the statements he made on the form "are true and correct".

Accompanying the firearms application was a letter from Mr Butler, one of the deponents to the affidavits filed in support of the present petition to the High Court, in which the appellant was referred to as a director of one of the companies mentioned in the founding affidavit.

The upshot is summarized by the learned judge *a quo* as follows:

"The Assistant Commissioner (of Police) as Controller of Firearms

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received the letter and noted that the Applicant had only disclosed one of his previous convictions, namely a conviction for the contravention of the Exchange Control Regulations, omitting to mention all the other convictions. Assistant Commissioner Mureverwi referred the matter to the Registrar of Companies, who in turn referred the

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matter to the Fraud Squad for an investigation of a contravention of the provisions of s 150(1)(d) of the Companies Act. Assistant Commissioner Mureverwi, the deponent, intervened, following the publication of a *rule nisi* in terms of this Petition on 30 October 1987. In two reports filed before the Court the Registrar of Companies confirms that part of the Assistant Commissioner's report in which he became involved and asks that the statutory bar against the Petitioner should not be lifted."

The die was cast. The appellant then made a clean breast of his record in his answering affidavit. But by then irreparable harm had been done to his case. The learned judge correctly attached great weight to Mr Mureverwi's affidavit, which reads in part as follows:

"I submit that public policy so far as it relates to who should or should not be entitled to become company director is quite clear - persons whose backgrounds are littered with dishonesty and other unlawful conduct are disqualified from holding office in companies except with the leave of the Court. I am of the view that in arriving at a decision as to whether one should be granted leave, as is the case before this Honourable Court, the Court has to seriously consider what harm the petitioner would cause to the man in the street, to the business fraternity, to the image of Zimbabwe in the eyes of the international business community (with whom petitioner would obviously do business) and above all to the national interest. I do not consider it in the interest of the nation or anybody for that matter, to allow persons of petitioner's background to be appointed directors of companies."

The appellant was hard put to give any convincing reply to those shattering averments. He said he had omitted "the assault matters" from his firearms application because they were "trivial"; that he believed he was likely to be prosecuted for contravening the Companies Act but that according to him it was only the convictions of dishonesty which were relevant to his petition.

It must be self-evident that a disposition to violent behaviour is highly relevant to an application for a gun licence. By the same token, to lie in any application for the exercise of a discretion in one's favour effectively

contradicts all protestations of honesty by the applicant. A court's approach to an application for the lifting of a statutory bar to the appointment of an applicant as a director is an exception, as a perusal of the authorities cited by Mr *Fitches* and Mr *Chatikobo* in their written heads of argument will already show. It suffices to refer only to Ex p *Boland* 1967 RLR 170, the headnote to which says:

"The object of s 144(1)(d) [now s 150(1)(d) of Chapter 190] is that the management of companies should not be in the hands of unscrupulous or disreputable men, and a conviction within the terms of that subsection is to be regarded as at least *prima facie* evidence that the person concerned is of such a nature. But in determining the issue the facts must be regarded as a whole, and no limited formula can necessarily be decisive. Exceptional circumstances may sometimes play an important part. Similarly, the possible consequences to shareholders and the public generally must be kept in view. But in the end the question must be whether in all the circumstances the applicant has satisfied the court that he has rehabilitated himself in the sense that he is worthy of trust in carrying out the functions which he is seeking permission to undertake. The exercise of judicial discretion is a far-roving inquiry in the fields of law and morality; but ultimately it boils down to the exercise of what has been called judicial common-sense.

Ex p *Richman* 1965 RLR 489; 1966 (1) SA 84 (SR) (folld)."

See also any of the following: Ex p *Rosen* 1969 (1) RLR 154 (GD); Ex p *K* 1971 (4) SA 289 (D);

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Ex p *Barron* 1977 (3) SA 1099 (C).

The finding of the learned judge *a quo* is in complete harmony with the above authorities and is amply justified by the facts disclosed by the papers. That finding reads as follows:

> "This apparent lack of candour appears to contradict the Petitioner's assertion that he is now a reformed man, and respectable character. Although this lack of frankness is not in itself a disqualifying act in terms of Chapter 190, it is nevertheless a valid factor to use in measuring up the Petitioner's morals against the very high expectations of the Companies Act.
>
> In my view what must be scrutinised herein is the applicant's whole character, whether it can be said that his word is his bond. In this regard

MANYARARA JA

> the Petitioner's obvious lack of candour, or tendency to deceive, casts a great deal of doubt on whether he is a truly reformed character, one to be trusted with the honest management of a company.
>
> For all the above reasons the petition is dismissed."

This Court was satisfied that no reasonable court could have come to any other conclusion in this matter, and the appeal against the learned judge's decision was dismissed with costs.

Gubbay JA: I agree.

Korsah JA: I agree.

Scott & Associates, appellant's legal representatives

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

ELECTRICAL & FURNITURE TRADING CO (PVT) LTD v M & N TECHNICAL SERVICES (ZIMBABWE) (PVT) LTD 1988 (2) ZLR 265 (HC)

Court **High Court, Bulawayo**

Blackie J

Civil trial

21 October 1988

Flynote

Practice and procedure - evidence - essential witness residing outside jurisdiction and refusing to return to jurisdiction to give evidence - reasonable grounds for such refusal - what are - High Court of Zimbabwe Rules 1971 - O 46 R 409 - "at any place" - meaning of - whether court may order evidence to be taken before it at a place outside Zimbabwe.

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Headnote

During the course of a trial, a witness vital to the plaintiff's case refused to attend court to give evidence. The witness resided in South Africa, though he had been resident in Zimbabwe when the contract which was the subject of the trial was negotiated. He submitted an affidavit in which he explained that he refused to return to Zimbabwe to attend court because he feared violence against him by the chief negotiator for the defendant; and that he feared that he would be unlawfully detained or interrogated by the Central Intelligence Organization following false reports made to it by the defendant's chief negotiator. He indicated that he was prepared to travel to Francistown, Botswana, to give evidence there. The plaintiff applied for the court to order the examination of the witness in terms of R 409 of the High Court of Zimbabwe Rules 1971; alternatively, it applied for the court to order the issue of a commission under R 410, with the presiding judge as the commissioner. The defendant argued that the plaintiff had not satisfied the basic requirements for the grant of an order under either Rule and that R 409 did not empower the taking of evidence outside Zimbabwe.

1988 (2) ZLR p266

BLACKIE J

Held, that R 409 allowed the court to make an order "where it [appeared] necessary for the purpose of justice". In this case, the witness' evidence appeared essential to the plaintiff's case; if the evidence were not heard and the plaintiff's case were true, there would be an injustice and a substantial loss to the plaintiff, coupled with a dishonest gain by the defendant.

Held, further, that the cumulative effect of the factors mentioned by the witness constituted a reasonable ground for him to refuse to come to Zimbabwe to give evidence.

Held, further, that while it would be artificial for the trial judge to appoint himself as commissioner under R 410, such a procedure usually relating to the appointment of a third party to act as commissioner, R 409 allowed the trial judge to hear the witness' evidence outside Zimbabwe, the words "at any place" including a place outside the jurisdiction of the court.

Cases cited:

Nxasana v Minister of Justice & Anor 1976 (3) SA 745 (D)

Tito & Ors v Waddell & Ors [1975] 3 All ER 997 (ChD)

St Edmundsbury & Ipswich Diocesan Board of Finance & Anor v Clark [1973] 2 All ER 1155 (ChD)

J B Colegrave for the plaintiff

J Sayce for the defendant

Judgment

Blackie J: The agreed issued in this case are as follows:

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1. Was there a contract between the parties entered into during or about August/September 1983 in terms of which the defendant was to act as plaintiff's agent in sale of school furniture and educational supplied to district councils and in the collection of the purchase price thereof?

2. If there was such an agreement, did plaintiff make sales of goods to district councils under the name of the defendant in accordance with such agreement?

3. If plaintiff did make such sales under the name of the defendant, has the defendant received payment from the purchases concerned?

On the second day of the trial, and before it had closed its case, plaintiff made application for the evidence of Mr Grant, one of its witnesses, to be heard

BLACKIE J

outside Zimbabwe. Mr Grant lives in South Africa and will not come to Zimbabwe to give evidence.

The application is brought in the alternative. It is made in terms of either Rule 409 or Rule 410 of the Rules of the High Court. These rules read as follows:

> "409 The court or a judge may, in any cause or matter where it appears necessary for the purposes of justice, make an order for the examination upon oath before the court or judge or an officer of the court, or any other person and at any place, of any witness or person, any may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court may direct.
>
> 410 A party desiring to have the evidence of a witness taken before a commissioner or examiner may apply to court on notice of motion to the opposite party. Such notice shall be supported by an affidavit setting forth the particular circumstances in which the application is made. Where the defendant is in default of appearance and the plaintiff desires to take evidence of any witness before a commissioner or examiner, he may apply by petition."

It is submitted that I should either adjourn the sitting of this Court to a place outside Zimbabwe, agreed to by the parties, and take Mr Grant's evidence there: alternatively, I should appoint a commission *de bene esse*, with myself as commissioner, to hear Mr Grant's evidence at the agreed place.

The defendant opposes the granting of any order to hear Mr Grant's evidence outside Zimbabwe However, the parties are agreed that, if I make an order in plaintiff's favour, then Mr Grant's evidence will be taken in Francistown, Botswana. The parties are also agreed that because the issue for which Mr Grant's evidence is required is one which will be determined, to a large extent, on credibility, it is essential that I should hear that evidence myself.

I am assured by plaintiff that if I make the order in plaintiff's favour, Mr Grant will come to Francistown to give evidence and subject himself to cross-examination.

Plaintiff's application does not comply with the form required by Rule 410. It has been made from the bar, supported by an affidavit from Mr Grant and oral evidence from a Miss Hoffman,

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assistant legal adviser to the group of

BLACKIE J

companies of which plaintiff is a member. The defendant does not object to this lack of form and, in the circumstances of this case, I see no reason why I should do so.

The defendant's objection to the plaintiff's application is that plaintiff has not satisfied the basic requirements for the grant of an order under either Rule 409 or 410 and that, in any event, Rule 409 does not empower me to adjourn this Court to a place outside Zimbabwe to hear evidence.

The court has a discretion under Rule 409 and Rule 410 to grant or refuse an application brought in terms of those rules. The discretion in Rule 409 is to be exercised "where it appears necessary in the interests of justice". Rule 410 does not expressly state the manner in which the discretion is to be exercised but the discretion must be exercised judicially and "in accordance with the recognised principles which have been evolved over the years": *Nxasana v Minister of Justice & Anor* 1976 (3) SA 745 (D) at 760 H

There is little practical difference between the standards to be applied under the rules because the South African decisions, in which the principles referred to in *Nxasana's* case *supra* have been evolved, are based on a rule of court in that country which permits the courts to grant the application "where it appears convenient or necessary for the purposes of justice": Herbstein & van Winsen *Civil Practice of the Superior Courts of SA* 3 ed p 429. The position is the same in England: *Halsbury's Laws of England* 4 ed vol 17 para 292; *St Edmundsbury and Ipswich Diocesan Board of Finance & Anor v Clark* [1973] 2 All ER 1155 (ChD).

Further, this is not the normal application for the appointment of a commission *de bene esse*. Such an application will usually be for the appointment of a third party to act as commissioner and to hear and record on paper the evidence taken. This application is essentially one for me to hear the evidence outside Zimbabwe.

As far as this application is concerned, the principles set out in the cases and to be taken into account in determining the application may be summarised as follows:

1. the applicant must supply the name of the witness to be called, the general nature of the evidence that it is proposed to lead from him and an explanation why the witness is not able to attend the court in person.

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2. The court must be satisfied that the evidence is admissible and material and will contribute appreciably to the determination of the case.

3. The discretion is to be sparingly exercised but the court is more likely to grant relief where

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the application is made in respect of a witness or the defendant rather than the plaintiff.

4. Where an application for a commission is made in the course of a trial rather than before the start of the trial, the court will scrutinise the merits of the application more closely.

5. The application will not be granted where it will cause injustice to the other party.

See Herbstein and van Winsen *op cit* pp 429 to 431, and the authorities quoted therein.

Is it "necessary for the purposes of justice" or "in accordance with the recognised principles" evolved by the courts, that I should hear the evidence of Mr Grant in Botswana?

Plaintiff has pleaded an agreement of agency. In particulars for trial, supplied at defendant's request, plaintiff states:

> "the agreement (of agency) was verbal and negotiated during the course of various meetings held at Bulawayo during or about the months of August and or September, 1983. ... the negotiations were conducted by Mr John Grant (for plaintiff) and Mr Benjamin ... Muvuti (for defendant)."

On the pleadings, the evidence of Mr Grant would appear to be essential to plaintiff's case.

Mr Grant has furnished an affidavit in which he sets out a summary of his evidence in regard to the formation of the contract of agency. It is not suggested that Mr Grant's evidence is inadmissible. However, the defendant has criticised the summary in Mr Grant's affidavit, saying that it does not altogether comply with the case pleaded by plaintiff. I do not think I have to concern myself with that detail at this stage. I need only satisfy myself that Mr Grant has placed before me sufficient to show that, if accepted, his evidence will establish an agreement of agency. On that point I am satisfied.

BLACKIE J

Miss Hoffman has given evidence as to plaintiff's attempts to establish its case other than through Mr Grant's evidence. She says that the plaintiff has been quite unable to do so. The defendant has not suggested any reason to doubt or disbelieve Miss Hoffman's evidence and, on the pleadings and evidence before me, it seems unlikely that any one other than Mr Grant can establish plaintiff's case.

In his affidavit, Mr Grant has given his reasons for refusing to come to Zimbabwe. He says that he was formerly plaintiff's managing director in Zimbabwe. He says that while he was in Zimbabwe, Mr Muvuti, on numerous occasions, threatened him with violence. On one occasion, in November, 1984, Mr Muvuti threatened him with a pistol in his hand. Mr Grant says that while he was in Zimbabwe he was questioned by the Central Intelligence Organisation. He believes this occurred as a result of a false report laid against him by Mr Muvuti. Finally, he says, in the month before this trail was due to start, he received an anonymous telephone call from Bulawayo saying it was not in his interests to come to Bulawayo to give evidence. Mr Grant says that he will not come to Zimbabwe because he fears violence against him by Mr Muvuti or

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action against him by the Central Intelligence Organisation or the police or all three.

The defendant has called Mr Muvuti to give evidence in this application. Mr Muvuti denies that he has ever threatened or assaulted Mr Grant. He denies he has ever made any report to the Central Intelligence Organisation concerning Mr Grant. He denies that he has anything to do with the anonymous telephone call received by Mr Grant.

Clearly, at this stage, I cannot resolve disputes of fact. Nor can I determine the respective reliability of Mr Grant's affidavit or Mr Muvuti's evidence. I do not think I have to do so. What I have to consider is whether the reasons given by Mr Grant for his refusal to come to Zimbabwe, might be true; if they might be true, do they constitute a reasonable ground for refusing to come to Zimbabwe; and, if they are reasonable grounds for so refusing, are they outweighed by any injustice to the defendant if I grant the order sought?

The defendant says that, regardless of the conflicts of fact between Mr Grant's affidavit and Mr Muvuti's evidence, the grounds for Mr Grant's refusal to come to Zimbabwe are insufficiently established in his affidavit and are, in themselves, insufficient for the grant of the order sought.

The defendant submits that the allegations of threats of assault are too

BLACKIE J

general: virtually no detail is given: no mention is made of reporting these threats of violence to the police: no reason is give for suggesting that the questioning by the Central Intelligence Organisation and the anonymous telephone call are connected with Mr Muvuti.

The defendant goes further. I have been referred to the evidence of Miss Hoffman, where she said that Mr Grant gave no indication that he would not come to Zimbabwe until the dates for trial were finally fixed. He then hesitated. Plaintiff offered him a paid holiday in Greece with his wife to help him make up his mind. He then said he would come. He changed his mind at the last minute. He now refused to come. Defendant submits that Mr Grant's behaviour is inconsistent with a genuine fear for his safety.

I do not think it is necessary for Mr Grant to set out in precise detail the entire basis for his refusal to come to Zimbabwe. He has alleged prior threats of physical violence; he alleges questioning by the Central Intelligence Organisation; he speaks of an anonymous warning not to come to Bulawayo to give evidence. These are the bases of his fears. Sufficient detail is given to understand the grounds for his refusal to give evidence.

In regard to Miss Hoffman's evidence about Mr Grant's conduct, that evidence shows Mr Grant to be vacillating; it may show him to be weak, but I do not think it can be said to be inconsistent with a genuine fear for his safety.

If Mr Grant's allegations are true, do they justify him in refusing to come to Zimbabwe to give evidence any my ordering that evidence to be heard in Botswana?

As a matter of principle a man's fear for his personal safety, either from physical violence or from unjustified arrest or detention seem to me to be reasonable grounds for refusing to come to

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Zimbabwe to give evidence. In this case however, Mr Grant, even on his own story, has not been subjected to any physical violence by Mr Muvuti. He has been threatened only. Further he has been merely questioned by the CIO and not detained or arrested. The anonymous telephone call is an isolated incident. Individually, none of these matters may amount to much. However, I am prepared to accept the cumulative effect is sufficient to constitute a reasonable ground for Mr Grant to refuse to come to Zimbabwe to give evidence.

If Mr Grant's evidence is not heard and the plaintiff's claim is a true one, there will be injustice and a substantial loss to plaintiff. There will also be a

BLACKIE J

dishonest gain by defendant of a substantial sum of money.

Does any prejudice to defendant outweigh any advantages to be gained by hearing Mr Grant's evidence?

This application has been made at a late stage. This is due to Mr Grant's last minute refusal to come to Zimbabwe. The trial has already started and it will not be completed in its allotted time.

No special factors of prejudice have been mentioned by defendant. There are however, the general factors of expense in Francistown. Francistown is not far from Bulawayo. Mr Grant's evidence will not take long to complete - two, possibly three days. The Court will consist only of myself, my clerk and a shorthand writer. No fees are involved for myself or the court staff. There will only be travelling and subsistence costs. These will not be great and can be dealt with by an appropriate order for costs at the end of the trial.

The delay in hearing Mr Grant's evidence will not be great. I have indicated to the parties that the Court will be available on any date the parties agree upon. The delay in hearing the rest of the evidence in this trial will be greater because of the current position in regard to set-down in the Bulawayo High Court. However, once Mr Grant's evidence has been taken, it seems unlikely that the trial will take more than four days to complete. It should not be difficult to get dates for a trial of that length within a reasonable period and I have directed the Registrar to provide the first available dates for the completion of this trial.

Even if there is considerable delay in hearing Mr Grant's evidence and in completing the trial, it is plaintiff's case that defendant is unlawfully holding approximately $300 000 (possibly more) belonging to plaintiff. If plaintiff's allegations are correct, delay in the finalisation of this matter is more likely to prejudice plaintiff than defendant. If defendant's claim that it does not hold any money belonging to plaintiff is correct, no undue prejudice will be caused to defendant by the delay.

In my view plaintiff is entitled to have the evidence of Mr Grant heard outside Zimbabwe and in Francistown.

The only outstanding matter to be decided is whether I have authority to adjourn this Court to Francistown under Rule 409 to hear the evidence or whether I must appoint a commission *de*

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bene esse to do so.

BLACKIE J

Rule 409 permits the adjournment of the Court "to any place". The language is simple and clear. No limitation is expressed. I do not see why any limitation should be implied from the words used or any other legislation or reasons of general protocol. I am doing no more than directing the manner in which certain evidence shall be heard.

There is some authority for the view which I take. In *Tito & Ors v Waddell & Ors* [1975] 3 All ER 997 (CLD) at 1000, MEGARRY J considered the words "any place" under the relevant rule of court is an application to carry out a view (an inspection *in loco*) outside the jurisdiction of the Court in which he sat. The learned judge held that such words were wide enough to include a view outside the jurisdiction of the Court. Further, and in regard to an inspection *in loco* generally, he said this:

> "At one time it was said that the function of a view was merely to enable the judge to follow the evidence. However, since *Buckingham v Daily News Ltd* I do not think that the function of a view is this restricted; and *Taneshwar v R* reinforces this approach. DENNING LJ put the matter succinctly in an earlier case, *Gould v Evans & Co*, when he said:'Speaking for myself, I think that a view is part of the evidence, just as an exhibit. it is real evidence; and it was this doctrine that was applied in the *Buckingham* case. What a Judge perceives on a view is itself evidence, in the same way as what he sees and hears in the Court room. Just as a portable object may be brought in to Court and, being made an exhibit, becomes real evidence, so if the Judge duly views a place or object which cannot be brought into court that place or object provides real evidence through the medium of the Judge's eyes, ears, touch, tongue or, as in one recent case before me, nose."

See also *St Edmundsbury & Ipswich Diocesan Board of Finance v Clark*, *supra* at 1159.

I respectfully agree with the conclusions reached by the learned Judge, as to both the meaning of "any place" and the evidential effect of what is seen in an inspection *in loco*. If I am able to go outside Zimbabwe to obtain evidence through my eyes, I see no reason why I should not do so through my ears.

In the result I am satisfied that I can make an order under either Rule 409 or 410. It is a matter of convenience under which order the Rule is made. It is simple enough to make it under Rule 409. It is somewhat artificial for me to appoint myself as commissioner under Rule 410 and then, as commissioner,

BLACKIE J

to hear the evidence and report back to myself as Judge after the hearing. I therefore adjourn the Court *sine die* in terms of Rule 409 to Francistown in Botswana to hear the evidence of Mr Grant. The date, time and location of the hearing are to be agreed by the parties and if they are unable to agree on the details, they should either, jointly or individually, make application for directions.

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The costs of this application are reserved.

Coghlan & Welsh, plaintiff's legal practitioners

Ben Baron & Partners, defendant's legal practitioners

S v CHIPINGE RURAL COUNCIL 1988 (2) ZLR 275 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Criminal appeal

3 & 24 October 1988

Flynote

Criminal law - culpable homicide - negligence - local authority allowing children to swim unsupervised in public swimming pool - whether authority negligent - sign disclaiming responsibility - effect of - when child may consent to risk - causation - whether negligence caused by death.

Headnote

The appellant rural council maintained a swimming pool which was largely used by children. At the entrance to the pool was a sign which excluded children under 8 years of age, unless accompanied by an adult, and which warned that there would be no assistance in the event of an accident. The swimming-pool superintendent's tasks were to ensure that unaccompanied children under 8 years did not enter and to collect the prescribed fee. The council engaged no-one to supervise or control the activities or behaviour of the swimmers and took no measures to prevent the occurrence of accidents. One day a 12-year-old girl was found to have drowned at a time when several other children were swimming. The council was convicted by a magistrate of culpable homicide; it appealed against the conviction.

Held, that there were several eventualities, all foreseeable, which could lead to a child being drowned, and there was a duty on the council to provide supervision for children of 8 years and above who used its swimming pool. This did not mean that a constant watch must be maintained on every single child who is swimming; the degree of supervision and vigilance to be exercised should be reasonably sufficient and adequate having regard to the circumstances of the case, including the potential

GUBBAY JA

victim's ability to look after himself.

Held, further, that, assuming that the wording in the notice at the entrance to the pool was to be

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taken as conveying that all persons using the pool did so at their own risk, such an exemption is not binding on a 12 year old child. Majority is normally regarded as the criterion determining the existence of legal capability in respect of consent or the voluntary assumption of risk; but even capacity to consent is not co-extensive with capacity to contract, the child must have the mental capability and maturity to evaluate responsibly the nature, extent and implications of his consent or assumption of risk. Even if the deceased perceived the danger inherent in the use of a public swimming pool for which no supervision was provided, which was doubtful, she certainly did not fully appreciate it or consent to incur the risk involved.

Held, further, that it could not be held with the requisite degree of certainty that but for the negligence of the council in failing to provide supervision, the drowning would not have occurred. There were various possible reasons why the child might have drowned, and even if a supervisor had been present and performing his duties in a responsible and efficient manner, he might well not have noticed the deceased until it was too late. The council's failure to provide supervision, therefore, was not shown to be causative of the death of the child.

Cases cited:

S v Bochris Investments (Pty) Ltd & Anor 1988 (1) SA 861 (A)

S v Burger 1975 (4) SA 877 (A)

Herschel v Mrupe 1954 (3) SA 464 (A)

R v John 1969(2) RLR 23 at 36; 1969 (2) SA 560 (RAD) at 570H-571C;

S v Rhodesian Alloys Ltd 1979 RLR 58 (AD) at 60C-D.

Clarke & Anor v Bethnal Green Borough Council (1939) 55 TLR 519; [1939] 2 ALL ER 54 (KB)

Rusere v The Jesuit Fathers 1970 (2) RLR 62; 1970 (4) SA 537 (R)

Broom & Anor v Administrator, Natal 1966 (3) SA 505 (D)

Knouwds v Administrateur, Kaap 1981 (1) SA 544 (C)

S v van As en 'n Ander 1967 (4) SA 594 (A)

S v Poole 1975 (1) SA 924 (N)

M R D Stonier for the appellant

I Houston for the respondent

Judgment

Gubbay JA: A few years ago the Chipinge Rural Council constructed a swimming pool upon land owned by it in the Gaza High Density Suburb, as

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a recreational facility for the local community, especially the children.

The swimming pool, which is 3.6 metres deep at the one end, is in an area of ground completely enclosed by a wall three metres high, topped with pieces of broken glass. Admission is gained through a door in the wall which is locked during the hours the swimming pool is closed to the public. At the entrance is a notice board which, in vernacular language, excludes children under the age of eight years unless accompanied by an adult, and warns that there will be "no assistance in the event of an accident". Children are the swimming pool's most frequent users.

On the inside of the wall nearest to the door is a kiosk-type structure in which sits the swimming pool superintendent. He has a double function to perform; to ensure that unaccompanied children under the specified age do not enter, and to collect the prescribed fee, which for children is ten cents. From where he sits he is unable to observe what is taking place in the swimming pool. Indeed, he is not obliged by the terms of his employment to keep the swimming pool under surveillance.

Relying upon the protection which it is considered the notice board affords it, the Rural Council engages no one to supervise or control the activities or behaviour of the swimmers, whether they be children or adults. And it takes no measures to prevent by the exercise of reasonable care the occurrence of accidents in the swimming pool.

On the afternoon of 25 November 1986 a twelve-year-old girl, Chipomhoniso Marota, was admitted to the swimming pool. Tragedy soon befell her, for at 15.30 hours, while there were several other children swimming, her body was noticed by one of them to be floating in the water. She had drowned.

Arising out of the death the Rural Council was charged in the Magistrate's Court with the crime of culpable homicide. The negligence complained of was its failure to engage an attendant to supervise and keep watch over the bathers and thereby to guard against the inherent dangers of attaching to a swimming pool, which omission was alleged to have been the cause of the child's death.

The Rural Council vigorously denied the charge. It contended that the expense of employing such a person far outweighed the likelihood of an accident happening and the possible seriousness of the consequences of it did; and that in any event it had warned that the persons swimming in the pool

did so at their own risk.

Unimpressed by these arguments, the trial court convicted the Rural Council and ordered it to pay a fine of $300. Equally adamant of its innocence, the Rural Council challenges the propriety of the conviction in this Court.

There have been many pronouncements upon the requirements of liability for culpable

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homicide. The most recent is perhaps that of NICHOLAS AJA in *S v Bochris Investments (Pty) Ltd & Anor* 1988 (1) SA 861 (A), where at 865G-H it is said:

> "The *onus* of proving *culpa* was on the State, which had to establish a failure by the accused to observe that degree of care which a reasonable man would have observed. The reasonable man is the *diligens paterfamilias* of Roman law, the average prudent person, 'that notional epitome of reasonable prudence', in the words of HOLMES JA *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at 373F. The reasonable man is the embodiment of the social judgment of the Court, which applies 'common morality and common sense to the activities of the common man' *(per* DIPLOCK LJ in *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518(CA) at 531; [1964] 1 All ER 98 at 103 *in fine*). The criterion of liability for *culpa* in both civil and criminal cases is reasonable foreseeability. In a case of culpable homicide, the question is whether a *diligens, paterfamilias* in the position of the accused would have foreseen the possibility of death resulting from his conduct. See *S* v Burger 1975 (4) SA 877 (A) at 879A; *S v Bernardus* 1965 (3) SA 287 (A)."

But, as so graphically emphasised by HOLMES JA in *S v Burger supra* at 879D-E:

> "One does not expect of a diligens paterfamilias any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a diligens paterfamilias treads life's pathway with moderation and prudent common sense."

See also *Herschel v Mrupe* 1954 (3) SA 464 (A) at 491E-G; *R v John* 1969 (2) RLR 23 at 36; 1969 (2) SA 560 (RAD) at 570H-571C; *S v Rhodesian Alloys Ltd* 1979 RLR 58 (AD) at 60C-D.

GUBBAY JA

With this approach in mind, the first issue to be considered is whether the Rural Council ought to have foreseen the possibility of death occurring in the use of its swimming pool by young children and guarded against such an occurrence.

The submission advanced by Mr *Stonier*, on behalf of the Rural Council, that a swimming pool which graduates to a depth of 3.6 metres does not constitute an inherent danger to young children and need not be guarded against by the authority responsible for its operation, finds no favour with me.

To my mind it is reasonably foreseeable that a young child (and this case is only concerned with the regrettable plight of a twelve-year-old), might venture out of its depth and get into difficulty, that a non-swimmer, or one with little prowess, might slip at the side and fall into the deep end, or be pushed into the deep end, or be ducked under water by others in mischievous play. All these eventualities, and there are more, could possibly lead to drowning. They are foreseeable and should be guarded against.

Just as it is the duty of the head of a school to appoint a teacher or some other responsible person to exercise supervision and vigilance over the children in the play ground, the degree required depending on the age of the pupils (see generally *Charlesworth and Percy on Negligence* 7 ed para 9-70) so too, there is a corresponding duty on the Rural Council to provide supervision for children of eight years and above who use its swimming pool.

Authority for this proposition, which does no more than accord with common sense, is to be found in *Clarke & Anor v Bethnal Green Burough Council* (1939) 55 TLR 519; [1939] 2 All ER 54 (KB). In that case the plaintiff, a girl aged thirteen years, claimed damages form the Burough

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Council for personal injuries she sustained while using its swimming pool. The accident happened in this way. As the plaintiff was standing on the spring board preparing to dive, another child, who was holding on to the under part of the board, suddenly let go, with the result that the plaintiff was thrown on to the edge of the pool. The negligence alleged against the Burough Council was that its attendant had failed to supervise properly the behaviour of the children who were in the swimming pool at the time, and that but for the fact that the attendant was "wool gathering" the accident would have been prevented. OLIVER J dismissed the claim on the evidence he found acceptable. His reasons for so doing are of no relevance in the present context. Of importance, however, are the learned judge's comments that it was a case in which children should certainly have supervision and that it was recognised

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GUBBAY JA

by everyone keeping public swimming baths that an attendant should be provided.

I do not suggest that it is the duty of those bodies keeping swimming pools that a constant watch on every single child who is swimming must be maintained. Such a task would be quite impossible unless a swarm of attendants were provided. The extent of the supervision depends upon the risk to which the children are exposed by their particular activity. As BECK J (as he then was) so sagaciously remarked in *Rusere v The Jesuit Fathers* 1970 (2) RLR 62 at 65; 1970 (4) SA 537 (R) at 539 F-G:

> "No doubt, a reasonable man who is in charge of a number of young children at the seaside would be guilty of negligence if he were not to keep them under constant observation. To contend, however, that children of this age should never be more than momentarily out of sight of a responsible person even when they are in normal and familiar surroundings which are devoid of features that could sensibly be regarded as hazardous, is, I think, to exact too high a duty of care from the *bonus paterfamilias*."

See also *Broom & Anor v Administrator, Natal* 1966 (3) SA 505 (D) 517A-518G: *Knouwds v Administrator, Kaap* 1981 (1) SA 541 (C) at 554H.

The degree of supervision and vigilance to be exercised must be reasonably sufficient and adequate having regard to all the circumstances of the case. Account must be taken of the potential victim's ability to look after himself. Children have a known propensity for impulsive and sometimes irrational action. Thus greater care is demanded towards them than is necessary for the safety of adults. To hold otherwise would be to put an old head on young shoulders and to assume that children act as predictably and sensibly as their elders.

As already pointed out, the Rural Council exercised no supervision whatsoever. It omitted to take any measures to guard against the possibility of a child drowning in the swimming pool, a fatality which was reasonably foreseeable. In my opinion it was proved to have been negligent.

Mr *Stonier* placed no reliance upon the warning notice as exempting the Rural Council from the consequences of its own negligence. He was right not to do so. Assuming that the wording in the notice is to be taken as conveying that all persons using the swimming pool do so at their own risk, I do not

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GUBBAY JA

consider such exemption to be binding upon a twelve year old child.

There is respectable authority for the proposition that **majority** is the criterion determining the existence of legal capacity in respect of consent or the voluntary assumption of risk. See Spiro *Law of Parent and Child* 4 ed at p 192; Boberg *Delict: Principles and Cases* Vol I at pp 731-732. But even if capacity to consent is not co-extensive with capacity to contract, in the words of Professor van der Walt in his work *Delict: Principles and Cases* para 34(h) at p 54, the child must have -

> "... the mental capability and maturity to evaluate responsibly the nature, extent and implications of his consent or assumption of risk. The existence of legal capacity in this sense is therefore relative to the particular circumstances of the case and particularly to the nature of the interests involved and the seriousness of the harmful conduct involved. A child of 14 years may, eg, have the necessary legal capacity to consent to the destruction of her doll, but she would normally not have the legal capacity to consent to medical treatment. Where a child does not have the necessary legal capacity, the guardian must act on behalf of the child."

See also Snyman *Criminal Law* at p 101; Burchell and Hunt *SA Criminal Law & Procedure General Principles* 2 ed Vol 1 at p 378.

I am satisfied that if the deceased child perceived the danger inherent in the use of a public swimming pool for which no supervision was provided (which is doubtful), she certainly did not fully appreciate it and consent to incur the risk involved. The State therefore discharged the *onus* on this aspect.

The next issue that naturally arises is whether the state succeeded in proving that the culpable omission of the Rural Council to employ a responsible individual to oversee the activities of children in its swimming pool was the cause of the unfortunate death. It is, of course, only causative negligence that gives rise to liability. See *S v van As en 'n Ander* 1967 (4) SA 594 (A) at 601 A-602D; *S v Poole* 1975 (1) SA 924 (N) at 930 *in fine* - 931A.

It is in respect of this element of the offence that the State case broke down as, in my view, it cannot be held with the requisite degree of certainty that "but-for" the negligence of the Rural Council in failing to provide supervision, the drowning would not have occurred.

GUBBAY JA

The child may have drowned quietly without attracting any attention in consequence of having suffered an epileptic fit, or severe cramp, or having been rendered unconscious by striking her head at the bottom of the swimming pool upon diving in. And there are other possibilities. The situation therefore, so it appears to me, is that even if a supervisor had been present performing his duties in a responsible and efficient manner, he may well not have noticed that the deceased was in trouble until it was too late. He cannot be expected to keep an eye on every child bather every minute. His obligation is to ensure that children behave themselves and do not resort to any form of "horse play"; to be vigilant and maintain a general observation, unless

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there is some reason to be alerted or put on enquiry. His attention, however, may be attracted to another child at the other end of the swimming pool or he may momentarily have to absent himself. He is not to be regarded as an insurer against every kind of mishap.

If the evidence led at the trial had been that another child, noticing the deceased thrashing about wildly in the pool, timeously raised the alarm, or that the deceased herself shouted for help, the causative link may have been established. But it is unnecessary to make a firm finding upon such hypothetical facts.

In the particular circumstances of this case the failure on the part of the Rural Council to provide any form of supervision at the swimming pool was not shown to be causative of the death of the child.

Accordingly I would allow the appeal and set aside the conviction and sentence.

McNally JA: I agree.

Manyarara JA: I agree

Atherstone & Cook, appellant's legal representatives

ADLER v ELLIOT 1988 (2) ZLR 283 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Civil appeal

4 & 24 October 1988

Flynote

Contract - performance of - intention of parties - when contract may be fulfilled by performance of an equivalent act.

Practice and procedure - pleadings - admission in - meaning of - withdrawal of admission - requirements for - exceptions - claim dismissed because successful exception taken - impropriety of where affected party could allege further facts which would disclose a cause of action.

Headnote

The appellant and respondent entered into a verbal agreement of sale in which the respondent sold an immovable property to the appellant. It was agreed that part of the purchase price would be paid outside Zimbabwe, in foreign currency. That portion of the price was duly paid but later returned, the respondent indicating that he wished to cancel the contract. The appellant demanded specific performance of the contract, and tendered the full price in Zimbabwe currency.

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In answer to a request for further particulars, the appellant averred that the foreign currency was lawfully held by him outside Zimbabwe, but, possibly *per incuriam*, replied "No" to the respondent's question: was the foreign currency acquired by the appellant otherwise than by way of the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe? Such an answer effectively amounted to a statement that the currency was acquired by way of the proceeds of business carried on in Zimbabwe, in which case the use of the currency would, without the permission of the Minister, have been a contravention

of the Exchange Control Regulations.

The respondent excepted to the appellant's declaration on two grounds: (a) that the agreement of sale was illegal and unenforceable, being in contravention of the Exchange Control regulations; and (b) that the appellant's tender of performance was not in terms of the contract.

The appellant sought to amend his answer to the question about the source of the foreign currency to "Yes"; his application was refused by the judge *a quo*, who also upheld the respondent's exception. The appellant appealed, arguing that the amendment did not involve the withdrawal of an admission and that the case should not have been dismissed on an exception.

Held, that the judge erred in allowing the exception on the first ground raised by the respondent, because it was not shown that the Minister's authority was not granted for the use of the foreign currency.

Held, further, that it is not only an express admission of an averment made by the other party to a suit which constitutes a judicial admission. While that is almost invariably the way in which admissions in pleadings are made, the test is whether the alleged fact has the effect of being a confessionary pleading, in that it is thereafter to be taken for granted and may not be disapproved.

Held, further, that an amendment which involves the withdrawal of an admission is not a right simply there for the asking; it is an indulgence, and the court will require a reasonable explanation both of the circumstances in which the admission came to be made and why the pleader seeks to resile from it. The court must be satisfied that the amendment is *bona fide* and that, if allowed, it will not cause prejudice or injustice to the other party to the extent that a special order for costs will not compensate him.

Held, further, that while it is not for the court to remake a contract for the parties, the court is not precluded from determining whether the parties intended that a particular term was to be fulfilled in the exact manner agreed upon or by some equivalent act. If the agreement is in writing, this may be obvious from the agreement itself; otherwise the intention may be ascertained from all the circumstances. Four other factors must be considered:

(a) if the circumstances give no clue as to the parties' intention, there is a rebuttable presumption in favour of exact performance, which becomes irrebuttable if the contract makes it clear that specific performance is intended;

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(b) in cases of doubt, equivalent performance will be sufficient if the manner of performance is immaterial or where exact performance is

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impossible through no serious fault on the promissor's part;

(c) the equivalent act tendered must actually be equivalent or of a nature that can make no material difference to the promissee;

(d) where the promissor can rebut the presumption in favour of exact performance, the court may be justified in finding that the promissor's performance amounts to substantial performance.

Held, further, that it was not possible to determine from the pleadings alone what the intention of the parties was.

Held, further, that a claim should not be dismissed on an exception where it is possible that the affected party may be able to allege further facts that would disclose a cause of action.

Cases cited:

D D Transport (Pvt) Ltd v Abbot 1988 (2) ZLR 92 (SC)

Whittaker v Roos & Anor 1911 TPD 1092

Ambrose & Aitken v Johnson & Fletcher 1917 AD 327

Holmes v Palley 1975 (2) RLR 98 (AD)

Hanomag SA (Pty) Ltd v Otto 1940 CPD 437

van Diggelen v de Bruin & Anor 1954 (1) SA 188 (SWA)

McKelvey v Cowan NO 1980 ZLR 235 (GD); 1980 (4) SA 525 (Z)

Green v Lutz 1966 RLR (GD)

M J Gillespie for the appellant

J B Colegrave for the respondent

Judgment

Gubbay JA: This is an appeal from the High Court against (i) the upholding of an exception taken by the defendant, the present respondent, to a declaration filed by the plaintiff, now the appellant, and the consequent order that the claim be dismissed with costs; and (ii) the refusal

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to allow the plaintiff to amend an answer contained in a paragraph of the further particulars to the declaration.

The material paragraphs of the declaration read as follows:

"3. In early August 1985 the plaintiff and the defendant entered into a verbal agreement of sale in terms of which the defendant sold to the plaintiff certain immovable property known as No. 6 Fleetwood Road, Alexandra Park, Harare.

4. It was agree between the parties that the purchase price of the property would be $65 000,00 payable as follows:

(a) 9.500 Swiss Francs ($10 000,00) to be paid into a Swiss bank

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GUBBAY JA

account named by the defendant as an initial deposit.

(b) $15 000,00 to be paid to the defendant before the end of 1985.

(c) $15 000,00 to be paid to the defendant before the end of February, 1986.

(d) The balance of $25 000,00 to be paid to the defendant before the end of July, 1986.

7. On the 12th December, 1985 in accordance with the terms of the agreement the plaintiff arranged payment of 9.500 Swiss Francs into a Swiss bank account named by the defendant.

8. In December, 1985 the plaintiff wrote to the defendant and tendered payment of $15 000,00. The defendant did not respond to this letter.

9. In May, 1986 the defendant approached the plaintiff and advised that he wished to cancel the agreement. The plaintiff refused to accept such cancellation.

10. On the 21st June, 1986 the defendant wrote to the plaintiff indicating that he was refunding the 9.500 Swiss Francs paid as aforementioned. Such money was refunded by way of a cheque dated 2nd July, 1986.

11. On the 13th July, 1986 the plaintiff wrote to the defendant by way of registered post protesting the cancellation and demanding specific performance in terms of the agreement...

14. The plaintiff is willing and able to pay the purchase price in the sum of $65 000,00."

In answer to a request for further particulars the plaintiff amplified para 4(a) of the declaration with the averment that he was a Zimbabwean resident and that the sum of 9.500 Swiss Francs was paid to the defendant from monies lawfully held by him outside Zimbabwe and available to him at the time the agreement of sale was entered into. To the pointed question -

"were such monies acquired by him otherwise than by way of the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe?"

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his reply was a simple "No".

In respect of para 14 of the declaration the plaintiff was asked whether it was his intention in making tender that he should adhere to the original agreement to pay 9.500 Swiss Francs to the defendant in Switzerland. He replied:

> "No. The plaintiff intends to utilise his Zimbabwe funds. The plaintiff now has sufficient funds in Zimbabwe to pay the defendant the full purchase price from his Zimbabwe funds."

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Thereupon the defendant excepted to the declaration as disclosing no cause of action. Two grounds were relied upon: first, that the agreement of sale involved a contravention by the plaintiff of s 8(1)(a) of the Exchange Control Regulations, 1977 (RGN 399/77) and as such was illegal and unenforceable; and second, that the plaintiff's tender of performance was not in terms of the agreement.

Prior to the date when the exception was due to be heard the plaintiff purported to amend his answer to the pointed question to a "Yes". In other words what he was seeking to do was to allege that his acquisition of the 9.500 Swiss Francs conformed with the requirements set out in s 8(2)(b)(iii) of the Exchange Control Regulations.

The learned judge's approach to the first ground upon which the exception to the declaration was taken was that were he to refuse the application to amend, which was moved before him by the plaintiff and opposed by the defendant, he would have to allow the exception. For if, as the plaintiff had pleaded, he had paid the defendant 9.500 Swiss Francs as an initial deposit of the purchase price of the property, in accordance with the terms of the agreement, and such foreign monies had been acquired by him by way of the proceeds of a trade, business or gainful occupation or activity carried on by him in Zimbabwe, the effect would be to render the sale null and void as involving a contravention of s 8(1)(a) of the Exchange Control Regulations. This reasoning would have been unassailable, save that the offence under the Regulations is only committed where the Minister has not authorised the particular act, and there is no allegation on the pleadings of the absence of such authority. In order therefore, to rely on this ground it was necessary for the defendant to have asked, in his request for further particulars, the additional question whether Ministerial authority for the making of the payment had been granted, and to have elicited a negative response. This the defendant failed to do. Thus a vital link in the chain of relevant facts required to sustain the argument of sale which was contrary to law and therefore not binding upon the defendant, was missing. On the pleading as it stands, uncertainty exists as to whether Ministerial authority was granted. It follows that in my view the learned judge was wrong in allowing the exception on this ground.

In refusing to exercise his discretion in favour of allowing the plaintiff's application, the learned judge considered that the amendment sought involved the withdrawal of an admission for which there was no explanation as to how the pleader came to make the mistake; and that in any event he

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GUBBAY JA

entertained grave doubts as to the *bona fides* of the amendment in the particular circumstances of the case.

It was Mr *Gillespie's* contention, on behalf of the plaintiff, that the amendment which had been applied for did not involve the withdrawal of an admission, for an admission is an "acknowledgement that something is true of untrue" (See Claassen *Dictionary of Legal Words and Phrases* Vol 1 at p 54), whereas the particular pleaded is in the nature of an allegation of fact. Accordingly, the amendment ought to have been allowed under Rule 132 of Order 20 of the High Court Rules 1971.

I am quite unable to accept the proposition that it is only an express admission of an averment made by the other party to the suit that constitutes a judicial admission. That, of course, is the almost invariable way in which admissions in pleadings are made. but the test is surely whether the alleged fact has the effect of being a confessionary pleading in that it is thereafter to be taken for granted and may not be disproved, being conclusive upon the party making it. Suppose for instance that the plaintiff, somewhat ill-advisedly, had prefaced para 4(a) of the declaration with the words -

> "In breach of s 8(1)(a) of the Exchange Control Regulations, 1977 ..."

it would not, I think, be open to argument that an application to delete such gratuitous information did not involve the withdrawal of an admission.

Plainly the negative answer to the question posed by the defendant gave rise to a pleading no different in nature from that in the example I have cited, for it has the effect of incorporating into the declaration the allegation of fact that the 9.500 Swiss Francs were acquired by the plaintiff by way of the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe. It is an admission.

It was not argued by Mr *Gillespie*, and wisely so, that if the learned judge was found to be correct in treating the application as one involving the withdrawal of an admission, he was nonetheless wrong to refuse it. It is apparent from the manner in which the application was presented that it was assumed that the grant of the amendment would be a mere formality. No affidavits were filed in an effort to establish the *bona fides* of the application and in explanation of how the pleader came to make the mistake. Recently, in *D D Transport (Pvt) Ltd v Abbot* S-137-88 (not yet reported)*(9) I had occasion to

GUBBAY JA

draw attention to the prevailing misconception that an amendment which involves a withdrawal of an admission is a right simply there for the asking. On the contrary, it is an indulgence. Before the court, in the exercise of its discretion, will grant such an amendment it will require a reasonable explanation both of the circumstances under which the pleader came to make the

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admission and the reasons why it is sought to resile from it. The court will have to be satisfied that the amendment is *bona fide*, and that if allowed, it will not cause prejudice or injustice to the other party to the extent that a special order for costs will not compensate him.

While I am satisfied that the learned judge had no option but to refuse the application on account of its improper presentation I am left in some doubt as to whether he was justified, in the absence of explanation, to express the misgivings he did as to the *bona fides* of the amendment. It just may be, and I put it no higher, that the cryptic reply "No" was due to "a slip of the pen or error of judgment or the misreading of a paragraph in pleading" (*per* WESSELS J in *Whittaker v Roos & Anor* 1911 TPD 1092 at 1103). Certainly that answer appears to be inconsistent with the earlier averment in the further particulars that "the sum of 9.500 Swiss Francs was paid to the defendant from monies **lawfully** held by the plaintiff outside Zimbabwe" (my emphasis).

Lest he was wrong in upholding the exception on the first ground, the learned judge very properly proceeded to consider whether in tendering to pay the full purchase price of the property in local currency as opposed to part of it in Swiss Francs, the plaintiff was performing in terms of the agreement. He held as follows:

> "On the pleadings in this matter I do not see what possible evidence can be led in the face of the clear admission that the plaintiff is not tendering in terms of the agreement. Rather, it seems to me, what is involved here is really a question of law. Whether the Court can remake the contract for the parties by sanctioning alterations of a term thereof in a way that is in no way implied by the language thereof."

Mr *Colegrave*, who appeared for the defendant, approved this reasoning. He cited the well known *dictum* of INNES CJ in *Ambrose & Aitken v Johnson & Fletcher* 1917 AD 327 at 343 in support of the undoubted principle that it is not for the court to remake a contract of the parties. In similar vein are the remarks of BEADLE ACJ in *Holmes v Palley* 1975 (2) RLR 98 (AD) at 105C that -

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> "When parties make an agreement, each party is entitled to expect that the other party will abide by it. One party is not entitled to expect that the other party will carry out an agreement which is **different from the one agreed to** simply because the other party is not prejudiced by this difference"

(my emphasis).

The application of this broad principle does not, of course, preclude a court from determining whether the parties to an agreement intended that a particular term thereof was to be fulfilled *in forma specifica*, that is, in the exact manner agreed upon by the parties, or *per aequipollens*, that is, by some equivalent act.

Where the agreement is in writing and the language employed is sufficiently clear, the common intention of the parties must be extracted from the agreement itself. But if the language is ambiguous or where the agreement of the parties was oral then the court is obliged to have

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regard to the surrounding circumstances an to any other admissible evidence in order to ascertain whether the common intention of the parties was to be fulfilled *in forma specifica* or whether performance thereof by some equivalent act would suffice. As so succinctly sated in Wessels *Law of Contract in South Africa* Vol I para 1335, quoted with approval by DE VILLIERS J in *Hanomag SA (Pty) Ltd v Otto* 1940 CPD 437 at 443:

> "The Court must gather from the surrounding circumstances what the parties contemplated. It must take into consideration everything which can give a clue to the intention of the parties. It must seek to find out what the parties would have wished if their minds had been specially directed to the question whether the condition was to be fulfilled *in forma specifica* or by an equivalent act."

In *van Diggelen v de Bruin & Anor* 1954 (1) SA 188 (SWA) at 193B-G CLAASSEN J added four further factors which are relevant in making a determination. They are:

(1) If the surrounding circumstances and other admissible evidence afford no clue as to what was in the contemplation of the parties, then there is a rebuttable presumption in favour of performance *in forma specifica*. But the presumption cannot be rebutted where it is clear from the terms of the agreement that performance *in forma specifica* had been stipulated.

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(2) In case of doubt the court will be more likely to find in favour of performance *per aequipollens* if the manner of performing the term is not material and also where performance *in formal specifica* is impossible through no serious fault on the promissor's part.

(3) The act or performance tendered *per aequipollens,* where such is permissible, must be an equivalent act to that stipulated for or be of such a nature that it can make no material difference to the promissee.

(4) Where the promissor succeeds in rebutting the presumption mentioned above, there may be circumstances falling short of impossibility, and even where there may be some fault on the part of the promissor, a court may be justified in concluding that the promissor's performance or tendered performance amounted to substantial performance.

While not disputing the correctness of the approach adumbrated by CLAASSEN J, Mr *Colegrave* submitted that the declaration contained no allegation that the tender of performance by the plaintiff was substantially in accordance with the agreement.

It is true that such an averment is not expressly made, but it seems to me that on a proper reading of the declaration, it is implicit. para 4(a) gives an equivalent in Zimbabwe currency of 9.500 Swiss Francs; para 7 and 10 allege that on 12 December 1985 the plaintiff duly paid 9.500 Swiss Francs to the defendant which the latter repaid on 2 July 1986; and in para 14 the sum of $65 000, which the plaintiff tenders, includes $10 000, which is stated to be the

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equivalent in local currency of 9.500 Swiss Francs.

The agreement between the parties being oral, it is my opinion that the learned judge erred in concluding that the common intention must have been that the tender of the purchase price could only be fulfilled by the inclusion of 9.500 Swiss Francs. He was not dealing with a written agreement, the language of which, properly construed, necessarily points to a common intention that the tender of the purchase price be made in the exact manner provided. In this case a determination of whether a tender of performance on the part of the plaintiff was to be fulfilled *in forma specifica* or by an equivalent ace depends upon an examination of the surrounding circumstances, taking into consideration any admissible evidence which can give a clue to the true common intention of the parties. The adduction of such evidence may or may not prove the propriety of the ender made by the plaintiff. The answer cannot be derived from the pleadings alone. That being

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GUBBAY JA

so the declaration ought not to have been found excipiable on he second ground raised by the defendant. See *McKelvey v Cowan NO* 1980 ZLR 235 (GD) at 236B; 1980 (4) SA 525 (Z) at 526.

Finally, although of no significance in view of the conclusion I have reached, Mr *Gillespie* justly criticised the order made by the learned judge. A claim should not be dismissed on an exception where it is possible that the party affected may be able to allege further facts that would disclose a cause of action. See *Green v Lutz* 1966 RLR 633 (GD) at 641A. He should be given leave to amend, within a specified period, if so advised. Such an opportunity was not afforded to the plaintiff.

Notwithstanding the plaintiff's failure to persuade me that the application to amend should have been allowed, I regard him as having achieved substantial success in this appeal. And counsel were agreed that the costs incurred in the lower court should be reserved for determination at the trial.

In the result I would order as follows:

1. The appeal is allowed with costs.

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

   "1. The exception is dismissed.

   2. The costs are reserved for determination at the trial."

McNally JA: I agree

Manyarara JA: I agree.

Ali Ebrahim, appellant's legal practitioners.

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Coghlan, Welsh & Guest, respondent's legal representative

STERLING PRODUCTS INTERNATIONAL LTD v ZULU 1988 (2) ZLR 293 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Civil Appeal

7 & 24 October 1988

Flynote

Employment - Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 - employer's application for termination of employment sent to wrong official - whether legislation complied with - waiver of right to suspend employee - payment of wages for limited period after employee's suspension - whether tacit waiver can be inferred.

Statutes - interpretation of - principles - directory or peremptory provisions in statutes - whether provisions have been complied with - test to be applied.

Headnote

In July 1987 the appellant, the respondent's employer, suspended the respondent from her employment without pay, pending the outcome of the appellant's request to the Ministry of Labour for her dismissal on the grounds of having stolen a confidential document from the company. The relevant section of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations required that application be made to a labour relations officer, but the appellant applied to an acting Regional Hearing Officer in the Ministry, instead of to a labour relations officer. It did so because the official in question had been concerned with a previous dispute between the parties. In January 1988 a labour relations officer referred the employer's application to the Labour Relations Board for hearing. The following month, the appellant paid the respondent her salary for the time from her suspension up to and including 21 September 1987, but gave no explanation for doing so.

In June 1988 the respondent applied on notice of motion for an order reinstating her in her employment. The application was granted by GREENLAND J, who found that the Regulations had not been complied with because the application for dismissal had been made neither to the correct official nor "forthwith", as required by the Regulations.*(10) The company appealed, arguing that the application to the Regional Hearing Officer, although not procedurally correct, was so close to what ought to have been done as to amount to a substantial compliance with the requirements of the Regulations. The respondent argued that even if the appellant had substantially complied with those requirements, it had, by paying the respondent's salary for a period after the date of suspension, either tacitly waived its right to summarily suspend her or

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condoned her misconduct.

Held, that the functions of a labour relations officer and a regional hearing officer are clearly distinguishable. The proviso to s 137(1) of the Labour Relations Act 1985 did not mean that each of the officials mentioned in the subsection was to be regarded as exercising the functions of the others, although each official might act in more than one capacity. There was no suggestion that the acting Regional Hearing Officer in this case was exercising the functions of a labour relations officer.

Held, further, that in deciding whether the Regulations had nevertheless been complied with, the court must look, not at the quality of the command and whether it is categorized as "peremptory" or "directory", but at the intention of the legislature, which can only be derived from the words of the enactment, its general plan and its objects. Having discovered the object of the enactment, the court must decide whether that object is defeated or frustrated by the non-compliance complained of. The degree of observance and non-compliance is another relevant consideration.

Held, further, that the degree of non-compliance in this case was by no means great and the object of the regulatory injunction was not frustrated or materially impaired by the appellant proceeding in the manner that it did.

Held, further, that where an employer, following summary dismissal or suspension of an employee on grounds of misconduct, does an act which, taken not in isolation but with all other pertinent factors, establishes an intention to continue the employee in service, the employer must be held to have waived his right to dismiss or suspend, or to have condoned the misconduct. The *onus*, however, is on the employee to show, on a balance of probabilities, that the employer knew its rights and definitely surrendered them, whether expressly or by conduct plainly inconsistent

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GUBBAY JA

or irreconcilable with an intention to persevere with their exercise. A court does not lightly assume that a party has abandoned or renounced his right, especially where a tacit waiver is relied on. On the facts, the respondent failed to discharge the *onus* on her.

Cases cited:

Lion Match Co Ltd v Wessels 1964 OPD 376

J E M Motors Ltd v Boutle & Anor 1961 (2) SA 320 (N)

Maharaj & Ors v Rampersad 1964 (4) SA 638 (A)

Shalala v Klerksdorp Town Council & Anor 1969 (1) SA 582 (T)

Nkisimane & Ors v Santam Insurance Co Ltd 1978 (2) SA 430 (A)

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Ex p *Dow* 1987 (3) SA 829 (D)

Swift Transport Services (Pvt) Ltd v Pittman NO & Ors 1975 (2) RLR 226 (GD); 1976 (1) SA 827

Macara v Minister of Information, Immigration & Tourism & Anor 1977 (1) RLR 67 (GD)

Ex p *Ndhlovu* 1981 ZLR 216 (GD)

Phillips v Foxall (1872) 7 LR QB 666

Usakos Recreation Club v Slaney 1950 (3) SA 121 (SWA)

Laws v Rutherfurd 1924 AD 261

Hepner v Roodepoort-Maraisburg Town Council 1962 (4) SA 772 (A)

Netlon Ltd & Anor v Pacnet (Pty) Ltd 1977 (3) SA 840 (A)

Feinstein v Niggli & Anor 1981 (2) SA 684 (A)

Alberts v Bryson 1976 (2) RLR 193 (AD); 1977 (1) SA 857 (RAD)

Bay Loan Investments (Pty) Ltd v Bay View (Pty) Ltd 1971 (4) SA 538 (C)

Borstlap v Spangenberg en Andere 1974 (3) SA 695 (A)

M J Gillespie for the appellant

A P de Bourbon SC for the respondent

Judgment

Gubbay JA: Consequent upon the institution of motion proceedings before the High Court, the present respondent, Miss Jeane Zulu (to whom I shall refer as "the employee"), obtained with costs an order against the appellant company ("the employer") that -

> "(the employer) reinstate the (employee) to the position she occupied with full pay and benefits as from the date of suspension from employment."

In order to determine the issues in this appeal, which were so persuasively argued on behalf of both parties, it is necessary at the outset to trace the

GUBBAY JA

relevant historical events, which for the most part were common cause. They are these:

1. On 13 April 1987 the employer summarily suspended the employee without pay and other benefits and, pursuant to s 3(1) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), applied forthwith to a labour relations officer for an order or determination terminating the contract

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of employment.

2. On 21 May 1987 the determination made by an Acting hearing Officer was to the effect that the employer was to reinstate the employee immediately in the position of Community Liaison-Officer, her salary to be equated with those of other Managers in the Marketing Department.

3. The employee lodged an appeal against the aforementioned determination to the Regional Hearing Officer, her complainant being that the employer had discriminated against her in relation to salary and the choice of persons for promotion within the organisation.

4. On 29 July 1987 the parties duly appeared before the Acting Regional Hearing Officer for Mashonaland Mrs WK Goromonzi.

5. On the same day the employer's General Manager wrote to the employee in these terms:

> "This letter will advise you that with immediate effect you are suspended from employment with the company without pay pending the outcome of my request to the Ministry of Labour for your dismissal on the grounds of purloining a confidential company document addressed to the personal attention of myself.
>
> ...
>
> However since you have repeated the offence, on this occasion in front of undoubted witnesses, I have no option but to request your immediate dismissal from employment with this company."

Another letter, bearing the same date and enclosing a copy of that written to the employee, was addressed to Mrs Goromonzi. It reads:

> "I would like to clarify that my company regard our request for your Ministry to approve Miss Zulu's dismissal as a completely separate issue

> from the case for adequate recognition and compensation which Miss Zulu has presented to your office and which the appropriate hearing took place on 9 July 1987. We should be pleased if this could be borne in mind and look forward to your Ministry's decision in due course."

6. The precise reason for the suspension was that on a date unknown to the employer, but prior to 29 July 1987, the employee had without authority obtained access to and used a confidential document of the employer, well-knowing that such action was wrongful and in breach of an implied condition of her employment.

7. On 16 September 1987 the Acting Regional Hearing Officer, Mrs Goromonzi, issued her determination in respect of the appeal hearing on 29 July 1987. In the main it was that the employee was to be reinstated to her former position as Community Liaison-Officer and that her allegation of discrimination was unfounded.

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8. On 22 September 1987 the employee, considering herself aggrieved by the determination, noted an appeal to the Labour Relations Board, leave having been granted her to do so. The employer did not seek to appeal.

9. On the same day the employer wrote to the Principal Labour Relations Officer in answer to the latter's request that he be furnished with the circumstances pertaining to the application of 29 July 1987. The letter reads in part as follows:

> "The second identical offence was brought to light during the hearing with Mrs Goromonzi and a representative of the Union held in your office at Kenneth Kaunda Avenue on 29 July, when Miss Zulu produced a copy of a confidential letter prepared by our Marketing Manager, Mr DG Thompson and addressed to our General Manager, Mr ASY Hamilton, reporting on a meeting with Miss Zulu and members of the Workers Committee in an attempt to resolve some of her problems and held in October 1986. Mrs Goromonzi will no doubt recall the incident.
>
> As far as we can determine, Miss Zulu's copy has been produced by a plain paper copier which means that she must have herself removed, or instructed an agent to remove, the original from Mr Hamilton's office.
>
> Following the second offence Miss Zulu was immediately advised by ordinary mail on 29 July that she had been further suspended, on this

> occasion without pay, awaiting the outcome of our request to your Ministry to terminate her employment."

10. Notwithstanding the determination of the Acting Regional Hearing Officer, the employer declined to act upon it, believing it was justified by reason of having suspended the employee on 29 July 1987 for the misconduct specified in s 3(1)(a) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations.

11. On 14 January 1988 the Labour Relations Officer, Mr Ndlovu, informed the parties that he was referring the employer's application of 29 July 1987 for hearing to the Labour Relations Board.

12. On 22 February 1988 the employer paid the employee her salary up to and including 21 September 1987, offering no explanation either at that time or since.

13. On 2 June 1988 the order of the Acting Regional Hearing Officer, certified by her in terms of s 111(3) of the Labour Relations Act, 1985, was registered as an order of the High Court. The order was served upon the employer the next day.

14. On 8 June 1988 the employee presented herself at the premises of the employer with the intention of resuming employment. She was advised that by virtue of the suspension of 29 July 1987, which was awaiting adjudication by the Labour Relations Board, the employer was not obliged to comply with the order of the High Court. She was asked to leave.

15. On 10 June 1988 the employee issued the notice of motion with which this Court is concerned, seeking an order for specific performance of the determination by the Acting Regional Hearing Officer made on 16 September 1987. The relief was opposed by the

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employer on the ground of its suspension of the employee on 29 July 1987.

The rationale for the learned judge's conclusion that the employee was entitled to be reinstated in her employment was that the employer had not adopted the procedures provided in s 3(1) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations (henceforth, "the Regulations"). Subsequent to its suspension of the em-

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ployee on 29 July 1987 it had not applied to a **labour relations officer** for an order or determination terminating the contract of employment, as Mrs Goromonzi, to whom the application was referred, was an Acting Regional Hearing Officer - both of whom, under the Labour Relations Act, were "essentially different officers with specified and particular functions".

The first argument advanced by Mr *Gillespie* on behalf of the employer was that notification of the employee's suspension on 29 July 1987 to the Acting Regional Hearing Officer, Mrs Goromonzi, fully and formally complied with the provisions of s 3(1) of the Regulations, thereby making the suspension effective until adjudicated upon; but if not procedurally correct, what was done was so close to what ought to have been done as to amount to a substantial compliance therewith.

Section 2 of the Labour Relations Act defines a labour relations officer and a hearing officer as follows:

> '"labour relations officer' means a labour relations officer referred to in para (d) of subs (1) of s 137 and includes an employment officer;"

and:

> '"hearing officer' means a hearing officer referred to in s 137 and includes a regional hearing officer and a chief hearing officer."

Section 137(1) lists these officials: (a) a chief hearing officer and regional hearing officers; (b) hearing officers; (c) a Registrar of Labour Relations and Assistant Registrars of Labour Relations; (d) labour relations officers and employment officers; and (e) a registrar of employment agencies, as being necessary for the purposes of the Act and whose offices shall form part the Public Service. The proviso reads:

> "Provided that nothing in this subsection shall be construed as preventing one person from exercising more than one function."

The functions of both a labour relations officer an a regional hearing officer are outlined in the Act and the Regulations made under it. Their spheres of activity are clearly distinguishable.

A labour relations officer, to whom a dispute or an alleged unfair labour practice has been referred, or who is acting on his own initiative to redress any dispute or unfair labour practice, is enjoined to investigate the matter.

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After due enquiry he may resort to a variety of measures, including attempting to redress or rectify the matter though reconciliation between the parties, making such determination as he deems fit, or referring the matter to a hearing officer or to the Labour Relations Board for determination. See s 109(2) of the Act and s 15 of the Labour Relations (General) Regulations 1985 SI 368 of 1985.

In the particular context of summary suspension, where the employer has good cause to believe the employee to have been guilty of one of the acts of misconduct specified in s 3(1) of the Regulations, the labour relations officer is required to carry out an investigation and, having done so, serve a determination or order on the employee terminating the contract of employment, or upon the employer to remove the suspension and reinstate the employee (see s 3(2)).

The function of a regional hearing officer, on the other hand, is to preside over an appeal from the order made by a labour relations officer or a hearing officer. He is empowered to confirm, vary or set aside the decision appealed against (see s 112 of the Act).

Nor does the proviso to s 137(1) of the Act mean, as contended for by Mr *Gillespie*, that each of the officials mentioned in subs (1) is to be regarded as exercising the functions of the others, more particularly, that because Mrs Goromonzi was an Acting Regional Hearing Officer she was a labour relations officer as well, and so notification of the suspension of the employee to her was notification to a labour relations officer. All that the law-maker intended was that each official may act in more than one capacity. If necessary he may exercise, not only his own function, but that of another official as well.

There is no suggestion that on 29 July 1987 Mrs Goromonzi was performing, not only the function of a regional hearing officer, but in addition that of a labour relations officer. To the contrary, the fact that she did not personally deal with the application but obviously referred it to the Labour Relations Officer, Mr Ndlovu, plainly shows that she was not exercising the function of the former.

It is perhaps understandable why the employer referred the suspension to Mrs Goromonzi. After all, she was concerned with the previous dispute and in the employer's mind proof of the employee's unauthorised access to the confidential document arose at that very hearing.

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But this is not the end of the matter, for the question that naturally arises is whether the making of the application forthwith to an acting regional officer instead of to a labour relations officer, though not in accordance with the exact letter of the law, nonetheless amounted to substantial compliance therewith.

The categorisation of an enactment as "peremptory" or "directory", with the consequent strict

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approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfilment will suffice, no longer finds favour. As was pertinently observed by VAN DEN HEEVER J (as he then was) in *Lion Match Co Ltd v Wessels* 1946 OPD 376 at 380, the criterion is not the quality of the command but the intention of the legislator, which can only be derived from the words of the enactment, its general plan and objects. The same sentiment was expressed by MILNE J in *JEM Motors Ltd v Boutle & Anor* 1961 (2) SA 320 (N) at 327 *in fine* - 328B. This approach received the *imprimatur* of the South African Appellate Division in *Maharaj & Ors v Rampersad* 1964 (4) SA 638 (A) where, after concluding that the provision with which he was concerned was imperative, VAN WINSEN AJA went on to enquire whether the failure in strict compliance therewith was fatal. He propounded the following test at 646 C-E:

> "The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with this injunction, but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."

See also *Shalala v Klerksdorp Town Council & Anor* 1969 (1) SA 582 (T) at 587H-588B; *Nkisimane & Ors v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434E; and more recently, Ex p *Dow* 1987 (3) SA 829 (D) at 831B-D.

Judges in this country also have not been slow to move away from the traditionally strict approach. See *Swift Transport Services (Pvt) Ltd v Pittman NO & Ors* 1975 (2) RLR 226 (GD) at 228C-229C; 1976 (1) SA 827

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at 828; *Macara v Minister of Information, Immigration and Tourism & Anor* 1977 (1) RLR (GD) at 70H; Ex p *Ndlovu* 1981 ZLR 216 (GD) at 217 F-G.

Testing the matter then in the manner approved by these authorities, one is constrained to discover the object of s 3(1) of the Regulations to determine whether that object is fundamental to the policy of the enactment and, if it is, to decide whether it is defeated or frustrated by the non-compliance complained of. The degree of observance and non-compliance is another relevant consideration.

The object behind the requirement of s 3(1), that upon suspension of an employee without pay and other benefits the employer is to apply forthwith to a labour relations officer for an order or determination terminating the contract of employment, is predominantly the protection of the interests of the employee. The common law remedy of summary dismissal on the ground of misconduct is no longer permissible, save in the few prescribed situations. Summary suspension is the remedy available to the employer, but the determination of whether the employee has been guilty of misconduct is placed in the hands of an independent third party, the labour relations officer. He must be informed forthwith of the suspension in order that he may embark upon the investigation and come to a decision with the minimum of delay, thereby

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achieving certainty for the parties and involving as little disruption of their lives as possible. Otherwise the employee is prejudiced by remaining without payment of salary during the period of suspension and unable to assume other employment. And the employer is prejudiced by being obliged not to fill the employee's position until such time as a favourable determination has been made.

That this object is fundamental to the policy of this particular provision is beyond question. But did the application for an order terminating the contract of employment to Mrs Goromonzi, made on the very day the employee was suspended defeat or obstruct that policy?

In my view, the degree of non-compliance was by no means great. The employer notified an official, albeit at a higher level, who deals with the same problems and investigations as those with which a labour relations officer is concerned. It is an inescapable inference that Mrs Goromonzi referred the matter to the Labour Relations Officer Mr Ndlovu and that he applied his mind to it, for he first of all sought further information as to the circumstances of the suspension (*vide* the letter of 22 September 1987) and on 14 January 1988 advised that he was referring the employer's application to the Labour

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Relations Board for hearing. It is more than likely that even if the application had been made by the employer directly to the labour relations officer the outcome would have been the same, as it would not have been appropriate for him to have given a decision while Mrs Goromonzi was still to determine the appeal before her. When she did so, on 16 September 1987, in favour of reinstatement, it was then that the Labour Relations Officer commenced to enquire into the merits of the suspension of 29 July 1987. And since there was an appeal to the Labour Relations Board from Mrs Goromonzi's decision, he felt it desirable that the Board should deal with both disputes.

But, in any event, any delay on the part of Mrs Goromonzi in referring the application of 29 July 1987 to the Labour Relations Officer, or on the part of the latter in dealing with it, was not attributable to the employer, for it had applied to Mrs Goromonzi **forthwith**.

It follows, in my view, that the regulatory injunction has been complied with. Its object was not frustrated or materially impaired by the employer proceeding in the manner it did.

On behalf of the employee, Mr *de Bourbon* advanced the submission that should it be found by this Court that the employer had complied in substance with procedural requirements of s 3(1), then it had, on 22 February 1988, waived its right to summarily suspend the employee, or had condoned her misconduct, by its undisputed and unexplained act in paying her salary for the period 29 July to 21 September 1987. He cited *Phillips v Foxall* (1872) 7 LR QB 666 at 680 and *Usakos Recreation Club v Slaney* 1950 (3) SA 121 (SWA) at 124G in support of the proposition that where, subsequent to summary dismissal or summary suspension on the ground of misconduct, an employer does an act which, taken not in isolation but with all other pertinent factors, established an intention to continue the employee in service, the employer must be held to have waived his right to dismiss or suspend, or to have condoned the misconduct.

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I have no hesitation in accepting that as a correct statement of the law. Certainly over sixty years ago INNES CJ in *Laws v Rutherfurd* 1924 AD 261 at 263 enunciated the principle as follows:

> "The *onus* is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances. It is

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always difficult, and in this case specially difficult to establish."

See also *Hepner v Roodepoort Maraisburg Town Council* 1962 (4) SA 772 (A) at 778E-H; *Netlon Ltd & Anor v Pacnet (Pty) Ltd* 1977 (3) SA 840 (A) at 872H; and *Feinstein v Niggli & Anor* 1981 (2) SA 684 (A) at 698F-G.

Thus, in order to succeed in establishing waiver or condonation, it was for the employee to prove knowledge by the employer of its rights and a definite surrender of those rights, whether expressly or by conduct plainly inconsistent or irreconcilable with an intention to persevere with their exercise. No stronger proof than a preponderance of probability is required. See *Alberts v Bryson* 1976 (2) RLR 193 (AD) at 197F; 1977 (1) SA 857 at 859. But a court does not lightly assume that a party has abandoned or renounced his right, especially where reliance is placed on a tacit waiver. See *Bay Loan Investments (Pty) Ltd v Bay View (Pty) Ltd* 1971 (4) SA 538 (C) at 540E-G; and *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A) at 704F-G.

The payment made to the employee on 22 February 1988 must not be divorced from its factual setting. It was not accompanied by a request that the employee immediately return to work. Nor can it have been interpreted as such by the employee, for she did not **thereupon** tender her services. No doubt she appreciated that to do so would be of no avail. Moreover, the payment was made by the employer in the knowledge that its application of 29 July 1987 was pending before the Labour Relations Board for its consideration, having been informed thereof by the Labour Relations Officer the previous month. And wholly consistent was the employer's adamant refusal to allow the employee to resume employment even in the face of the High Court order.

In short, I am satisfied that on the affidavits placed before the court *a quo* the employee failed to discharge the *onus* upon her of establishing that the employer tacitly condoned her alleged misconduct or waived its right to summarily suspend her from employment.

The conclusion I have reached relieves me of the need to discuss Mr *Gillespie's* interesting alternative contention that the learned judge ought not to have afforded the employee the relief of reinstatement.

I would accordingly allow the appeal with costs and alter the order of the court *a quo* to read

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"The application is dismissed with costs."

McNally JA: I agree.

Manyarara JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal representatives

Winterton, Holmes & Hill, respondent's legal representatives

SHUBARA RANCH (PVT) LTD v SHIELD OF ZIMBABWE INSURANCE CO LTD 1988 (2) ZLR 306 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Gubbay JA, Manyarara JA & Korsah JA

Civil Appeal

18 & 25 October 1988

Flynote

Insurance - exclusionary clause in motor insurance policy - requirements for driver of vehicle to be "duly and fully licensed" - driver not holder of a licence nor of a tractor drivers permit under s 8 of Road Traffic Act 1976 - whether exclusion clause should specifically mention permits.

Headnote

It is accepted principle in interpreting insurance contracts that it is the obligation of the insurance company to make clear what risks it wants to exclude. This it must do in reasonably clear language, so that the insured may know what the limitations to the policy are.

Where an insurance contract excluded liability in respect of drivers who were not "duly and fully licensed", it was not necessary, where the vehicle in question was a tractor, specifically to mention tractor drivers permits issued under s 8 of the Road Traffic Act 1976. The wording of the exclusion clause was unambiguous, and there was no possible basis for holding that a driver who held neither a drivers licence proper nor a tractor drivers permit could be held to be "duly and fully licensed".

Judgement of GIBSON J in *Shield of Zimbabwe Insurance Co Ltd* v *Shubara Ranch (Pvt) Ltd* *(11) upheld.

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D P Carter for the appellant

M J Gillespie for the respondent.

GUBBAY JA

Judgment

Gubbay JA: On 31 May 1985, on the Chinhoyi-Karoi Road, a farm tractor and trailer owned by the appellant, driven by one of its employees and insured with the respondent, was involved in a collision with a motor vehicle, driven by Dudley Duvenage, and an Army lorry, the driver of which was Private Mamvocha. In consequence of the collision Duvenage was killed and a passenger in the lorry, Captain Ngwenya, lost a leg.

The dependants of the late Duvenage issued summons against the respondent for the payment of damages representing their loss of support. The respondent was obliged by the provisions of Part III of the Road Traffic Act 1976 to defend the claim. Although action against the respondent was not brought by Captain Ngwenya it was agreed between him, the dependants and the respondent, that the latter was to pay overall damages in an amount of $77 500 in full and final settlement of both claims; the sum of $23 000 to be Captain Ngwenya's share.

Once the settlement with the victims of the collision had been achieved, the respondent instituted a notice of motion against the appellant in which it sought reimbursement of the sum of $77 500 with costs.

At the hearing a special case was presented to the learned judge in terms of Rule 199(1) of Order 29 of the High Court Rules 1971, the question for opinion being expressed thus:

> "Whether the insurer is entitled in law to repudiate its obligations under the policy of insurance issued by it in respect of the insured on the grounds of the breach by the insured of special exception (B)ii of sub-clause B-E of s 14 of the policy in the circumstances given below."

The additional facts to those above stated were given as these:

> "(6) The insured's tractor was being driven for the insured's business purpose by an employee of the insured with its general knowledge and consent.
>
> (7) The insured's driver was not the holder of a drivers licence in terms of s 6 nor of a tractor drivers permit in terms of s 8 of the Road Traffic Act.
>
> (8) The insured employs a farmer or farm manager who holds a drivers licence and who permitted the insured's driver to drive the said tractor.
>
> (9) The tractor was being driven on the Chinhoyi-Karoi Road within a

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belt of ten kilometres wide outside the boundaries of the insured's farm when the collision giving rise to the third party claims occurred."

In a well reasoned judgment GIBSON J concluded that the question posed was to be answered in the affirmative, and awarded the respondent consequential relief and costs. It is against that decision that this appeal now lies.

The special exception in the policy, which relates to commercial type vehicles and is specified as applicable to the tractor involved in the collision, reads as follows:

"The Company shall not be liable in respect of:

A. ...

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 drive 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 license 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 where 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;

(iii) ..."

The argument advanced by the respondent before the learned judge, and repeated in this Court by Mr *Gillespie*, was simple yet formidable. It was that the respondent was entitled to repudiate liability because the tractor driver was not "duly and fully licensed" to drive the tractor in accordance with prevailing legislation. He was not the holder of a drivers licence in terms of s 6(1), nor of a learners licence in terms of s 9(5), of the Road Traffic Act; and even if it were to be assumed that the words "duly and fully licensed" properly interpreted include, in common parlance, a person who is the holder of a tractor drivers permit and who drove at the material time in accordance with the conditions under which such permit is issued under s 8(7) of the Act, the admitted fact was that the tractor driver held no such permit.

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Mr *Carter*, who appeared for the appellant, strove valiantly to overcome the obvious attraction of the respondent's contention. He submitted that because the special exception in the policy makes no mention of the tractor drivers permits, despite such contingency being the subject of s 8 of the Road Traffic Act, the exemption from liability only operates where the driver was not the holder of a drivers **licence** or a learners **licence**, or if the holder of the latter **licence**, he was not at the critical time under the supervision required by the Act. Stated otherwise, if the policy were intended to exclude liability where the driver of a tractor insured under it was not the holder of a tractor drivers permit, it would have made specific provision to that effect. And since it does

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not, there is a measure of ambiguity necessitating that the words "duly and fully licensed" be construed against the party responsible for the drafting of the special exception, which was the respondent.

The fallacy of the proposition is self evident when one asks:

> "What provision should have been made to exclude the tractor driver in the circumstances of the special case?"

Words such as -

> "Provided that a tractor driver who is not duly and fully licensed and who does not hold a tractor drivers permit or who does not otherwise comply with the provisions of s 8 of the Road Traffic Act shall not be regarded as duly and fully licensed"

would be required. But that stipulation is both unnecessary, and illogical, for there is no possible basis upon which such a driver could be held to be "duly and fully licensed".

Moreover, it is inherent in Mr *Carter's* contention that the respondent undertook to insure the appellant against any accident, injury, loss or damage, notwithstanding that the occurrence was linked to a contravention of s 8 of the Road Traffic Act by the tractor driver, and vicariously perhaps by the appellant itself. Such a construction of special exception would produce an unrealistic and generally unanticipated result and one inconsistent with good business sense. In any event it is simply not borne out by the plain, ordinary, popular and grammatical meaning of the words.

It is an accepted principle in interpreting insurance contracts that it is the obligation of the insurance company to make it clear what particular risks it

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wished to exclude. Unquestionably it may limit its liability but must do so in reasonably clear language so that the insured may know what the limitations are. The special exception achieves that object. It is devoid of ambiguity.

It follows that, as the tractor driver was not "duly and fully licensed", the respondent was absolved from liability by the special exception.

The appeal fails and is dismissed with costs.

Manyarara JA: I agree.

Korsah JA: I agree.

Morris, Beale & Collins, appellant's legal representatives

Winterton, Holmes & Hill, respondent's legal representatives

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WEBBER v MINISTER OF DEFENCE 1988 (2) ZLR 311 (HC)

Court **High Court, Harare**

Greenland J

Application for declaratory order

13 & 26 October 1988

Flynote

Contract - interpretation of - words to be interpreted in their context - pay and allowances "received" - whether includes monies deducted for payment of income tax.

Headnote

The applicant was an officer in the Zimbabwe Army. While so employed, he entered into a contract with the respondent, in terms of which the respondent would assist him financially while he pursued a course of study for a university degree. In return for that assistance, the applicant undertook to remain in the respondent's employ for a period equal to the length of the degree course, four years. If he left before the end of that period, he was required to refund the cost of his university education, the amount decreasing in proportion to the amount of the period actually served. He also undertook to repay, on a similar *pro rata* basis, "the full amount of the pay and allowance received by him during the period that he was at the [university]".

The applicant left the employ of the respondent before the expiry of the four-year term. The defendant withheld certain monies payable to the applicant as being monies owed by the applicant under the contract. The applicant argued that because certain sums were deducted as "pay as you earn" tax, those sums were not "received" by him and he was therefore not liable to repay them. He sought a declaratory order as to the quantum of his monetary obligations, as well as an order that the respondent refund some $9000.

Held, that while the ordinary and usual meaning of the word "received" would support the applicant's contention, that did not dispose of the

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matter. It is misleading to seize on one word in a contract, ascribe to it its usual meaning, and then interpret the contract in the light of that meaning. The context in which the word is used is of prime importance; regard must be had to the nature and purpose of the contract and the use of the word in the contract as a whole.

Held, further, that the grammatical and ordinary sense of the words used in the context of this contract admit the meaning contended for by the respondent, that is, full pay and allowances before tax. To hold otherwise would lead to the absurdity and irrationality that the respondent

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had undertaken the applicant's legal obligation to pay tax.

Cases cited:

List v Jungers 1979 (3) SA 106 (A)

Swart en 'n Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A)

Consolidated Diamond Mines v Administrator SWA 1958 (4) SA 572 (A)

National Railways of Zimbabwe Contributory Pension Fund v Edy 1988 (2) ZLR 157 (SC)

M R D Stonier for the applicant

D P Carter for the respondent.

Judgment

Greenland J: In this case applicant seeks a declaratory order as to the quantum of his monetary obligations in terms of a contract and also an order that respondent refund the sum of $9 488,15.

The relationship between the parties was contractual. The issues have to be resolved by way of interpreting a written contract entered into by the parties in March 1981.

At that time applicant was employed by respondent in the army with the rank of captain. Respondent agreed to assist him financially in pursuing a course of studies for a degree at the University of Zimbabwe. The degree course was for a period of four years commencing on 12 March 1981.

In return for providing this financial assistance, the contract required applicant to remain "bonded" to respondent's employ for a period of four years after completion of the course. In the event of the applicant leaving employment within this period, he was required to refund the cost of his University education, the quantum of such refund being dependent on the proportion of the bonded four year period actually honoured.

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Having successfully completed the course, with respondent's assistance, by December 1984, the applicant thereafter breached the contract, ie the bonding aspect, by leaving respondent's employ with effect from 30 April 1987. It is common cause that he is liable to repay respondent one half of the "expenses" involved. The dispute centres on three aspects of this matter.

Firstly applicant submits that, in terms of the agreement, he is not required to refund that portion of salary not received by him because it was deducted at source in terms of PAYE procedures. It is helpful to set out the relevant clause in the contract:

> "5. If the Student resigns, retires or is dismissed from the Regular Force -

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(a) before the completion of his studies at the Institution; or

(b) within the period specified in clause 3(e);

he shall be liable to pay to the GOVERNMENT as a genuine pre-estimate of the damages thereby suffered a sum of money (hereinafter called 'the expenses') equal to the full amount of pay and allowances received by him during the period that he was at the Institution."

Because certain sums were deducted as PAYE ("pay as you earn" tax), so the submission goes, it cannot be said that this amount was "received by him during the period he was at the Institution. . . " so he is not obliged to repay it.

Understandably, this submission relies heavily on the ordinary meaning of the word "received" given in the Shorter Oxford English Dictionary, 3 ed, *inter alia*:

"To take in one's hand, or into one's possession, to take delivery of a thing from another. . . to take, accept, or get, in various senses, to be or become a recipient."

There can be no doubt that the ordinary and usual meaning of the word "received" is as contended for by the applicant. In my view, however, this does not resolve the issue and I would quote DIEMONT JA in *List v Jungers* 1979 (3) SA 106 (A) 118D-E:

"It is, in my view, an unrewarding and misleading exercise to seize on one word in a document, determine its more usual or ordinary meaning, and then, having done so, to seek to interpret the document in the light of the meaning so ascribed to that word. Apart from the fact that to decide on

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the more usual or ordinary meaning of a word may be a delicate task - so for example STRATFORD CJ and GREENBERG J gave differing 'ordinary meanings' to the word 'guarantee' in the cases noted above - it is clear that the context in which the word is used is of prime importance."

This approach is in accordance with Pothier's and Van der Linden's sixth rule and a long line of authority set out by Christie *The Law of Contract in South Africa* p 197. I accept also the dictum of RUMPFF CJ in *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C that it is self-evident that when one considers the words of a contract regard must de had to the **nature and purpose** of the contract and the use of the words in the contract as a whole. The words cannot be cut out, pasted on a clear sheet of paper, and then considered with a view to determining their meaning. As stated by FAGAN CJ in *Consolidated Diamond Mines v Administrator SWA* 1958 (4) SA 572 (A) at 599C:

"When we find in a judgment statements which attach meanings to particular words or phrases, we must remember that the Judge is dealing with those words or phrases in the context in which they occur and with reference to the subject matter to which they relate. Beyond that, a statement as to the meaning of a word or phrase would merely be *obiter dictum*. I should be loth to read a Judge's elucidation of a word with no specialised legal meaning as intending to lay down as a matter of law what that word means independently of the context in which he is dealing with it, for defining the meaning of words as such is not a Judge's function, but that of a philologist. A Judge's statement on the meaning of such a word can be no more than an expression of his opinion on a matter outside his domain of special knowledge, which is that of law, not of language."

Adopting this overall approach, it does not appear to me correct to hold that the common intention of the parties as expressed in the contract, excludes the PAYE deductions. To do so

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would be to ignore the nature ad purpose of the contract and the context in which the critical words are used. The nature and purpose of the contract was to ensure that applicant repaid in full the salary disbursed by respondent as a "genuine pre-estimate of the damages" suffered in consequence of applicant's breach. In context, a meaning must be given to the clause and words as a whole and not to one individual word. In particular the words:

> "equal to **the full amount of pay and allowances**. . . "

GREENLAND J

to my mind have only one meaning, ie salary due, payable and receivable. This colours the meaning of the word "received" to give it the meaning encompassed in the dictionary meaning quoted above, ie

> ". . .in various senses, to be or become a recipient."

The obligation to pay tax is a legal one. PAYE deductions are mandatory in terms of para 3 of the 13th Schedule of the Income Tax Act [*Chapter 18*]. It was by operation of law, therefore, that, as is now usual and normal, the deductions were made and paid over, on applicant's behalf, to the Collector of Taxes. In the context of this agreement and bearing in mind its nature and purpose it is simply inconceivable that the common intention was that applicant was to be regarded as not receiving that portion of his pay so deducted.

In my view, the grammatical and ordinary sense of the words used in the context of this contract, and bearing in mind its nature and purpose, admit of the meaning contended for by respondent ie full pay and allowances before tax. To hold otherwise would lead to absurdity, as envisaged by the golden rule (Christie *supra* p 200), and lead also to an irrational result as envisaged by GUBBAY JA in *National Railways of Zimbabwe Contributory Pension Fund v Edy* S-141-88 at p 4. That absurdity and irrationality would lie in holding that it was the common intention of the parties, as expressed, that respondent would undertake applicant's obligation to pay tax. Such an extraordinary matter, if intended, would certainly not be concluded in the language employed. The first issue is therefore resolved against the applicant.

Secondly, applicant submits that he is not obliged to refund pay and allowances received by him during such periods of time he was on vacation from university because, during such periods, so the submission goes, he was not "at the Institution" as stipulated in Clause 5 *supra* and, in fact, was physically employed by respondent. It is not disputed that during vacation he was not physically present at the university. Neither is it disputed that he presented himself for duty and physically performed these duties with respondent, ie in the army, during these periods. Are these periods to be excluded on a proper interpretation of Clause 5 *supra*?

Adopting the same approach as outlined above and having particular regard to the whole of the contract I hold that the vacation periods cannot be so excluded. It is true that Clause 5 employs the words "a genuine pre-estimate

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of the **damages suffered**" (my emphasis). It is true that respondent suffered no damages during vacation periods as applicant reported for work.

However, it is clear that the common intention reposes in the use of the words "genuine pre-estimate" and not in the words "damages suffered". The intention was to adopt a practical and functional method of computing the envisaged damages, not an exact scientific or arithmetical formula.

This is made clear by a reading of the rest of the Agreement. Clause 3 reads:

> "3. The Student undertakes -
>
> (a) to attend the Institution **for the period of time** set out in Clause 1;"

Clause 1 reads:

> "1. The Government undertakes for a **period of ... 4... years** commencing on the 12th March 1981 to pay. . . "

From these two clauses it is patent that the parties agreed that applicant would attend University for a period of four years and would be regarded as so attending. It is simply not open to applicant to now say that the period agreed was something less. The issue is put beyond question by Clause 3(d) which reads:

> "3. The Student undertakes -
>
> (a) to attend the Institution for period of time as set out in Clause 1;
>
> (b) ... ;
>
> (c) ... ;
>
> (d) if required by the Commander, to **report for duty during the vacation of the Institution;**
>
> (e) upon completion of his course of studies at the Institution, to resume service in the Regular Force for a minimum period of FOUR (4) years."

(My emphasis.)

From all the above it is patent that the parties actually agreed the issue in its entirety and there is really no room for now attempting to modify that agreement. It is clear that what is meant by the words -

> "during the period that he was at the Institution"

in Clause 5 is the 4 year period referred to in Clauses 3 and 1. As applicant specifically agreed in Clause 3(d) to report for duty during vacations it is not

open to him to now submit that this period of four years can in any way be reduced in

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computing the damages in terms of the formula set out in Clause 5. This issue is resolved against the applicant.

The last issue is whether or not applicant is obliged to refund the cost of books utilized by him during his studies and paid for by respondent. It is necessary to reproduce the relevant clause in the Agreement:

> "1. The Government undertakes for a period of ... 4 ... years commencing on .... to pay on the terms and conditions hereinafter contained -
>
> (a) the tuition and examination fees and charges, excluding meal charges, due by the student to the Institution; and
>
> (b) **the cost of necessary books for the course of studies; and**
>
> (c) the travelling expenses incurred by the Student in reporting unless required to do so by the Commander, for duty."

(My emphasis.)

As can be seen this clause embodies an equivocal, unqualified obligation to pay for the books in question. There is no provision for the return of the books to respondent. In particular, there is no suggestion that during the two years period after completion of the course applicant was required to return the books. No doubt had he not broken his "bonding" nothing more would have been heard of the matter and he would have remained in permanent possession. The formula for computing the damages in Clause 5 *supra* makes no reference to refunding the costs of the books. It is also significant that respondent has not claimed a refund of any of the expenses in Clause 1(c). There is simply no basis for holding that applicant is liable to refund the costs of the books. This issue is resolved in his favour.

In the result, therefore, the application succeeds only to the extent that it is declared that applicant is not obliged to refund the sum of $466,39, being the costs of the books supplied.

As respondent has withheld this amount from applicant, respondent is ordered to refund it.

As applicant has been substantially unsuccessful it is fair and appropriate that each party pay its own costs.

Atherstone & Cook, applicant's legal practitioners

S v MAVINGERE 1988 (2) ZLR 318 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA, McNally JA

Criminal appeal

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27 October 1988

Flynote

Appeal - evidence on - when Supreme Court will call for further evidence to be led before it.

Criminal law - statutory offences - mens rea in - s 43 of Road Motor Transportation Act [Chapter 262] - whether mens rea required.

Criminal procedure - trial - prosecutor failing to call vital but formal evidence - duty of magistrate to do so.

Headnote

In terms of s 15 of the Supreme Court of Zimbabwe Act 1981 the Supreme Court has to power to call for evidence or for any document to be produced, if it appears to the court necessary for the determination of the case. This power may be exercised even where the evidence called for will supply a fatal deficiency in the prosecution case, such as is caused by the failure to prove a mere technicality. However, where the missing evidence is of a contentious nature, such power should be exercised sparingly. Similarly, where the prosecutor at the trial fails to call the evidence necessary to prove a mere technicality, the court can and should call the evidence itself, under the powers given to it by s 218 of the Criminal Procedure and Evidence Act [*Chapter 59*].

The Court accepted, without finally deciding the point, that for a contravention of s 43 of the Road Motor Transportation Act [*Chapter 262*] (which penalizes a refusal or failure to pay on demand a far due for carriage in public service vehicle) *mens rea* is required.

1988 (2) ZLR p319

McNALLY JA

Cases cited:

S v Buitendag 1976 (1) RLR 345 (AD)

S v Ndhlovu 1983 (2) ZLR 263 (SC)

S v Sithole 1979 RLR 412 (GD)

R v Boshoff 1956 R & N 61 (SR)

R v Ngombe 1964 RLR 231 (AD); 1964 (3) SA 816 (RAD)

R v Misheck 1965 RLR 657 (AD); 1966 (2) SA 53 (RAD)

S v Onward Mudimu 1971 (1) RLR 172 (GD); 1971 (4) SA 283 (R)

S v Bira 1971 (1) RLR 263 (AD)

R v Pretoria Timber Co (Pty) Ltd & Anor 1950 (3) SA 163 (A)

S v Chitenga 1979 RLR 228

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S v Maporovera S-167-88 (unreported)

S v Mudzonga S-158-88 (unreported)

R v P Hall & Co (Pvt) Ltd 1966 RLR 374; 1966 (4) SA 222 (RAD)

E W W Morris for the appellant

Miss *E F Ndewere* for the respondent

Judgment

McNally JA: The appellant was charged before the Magistrate, Chinhoyi, with three offences arising out of a series of events on the evening of 26 March 1986.

The first charge related to contravention of s 43 of the Road Motor Transportation Act [*Chapter 262*], in that he did -

> "Wrongfully and unlawfully hire a public service vehicle authorised to carry passengers, to wit a Pfumo Mini Cab, knowing or having reason to believe that he cannot pay the lawful fare, or with intent to avoid payment of lawful fare."

The second charge was one of common assault, it being alleged that he wrongfully and unlawfully assaulted a policeman who was summoned by the aggrieved taxi-driver. He was acquitted on this charge.

The third charge was one of contravening s 6(c) of the Miscellaneous Offences Act [*Chapter 68*], in that he did -

> "wrongfully and unlawfully resist or hinder or disturb a police officer in the execution of his duty."

This charge arose out of his alleged unlawful resistance to the reinforcements

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McNALLY JA

summoned by the first policeman, the complainant in count 2.

The appellant was convicted on the first and third counts and fined $50 (or, in default of payment, twenty-five days) and $20 (or, in default of payment, ten days), respectively. He appealed against conviction only on both counts. At the conclusion of the hearing we dismissed the appeal in its entirety. These are our reasons for so doing.

Mr *Morris*, who appeared for the appellant, first took a very technical point. He claimed that the State had failed to prove that the taxi which the appellant hired was "a public service vehicle authorised to carry passengers".

I think he was right to this extent. Unless the vehicle in question was proved to be both

(a) a public service vehicle; and

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(b) authorised to carry passengers

no offence was committed. It is clear from the provision of s 4 of the Act that a person, who carries passengers (subject to certain exceptions) on public service vehicle which is **not** authorised to carry passengers, commits an offence. A passenger on such a vehicle who does not pay his fare cannot be prosecuted under s 43. Therefore, if an accused person is to be brought within the section, the State must prove both these allegations. That is why, quite correctly, both allegations are in charge. They are essential averments. The prosecutor, when listing before the trial the facts which he needed to prove, should have listed these two facts and should have decided how he was going to prove them. The obvious way would have been to produce, through the driver, the road service permit, which, in terms of s 12 of the Act, he was obliged to carry in the vehicle.

I think the evidence established that the vehicle was a public service vehicle. It was described by all parties as a taxi. It was hired from a taxi rank. "Taxi-cab" is defined in the Act as a public service vehicle having seating accommodation for not more than seven passengers. "Public Service Vehicle" is defined as "a motor vehicle ... used for the carriage ... of passengers ... for hire or reward on one or more occasions."

However, it was certainly not proved that this public service vehicle was authorised to carry passengers.

I have said that the prosecutor should have realised the need to prove this point. Failing him, the magistrate would have been entitled to raise the point

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McNALLY JA

and call for the evidence, under the powers given to him by s 218 of the Criminal Procedure and Evidence Act [*Chapter 59*]. He should have done so. See *S v Buitendag* 1976 (1) RLR 345.

This Court has the power, in terms of s 15 of the Supreme Court of Zimbabwe Act No. 28 of 1981, to remit the matter, to call for evidence, or to call for the production "of any document ... the production of which appears to it to be necessary for the determination of the case". But it is said that such power should be exercised sparingly. See for example *S v Ndhlovu* 1983 (2) ZLR 263 at 268F *et seq* and *S v Sithole* 1979 RLR 412 at 419E-F.

These cases govern the situation when the missing evidence is of a contentious nature. But what of a situation such as this, where for want of proof of a mere technicality a State case is found to be fatally defective?

The answer is to be found in *R v Boshoff* 1956 R & N 61 at 64, and the cases which have followed it. In *Boshoff's* case a man had been convicted of refusing or failing to leave licensed premises when requested to do so by the licence, his servant or agent. The premises concerned were Meikles Hotel. An assistant manager had said in evidence that the hotel was "licensed premises". But the point was taken that that was not the best evidence. Therefore it was inadmissible. The licence itself should have been produced. It was not. In the

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circumstances there was not evidence that the premises were licensed.

HATHORN J solved the problem as follows:

> "It has frequently been laid down that the power to remit or to hear evidence on appeal in order to supply a deficiency in the Crown case should be used sparingly, but in my view the considerations I have mentioned justify this course being taken in the present case. The case falls within proposition (c) set out by BRINK J in *R v Siwi* 1951 (3) SA 703 (O) at 714, and it conforms to the requirements stated by MURRAY J in *R v Letuli & Anor* 1953 (4) SA 241 (T) at 246. Moreover the Appellate Division indicated in *R v Pretoria Timber Co (Pty) & Anor* 1950 (3) SA 163 at 178-9 that the power had been used too sparingly in the past and added that, in *R v Katzenburg* 1947 (1) SA 423 (T), a case similar in principle to the present case, the Court was wrong to have refused to exercise the power."

Subsequent cases have repeated the point that the power will not be exercised

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McNALLY JA

when the evidence is likely to be contentious - see *R v Ngombe* 1964 RLR 231 (AD) at 233H *et seq*; 1964 (3) SA 816. BEADLE CJ said in *R v Misheck* 1965 RLR 657 (AD) at 659 1966(2) SA 53 at 659; that "our courts have perhaps been rather more prone to remit cases for the taking of further evidence than have the courts in the Republic of South Africa". See also *R v Onward Mudimu* 1971 (1) RLR 172 (GD) at 175 H-I; 1971 (4) SA 283; *S v Bira* 1971 (1) RLR 263 (AD) at 265D *et seq*.

I would agree with respect with the words of SCHREINER JA in *R v Pretoria Timber Co (Pty) Ltd & Anor* 1950 (3) SA 163 (A) at 178-179. He said:

> "A provincial Division has, under that subsection (s 98 (2) of Act 32/1944) a discretion whether to hear evidence and I see no reason for restricting that discretion so as to prevent the Court from hearing evidence that may supply a fatal deficiency in the Crown's case ... It is enough to say that in the present case the fact that Pretoria falls within the area was duly alleged in the charge sheet, the failure to prove it was obviously due to an oversight and not to obstinacy on the part of the Crown's representative, the offences were deliberate and serious and the matter was one which ... could be proved without delay and beyond dispute once the proper meaning of the description of the area was ascertained."

Once we made it clear to Mr *Morris* that we would if necessary call for the production of the documentary evidence to prove beyond dispute that the vehicle was both a public service vehicle and one authorised to carry passengers, he very properly saved his client the expense of a further hearing by formally conceding the point.

Thus the first issue was disposed of.

The second point taken was that on the facts the State had not proved that the appellant knew or had reason to believe that he could not pay the fare. The appellant's contention had been that he knew (or thought he knew) that his wife who was at home had $5 in her possession, which was his money. When he got home he found that she had spent it. The fare was $3,40. Although the evidence given by the appellant was hotly contested by the taxi-driver, whose evidence was preferred by the magistrate, I will accept for the purpose of this case that the appellant had some hope or expectation that he would find $5 when he got home. But the fact is that he did not pay, and the better evidence is that the money was only tendered when all the

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parties were at the

McNALLY JA

police station, at which stage the appellant's wife brought a $10 note.

The magistrate was, I think, conscious that there was a difficulty here, and that the charge was inappropriately worded, because in his judgment he drew attention to the provisions of subs(c) of s 43, the section under which the appellant had been charged. Subsection (c) reads:

> "If any person ... refuses or fails to pay on demand a fare lawfully due from him, he shall be guilty of an offence."

What the magistrate forgot was that the wording of the charge made it clear that the charge was framed in terms of subs(a) of the section, not subs(c). He should have amended the charge, using the powers granted to him by s 191 of the Criminal Procedure and Evidence Act: see *S v Chitenga* 1979 RLR 228 and compare *S v Maporovera* S-167-88 (not reported) and *S v Mudzonga* S-158-88 (not reported).

There is clearly no prejudice to the appellant if the charge is amended to read:

> "Contravening section 43 of the Road Motor Transportation Act [*Chapter 262*], in that on 22 March 1986, and at Chikonohono Township, Chinhoyi, the accused unlawfully, with reference to a public service vehicle authorized to carry passengers, namely, a Pfumo Mini Cab, refused or failed to pay on demand a fare lawfully due from him."

The charge is accordingly so amended.

Mr *Morris* argued that the offence should not be construed as one of strict liability. In making a determination on this point one looks at the test laid down in such cases as *R v P Hall and Co (Pvt) Ltd* 1966 RLR 374; 1966 (4) SA 222 (RAD). The one feature of the present situation which does not pass the P Hall test is the penalty provided. It is not merely a fine. The general penalty clause provides for a prison sentence, however unlikely it may be that such a sentence could be passed for this offence. The provision of such a penalty suggests that strict liability should not be inferred.

To introduce the concept of *mens rea* one would have to imply the word "wilfully" before the word "fail". My initial reaction was that this would result in "refuse" and "fail" meaning virtually the same thing. But on second thoughts they are different. A passenger who, after demand has been made, tiptoes away while the taxi driver's attention is diverted, with the intention

McNALLY JA

of avoiding payment, has not refused to pay. He has simply failed to pay, albeit with a positive intent to avoid payment. The word "refuse" would not adequately cover his situation.

Without finally deciding the point, therefore, I am prepared to accept for the purposes of this case that *mens rea* is necessary. I turn then to examine the evidence in this regard.

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The perfectly credible evidence of the taxi driver is that on arrival at the appellant's house the meter showed $3,40. He asked for payment. The appellant went in to his house and then came back and said "I have no money". His wife also came and said she had no money. That may well have been the truth, but the point is that no offer was made to obtain the money. The driver said that in the circumstances he would have agreed to wait till the next day, but no request for such credit was made. He told them he was going to go to the police and the appellant told him he could go where he liked. In the interim the appellant had been walking about holding his baby and ignoring the pleas of the taxi driver.

Just before the taxi driver went off to call the police he saw the appellant go to the next house. The appellant claims that this was yet another effort on his part to raise the money by borrowing it. All one can say is that it is strange nothing of this was said to the taxi driver. One would have expected the appellant to say to the taxi driver "hold on, let me see if I can borrow the money from my neighbour". In the absence of any such remark, the magistrate was quite entitled to conclude that the appellant was being untruthful, and that in fact he was refusing to pay. We do not know why he went to the neighbour's house. The neighbour was not called to support the defence case. Nor were any of the people in the appellant's house.

As I indicated earlier, one must give the appellant the benefit of the doubt as far as his expectations were concerned. He may have believed, or hoped, that he would find enough money at home to pay the taxi driver. But when he found there was not, it is evident that he decided to brazen it out and refuse to pay. He may have thought that his position would protect him. He may have thought that the driver would not make a fuss over so small an amount. But, from that point on his behaviour was an arrogant rejection of the demands made on him.

This is supported by the taxi driver's evidence of what took place when he came back with a policeman, Constable Shindi. The policeman went into the

house while the taxi driver remained outside. The policeman said when he went inside and asked for the person who had refused to pay the taxi fare he was told that person was not present. He had to go back and call the taxi driver to identify the appellant. This evidence of the policeman was corroborated by the taxi driver and so can safely be accepted, even though his evidence as a whole was found to be unreliable. Here again is evidence of obstructive behaviour consistent with refusal and not simply inability to pay. The appellant was positively attempting to avoid having to pay the fare. He was not simply expressing his inability to pay immediately, or asking for time to pay. He was refusing to pay.

In my view there was ample evidence to justify a conviction on the charge as amended. The evidence in relation to the third count, which I am about to set out, confirms, if such confirmation is necessary, that the appellant at no stage attempted to negotiate on the basis of an admission of liability, even when invited to do so.

The third count arose out of the third attempt by the taxi driver to get his money. When the policeman emerged from the appellant's house (and he was running, with his cap in his hand,

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and the taxi driver had heard sounds of argument within) they went off to the police station to obtain reinforcements. They came back again with two other policemen, one of whom was Section Officer Chiguri. He gave evidence. He said that he had received a report from Cst Shindi to the effect that he (Shindi) had been assaulted by someone who had refused to pay a taxi fare. This hearsay evidence is admissible on the basis that it goes to prove SO Chiguri's state of mind. In determining whether he had a right to arrest the appellant, one must accept that he had direct information from a police constable that he, the police constable, had been unlawfully assaulted. He, SO Chiguri, was entitled to rely on that information, subject to what the appellant had to say, as justification for arresting the appellant under the provisions of s 29(i)(b) of the Criminal Procedure and Evidence Act.

This is of importance because SO Chiguri did not have authority to arrest the appellant without a warrant in relation to the charge of non-payment of the fare.

SO Chiguri's evidence makes it clear that he would not have arrested the appellant if some sort of reasonable explanation had been put forward by him. "If he had become co-operative I would have spoken to him and then left him at his house".

McNALLY JA

SO Chiguri knew, when he approached the appellant, that he was dealing with a Government official, a Community Court Presiding Officer. But, he said "accused did not give me a chance to clarify the allegations against him". This attitude on the part of the appellant confirmed the *prima facie* reliable information about the assault and gave him reasonable grounds to arrest the appellant.

It was the appellant's undenied resistance to this arrest which led to the third charge. The magistrate accepted SO Chiguri's version of the relevant events and rejected that of the appellant. Since the appellant's version was unsupported by any of the people who were present, and conflicted with that of all three State witnesses, and was improbable to boot, the magistrate was perfectly justified in rejecting it.

SO Chiguri may not have expressed himself with perfect clarity, and he may have though incorrectly that he had a right of arrest on the non-payment charge, but it seems to me that his evidence is absolutely clear on the following points:

1. He had information which gave him reasonable grounds to suspect that a First Schedule Offence (assault) had been committed.

2. He knew he had a right to arrest the appellant on that basis.

3. Knowing that the appellant was a man of some importance he was conciliatory in his initial approach.

4. The appellant's attitude made it clear that no explanation was being offered.

5. The appellant's attitude tended to confirm the report received.

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6. He arrested the appellant and was resisted in so doing.

On these grounds we were satisfied that the appeal should be dismissed in its entirely.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Morris, Beale & Collins, appellant's legal representatives

C STENSLUNDE & CO (PVT) LTD v BANWELL ENGINEERS LTD 1988 (2) ZLR 327 (HC)

Court **High Court, Harare**

Mtambanengwe J

Application for summary judgment

20 October & 9 November 1988

Flynote

Practice and procedure - summary judgment - application for - supporting affidavit referring to lesser amount than that claimed in summons - plaintiff not entitled to summary judgment.

Headnote

In terms of Order 10 Rule 64 of the High Court of Zimbabwe Rules 1971, the plaintiff may, where the defendant has entered appearance to a summons for a debt or liquidated demand, apply for summary judgment for what is claimed in the summons, together with costs. In support of his application he must submit an affidavit which *inter alia* verifies the cause of action and the amount claimed. If the amount claimed in the application for summary judgment differs from that mentioned in the summons '(even if it is a smaller amount), Rule 64 has not been complied with and the plaintiff is not entitled to summary judgment.

Cases cited:

Shingadia v Shingadia 1966 RLR 285 (GD); 1966 (3) SA 24 (R)

Winsor v Mazarodze 1958 R&N 148; 1958 (3) SA 554 (SR)

J B Colegrave for the plaintiff

M J Gillespie for the defendant

Judgment

Mtambanengwe J: This is an application for summary judgment. In its summons the plaintiff

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claims from the defendant the sum of $24 522,78.

Together with its application for summary judgment, the plaintiff filed a

MTAMBANENGWE J

declaration in which the claim is reduced to the sum of $22 710,84. The summons was not endorsed in terms of Rule 13 of the High Court of Zimbabwe Rules 1971.

The plaintiff's supporting affidavit, sworn to by one of its directors, states in para 2:

> "Defendant is truly and lawfully indebted to the plaintiff in the sum of $22 710,84 on the grounds stated in plaintiff's declaration."

The defendant submits that the application should be dismissed with costs, because of the non-endorsement of the summons in terms of Rule 13 as read with Order 10 Rule 64 of the High Court Rules. Counsel for the defendant argued that -

> "Despite the wording of Rule 64 it is surely necessary that an application for summary judgment be based on a summons endorsed in terms of Rule 13. Otherwise the plaintiff would be entitled to avoid the effect of the ban on amending a summons on application for summary judgment by filing with his application in terms of Rule 64 a declaration which alters the claim. The declaration amends, without explaining the reason therefor, the quantum of the claim. ...

Rule 64 states:

> "Where the defendant has entered appearance to a summons for debt or liquidated demand with or without interest and costs, the plaintiff on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action, may apply to the court to enter judgment for what is claimed in the summons and costs."

Clearly, the summons to which defendant has entered appearance differing in the amount claimed to the amount being verified in terms of the plaintiff's affidavit, there is non compliance with the Rules. The applicant has not brought himself squarely within the ambit of the Rule to entitle him to the relief claimed. See *Shingadia v Shingadia* 1966 RLR 285 (GD) at 288-289; 1966 (3) SA 24 (R) and the cases there referred to, and *Winsor v Mazarodze* 1958 R&N 148 at 151 H; 1958 (3) SA 554 (SR).

MTAMBANENGWE J

The correspondence between the parties on some of which the plaintiff relies for the statement that defendant admits the claim, is capable of interpretation in the sense argued by defendant in resisting the claim for summary judgment. I am satisfied, without detailing the same, that if the defendant at the trial proved that its interpretation is correct in the circumstances of the carrying out of the contract between the parties he would be entitled to succeed in resisting the claim or in meeting the claim with a substantial counterclaim.

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The application for summary judgment is dismissed.

The plaintiff should not have proceeded with the application without complying with the Rules and for this reason the costs shall be borne by the plaintiff.

The defendant is given unconditional leave to defend.

Winterton, Holmes & Hill, plaintiff's legal practitioners

Gill, Godlonton & Gerrans, defendant's legal practitioners

COLEMAN v FAZILAHMED & ORS 1988 (2) ZLR 330 (HC)

Court **High Court, Harare**

Greenland J

Opposed motion

27 October & 9 November 1988

Flynote

Contract - breach of - notice to remedy breach delivered to addresses other than the domicilium citandi - effect of such delivery.

Evidence - receipt of document - whether proof of posting of document can prove receipt of the document.

Practice and procedure - pleadings - requirement for defendant to deal specifically with allegations in declaration - vague replies insufficient to allow court to decide matter in favour of defendant.

Headnote

The respondents purchased a piece of immovable property from the applicant. They breached the contract by failing to keep the property in a good state of repair. The contract permitted the applicant to cancel the contract if the respondents remained in breach for fourteen days after despatch of written notice by registered post requiring the remedying of the breach. The *domicilium citandi* provided by the contract was the property itself, but the applicant sent the notices to the second and third respondents at different addresses. They claimed that the applicant's cause of action failed for want of giving proper notice requiring the remedying of the breach of contract.

In their pleadings, the respondents admitted some of the allegations about the damage done to the applicant's property, but gave no reason for the damage or any real indication of when the damage might be made good.

Held, that the *domicilium citandi* clause was one for the benefit of the applicant, who was, in the absence of indications to the contrary in the

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GREENLAND J

contract, entitled to adopt the more burdensome process of giving direct notice to the respondents and of proving that notice was received. The words in the contract "All notices ... shall be sent" did not indicate a contrary intention.

Held, further, that proof of posting of a document does not of itself prove receipt thereof; it is merely evidence from which the inference may be drawn that the document reached the addressee. All the circumstances must be considered in order to decide whether the inference of receipt should be drawn. The circumstances include the absence or presence of a denial by the addressee that he received the document. The absence of a denial will normally lead the court to infer that the letter was received, as will a denial which is disbelieved. The reason for this approach is the maxim *omnia praesumuntur rite esse acta*, ie the official acts of the postal authorities are presumed to have been properly executed.

Held, further, that the defendants' pleadings were so vague as to be meaningless. They did not constitute evidence on which the court could rely, let alone conclude that the defendants were no longer in breach.

Cases cited:

Judson Timber Co (Pty) Ltd v Ronnie Bass & Co (Pty) Ltd & Anor 1985 (4) SA 531 (W)

Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd 1984 (3) SA 834 (W)

Cape Coast Exploration Ltd v Scholtz & Anor 1933 AD 56

HK Outfitters (Pty) Ltd v General Assurance Society Ltd 1975 (1) SA 55 (T)

Songore v Olivine Industries (Pty) Ltd 1988 (2) ZLR 210 (SC).

D P Carter for the applicant

R Fitches for the respondents.

Judgment

Greenland J: In this case the applicant seeks, *inter alia*, cancellation of a contract of sale and ejectment of the respondents from the contract property.

Clause 5 of the contract reads:

> "The Purchaser undertakes to keep the Property and all the buildings and improvements thereon in good and thorough state of repair and condition to the satisfaction of the Seller."

The applicant alleges:

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GREENLAND J

"5. That on 12 June 1988 I inspected the property and in the presence of Manil Jacob Fazilahmed, one of the respondents, noted the following:

(a) the pool was badly cracked due to it only being one-third filled with dirty stagnant water;

(b) the filtration system had not been used for a considerable period of time and in all probability was now blocked;

(c) a gate in the pool area was broken;

(d) the roof gutters had grass growing in them;

(e) Kikuyu grass was growing up the boundary walls and would result in their cracking;

(f) there was an abandoned chassis of an Alfa Romeo in the back yard;

(g) the house was generally in a bad state of repair, namely;

(i) exterior light fittings were broken;

(ii) tiles in the kitchen had broken off;

(iii) interior and exterior walls were dirty and unpainted in certain areas."

To this allegation of breach the second and third respondents have each simply stated:

"4. I have no direct knowledge of the contents of para 5."

First respondent has stated:

"4. I admit that the applicant inspected the property on or about 12 June 1988, although the defects pointed out were not as serious as may appear from the contents of para 5."

Applying the provisions of Rule 104 (2) of the High Court of Zimbabwe, Rules 1971, which state, *inter alia*:

"... every allegation in a declaration or claim in reconvention shall be dealt with by the opposite party specifically. He shall admit or deny every allegation or state that he has no knowledge concerning it, or confess and avoid it. Every allegation not so dealt with shall be taken to be admitted."

It must be found that Respondents were in breach of the sale contract, ie in breach of Clause 5 quoted in full above.

The applicants right to cancellation for breach is prescribed by Clause 10 thereof which reads:

GREENLAND J

"10. Should the purchaser fail to make any payments provided therein or otherwise commit a breach of any of the conditions hereof and remain in default for fourteen days after despatch of written notice by registered post requiring such payment or the remedying of any other breach, the seller shall be entitled without further notice (in addition to and without prejudice to any other rights available at Law) -

(a) to claim immediate payment of the entire balance outstanding, although not otherwise due, by the

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purchaser under this deed of sale, or

(b) to cancel this deed of sale and retain all amounts paid by the purchaser as rouwkoop and/or as a genuine pre-estimate of liquidated damages suffered by the seller;

(c) to resume unencumbered possession of the property."

The applicant claims that he gave the respondents the requisite notice by registered mail to their respective addresses. This aspect is regulated by Clause 9 of the sale contract, which reads:

"9. All notices intended for the purchaser shall be sent by registered post to him care of the property hereby sold, which address for the purpose hereof the purchaser selects as *domicilium citandi* and shall de deemed to have been duly delivered to the purchaser five days from date of posting thereof by the seller or his duly authorised agent."

It is common cause that the said notices, as regards the second and third respondents were sent, not to the *domicilium citandi* stipulated in Clause 9 *supra,* but to them at different addresses. For this reason all the respondents now aver that the applicant's cause of action fails for want of having given proper notice of breach in terms of the contract.

The position which pertains, in such circumstances, was well put by MARGO J in *Judson Timber Co (Pty) Ltd v Ronnie Bass & Co (Pty) Ltd & Anor* 1985 (4) SA 531 at 538 B:

"The *domicilium citandi* clause is therefore one for the benefit of the party giving the notice and, in the absence of indications to the contrary in the contract, such party is entitled to adopt the more burdensome process of giving direct notice to the other party and of proving that it was received."

GREENLAND J

In that case the learned judge was faced with a clause of almost identical wording as that in Clause 9 quoted above. In particular it stipulated:

"All notices which may be given by the lessor to the lessee, **shall be** given at the lease premises"

(my emphasis).

Despite the use of the words "shall be" MARGO J, following good authority, reached the conclusion quoted above.

In my view the present matter is barely distinguishable. In particular, there are no indications in the contract that the applicant was not "entitled to adopt the more burdensome process of giving direct notice to the other party and of proving that it was received. Has the applicant proved the receipt thereof? With masterly evasiveness the respondents have neither admitted nor denied actual receipt of the notices. The concept of delivery, in such circumstances, includes the specific requirement that actual receipt of the notice be proved. See for instance *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 at 845I onwards.

To my mind, this important aspect is resolved by the fact that the respondents have admitted that the applicant sent the notices by registered mail to each respectively. It is good law that proof of the posting of a document can prove receipt thereof. See *Cape Coast Exploration Ltd v*

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Scholtz & Anor 1933 AD 56. However, the position is clarified by BOTHA J in *HK outfitters (Pty) Ltd v General Assurance Society Ltd* 1975 (1) SA 55 at 59:

> "Counsel for the defendant argued that the fact of the posting of the cheque to that address justified the inference that it had actually been delivered there and he relied in this connection on *Cape Coast Exploration Ltd v Scholtz & Anor* 1933 AD 56 at 76. He submitted that the reasoning in that case applied to the facts of the present matter. I am unable to accept this argument. In *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950(2) SA 763 (T) at 768, RAMSBOTTOM J, dealing with a similar situation:
>
> > 'The question remains whether there is sufficient proof that the envelope reached the plaintiff's post-office box. There is no direct evidence of this fact, but Mr *McKerron* argued that, in the evidence of rebutting evidence, there is a presumption that a letter which has been posted has reached the addressee - or, in this case the post-office box

GREENLAND J

> > to which the envelope was addressed. I am aware that the word 'presumption' is sometimes used in this context, but it means no more than that the fact that a letter was posted is evidence from which the inference that it reached the addressee may be drawn. But all the circumstances must be considered in order to decide whether on a balance of probabilities the inference ought to be drawn.'
>
> The circumstances to be considered obviously include the absence or presence of a denial by the addressee, in evidence, of the receipt of the letter. If there is evidence of the posting of a properly addresses letter and nothing else then no doubt a court will be entitled to draw the inference that it is more probable than not that the letter was duly delivered. If there is a denial in evidence by the addressee of receipt of the letter then the value of such evidence will have to be assessed. If it is found that the addressee is an untruthful witness and his evidence is rejected, then of course, an inference of delivery may be drawn just as in the case where no rebutting evidence is given. It appears to me that this was the position in *Cape Coast Exploration (Pty) Ltd v Scholtz & Anor supra*; although the addressee denied receipt of the letter, the Court was clearly of the opinion that he was an untruthful witness and in fact rejected his evidence (see p 79). In those circumstances an inference of due delivery was clearly justified. On the other hand, if the addressee's denial of receipt is believed then, of course, there is no room for an inference of delivery (cf *Vengatsamy v Scheepers* 1946 NPD 84, and *Odendaalsrus Municipality v Odendaalsrus Gold, General Investment and Extensions Ltd* 1959 (1) SA 374 (AD) at 378H-379A, 382H-383B)."

The reasoning in the *Cape Coast* case *supra* is founded on the presumption expressed as *omnia praesumuntur rite esse acta*, ie the official acts of the post office are presumed to have been properly executed. The reasoning of BOTHA J *supra* in clarifying this aspect in its application needs no comment except that this approach commends itself to me as being correct. The Zimbabwe Supreme Court has not yet pronounced on the issue.

From all the circumstances, especially the fact that respondents have not denied that they received the notices posted to each respectively, I infer that each received such notice.

The notices required rectification of the breach within 14 days (see Clause 10 *supra*). Applicant alleges that by 12 August 1988, well past the 14 day limit, certain aspects of the breach had not been rectified. These are:

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GREENLAND J

"(a) the pool was badly cracked due to it only being one-third filled with dirty, stagnant water;

(b) the filtration system was not being used for a considerable period of time;...

(e) Kikuyu grass growing up the boundary walls and would result in their cracking;...

(g) the house was generally in a bad state of repair;

(i) exterior light fittings were broken ...

(iii) interior and exterior walls were dirty and unpainted in certain areas."

In the result the applicant, by letter dated 26 August 1988, cancelled the contract.

On the papers, there is an irresolvable dispute of fact as to whether or not the respondents rectified aspects (c) and (g) above. However, there is no dispute that aspects (a) and (b) had not been rectified by 16 September 1988. On that date the respondents advised the applicant as follows:

"(a) The swimming pool - our client accepts that the swimming pool is not in a good state. However, our client has been attending to the repair thereof. Apparently the cost of repair will be expensive, but our client will be attending to the same in stages, as and when he can afford these expenses."

As can be seen, therefore, the respondents have permitted serious damage to the applicant's property in the process of being acquired by them in terms of the contract, which is a deed of sale. In terms of the respondent's stance, the nature of the damage is such that it will take an indefinite period of time to repair despite the collective sources of the three respondents. The respondents have taken neither this Court not the applicant into their confidence as to why this state of affairs has come about or why it persists. The applicant is expected to rely implicitly on the say-so of the very persons responsible for the damage, with no real assurance as to if and when the damage will be rectified. In this respect I quote from the First Respondent's affidavit:

"8. It will be an expensive task to repair the swimming pool, but work has already commenced thereon. However, I aver that in terms of the agreement of sale, I am not in default with regard to the remedying of the breach, as the matter is being attended to."

GREENLAND J

Such a stance is extremely unhelpful. It is so vague as to be meaningless. is not evidence on which any Court can rely, let alone conclude that the respondent is no longer in breach. The key words "expensive" and "being attended to" are capable of any meaning within a wide spectrum of meanings. It may be that the damage is worth $20 000 and so far has been attended to only by a vigorous scrub with a kitchen brush. The Supreme Court has recently given a clear indication that a court should not be expected to sanction this kind of stance. See *Songore v Olivine Industries (Pty) Ltd* S-148-88*(12) at p 2 *et seq.*

The applicant is entitled to the relief sanctioned in the contract. There will be an order in terms

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of the draft.

Condy, Chadwick & Elliott, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondents' legal practitioners

MUHAKA v VAN DER LINDEN 1988 (2) ZLR 338 (SC)

Court **Supreme Court, Harare**

McNally JA (in Chambers, in terms of Rule 34(5) of the Rules of the Supreme Court 1979)

Application for order declaring appeal to have lapsed

4 & 14 November 1988

Flynote

Appeal - record - deposit with Registrar of estimated cost of record - undertaking for payment of cost in lieu of deposit - must be made within same time limits as deposit.

Costs - against legal practitioner-appropriate where practitioner guilty of basic errors in procedure prejudicing other party.

Court - officer of - Registrar of High Court - to what extent can bind the Court by condoning non-compliance with Rules.

Headnote

In terms of Rule 34(1) of the Rules of the Supreme Court 1964 (as amended by SI 796/1979), an appellant in a civil appeal from the High Court is required, either at the time of noting the appeal or within seven days from that time, to deposit with the Registrar the estimated cost of the preparation of the record. In lieu of the deposit, the Registrar may accept a written undertaking for the payment of the cost immediately after it has been determined. Such an undertaking can only be accepted within the same time limitations as the deposit. A failure to provide either the deposit or the undertaking will result in the appeal lapsing.

The power to condone non-compliance with the Rules belongs to the Court, not to the Registrar; the Court is not bound by the Registrar's acceptance of documents from a party whose appeal ought to have been held to have lapsed.

Where, through basic errors in procedure on the part of one party's legal

McNALLY JA

practitioner, the other party is prejudiced, it is appropriate that at least some of the costs be

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borne by the legal practitioners concerned.

Cases cited:

Fedco Cape (Pty) Ltd v Meyer 1988 (4) SA 207 (E)

J W Lamin (Pvt) Ltd v Bedford & Anor S-65-88 (unreported)

Venturas v Kuszaba-Dabrowski & Anor 1966 RLR 66 (AD); 1966 (2) SA 277 (RAD)

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

D M Foroma for the applicant

M J Gillespie for the respondent

Judgment

McNally JA: The applicant succeeded in an action in the High Court and recovered the sum of $20 000 and costs in a judgment handed down on 1 October 1986 (Judgment No. HH-397-86). The respondent appealed. The record has not yet been prepared. Mr *Foroma*, for the applicant, has now discovered that there was not timeous compliance with Rule 34(1) of the Rules of this Court (as amended by SI 796 of 1979). Accordingly, he seeks an order declaring the appeal to have lapsed and granting his client leave to execute on the judgment with costs on the Attorney and client scale.

Mr *Gillespie*, who appears for the respondent, does not concede that there has been any default in respect of compliance with Rule 34(1). It is necessary, therefore, to consider the meaning of the Rule, which reads:

> "The appellant ... shall at the time of noting an appeal in terms of Rule 29 or within such period therefrom, not exceeding seven days, as the Registrar of the High Court may allow, deposit with the said Registrar the estimated cost of the preparation of the record in the case concerned.
>
> Provided that the Registrar of the High Court may, in lieu of such deposit, accept a written undertaking by the appellant or his legal representative for the payment of such cost immediately after it has been determined."

It is also relevant to set out Rule 34(5) which reads as follows:

> "If the appellant fails to comply with the provisions of subrule (1), or any written undertaking made in terms of the proviso to that subrule, the appeal shall be deemed to have lapsed unless a judge grants relief on cause shown."

McNALLY JA

Mr *Foroma's* contention is that, since there is no substantive application before me, the appeal must be deemed to have lapsed. The Registrar of the High Court, being unwilling to treat the appeal as having lapsed, requires a declaratory order to that effect.

Mr *Gillespie,* on the other hand, contends that there has been no breach of Rule 34(1) and therefore no lapsing in terms of Rule 34(5). Alternatively, he contends that this is a proper case

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for condonation of any breach which may inadvertently have occurred.

What happened was this. Mr *Gillespie's* instructing legal practitioner was working on an unamended copy of the Rules of this Court. He was unaware, therefore, of the requirements of the amended Rule 34(1) - which I may say came into effect just a few days short of nine years ago. Despite this, he seems to have become aware subsequently of the amended provisions because he wrote to the Registrar of the High Court on 6 February 1987 in the following terms:

> "Following our submission of a notice of appeal in this matter, we hereby furnish our written undertaking to bear responsibility for the costs of the Court record."

There was no response to this letter from the Registrar and it seems, from subsequent correspondence between the legal practitioners concerned and the official transcribers, that the delay in transcription is no more than a delay. In other words, it is not suggested that there is a refusal to transcribe because of an allegation that the appeal has lapsed. Indeed, the legal practitioners also wrote to the Registrar on 18 June 1987 asking what had happened about the record and there is no response suggesting that the Registrar is treating the appeal as lapsed. In fact, Mr *Foroma* has made his application precisely because he says the Registrar is not prepared to adjudge the appeal as lapsed without an order of the Court. This seems to me to be a proper approach : see the recent decision of LUDORF J in *Fedco Cape (Pty) Ltd v Meyer & Anor* 1988 (4) SA 207 (E), a case in which the Registrar of the Eastern Cape Division was the second respondent.

The following remarks by the learned judge in that case are pertinent in the present context:

> "The Court has the power in appropriate circumstances to condone any non-compliance and it is not for the Registrar to purport any pre-emption

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McNALLY JA

> of the Court's powers by simply returning documents whence they came, nor does that official bind the Court by purportedly accepting documents 'in compliance' with the Rules."

I cannot accept Mr *Gillespie's* submission that the proviso to Rule 34(1) is not governed by the seven day limitation. In the first place, I think the grammatical meaning is clear. If the undertaking may be accepted "in lieu of" (ie, in place of) the deposit, and the deposit can only be accepted within a limited period, then its replacement can only be accepted within the same period.

Secondly, a commonsense interpretation demands that one follows the grammatical interpretation. Otherwise how does one determine in terms of Rule 34(5) when an appeal is deemed to have lapsed?

I consider that Mr *Foroma's* interpretation of the Rule is correct. And it must be noted that Mr *Foroma* pointed out to the respondent that the appeal had lapsed, in a letter dated 8 August 1988. An application for condonation should have been made at the latest at that stage - compare *J W Lamin (Pvt) Ltd v Bedford & Anor* S-65-88 (not reported).

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In my view the appeal lapsed and Mr *Foroma* is technically entitled to the order as he seeks.

However, at this belated stage, and even now only on a conditional basis, the respondent applies for condonation on this aspect (if his interpretation of the rule is found to be wrong, which it has been) and on another aspect, that of failure to comply with Rule 46(5). This failure is acknowledged, and therefore I will not dwell on the details. I should add, however, that there has now been compliance with Rule 46(5) and no prejudice has resulted from the delay.

In considering condonation, the criteria set out by my brother KORSAH JA in *Lamin's* case *supra* are the applicable criteria. One of the difficulties I have is that in the absence of the record I am hampered in forming a view as to the prospects of success of the appeal. In my view however, I must do what I can with the materials at hand. I have a copy of the judgment.

I do not consider the delay of just over two months to be inordinate, bearing in mind how long the delay is in any event because of difficulties in the transcription service. It is the delay in setting the machinery of transcription

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McNALLY JA

in motion which is relevant rather than the delay in making the application, in the particular circumstances of this case. That relatively short delay is also the measure of the prejudice to the applicant, who has all along known that the respondent intended to appeal.

I consider the explanation for the delay is reasonable, in the sense that it is understandable. I have difficulty in understanding, however, why the respondent's attorney, having written the letter of 6 January 1987 (presumably as a result of being advised about the amendment) failed to appreciate either that condonation was necessary or that his version of Rule 46(5) was equally out of date. The amendment to Rule 46(5) is in the same Statutory Instrument as the amendment to Rule 34. This aspect, in my view, can properly be dealt with when I come to consider the order as to costs. It does not invalidate the reasonableness of the explanation for the delay.

Finally, I must consider the prospects of success. It is not appropriate to go into detail at this stage. It is enough to say that the facts of the case are somewhat out of the ordinary. In a shooting accident, it is not normally disputed that the defendant shot the plaintiff. In this case, the facts are sufficiently unusual, simply from a perusal of the judgment, for me to be able to say that there is an arguable appeal.

As far as costs are concerned, Mr *Gillespie* has conceded that the respondent must bear the applicant's costs. It was the error of the respondent, coupled with its denial of one of those errors and its unwillingness to apply for condonation, that forced the applicant to make this application.

Mr *Foroma*, has asked for costs on the legal practitioner and client scale. In my view, he is justified in that request. His client, a young boy of about twelve years, assisted by his father, an unemployed domestic worker, has been unable to execute on a judgment in his favour for $20 000 for over two years, and some of that delay is attributable to basic errors in procedure by the

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respondent's attorneys. It does not seem to me to be right that the applicant should bear any of the costs of this application. But it seems to me further that at least the extra costs involved in an order for costs on the scale of legal practitioner and client should not in this case be borne by the client but by the firm of legal practitioners concerned. Compare *Venturas v Kuszaba-Dabrowski & Anor* 1966 RLR 66 and *de Kuszaba-Dabrowski et Uxor v Steel NO* 1966 RLR 60; 1966 (2) SA 277 (RAD); 1966 (2) SA 277 (RAD).

McNALLY JA

Accordingly I make the following order:

1. The application is dismissed.

2. The cross-application by the respondent is allowed and the appeal is reinstated.

3. The respondent is to pay the costs of these proceedings on the scale of legal practitioner and client, but it is further directed that the additional costs occasioned by the award of costs on the higher scale are to be borne by the respondent's legal practitioners.

The registrar is asked to give favourable consideration to a request for an early set down date when the application for set down is before him.

Sawyer & Mkushi, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

S v HARINGTON 1988 (2) ZLR 344 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Korsah JA

Criminal appeal

10 October & 15 November 1988

Flynote

Criminal law - Official Secrets Act [Chapter 97] - s 3(c)(ii) - communicating information to an "enemy" - "for any purpose prejudicial to the interests of Zimbabwe" - meaning of.

Statutes - interpretation of - legislation modelled on foreign statutes - extent to which interpretations by foreign courts may be relied on.

Criminal procedure (sentence) - assessment of sentence - need for a balance between interests of society and those of criminal - statutory offence - court expressing personal view on what sentence should be - impropriety of - torture at hands of police before trial - mitigatory effect of - Official Secrets Act [Chapter 97] -

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communicating information to an enemy - woman communicating information to South African agents about ANC personnel and activities in Zimbabwe - appropriate sentence.

Headnote

The appellant, a citizen of South Africa, was asked by South African secret agents to go to Zimbabwe, posing as a courier for the African National Congress of South Africa. Her task was to collect and send to South African agents information about the ANC. She sent some information and documents to her controllers, but a letter containing a diagram of a house belonging to ANC officials, together with names and other information relating to those officials, was intercepted. She was charged before the High Court with contravening s 3(c) (ii) of the Official Secrets Act [*Chapter 97*]. That section penalises -

McNALLY JA

> "[Any] person who for any purpose prejudicial to the safety or interests of Zimbabwe. . . obtains, collects, records, publishes or communicates to any person. . . any model, article, document or other information which is calculated to be or which might be or is intended to be useful, directly or indirectly, to an enemy. . . "

The appellant pleaded not guilty but was convicted and sentenced to twenty-five years' imprisonment, the maximum sentence provided by the Act.

In sentencing the appellant, the Presiding Judge expressed the view that the death sentence, not imprisonment, was the most appropriate sentence. The maximum sentence was imposed in spite of challenged evidence from the appellant of torture of a most degrading, indecent and immoral nature at the hands of members of the Zimbabwean Central Intelligence Organization. This treatment was meted out in the presence of a member of the ANC.

An appeal was noted against conviction and, with the leave of the Supreme Court, against sentence. In respect of conviction, it was argued on behalf of the appellant that -

(a) as Zimbabwe was not at war with South Africa, there was no "enemy" for the information to be useful to;

(b) for the information to provide the basis for a criminal offence, their content must be such as to be useful to a potential enemy in a war situation and that the appellant had discharged the onus placed on her by s 8(1) of the Act;

(c) there was no connection between the information sought to be supplied and the interests of Zimbabwe.

Held, that it was not necessary for Zimbabwe to be in a state of war for the section to be contravened. While that limited connotation to the word "enemy" was one of long standing and was appropriate in s 16(8)(b) of the Constitution, which dealt with the protection of property rights of individual citizens, in interpreting the word's meaning in the Official Secrets Act the court must look at the Act and at what the legislature desired to achieve and the mischief it sought to remedy. The Zimbabwean Act was modelled on the English Official Secrets Act 1911. In interpreting a statute that is moulded on a foreign statute, assistance can be had from the

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interpretations made by foreign courts. In England, it has been held that in the context of the Official Secrets Act, the word "enemy" includes a potential enemy. In the light of a Ministerial certificate showing that South Africa had carried out cross-border military incursions, the assassination of people in Zimbabwe and the bombing of property in Zimbabwe, South Africa was a potential enemy,

even though South Africa and Zimbabwe had trade relations and were connected by air, road and rail links and each had a trade mission in the other's country.

Held, further, that the appellant had failed to discharge the *onus* cast on her by s 8(1) of the Act, which required her to show that she had not, for a purpose prejudicial to the safety or interests of Zimbabwe obtained or attempted to obtain information which is calculated to be or might or is intended to be useful to an enemy. There was a direct connection between the information supplied and the interests of Zimbabwe, since the protection of all the people living in Zimbabwe, whatever their status, the protection of all property in Zimbabwe, irrespective of its ownership, and the safety and security of Zimbabwe are in every respect the interests of Zimbabwe. The appellant's purpose encompassed the destruction of Zimbabwean property occupied by members of the ANC and the killing of members of the ANC living in Zimbabwe.

Held, further, that fairness and justice exclude a passionate approach to sentence. Courts should, when assessing sentence, avoid insensitivity to one side or an exaggerated sense of the wrong done to society. Fairness does not exclude the element of mercy nor does it exclude a robust approach to sentence. The courts have a duty to do justice to all manner of people. This includes the protection of the interests of society and of the accused. It is the clear and balanced weighing in the scales of justice of the facts of the case that results in punishments that fit the crime as well as the criminal and are at the same time fair to society.

Held, further, that by expressing the private opinion that the death penalty was the most appropriate one for this offence, the Presiding Judge had not applied his mind judiciously to the evidence before him. The expression of such views and opinions not connected to the case before the court was a misdirection and there was no need to think of it when discussing sentence.

Held, further, that the uncontroverted evidence of torture should have been regarded as mitigatory, as should the presence of the ANC official during the interrogation and torture sessions, which was, to say the least, improper.

Held, further, that although the appellant confessed a support for the *apartheid* system, her political beliefs were not a factor to be taken into account when assessing sentence.

Held, further, that the maximum sentence of twenty-five years' imprisonment was exceptionally long and should be resorted to in very exceptional circumstances. This case was not exceptional but even if it were, the mitigatory features justified a sentence less than the maximum

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sentence. A sentence of twelve years' imprisonment would be substituted.

Cases cited:

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

Barras v Aberdeen Steam Trawling & Fishing Co Ltd [1933] AC 402 (HL); [1933] All ER Rep 52

Venter v Randburg Town Council 1968 (4) SA 302 (W)

Estate Wege v Strauss 1932 AD 76

Ex p *Adair Properties (Pvt) Ltd* 1967 RLR 56 (GD); 1967 (2) SA 622 (R)

Tolima (Pty) Ltd v Cugacius Motor Accessories (Pty) Ltd 1983 (3) SA 504 (W)

R v Parrott (1913) 8 Cr App R 186

S v du Plessis 1981 (3) SA 382 (A)

S v Niesewand (3) 1973 (1) RLR 216 (AD); 1973 (3) SA 584 (RAD)

Chandler v DPP [1964] AC 763; [1962] 3 All ER 142 (HL)

S v Marais 1971 (1) SA 844 (A)

R v Zonele & Ors 1959 (3) SA 319 (A)

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

S v Ncube & Ors 1988 (2) SA 702 (ZS)

S v Whitehead 1970 (4) SA 424 (A)

S v Drummond 1978 RLR 422 (AD); 1979 (1) SA 565 (RAD)

S v Markham & Anor S-185-88 (unreported)

A P de Bourbon SC for the appellant.

A V M Chikumira for the respondent.

Judgment

Dumbutshena CJ: The appellant was convicted by the High Court of contravening s 3(c)(ii) of the Official Secrets Act [*Chapter 97*] on 26 November 1987. She was sentenced to twenty-five years' imprisonment with labour, the maximum penalty provided by the Legislature.

On 27 November 1987 she applied to the High Court for leave to appeal against sentence. Leave was refused. She then applied for leave to appeal against sentence to this Court and was granted leave by a judge of this Court. She had already appealed against conviction on a point

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of law.

The material parts of s 3 of the Official Secrets Act read as follows:

DUMBUTSHENA CJ

"3. Any person who for any purpose prejudicial to the safety or interests of Zimbabwe -

(a) ...

(b) ...

(c) obtains, collects, records publishes or communicates to any person -

(i) ...

(ii) any model, article, document or other information which is calculated to be or which might or is intended to be useful, directly or indirectly, to an enemy;

shall be guilty of an offence and liable to imprisonment for a period not exceeding twenty-five years."

Mr *de Bourbon*, who appeared for the appellant, attacked the conviction on two broad grounds, namely, that -

"A. The articles, documents and other information which the appellant provided to South Africa was not useful, directly or indirectly, to en "enemy", as that word is properly interpreted, or even to a potential enemy.

B. The appellant established that she did not act for any purpose prejudicial to the safety or interests of Zimbabwe."

Briefly the facts of this case are as follows.

The appellant is a citizen of South Africa. At the time of her trial she was 27 years of age. She is a graduate of the University of Pretoria, where she studied fine arts. She was awarded a scholarship by the Goethe Institute to study the German language in West Germany. She visited Botswana and Mocambique before coming to Zimbabwe.

In October 1986 she got in contact with South African secret agents. She was asked to go to Zimbabwe to be a courier for the African National Congress of South Africa, hereinafter referred to as "the ANC". Her duty was to send information on the ANC to secret agents in South Africa.

The appellant entered Zimbabwe on 7 October 1986 through Beitbridge. As soon as she arrived in Harare she took a taxi to Kambuzuma high density suburb where she stayed at the YWCA hostel. On 15 November 1986 she was moved to a Transit Centre for Refugees in Waterfalls. She said in her

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statement, Exhibit 7, that she sent to her contacts in South Africa, the description of the Refugee Centre and names of people who lived there. She informed them that the Centre was

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guarded by police and sometimes by soldiers. She lived at this centre for two months.

The appellant was then transferred to a house owned by ANC officials. This house had a police guard. Whilst there, she started sending documents to an agent of the South African Secret Services.

On 29 January 1987 the appellant asked Sergeant Mukwebu, one of the police guards at the house, to post her letters. She handed him a large envelope, which was partially sealed, and money for postage. S Mukwebu became suspicious. He telephoned Section Officer Nhunduma and reported the matter to him. SO Nhunduma collected the envelope.

The contents of the envelope were not denied by the appellant. According to her Defence Outline: "These envelopes contained, *inter alia*, names and addresses of ANC officials" residing at the house, "as well as a photograph of a man called Gigi". She also included a diagram of the house, together with a description thereof. In one of the envelopes which she handed to S Mukwebu were details of registration numbers of vehicles belonging to the ANC and various outdated Water and Electricity and Telephone Bills. The learned Judge President points out in his judgment that in addition to the above documents she had enclosed with her letters "newspaper cuttings bearing the photographs of the President of Zimbabwe, the Prime Minister and other foreign dignitaries".

The question is: "Is this sort of information, in the words of subpara (ii) of para (c) of s 3 of the Act,'calculated to be... or... intended to be useful, directly or indirectly, to an enemy'?"

Mr *de Bourbon* argued that to contravene s 3(c)(ii) of the Act, the article, document or other information supplied by the appellant, must be calculated to, or intended to, be useful, directly or indirectly, to an enemy. He did not think the information disclosed fell within the ambit of the section.

Mr *de Bourbon* further contended that the word "enemy" does not present any problem because the "concept of an enemy is well known in law, and constitutes only a state which is at war with this country". He relied on *Minister of Home Affairs v Bickle & Ors* 1983 (2) ZLR 400; 1984 (2) SA 439 (ZS).

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Is Mr *de Bourbon* right? In *Minister of Home Affairs v Bickle & Ors supra* the Minister appealed against the decision of KORSAH J (as he then was), declaring a forfeiture order made pursuant to the Emergency Powers (Forfeiture of Enemy Property) Regulations 1981 (SI 925D of 1981), as amended, invalid and of no force and effect, because the regulations were contrary to s 16(8)(b) of the Constitution.

The facts of that case were these. Colin Bickle was a citizen of Zimbabwe; whether he is still a citizen I do not know. He had considerable property in Zimbabwe. In 1979 he formed a company, Bickle Investments Ltd, for the purpose of dividing his property among his children and his mother. At the time of the hearing of the appeal he was living in South Africa. His property was declared forfeit to the State because on 28 November 1981 he flew his aircraft

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from Zimbabwe to a farm in South Africa and back to Zimbabwe. On the first trip he took a Mr MacFarlane's firearms illegally to South Africa. On the return trip he brought into Zimbabwe two men. One of these men was trained by the South African authorities in Namibia. He was apparently a Zimbabwean returning to this country on leave. He also brought in illegally twelve bottles of whisky. On another occasion he permitted Mr MacFarlane to fly from his airstrip to South Africa.

Bickle was prosecuted on seven charges, including contravening the Immigration Act, in that he departed from Zimbabwe from a place which was not a port of exit; for conveying Mr MacFarlane out of Zimbabwe from a place which was not a port of exit; for bringing the two men into Zimbabwe and landing them at a place which was not a port of entry; and for assisting Mr MacFarlane to leave Zimbabwe from a place which was not a port of exit. Two other charges were for contravening the Customs and Excise Act, in that he exported firearms illegally and imported whiskey, also illegally. And finally he was charged with contravening the Official Secrets Act because he brought into the country two men who were either foreign agents or in communication with foreign agents. He had also failed to report their presence to the police. He was found not guilty on this count, but guilty on the other counts, to which he had pleaded guilty.

The first attempt to declare Bickle's property forfeited did not succeed because the Minister accepted that the first order he had made was invalid. The Minister revoked it.

Section 3 of the Emergency Powers (Forfeiture of Enemy Property) Regulations 1981 reads as follows:

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> "3. (1) If it appears to the Minister that any person is an enemy of the State by reason of the fact that he is, or has been, acting -
>
> (a) as the agent of, or on behalf of, or in the interests of any foreign country or foreign organization; and
>
> (b) in a manner which is prejudicial to the public safety of Zimbabwe or which is subversive to the authority of the lawfully established Government of Zimbabwe;
>
> and that it is necessary or expedient in the interests of the public safety of Zimbabwe to do so, he may, by order in the *Gazette*, and whether or not the person concerned is in or outside Zimbabwe, declare that the property of the person concerned shall be forfeited in terms of these regulations."

The Emergency Powers (Forfeiture of Enemy Property) (Amendment) Regulations 1983 (No. 1) (SI 239 of 1983) effected certain amendments to the 1981 Regulations. We are not concerned here with those Regulations.

What concerns this Court is the interpretation of the word "enemy".

Mr *de Bourbon* contends that no further interpretation need be made to the word "enemy" since it has already been interpreted in *Bickle's* case *supra*. In that case GEORGES CJ defined the word "enemy" as used in s 16(8)(b) of the Constitution of Zimbabwe. It is, therefore, useful to look at s 16(8)(b) of the Constitution before considering the meaning of "enemy". The relevant

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parts of s 16 read:

> "16. (8) 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 -
>
> (a) ...
>
> (b) by way of the vesting or administration of any property belonging to or used by or on behalf of an enemy or organization which is, in the interests of defence, public safety or public order, prescribed or declared by a written law to be an unlawful organization;
>
> (c) ... "

The Minister's contention in the *Bickle* case was that the Emergency Powers (Forfeiture of Enemy Property) Regulations Act fell within s 16(8)(b) of the Constitution. Since the word "enemy" in s 16(8)(b) is not defined in s 113

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- the interpretation section) - of the Constitution, GEORGES CJ looked elsewhere. After mentioning the various Acts which he believed influenced the Legislature in using the word "enemy" in s 16(8), the learned CHIEF JUSTICE stated at 440 B-F (447 D-H of the South African report):

> "The indications therefore seen to me compelling that the draftsman had in mind, when referring to the vesting of property belonging to or used by or on behalf of an enemy, to the Trading with the Enemy Act 17 of 1939. There is no doubt that "enemy" as used in that Act is an enemy when there is a state of war.
>
> The word "enemy" is not defined in s 113 - the interpretation section of the Constitution. The meaning must therefore be determined by having regard to the canons of interpretation adopted by this Court for the interpretation of the Constitution.
>
> In this connection the words of LORD WRIGHT in *James v Commonwealth of Australia* [1986] AC 578 at 613 are instructive:
>
> > 'The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not *in vacuo* but as occurring in a single complex instrument, in which one part may throw light on another.'
>
> At 614 LORD WRIGHT continues:
>
> > 'It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the word changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that "in interpreting a constituent or organic statute such as the Act (ie the British North America Act), that construction most beneficial to the widest possible amplitude of its powers must be adopted": *British Coal Corporation v The King* [1935] AC 500 at 518. But that principle may not be helpful when the section is, as s 92 may seem to be, a constitutional guarantee of rights. . . The true test must, as always, be the actual language used'."

I agree with what LORD WRIGHT said in the passage cited above. I am, however, more persuaded that the significance, in as far as the use of the word "enemy" in the Official Secrets

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Act is concerned, is illustrated in these words:

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> "The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words change, but the changing circumstances illustrate and illuminate the full import of that meaning."

It is true that when the draftsmen were working on s 16 they had knowledge of states of emergency. What they did not have was knowledge of what was going to happen in an independent Zimbabwe. They did not know at the time that South Africa, according to the Minister's certificate, Exhibit 26, was going to carry out: "... cross-border military incursions, assassination of people in Zimbabwe and bombing of property in Zimbabwe ... "because South Africa had been very friendly to Rhodesia and later Zimbabwe-Rhodesia. These are the vicissitudes of fact which emerged after Independence and "the changing circumstances" which "illustrate and illuminate the full import" of the meaning of the word "enemy".

However, the meaning accorded to the word "enemy" in *Bickle's* case is found at 445D (451D), where the learned CHIEF JUSTICE stated:

> "I am satisfied that the word 'enemy' in s 16(8)(b) of the Constitution means an enemy State with whom Zimbabwe is at war, either by reason of a declaration of war or by reason of armed conflict between that State and Zimbabwe of such a scale as to amount to a state of war."

That meaning only applies to the word "enemy" in para(b) os s 16(8) of the Constitution. That meaning must relate to circumstances in which there is a desire on the part of the Government to forfeit to the State someone's property on the basis that he is an enemy of the State. Because the section seeks to protect individual property rights against unreasonable forfeiture, it was proper to accord to the word "enemy" a restrictive meaning. In my opinion, s 16 of the Constitution is aimed at protecting individual property interests, whereas s 3 of the Official Secrets Act is aimed at the protection of the safety and interests of the State - the public at large - hence the difference in the meaning of the word "enemy".

The existence of a potential enemy has nothing to do with the presence or non-presence of trade, transport, consular or diplomatic relations in each other's country. The Shorter Oxford English Dictionary defines the word "potential" as: -

> "possible as opposed to actual; existing *in posse*; capable of coming into being; latent."

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The minister's certificate shows that South Africa carries out, that is, as against Zimbabwe, hostile acts short of war. In the face of those acts the likelihood of South Africa carrying out a full scale war in the future cannot be discounted. This makes South Africa a potential enemy, even though Zimbabwe and South Africa have trade relations and are connected by air, road

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and rail links, and even though each has a trade mission in the other's country.

I agree with Mr *Chikumira*, for the respondent, that the word "enemy" in s 16 of the Constitution has a limited and restrictive meaning in the legislation, consonant with protection of the property rights of the individual. The Court in *Minister of Home Affairs v Bickle & Ors* gave the word that limited and restrictive meaning which accords with the protection of property rights of individual citizens.

Mr *de Bourbon* further contended that the approach by the courts to the meaning of the word "enemy" was of long standing. In such circumstances the courts assume that the Legislature used the word in the sense in which it had been interpreted. In support of his contention he relied on *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 at 447; [1933] All ER Rep 52 at 72; and *Venter v Randburg Town Council* 1968 (4) SA 302(W) at 306.

The contention is valid. It does not mean, however, that the interpretation of "enemy" in s 16(8)(b) of the Constitution should provide the guideline to the interpretation of "enemy" in s 3(c)(ii) of the Official Secrets Act, or under any other Act. In interpreting "enemy" in s 3 of the Official Secrets Act the Court has to look at that statute and look at what the Legislature desired to achieve and the mischief it sought it to remedy.

The Zimbabwe Official Secrets Act was modelled on the English Official Secrets Act 1911 (1 & 2 Geo 5 c 28), which was first in time. In my view, it is from that Act , that the courts should derive assistance in construing the provisions of our Official Secrets Act. I do not agree with Mr *de Bourbon*'s submission, in his written Heads of Argument, that:

> "The fact that the English courts have interpreted the word "enemy" in their Official Secrets Act in a particular way does not mean that our Legislature intended that meaning."

Although there are some authorities which seem to support his contention,

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those same authorities do not exclude entirely the following of decisions in other countries which interpret identically worded provisions of similar statutes. The courts must take cognisance of the intention of the Legislature and the common law of the country. If the common law of two countries do not conflict and the statutes of the two countries are identical, the easier it is to adopt an earlier interpretation rendered by the courts of the other country.

In *Estate Wege v Strauss* 1932 AD 76 at 80-81, WESSELS ACJ had this to say:

> "The first question is whether our courts ought to interpret a section of a statute manifestly taken over from an English statute in the same way as it had been interpreted in English courts. It may be stated as a general proposition that our courts would, as a general rule, follow the authoritative interpretation of a section in an English statute as laid down by the higher English courts if that section occurs in a Union statute which in all its essentials is the same as the English statute in which the section occurs. If the decision is one of the Privy Council, and there is no difference between the Union statute and the English statute and there is nothing in our common law which would require a different interpretation, then we would follow the decision of the Privy Council; and if an interpretation has been put upon a section of an English statute by one of the higher English courts, we would attach great weight to such an interpretation. But if our Legislature takes over a section of an English statute, that

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> section will have to be interpreted in the light of our common law in exactly the same way as if it had not occurred in an English statute. The draftsman of a Union statute may find it convenient to use the same words as a similar section in an English statute, but it does not follow that our Legislature must be considered to have thereby incorporated not only the words of the section but the meaning which the English courts have given that section as interpreted in the light of English common or statute law."

See Ex p *Adair Properties Ltd* 1967 RLR 56 at 1967 (2) SA 622 (R) at 623-4; *Tolima (Pty) Ltd v Cugacius Motor Accessories (Pty) Ltd* 1983 (3) SA 504 (W) at 510F-511C.

A reading of the cases on this topic shows that there are conflicting views on when the "Legislature can be presumed to know of the interpretation given by foreign courts to foreign legislation used as a model by our Legislature". per GOLDSTONE J at 510F in *Tolima (Pty) Ltd v Cugacius Motor Accessories (Pty) Ltd supra*.

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There are matters that fall to be considered when accepting or rejecting the interpretation rendered by foreign courts to words or phrases in a statute that is similar to or different from ours. If the impression gathered by the Court is that the similarity portends that the statute in question was moulded on a foreign statute assistance can be had from the interpretations made by a foreign court. If, on the other hand, there is conflict in the common law of the two countries, that conflict must affect the two statutes and a rejection of a foreign court's interpretation may be called for. If the provisions of the statute sought to be construed have nothing to do with the common law, the interpretation rendered to similar provisions in a foreign statute cannot be justifiably ignored. There is no common law involved in the English Official Secrets Act and its Zimbabwean counterpart.

The history of the Official Secrets Act is intertwined with that of the English Official Secrets Act. The mischief the two statutes seek to remedy is the same. I therefore find what GOLDSTONE J said in *Tolima (Pty) Ltd supra* at 511 C-E very helpful in the proper approach to be made to the interpretation of the word "enemy" in our Official Secrets Act *vis-à-vis* the interpretation given to "enemy" in the English Official Secrets Act. There the learned judge stated:

> "In my respectful opinion no invariable rule can be applied. Whether such a presumption can or should be made must depend upon the nature and history of the enactment in question and the bearing, if any, which our own common law or statute law, has on the subject matter of the enactment. In the field patents and copyright law, the South African Legislature, for most of this century, has modelled our legislation upon that of England. The South African may well be presumed to have knowledge of the doctrine of indirect copying."

Bearing this in mind, I see no difficulties entitling the Courts of this country to ignore the interpretation of the word "enemy" in *R v Parrott* (1913) 8 Cr App R 186. Section 3 of our Act and s 1 of the British Act deal with espionage. In my opinion, the learned JUDGE PRESIDENT was therefore correct in holding that the word "enemy" includes a potential enemy as defined in *Parrott's* case, *supra*.

The appellant's further contention was that the articles, documents or information taken by the appellant do not constitute a criminal offence in respect of a potential enemy. For such documents to provide the basis for criminal offence their content must be such that it would be

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useful to a

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potential enemy in a war situation. It was submitted, further, that because of that the admitted facts in this matter "are such that the appellant has discharged the *onus* under s 8(1) to show they would not be useful".

The learned JUDGE PRESIDENT did not think so. He found that the appellant had not discharged the presumption against her in terms of s 8(1) of the Act. He was right.

Section 8(1) reads:

> "8. (1) If in any prosecution against a person for an offence in terms of section *three*, it is proved that he has been in communication with or attempted to communicate with a foreign agent in Zimbabwe or elsewhere, it shall, unless the contrary is proved, be presumed that he has, for a purpose prejudicial to the safety or interests of Zimbabwe, obtained or attempted to obtain information which is calculated to be or which might or is intended to be, directly or indirectly, useful to an enemy."

What is interesting in this case is that the appellant did not only make admissions, she gave evidence in which she emphasised her desire to have the ANC destroyed. She said she knew about South Africa's cross-border incursions into Zimbabwe and the destruction of property in Zimbabwe by South African agents. She appreciated that the information she had gathered, recorded and attempted to send to the South African Secret Services was intended to be useful, directly or indirectly, to South Africa. There was no attempt to discharge the *onus* placed on the appellant to show on a balance of probabilities that the materials she gathered and attempted to send to the Secret Services in South Africa were not for purposes prejudicial to the safety and interests of Zimbabwe.

It was common cause that the appellant was attempting to communicate with South African secret agents. In her evidence she failed to prove on a balance of probabilities that she was attempting to communicate with secret agents for a purpose other than that which was prejudicial to the safety or interests of Zimbabwe. When considering a similar section to our s 8(1), CORBETT JA said in *S v du Plessis* 1981 (3) SA 382 (A) at 396H:

> "This presumption clearly operates in favour of the State and means, in effect, that, once an unauthorized communication in terms of, *inter alia*, s 3 (2)(a) has been proved, the *onus* is upon the accused to show that the purpose of the communication was not a prejudicial one; and, failing

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> such proof, a presumption of prejudice prevails (cf *S v Niesewand* (*supra* at 587C-G)). The standard of proof required of the accused would be proof upon a preponderance of probability (cf *R v Vorster* (1941 AD 472 at 482-3) ; *S v Niesewand* (*supra* at 588A))."

See *S v Niesewand* (3) 1973 (1) RLR 216 at 222A-B; *Chandler v Director of Public Prosecutions* [1964] AC 763; [1962] 3 All ER 142 (HL) at 146C-D, 149E-F, and 155B-D.

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Mr *de Bourbon* further submitted that there has to be a direct connection between the information and the interests of Zimbabwe. In my view, it has been shown in this case that the Government of Zimbabwe has given refugee status to members of the ANC. They are under the protection of the State of Zimbabwe. They form an interest or one of the interests of the State.

In *Chandler v Director of Public Prosecutions supra* at 160F LORD PEARCE had this to say: -

> "... the interests of the state must in my judgement mean the interests of the state according to the policies laid down for it by its recognised organs of government and authority, the policies of the state as they are, not as they ought, in the opinion of a jury, to be. Anything which prejudices those policies is within the meaning of the Act 'prejudicial to the interests of the state'."

In the context of Zimbabwe the protection of all the people living in Zimbabwe, be they citizens, residents, refugees or even visitors; the protection of all property in Zimbabwe irrespective of their varied ownership; and the safety and security of Zimbabwe are , in every respect, the interests of Zimbabwe. Any act prejudicial to these interests falls within the ambit of s 3 of the Official Secrets Act.

Whether the appellant thought that her purpose, the destruction of the ANC, did not jeopardise the safety and interests of Zimbabwe is not the question. What is important is that her purpose encompassed the destruction of Zimbabwean property occupied by members of the ANC and the killing of members of the ANC living in Zimbabwe.

I find support in what WESSELS JA said in *S v Marais* 1971 (1) SA 844 (A) at 850C-E (see the Official Translation):

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> "The meaning of the words:
>
> > 'for any purpose prejudicial to the safety or interests of the State'
>
> was considered in *Chandler v Director of Public Prosecutions* [1962] 3 All ER 142. From the various judgments delivered there, it appears that a person can act with more than one purpose or object, and that a conviction is justified if any of those purposes is prejudicial to the security or interests of the State, even if it is only the immediate and not also the ultimate purpose which is prejudicial. When the presence of the alleged purpose has been proved, the next question as to whether it is prejudicial is judged on objective standards. It would also not excuse an accused should it appear that his ultimate purpose (which may indeed be his motive for the conduct in question) is not prejudicial."

In view of what I have said above, and the clear judgment of the court *a quo*, the appeal against conviction should fail.

The appellant appeals against the severity of the sentence of twenty-five years' imprisonment with labour imposed by the court *a quo*. Twenty-five years' imprisonment is the maximum penalty for this type of crime.

Mr *de Bourbon* argued that the sentence was of an unduly harsh length. The learned JUDGE PRESIDENT was of the view that this was a very serious offence and thought that a sentence of twenty-five years' imprisonment with labour was not so severe as to induce a sense of shock.

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It was for this reason that he refused the appellant leave to appeal against sentence. She now appeals against sentence by leave of this Court.

The Legislature prescribed a sentence of twenty-five years' imprisonment as a maximum penalty for contravening s 3 of the Official Secrets Act. It is the ceiling of a range of sentences which a court may impose for a contravention of the section.

It is my view that in this type of crime a court, in assessing sentence, must balance the interest of society, which requires that those who spy and threaten the safety and interests of Zimbabwe should be punished and the interest of the accused, who expects a just and fair sentence.

Fairness and justice exclude a passionate approach to sentencing. Courts should also, when assessing sentence, avoid insensitivity to one side or an exaggerated sense of the wrong done to society. We are all agreed that

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punishment must fit the criminal as well as the crime. See *R v Zonele & Ors* 1959 (3) SA 319 (A) at 330E. HOLMES JA said in *S v Rabie* 1975 (4) SA 855 (A) at 861D that there is also the -

> "... approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought that tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society."

Fairness does not exclude the element of mercy and it does not also exclude a robust approach to sentencing. For other principles of sentencing see *S v Rabie supra* at 862 C-F.

The learned JUDGE PRESIDENT appreciated that if the information gathered by the appellant had been communicated to the South African agents they would have used it to destroy the ANC house and to kill innocent people. The bombing of the houses and the killing of people by South African agents in Zimbabwe is a notorious fact. If it is not, the Minister's certificate assures us that it happens. The appellant, in her evidence, said candidly that she wanted the ANC destroyed. She is a confessed supporter of apartheid. However, the appellant's political beliefs are not a factor to be taken into account when assessing sentence. It makes no difference to the Court whether she is a staunch supporter of apartheid or an avowed liberal. Her crime is not her support of apartheid.

Mr *de Bourbon* attacked the remarks made by the learned JUDGE PRESIDENT when he suggested that the most appropriate sentence would be the death penalty. The passage referred to reads:

> "In terms of s 3 of the Official Secrets Act [*Chapter 97*], the maximum sentence which can be imposed upon the accused is imprisonment for a period of 25 years. In my view imprisonment is not the most appropriate sentence, in a case such as this. The most appropriate sentence in a case such as this is, in my view, the death penalty. In some parts of the world the accused would, shortly after my comments, be facing the firing squad."

Mr *de Bourbon* submitted that these remarks were injudicious because -

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> "In times of peace, the death sentence for what the appellant did would be grossly disproportionate, and thus unconstitutional ... "

See *S v Ncube & Ors* 1988 (2) SA 702 (ZS) at 715I-716E.

I am of the view that a maximum sentence of twenty-five years' imprisonment is exceptionally long, and should be resorted to in very exceptional circumstances. See *S v Whitehead* 1970 (4) SA 424 (A) at 438H.

This case is not an exceptional one. Even if it were exceptional it has mitigatory factors which if used, would result in the imposition of a lesser than maximum sentence. What is more, the facts and circumstances of this case do not justify the imposition of the maximum sentence prescribed by the Legislature. In my view, the sentence of twenty-five years' imprisonment should be reserved for the more serious infringements of s 3 of the Official Secrets Act. These would include the stealing of Army secrets and other acts of espionage which take place during these times of war. It is the degree of the seriousness of the damage done to the security of Zimbabwe that warrants a severe penalty.

Mr *Chikumira* put up a stout defence of the sentence of the imposed by the court *a quo*. He contended that the conduct of the appellant would, had she succeeded, have endangered the lives and property of people in Zimbabwe. He urged the Court to deal harshly with any persons who come to Zimbabwe for the sole purpose of identifying persons to be killed or property to be destroyed by any foreign power.

I agree that courts should pass deterrent and severe sentences on such people. However, the courts have a duty which is to do justice to all manner of people. This includes the protection of the interests of society and the accused. It is the clear and balanced weighing in the scales of justice of the facts of the case that results in punishments that fit the crime as well as the criminal and are at the same time fair to society. Severe sentences of a harsh nature should be resorted to in exceptionally serious cases. I need not emphasise that a fair sentence need not be lenient. It may justifiably be harsh, but it must fit the crime committed.

What went wrong in this case? It is this: The learned JUDGE PRESIDENT pitched his sights too high and scanned sights far beyond the ambit of s 3. He believed the death sentence was the appropriate sentence. It was therefore not surprising that the sentence that was imposed was twenty-five years' impris-

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onment, which the learned JUDGE PRESIDENT had categorised as "not the most appropriate sentence". He felt his hands were tied. He could not go above the maximum set down by the Legislature. In this approach there was no room for taking into account of factors of mitigation, although the learned JUDGE PRESIDENT said he had taken them into account. No account was taken of the unchallenged evidence of torture adduced by the appellant in mitigation of

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sentence.

Failure to take into account mitigatory factors, including evidence of torture, was a misdirection. That evidence, as I have said, stood unchallenged. In cross-examination the State put up a half-hearted attack on the evidence of torture. Yet the appellant told a disturbing narrative of torture. She was beaten, she said. There were other stories of torture that do injustice to human decency and morality. Here is one gory story told by the appellant:

> "Q. One thing I want to draw your attention to in this, please Miss Harington, you say *inter alia* that someone spat on your private parts. What were you referring to in this regard? A I .. I .. I ..
>
> Q. Do not be embarrassed to tell His Lordship, he has heard much worse? A It was, before I was taken to Chikurubi, it was during those first days at Mabelreign Police Station. It was towards 5 o'clock in the morning after a night's interrogation and Jeff told me to remove my T shirt and I then had to squat and put my arm behind my head for the benefit of the five male interrogators who were present.
>
> Q. Go on please, what happened? A He then told me to put on the T shirt.
>
> Q. Was the top part of your body totally exposed when you took off the T shirt? A Yes.
>
> Q. Yes, I see, go on? A And then he told me to lower my trousers until knee level and Mr Moyo who I have mentioned, the other CIO officer, tried to stop him but he was brushed aside. And then he instructed me to pull open my private parts so that he could firstly look and this was accompanied by insults and then he told me to pull them open again so that he could spit on them.
>
> Q. And I take it your private parts were totally exposed during this period of time? A Yes."

Here is a description of another incident:

> "Q. And you told His Lordship that you were beaten in the most brutal

> manner of all. Now I would like you please to take a bit of time ... and describe to His Lordship the form this beating took? A . My feet were tied together with his belt as before and my hands tied behind my back and they used [a] piece of solid rubber, it was like a baton, not a baton but that sort of format, and I was brutally beaten."

She went on to describe the beating and how she soiled her pants.

This torture is contrary to s 15(1) of the Constitution, which reads:

> "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

The torture or other treatment she received at the hands of members of the Central Intelligence Organisation was of a serious nature and must constitute mitigation.

What I find difficult to understand is that no evidence was called by the State to controvert these damaging allegations of torture. It was necessary to lead evidence in rebuttal. It was not

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led.

Mr *Chikumira* said everything that could be said on behalf of the respondent. At the end of his submission he conceded that this evidence of torture, in the absence of evidence to the contrary adduced by the State, was a feature of mitigation. See *S v Drummond* 1978 RLR 422 at 427D-E; 1979 (1) SA 565 (RA); *S v Markham & Anor* S-185-88. It was a concession which was proper to make in view of the evidence on the record.

The learned JUDGE PRESIDENT did not think this evidence of torture was mitigatory. He said:

> "... from her evidence, it is possible or likely that she may have been subjected to some form of ill-treatment by members of CIO but on the basis of information I have before me, I am unable to say as a fact that this took place."

This was not an adequate assessment of the evidence. Having said in his view a sentence of imprisonment for twenty-five years' was inappropriate and that the death penalty was the most appropriate sentence in a case such as this, he then said in the last paragraph of the judgment on sentence:

DUMBUTSHENA CJ

> "I am not impressed by certain arguments advanced by some theorists that the death penalty is not a deterrent. Such arguments do not make sense to me."

The death penalty had nothing to do with this case. There was no need to think of the death penalty. The law did not permit the imposition of a sentence of death for this offence. I am therefore of the view that the learned JUDGE PRESIDENT did not apply his mind judiciously to the evidence before him. It cannot be said that the death penalty was most appropriate as a sentence when the Legislature did not see fit to prescribe it as a penalty for contravening s 3 of the Official Secrets Act. The expression of private views and opinions not connected with the case before the court is, in my judgement, a misdirection.

When considering the appropriate sentence to be imposed, the magistrate or judge must form a view of the evidence deposed to by the accused and the State and determine any issues or matters in dispute. Failure to identify the facts in that evidence relevant to sentence can and does result in a successful appeal.

There is another matter that should have been taken into account as a mitigating feature. The presence of a member of the ANC during the interrogations and torture sessions was, to say the least, improper. Why was a civilian allowed to be present and to torture the appellant? It was highly undesirable for him to be present. Besides, he was an interested party. He should never have been present, and he should not have been allowed to taunt or torture the appellant.

In assessing sentence, it is proper in cases such as this, to take into account the torture an accused person has been subjected to before the trial. This should have been done in this case. It was, however not done. See *S v Drummond* and *S v Markham & Anor supra*.

I entertain no doubt as to the seriousness of this case. The appellant was not forced to spy for

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South Africa. She accepted her mission, knowing that properties and lives would be destroyed as a result. If she had succeeded in sending her information to secret agents in South Africa the ANC house and neighbouring houses might have been destroyed and people killed. It is fortunate that she was naive enough to pull from under her jersey and to give a half open envelope to a police officer guarding the residence. And to believe that after telling him she was not allowed to leave the house, she instructed him to post the envelope for her. He did not. The country owes

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a debt of gratitude to that police officer for his presence of mind. She continued her naivety in prison. She wrote letters to her contacts in South Africa and believed that everyone around her would be sympathetic to her cause. She did not appreciate that those she came into contact with might be her enemies. Was it naivety or sheer grit that made her do these things? We do not know. Whatever made her believe she could do what she wanted led her to her arrest, conviction and imprisonment.

The appellant has to pay for her crime. But she must be sentenced rationally and fairly. This is one of the principles of criminal justice which requires that the punishments imposed by the court for crimes committed must themselves be just and fair. In balancing the scales of justice it is well to remember that: -

> "(t)here must be an appropriate degree of severity in the range of punishments available in order that the criminal justice system as a whole can rationally demonstrate that a breach of the law is attended by real consequences."

(See *Australian Law Reform Commission Report No*. *44* at para 28.)

It is also well to remember that too harsh a sentence is as ineffective and unjust as is a sentence that is too lenient. In arriving at a just and fair sentence, the court should never assume a vengeful attitude. Francis Bacon said in his essay "On Revenge": "Revenge is a kind of wild justice which, the more man's nature runs to, the more ought law to weed it out".

It is with these thoughts in mind that I have come to the view that the sentence of twenty-five years' imprisonment for this crime is a severe and vicious one which induces a sense of shock. The maximum sentence should be reserved for more serious crimes falling within the ambit of s 3 of the Official Secrets Act.

In my judgement the appeal against sentence ought to succeed.

Accordingly the appeal against conviction is dismissed, but the appeal against sentence succeeds to this extent:

> "The sentence of twenty-five years' imprisonment with labour is set aside and in its place is substituted a sentence of twelve years' imprisonment with labour."

DUMBUTSHENA CJ

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McNally JA: I agree.

Korsah JA: I agree.

Surgey, Pittman & Kerswell, appellant's legal representatives.

S v KUDAVARANDA 1988 (2) ZLR 367 (HC)

Court **High Court, Harare**

Greenland J

Criminal review

23 November 1988

Flynote

Criminal procedure (sentence) - mandatory minimum sentence - whether may be suspended - "special circumstances" justifying a lesser sentence - two offences carrying similar mandatory sentences arising out of same course of conduct with same motive and intent - killing a rhinoceros and possessing its horns, in contravention of Parks and Wild Life Act 1975 - special circumstances found in relation to second offence.

Headnote

The accused had been convicted, *inter alia*, of two charges under the Parks and Wild Life Act No. 14 of 1975. The first was one of killing a specially protected animal, namely a rhinoceros, in contravention of s 36(1)(a) of the Act. The second was one of possessing the horns of the same rhinoceros, in contravention of s 37(b) of the Act. Both offences carry a mandatory penalty of a fine of $15 000 or five years' imprisonment, unless there are special circumstances in the particular case justifying the imposition of a lesser penalty. The magistrate imposed the mandatory penalty on each count, but suspended half the total for five years on appropriate conditions. On review,

Held, that under s 337(1)(b) as read with the Sixth Schedule of the Criminal Procedure and Evidence Act [*Chapter 59*], the trial court had no power to suspend any portion of the minimum sentence.

Held, further, that in enacting the severe minimum penalties provided by the Act, the legislature intended to prevent or deter the hunting of the endangered animals themselves. In respect of the rhinoceros, the killing of the animal was motivated by a desire to acquire the horn but nothing

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else. In this case, the killing of the rhinoceros and the possession of its horns were completely

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interlinked. Consequently, special circumstances existed in relation to the offence of possession, justifying the imposition of a sentence less than the mandatory minimum sentence.

Cases cited:

S v Boid HH-128-82 (unreported)

S v de Montille 1979 RLR 105

S v Moyo 1988 (2) ZLR 79 (HC)

S v Ndebele HB-71-82 (unreported)

S v Chisiwa 1981 ZLR 666 (SC)

S v Dracos S-100-82 (unreported)

Judgment

Greenland J: In this case the relevant facts emerge from the very helpful submissions of the Acting Attorney-General, which are quoted in full:

> "The accused was charged with one offence against the Firearms Act, [*Chapter 308*] and three offences against the Parks and Wildlife Act No. 14 of 1975. He pleaded guilty and was, eventually, sentenced on all four counts. His Lordship has asked the Acting Attorney-General to 'advise shortly whether or not he is satisfied with the propriety of the proceedings. In particular, is the suspension of the mandatory sentence incompetent?
>
> Count one alleged an offence against s 5(2)(b) of the Firearms Act. The charge itself is badly drawn as it does not specify which of the alternatives in the section was alleged against the accused. See *S v Boid* HH-128-82. But it seems that the accused was sentenced on the basis of possessing a rifle without being a holder of a certificate. The magistrate found that special reasons existed and fined the accused $200 or, in default of payment, 2 months' imprisonment with labour. The certificate of the firearms examiner falls short of proving beyond reasonable doubt that the rifle was manufactured after 1900. All the examiner is able to say is that he suspects 'that it was most likely made after the year 1900'.
>
> Count 3 alleged a contravention of s 36(1)(a) of the Parks and Wildlife Act. The particulars read: 'In that on the 29th day of July 1987 and at or near Nyawude village, Chief Chitsungo, in the said Province, the accused did wrongfully and unlawfully hurt a specially protected animal, that is to say the accused killed one rhinoceros'. On this count, the accused was fined $15 000 or in default of payment 5 years imprisonment

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> with labour. That is to say, the magistrate imposed the mandatory penalty.
>
> Count 4 alleged a contravention of s 37(b) as read with s 84(1)(a) of the Parks and Wildlife Act. The particulars read 'In that on the 6th August 1987 and at Nyawude Village, Chief Chitsungo, Guruve, in the said province the accused did wrongfully and unlawfully purchase, acquire or have in his possession two rhinoceros horns.' Again, the charge is badly drafted. On this count, the accused was also fined $15 000 or in default of payment 5 years imprisonment with labour - the mandatory penalty.

Having announced his penalties on counts 3 and 4, the magistrate continued:

> 'Total on counts 3 and 4 is $30 000 or in default of payment 10 years imprisonment with labour, of which $15 000 or in default of payment 5 years imprisonment with labour is suspended for 5 years on condition

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accused does not within this period commit any offence involving the contravention of s 36(1)(a), s 37(b) as read with s 84(1)(a) of the Parks and Wildlife Act, 14/75."

In my submission the order purporting to suspend part of the sentence was incompetent. The magistrate's power to suspend a sentence is contained in s 337(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*]. But that power does not extend to offences specified in the Sixth Schedule which specifies, *inter alia*, 'offences in respect of which any enactment imposes minimum sentence. . . ". The penalties laid down for the offences alleged against the accused are set out in subs(4a) of s 115 of the Parks and Wildlife Act and are clearly minimum penalties. Accordingly, there was no power to suspend. See *S v de Montille* 1979 RLR 105.

The fact that the accused was charged with 2 offences in respect of the one rhinoceros killed is disquieting, although technically in order. But the sentences imposed in respect of those offences, in so far as they involve sentences of imprisonment, should have been concurrent. As to the fines, it may be that, given the circumstances of the offences, the obligation to pay a fine in respect of the one offence constitutes special circumstances in respect of the other."

As regards the first count of contravening s 5(2) of the Firearms Act, it is clear from the record that it was "possession" of the firearm that the State was

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concerned with. As there is no prejudice to the accused the charge is amended to properly reflect that allegation.

"Possession" is also the gravamen of the charge in Count 4 and as there is no possible prejudice that count is also amended accordingly.

The Acting Attorney-General is, for the reasons given, correct in submitting that the court had no power to suspend the mandatory sentences or any portion thereof. This aspect therefore requires rectification.

The first step is to accept that it is clearly the intention of the legislature that the rhinoceros is a particularly endangered species and deserving of unique protection. Hence the bringing into force of the severe sanctions of mandatory sentences prescribed in the Parks and Wildlife Amendment Act No. 35 of 1985. This court can take judicial notice of the appalling situation that now pertains to the rhinoceros, where the State's resources are being stretched beyond limits in an attempt to contain internationally organised, inspired and financed decimation of a greatly depleted species.

Secondly, it is clear that it is the horn of the rhinoceros which poachers, such as the accused, require. The rest of the animal is neither prized nor utilised.

It follows that, as in the present case, the killing of the animal is in consequence of the desire to possess the horn thereof. The two separate offences of 'Hunting a specially protected animal" and of "possession of a rhino horn" are completely interlinked on the facts. Had the accused not removed the horns from the carcass it is unlikely that two separate charges would have been levelled.

It is clear that the intention of the legislature, in prescribing the exemplary sanction of a mandatory minimum sentence for mere possession of a rhino horn, is to prevent or deter the

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hunting of the trophy animal itself.

To my mind the above stated aspects constitute "special circumstances in the particular case justifying the imposition of a lesser penalty. . . ", as stipulated and envisaged by the proviso to s 115(4a) of the Act.

To quote from *S v Moyo* HH-346-88:

> "The expressions "special reasons" and "special circumstances", which mean the same thing (see *R v da Costa Silva* 1956 R & N 369 at 372C

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> per BEADLE J, as he then was) have been considered in a number of cases, most recently in *S v Mbewe* HH-27-88. A concise statement of their meaning is found in *S v Makaurire* HB-134-84.
>
> > 'Special reasons are factors arising out of the commission of the offence or peculiar to the offender, which are out of the ordinary, either in their degree or their nature'."

This dictum is a crystallisation of what has been clearly set out in precedents such as *S v Ndebele* HB-71-82; *S v Chisiwa* 1981 ZLR 666 (SC) and *S v Dracos* S-100-82.

To my mind, the accused's criminal responsibility reposed in the fact of killing the animal. That fact rendered him the immediate possessor of the horns. Possession thereof was in instant consequence of the killing. Special circumstances exist in relation to the offence of possession of rhino horn.

In the result therefore the sentence in respect of Count 4, "possession of rhino horn", is set aside. So, too, is the order that the sentences on counts 3 and 4 be suspended.

The sentence on Count 3, "illegal hunting' is restated as:

> "fined $15 000 or, in default of payment, 5 years' imprisonment with labour."

The sentence on Count 4 is substituted as follows:

> "fined $2 000 or, in default of payment, one years' imprisonment with labour, suspended for 5 years on condition the accused is not convicted of committing within that period any offence involving the hunting or trapping of any animal or the possession of the meat, skin or trophy thereof for which he is sentenced to prison without option.
>
> The special circumstances is that the accused's possession was in consequence of his personal hunting of the trophy animal, which illegal act is being appropriately punished in Count 3. The two illegal acts arise out of the same course of conduct with a common motive and intent."

The accused is to be taken before the trial court and the sentence explained to him.

Reynolds J agrees.

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S v MANGWARIRA 1988 (2) ZLR 372 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ & McNally JA

Criminal appeal

20 October & 24 November 1988

Flynote

Criminal law - assault - corporal punishment inflicted by schoolteacher - authority of teacher to inflict such punishment.

Headnote

The appellant, a student teacher at a government secondary school, was convicted of assault after she had caned one of the boys on his buttocks. She admitted at the trial that she knew that only the headmaster was permitted to administer corporal punishment. On appeal,

Held, that although the right of a parent to administer reasonable punishment is clear under the common law, the right of a teacher to do so is less certain. Especially in modern times, the right of a schoolmaster in this respect tends, even in private or non-Government schools, to be restricted by internal regulations governing such questions as who may punish, in what circumstances and in what manner. In the absence of any rule or regulation to the contrary, it may be that even a student teacher has a right to inflict moderate chastisement on pupils under his or her control.

Held, further, that in my view of the appellant's admission that she knew that only the headmaster was authorized to inflict corporal punishment, it did not matter whether that reservation of authority was based on an internal school rule or, as here, on a statutory instrument, the Education (Disciplinary Powers) Regulations 1979 (RGN 95/1979). In either case, she could not rely on an authority which she acknowledged she did not have and the defence of lawfulness must fail.

McNALLY JA

Cases cited:

R v Muller 1948 (4) SA 848 (O)

S v Meeuwis 1970 (4) SA 532 (T)

R v Scheepers 1915 AD 337

Ryan v Fildes & Ors [1938] 3 All ER 517 (KB)

S v Mavingere 1988 (2) ZLR 318 (SC)

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R v Boshoff 1956 R & N 61 (SR)

S v Drummond 1978 RLR 422; 1979 (1) SA 565 (RAD)

C C Seddon for the appellant

Mrs *J Zindi* for the respondent

Judgment

McNally JA: The appellant was a student teacher at Pfupajena Secondary School, Chegutu, on 10 June 1987 when she decided to punish a schoolboy by caning him on the buttocks. She had decided to give him five strokes. When she was administering the second stroke the boy moved his hand in a protective reaction and the blow aimed at his buttocks caught him on the wrist. He moved away but did not say anything to her. He conceded she did not know she had injured his wrist. She called him back and administered the other three strokes.

Later he complained about the swelling and was examined by the doctor at Chegutu Hospital, who recorded "Injury rt. forearm. Epiphysiolysis (fracture) lower end rt. ulna". No permanent disability was found likely to result. My limited understanding of medical terminology, assisted by the Oxford English Dictionary, suggests to me that the fracture was minimal - if not speculative.

The appellant was charged with assault with intent to do grievous bodily harm but was convicted only of common assault. She was sentenced to a fine of $200 or 60 days' imprisonment with labour and in addition to one month's imprisonment with labour suspended on conditions for five years. She appeals both against conviction and sentence.

As far as conviction is concerned, her main ground of appeal is that her action was not shown to be unlawful. At common law so it was contended by Mr *Seddon* who appeared for her, a teacher stands *in loco parentis* and is entitled to impose physical chastisement on a pupil, provided that the degree of punishment is not excessive or unreasonable, and is imposed for reasons of proper discipline.

McNALLY JA

The right of a parent to administer reasonable punishment is clear under the common law. The right of a teacher is less certain. Lee and Honoré *Family, Things and Succession* 2 ed at para 146 footnote one, states:

> "Within the bounds laid down by any applicable legislation, a teacher may inflict moderate corporal or other punishment upon a pupil."

Whether the right of a teacher to chastise a child is one delegated to him (or her) by the parent, or is one flowing directly from the teacher/pupil relationship has been debated - *R v Muller* 1948 (4) SA 848 (O) at 861. The English law tends nowadays to take a different view:

> "School authorities also have power to administer corporal punishment though this seems to be based upon statutory authority rather than upon parental delegation."

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Bromley's *Family Law* 7 ed p 274 n 3 (I believe that the European Court of Human Rights has now outlawed corporal punishment in schools).

Boberg in his 1977 *Law of Persons and the Family* at p 465 says:

> "A teacher is similarly entitled, subject to the same limitations, to inflict corporal punishment upon his pupils, both as a person to whom the parent has delegated his authority by sending the child to school, and in his own right."

He goes on to make the point that -

> "The court will not lightly interfere with the exercise of the parent's or schoolmaster's discretion in disciplinary matters, and the *onus* of proving that the punishment imposed was unjustified or excessive rests upon the person alleging it."

In a footnote on the same page the learned author refers to *S v Meeuwis* 1970 (4) 532 (T) for the proposition that -

> "Where a schoolmaster's common law powers have been circumscribed by legislation, the infliction of corporal punishment constitutes an assault unless it is justified under the legislation, which supersedes the common law in this respect."

McNALLY JA

This decision followed on this point the decision of the Appellate Division in *R v Scheepers* 1915 AD 337.

The right of a schoolteacher to discipline a child, especially in modern times, tends even in private of non-Government schools to be restricted by internal regulations governing such questions as who may punish, in what circumstances and in what matter. It may not have been so in earlier days. Thus for example *Street on Torts* 7 ed at p 79 cites the case of *Ryan v Fildes & Ors* [1938] 3 All ER 517 (KB) for the proposition that even as assistant teacher had a common law authority to chastise - although on the facts it was held that the blow, though a moderate one, exceeded reasonable but lawful correction.

It may be, in the absence of any rule or regulation to the contrary, that even a student teacher has a right to inflict moderate chastisement on pupils under her control.

I do not find it necessary to decide the point because the evidence of the appellant herself reveals that she was aware that she had no such authority. I refer to the passage in the defence outline where she says:

> "I knew that only the headmaster is allowed to administer strokes."

The legal position is that the appellant has sought to justify her assault by reliance on her status as a teacher exercising authority over the complainant as a pupil. Yet she herself has established that the authority to impose corporal punishment has been reserved to the headmaster. It does not matter whether that reservation of authority is based on a Statutory Instrument or an internal school rule. In either case she cannot rely on an authority which she acknowledges she does not have.

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We were concerned at the hearing of the appeal that no one in the court a quo had appreciated the significance of the question whether or not the school concerned was a Government School.

If Pfupajena Secondary School is a Government School, then the power of teacher to inflict corporal punishment is regulated by the Education (Disciplinary Powers) Regulations 1979, to be found in RGN 95/1979. It is clear from s 5 of those regulations (if they apply) that the appellant was not authorised to inflict corporal punishment unless she was "a teacher to whom authority had been delegated by the head". She expressly disavowed any

such authority. Thus, on the *Meeuwis* and *Scheepers* principle her defence would fail.

It seemed to us that a fact of this nature, simple to obtain, not open to controversy once obtained, and possibly necessary for the determination of the case (though in the event our decision would not have been different without it), was one which should be placed before us. In the exercise of our powers under s 15 of the Supreme Court of Zimbabwe Act No. 28 of 1981, we directed the parties to obtain the evidence and (if possible by consent) to place it before us.

I do not propose here to elaborate our reasons for adopting this approach, because they have been set out in another recent decision, *S v Mavingere* S-195-88*(13), relying on *R v Boshoff* 1956 R & N 61 (SR).

The parties have since placed before us, by consent, the information that the school is indeed a Government School. We appreciate their assistance. It follows inevitably and *a fortiori* that the defence must fail.

In the result I am satisfied that the conviction was correct. The defence of lawfulness fails. And it fails. I must say, wherever the *onus* of proof lies in regard to lawfulness.

The magistrate was quite right to reject the contention that there was an intent to do grievous bodily harm. It was not proved that the blow on the wrist was intended. Indeed it is very probable that the appellant was truthful when she said it was an accident, caused by the boy unwisely trying to parry the blow with his hand.

However, it still seems to me that the magistrate took much too serious a view of this assault. This appellant was a young woman of 23, an inexperienced student teacher, faced with a report that an unruly class was disturbing others who were writing examinations. Her actions were not intended to achieve evil but good. Had it not been for the accidental blow on the wrist she would probably not have been charged. She was not charged with assault on the other eleven boys whom she caned.

Her guilt lies in her choosing the wrong means of restoring order, and the blame for this is largely attributable to her inexperience.

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McNALLY JA

Moreover, we have been informed without serious objection that the consequences of her action upon her career have been considerable. She was suspended without pay from July to December 1987 and has had to repeat her student teaching term in the first term of 1988, thus delaying by some four months an increment from $392 per month to $745 per month. Since we are in any event at large on the question of sentence, we can taken into account these further facts. Compare *S v Drummond* 1978 RLR 422 at 427F-428H; 1979 (1) SA 565 (RA) and the many cases where the Court has taken into account the effect of a conviction and sentence on the accused's employment.

I am satisfied that a sentence of imprisonment, even wholly suspended, is quite unwarranted. I consider that a fine of $75 will, in the light of all other consequences of her rash action, be sufficient to mark the level of the appellant's blameworthiness.

In the circumstances, the appeal against conviction fails. The appeal against sentence is allowed. The sentence is set aside, and in its place the appellant is sentenced to a fine of $75. No alternative of imprisonment is necessary.

Dumbutshena CJ: I agree.

Coghlan, Welsh & Guest, appellant's legal representatives

S v GOROGODO 1988 (2) ZLR 378 (SC)

Court **Supreme Court, Harare**

Gubbay JA, Manyarara JA & Korsah JA

Criminal Appeal

7 & 24 November 1988

Flynote

Criminal procedure (sentence) - assessment of - need to decide what total sentence should be then determine what portion (if any) should be suspended - suspended sentence - no rule that first offender entitled to have portion of sentence suspended - theft - by public official of public funds - appropriate sentence.

Headnote

The appellant was convicted on fifty-five counts of theft by conversion of money, involving some $73 000. He had been employed by the Manicaland Provincial Authority as an accountant and had stolen the money from his employer over an eighteen month period. None of the stolen money was recovered and no explanation proffered for this persistent course of conduct. The magistrate took various groups of the offences as one for sentence and ordered some to run concurrently with others, and thus arrived at a globular total sentence of seventeen years'

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imprisonment, of which five years were suspended for five years on conditions. On appeal against sentence.

Held, that the proper approach to sentence was to look primarily, not at the effective sentence, but at what total sentence the offence or offences should attract; and having determined that, to consider what portion, if any should be suspended.

Held, further, that there was no rule that every first offender who is to be imprisoned is entitled to have a portion of the sentence suspended. The main purpose of a suspended sentence is rehabilitation; if an offender is required to undergo very lengthy incarceration and that punishment does not induce him to settle down to a useful life, it is unlikely that upon his

release from prison a further period of imprisonment hanging over his head will deter him from future crime.

Held, further, that the dishonest appropriation of public monies can never be viewed lightly, particularly where the sum involved is enormous. Regrettably, despite warnings from the courts, thefts by persons in positions of trust have not significantly decreased and factors of deterrence and public expectation regarding punishment must be taken as paramount considerations. Nonetheless, such factors must not be permitted to weight so heavily as to negate others which may in some way lessen the seriousness of the offence. No principle can justify, for the sake of deterrence and public indignation, the imposition of a sentence grossly in excess of what, having regard to the crime and the degree of the offender's moral reprehensibility, would be a fair and just punishment.

Held, further, that the appellant could not claim that he was illfitted by qualification or experience to hold the position he did. He was properly trained and the system did not create conditions conducive to the commission of thefts or frauds. The temptation to which he was exposed was no greater than that which every senior accountant encounters. The nature of that calling presumes the attributes of a high degree of integrity and honesty. The appropriate sentence was one of twelve years' imprisonment, with none suspended.

Cases cited:

S v Wakiri 1981 ZLR 51 (AD); 1981 (2) SA 527 (ZA).

S v Sharma S-117-84 (not reported)

S v Ndhlovu 1982 (1) ZLR 39 (GD); 1982 (3) SA 51 (ZH)

S v Chikopa 1984 (1) ZLR 209 (SC)

S v Chirata & Ors S-41-86 (not reported)

S v Moyana & Anor 1980 ZLR 460 (AD)

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G S Wernberg for the appellant

Miss *E F Ndewere* for the respondent.

Judgment

Gubbay JA: The appellant was charged with sixty-two counts of theft by conversion, alleged to have been committed between 18 August 1983 and 17 January 1985. He pleaded guilty to twenty-two counts and, during the course of the trial, to a further twenty-one counts. He was acquitted on seven counts (one being withdrawn by the prosecutor after plea) and was convicted on fifty-five counts involving a total loss to the complainant of $73 042,63.

GUBBAY JA

Apart from Counts 51, 61 and 62, the offences fell into four distinct groups and in his approach to sentence the trial magistrate passed separate periods of imprisonment in respect of the convictions entered in the first and fourth groups and on Counts 51, 61 and 62, and in respect of the second and third groups he took the convictions as one for the purposes of sentence. He then ordered many of the sentences to run concurrently with others and in this way arrived at a globular total of seventeen years' imprisonment with labour. Of that period five years was conditionally suspended for a period of five years, leaving an effective sentence of twelve years' imprisonment with labour.

It is unnecessary to set out the facts of the matter in any great detail, for Mr *Wernberg*, who appeared for the appellant, did not pursue the appeal noted against conviction on Counts 13, 14, 38 and 51. He very prudently confined his argument to the submission that the sentence, in both its overall and effective aspects, was so excessive as to warrant interference by this Court.

While the appellant was in the employ of the Manicaland Provincial Authority as an accountant, he converted to his own use monies totalling $73 042,63. And, save for the vigilance of an official who became suspicious about a cheque payable to the Manicaland Provincial Authority but deposited by the appellant to his personal account with the Bank of Credit and Commerce, he would have succeeded in stealing an additional $3 232,98.

Over a period of eighteen months the amounts of money stolen by the appellant averaged $4 500 per month. No explanation was proffered for this persistent course of theftuous behaviour and the inference to be drawn is that the appellant was motivated solely by greed and self-aggrandisement. Since all of the stolen money was spent, there was no prospect of the appellant being able to make even partial restitution.

As the magistrate rightly stressed, the offences were highly premeditated and professionally executed, making subsequent detection difficult. In a number of instances the appellant used a receipt book which he had stolen from a security locker. As the receipt book was not in circulation at the time, he used the receipts to give to persons who had paid money to the Manicaland Provincial Authority, but failed to enter the payments in the books of account. On other occasions he converted interest which was payable on monies held by the Manicaland Provincial Authority by simply removing the cheques and subsequently depositing them to his

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personal account with the Zimbabwe Banking Corporation Limited. On yet other occasions he would convince senior personnel who were counter-signatories on cheques that certain

GUBBAY JA

payments were required to be made by the Manicaland Provincial Authority. A cheque would be made out, which the appellant would then cash at the Bank and convert the monies to his own use.

Clearly, the appellant stole a very considerable amount of public funds. He was placed by his employer in a position of great trust which he sorely abused. He was responsible for ensuring that the books balanced at the end of each month and no checks were carried out by anyone else. He had only one superior, the Chief Executive Officer.

As the magistrate pointed out in a careful judgment, there was little to be said in the appellant's favour. He was a first offender and was employed at a comparatively low salary of $500 per month. Thus perhaps he was exposed to some temptation, but I see nothing extraordinary about it. It was no greater than that which every senior accountant, whose duty it is to deal with his employer's funds, encounters. The nature of that calling presumes the attributes of a high degree of integrity and honesty.

But where I think the magistrate went wrong was in reaching an overall sentence of seventeen years' imprisonment with labour, for I regard that punishment as disturbingly severe for the totality of the offences under consideration. As observed by FIELDSEND CJ in *S v Wakiri* 1981 ZLR 51 (AD) at 53A; 1981 (2) SA 527 at 529; the proper approach is to look primarily, not at the effective sentence, but at what total sentence the offence or offences should attract and, having determined that, to consider next what portion, if any, should be suspended. See also *S v Sharma* S-117-84 at p 5 of the cyclostyled copy of the judgment.

I should mention also one further aspect of the sentence. I am far from convinced that this was a case where a suspended sentence was appropriate. If the magistrate wished to achieve an effective sentence of twelve years' imprisonment with labour it could have been better obtained by making a further five years run concurrently with the sentence on the other counts. In any event, I am certain that it was not right to suspend the five year period for the maximum period for five years. See *S v Wakiri supra* at 54E; *S v Ndhlovu* 1982 (1) ZLR 39 (GD) at 42D; 1982 (3) SA 51 at 54 (ZH).

Unquestionably, therefore, this Court is now free to determine what total sentence the offences merited and whether any portion of it should be suspended.

GUBBAY JA

I have considered the authorities cited by counsel by way of comparison, and in particular *S v Chikopa* 1984 (1) ZLR 209 (SC); *S v Sharma supra*; and *S v Chirata & Ors* S-41-86. They

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provide a rough guide as to an acceptable level of punishment in cases such as this.

Mr *Wernberg* placed the most emphasis on *Chikopa's* case *supra* where this Court reduced a sentence of twelve years' imprisonment with labour imposed by the lower court for the theft of $80 000, by suspending three years thereof. He submitted that the appellant was deserving of a similar punishment. I am unable to agree. Admittedly the amounts stolen more or less equate, but the substantive mitigating feature in Chikopa's favour was that he was employed as a clerk with inadequate training and subject to little, if any, supervision. This is made clear by the learned CHIEF JUSTICE, who remarked at p 3 of the cyclostyled copy of the judgment:

> "And in a case such as this one society has, as I have pointed out above, a responsibility of preventing crime by putting its own house in order by not placing people in positions of trust when they are ill fitted by qualification or experience to hold those positions. If such men are placed in positions of trust which present them with temptation which leads them to commit crimes they would not have committed, members of the society who are responsible for creating such a situation must bear a measure of responsibility."

In contrast, the appellant was properly trained and in a much higher position. There was no laxity in the system in which he was a part. It did not create conditions conducive to the commission of thefts or frauds. The appellant had to rely on his own ingenuity, misplaced resourcefulness, and clever deceptions.

The dishonest appropriation of public monies can never be viewed lightly, especially where the sum involved is enormous. Regrettably, despite warnings from the Courts, thefts by persons in positions of trust have not over the past few years significantly decreased, and factors of deterrence and public expectations regarding punishment must be taken as paramount considerations.

Nonetheless, such factors must not be permitted to weigh so heavily as to negate others which go in some way to lessen the seriousness of the offence. What is to be guarded against is such an excessive devotion to the cause of deterrence an may so obscure other relevant considerations as to lead to a

punishment which is disparate to the offender's deserts. I cannot conceive of any principle which can justify, for the sake of deterrence and public indignation, the imposition of a sentence grossly in excess of what, having regard to the crime and to the degree of the offender's moral reprehensibility, would be a fair and just punishment.

With these remarks in mind, it is my opinion that a sentence of twelve years' imprisonment with labour (which is what the trial court effectively ordered), is called for. And I do not believe that it is appropriate to suspend any portion thereof. There is no rule that every first offender who is to be imprisoned is entitled to have a portion of the period suspended. See *S v Moyana & Anor*, 1980 ZLR 460 (AD) at 464E-F. The main purpose of a suspended sentence is rehabilitative. Where, in consequence of the nature of his wrongdoing, the offender is required to undergo very lengthy incarceration (as in this instance), if that punishment does not induce him to settle down to a useful life, it is unlikely that upon his release from gaol a further period of

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imprisonment hanging over his head will deter him from future crime.

In the result, I would allow the appeal against the sentence and, while not disturbing the sentences imposed by the trial court either on the individual counts or where several counts were taken together, I propose to alter the manner in which the sentences were ordered to run concurrently, thereby setting aside the period of seventeen years' imprisonment with labour of which five years was suspended.

Accordingly, I would adjust the sentence as follows:

1. The sentences imposed on Counts 1 to 38 are to stand, but the sentences imposed on Counts 18, 20, 29, 31 and 38 are ordered to run concurrently with the sentence of twenty-five months' imprisonment with labour imposed on Counts 34.

2. The sentence on Counts 39 to 43 and Count 46 (taken as one) is to stand but is ordered to run concurrently with the sentence of seventeen months' imprisonment with labour imposed on Count 55.

3. The sentence imposed on Counts 49 to 50 (taken as one) is to stand, but is ordered to run concurrently with the sentence of four months' imprisonment with labour imposed on Count 17.

4. The sentence imposed on Count 51 is to stand, but is ordered to run

concurrently with the sentence of seventeen months' imprisonment with labour imposed on Count 55.

5. The sentences imposed on Counts 52 to 62 are to stand, but the sentences of five months' imprisonment with labour imposed on Counts 61 and 62 are ordered to run concurrently with the sentence of five months' imprisonment with labour imposed on Count 53.

In the event, the sentence to be served by the appellant is twelve years' imprisonment with labour.

Manyarara JA: I agree.

Korsah JA: I agree.

Kantor & Immerman, appellant's legal representatives

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S v DUBE & ANOR 1988 (2) ZLR 385 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

24 November & 1 December 1988

Flynote

Criminal procedure - trial - plea - of guilty - essential elements - requirement to explain carefully - admissions on plea - requirement to clarify exactly what is being admitted - multiple accused - each accused's answers to be recorded separately - fair trial - requirement for - unrepresented accused - when court should consider ordering legal representation to ensure fair trial.

Criminal procedure (sentence) - minimum sentence - need for court to explain meaning and implications of - Parks and Wild Life Act 1975 - s 115(4a) - period of imprisonment not specified as being minimum period in default of payment of minimum fine - court free to make its own assessment as to appropriate period.

Headnote

Section 115(4a) of the Parks and Wild Life Act 1975 provides a minimum sentence for certain offences under the Act. It does so by prescribing "a fine of not less than $15 000 or imprisonment for a period of not less than five years, or both such fine and imprisonment". This phraseology, which is an unusual way of prescribing a minimum sentence, does not mean that the minimum period of imprisonment in default of payment of the fine is one of five years; the court is entitled to make its own assessment of a proper alternative to the $15 000 fine. It is only if the court decides to impose not a fine, but imprisonment, that five years is the minimum period to be imposed.

Where there is a plea of guilty, judicial officers must be careful not to regard every fact as proved just because it is admitted. Where the accused

admits "possession" of a prohibited article, the court must establish just what the accused is admitting, possession being a difficult legal concept. A similar caution applies to the explanation of the charge and the elements of the offence. Section 255(3) of the Criminal Procedure and Evidence Act [*Chapter 59*] requires that the court's explanation, any statements by the prosecutor and the reply and statement by the accused be recorded. This record should be full. Where there is more than one accused person, each should be dealt with separately.

In cases where the law provides a minimum penalty unless special circumstances exist, the accused should be told what the penalty is and the meaning of special circumstances. This should be done early in the trial. Allied to this enquiry is the broader one of whether the accused will have a fair trial. The court should consider whether the case is a complex one, from the point of view of such matters as -

(a) whether the ascertainment of the facts includes difficult legal concepts such as

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"possession", "consent" or "knowledge";

(b) whether the facts themselves are complex or difficult;

(c) whether there is a need to prove "special reasons" or "special circumstances" to avoid a minimum sentence;

(d) whether a long prison sentence is likely to follow conviction.

In such cases, the court should ask itself:

(1) even if the accused has pleaded guilty, whether it would nonetheless be appropriate to enter a plea of not guilty in terms of s 255A of the Criminal Procedure and Evidence Act;

(2) if the accused is unrepresented, whether it would be fair and appropriate to advise him of the complexities of the matter and to ask him if he has considered obtaining legal representation; and

(3) if satisfied that the accused should have legal representation but cannot afford it, whether the court should certify that legal representation be provided under the Legal Assistance and Representation Act [*Chapter 66*].

In most cases, a plea of guilty will be unequivocal and the procedures provided by s 255 of Chapter 59 will ensure a fair hearing, as will the use of the procedure provided by s 255A. In other cases, it will be enough for the magistrate to explain legal complexities and to ask if the accused wants to engage legal representation at his own expense. Only in the minority of cases should the court conclude that there cannot be a fair trial without legal representation.

DUMBUTSHENA CJ, GUBBAY JA & McNALLY JJA

Cases cited:

S v Zvinyenge & Ors S-99-87 (not yet reported)

S v Chaerera 1988 (2) ZLR 226 (SC)

S v Mupanduki 1985 (2) ZLR 169 (SC)

S v Sibanda & Ors 1977 (2) RLR 189 (GD)

S v Deka & Anor S-199-88 (unreported)

Attorney-General v Chimwadze 1982 (2) ZLR 218 (SC)

S v Hoareau S-143-88 (unreported)

S v Dyer 1988 (2) ZLR 395 (SC)

S v Chirodzero HH-14-88 (unreported)

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S v Bizwick S-122-87 (not yet reported)

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

S v Mudingi S-1-87 (unreported)

S v Mbewe & Ors 1988 (1) ZLR 7 (HC)

S v Radebe, S v Mbonani 1988 (1) SA 191 (T)

S v Khanyile & Anor 1988 (3) SA 795 (N)

S v Gwebu 1988 (4) SA 155 (W)

S v Morrison 1988 (4) SA 164 (T)

S v Nyamweda 1983 (1) ZLR 131 (SC)

S v Malili & Anor 1988 (4) SA 620 (T)

A P de Bourbon SC for the appellant.

A O Agyemang for the respondent.

Judgment

Dumbutshena CJ, Gubbay JA & McNally JA: This is an appeal against a conviction and sentence arising out of a charge of contravening s 36(1)(b) as read with s 36(2) of the Parks and Wild Life Amendment Act No 14 of 1975 as read with s 115 as amended by s 18 of the Parks and Wild Life Amendment Act No. 35 of 1985. The offence consists in unlawfully keeping or having in possession or selling or otherwise disposing of a trophy of a specially protected animal, in this case two rhinoceros horns.

Each of the two appellants was granted lease to appeal in person against conviction and sentence, and it was directed that argument be advanced on the following questions, namely, whether -

(a) the trial magistrate adequately explained the elements of the offence;

(b) in respect of the second appellant, the statement of agreed facts proved that he "kept or had in his possession" the rhinoceros horns;

DUMBUTSHENA CJ, GUBBAY JA & McNALLY JJA

(c) the concept of "special circumstances" was properly explained to the appellants and the issue probed with them;

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(d) the requirement of "special circumstances" was not met in the statement of agreed facts;

(e) having regard to the serious nature of the offence and the mandatory penalty it attracted, the appellants were denied a fair hearing by reason of the trial magistrate's omission to advise them that it was in their best interests to secure legal representation and, in the event of their not being able to afford it, to grant legal assistance to them.

In addition the appellants were granted legal aid in the preparation and presentation of this appeal. The Court is indebted to Mr *de Bourbon*, who appeared for the appellants, for his thoughtful and interesting submissions.

The Court has on previous occasions expressed disquiet over the provisions of this Act and the way it is administered. See *S v Zvinyenge & Ors* S-99-87 and *S v Chaerera* S-152-88 (not yet reported)*(14). It may be as well to summarise our concerns in relation to the problems arising out of the way the Act has been drafted, and at the same time to correct certain inaccuracies:

1. In *Zvinyenge supra* the point was made that the Act lays down a penalty for a contravention of s 36(1)(b) and then later, confusingly, contradicts it. The penalty is set out in s 115(1)(a) and then increased in s 115(4a). This has led to understandable errors in the past on the part of magistrates. Redrafting seems desirable.

2. In *Chaerera supra* the judgement refers to the mandatory minimum sentence as being "a fine of $15 000 or, in default of payment, five years' imprisonment with labour". In fact the prescribed sentence, for a first offender, is "a fine of not less than $15 000 or imprisonment for a period of not less than five years, or both such fine and imprisonment".

   This is an unusual and ambiguous way to define what is usually called a mandatory minimum sentence. Mr *de Bourbon* has made the point that the five years is not specified as the minimum in default of payment of the $15 000. Therefore, he says, the court would be entitled to make its own assessment of a proper alternative to the $15 000. Bearing in mind

the *dicta* in *S v Mupanduki* 1985 (2) ZLR 169 (SC), a court might impose a sentence of a fine of $15 000, or in default of payment, two years' imprisonment with labour, without breach of the provisions of the section. See also *S v Sibanda & Ors* 1977 (2) RLR 189 (GD) at 190G 191A. Mr *Agyemang*, who appeared for the State, did not dispute this interpretation.

It is apparent that this confusion has arisen out of the use by a draftsman of the formula usually used for the defining of maximum penalties instead of the formula used for the defining of minimum penalties (compare s 31C(2) of the Drugs and Allied Substances

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Control Act [*Chapter 320*], as introduced by s 11 of Act 7 of 1987.) Nonetheless an anomaly has been created and convicted persons are entitled to the benefit of it.

Judicial officers who sentence accused persons to a fine in terms of this provision are therefore required to apply the provisions of s 323 of the Criminal Procedure and Evidence Act in determining an appropriate alternative sentence of imprisonment, and are not bound by the figure of five years appearing in the section unless they decide to impose, not a fine, but a prison sentence. If they do so decide, then five years is the minimum prison sentence to be imposed. And, of course, both the minimum fine and the minimum prison term may be imposed.

Dicta to the contrary in *Chaerera supra* should be regarded as having been made *per incuriam.*

3. It has also emerged in the course of considering the Act that the proviso introducing the concept of "special circumstances" (s 18 of Act 35 of 1985) is printed and indented in such a way as to make it appear that the proviso is applicable only to subsection (ii) and not to subsection (i). Clearly, it applies to both, and no doubt the error in layout will be corrected when the Act is reprinted in its amended form.

So much for the general problems created by the way in which the Act and its amendments have been drafted. We turn now to the difficulties which have arisen specifically in the present appeal.

THE PLEA OF GUILTY

First of all there was a plea of guilty. There have been a number of recent judgements in which it has been pointed out how careful a judicial officer

DUMBUTSHENA CJ, GUBBAY JA & McNALLY JJA

must be when faced with a plea of guilty. Not every fact should be regarded as proved simply because it is admitted. Thus an admission of "being in a prohibited area" should not be blindly accepted. The court should require proof that the area was indeed a prohibited area - *S v Deka & Anor* S-199-88. The same is true of an admission of "possession". The court must be careful to establish what it is that the accused is admitting, because possession is a difficult legal concept - *Attorney General v Chimwadze* 1982 (2) ZLR 218 (SC); *S v Zvinyenge & Anor supra*; *S v Hoareau* S-143-88; *S v Dyer* S-204-88*(15). And see generally the remarks of REYNOLDS J in *S v Chirodzero* HH-14-88.

In the present case it is not at all clear on the facts as presented in the statement of agreed facts that the second appellant, who was, the second accused at the trial, did in fact "keep or have in his possession or sell or otherwise dispose of" one or other or both of the horns. He seems to have accompanied the first accused, who possessed the horns for several weeks, when the horns were handed over to accused three. When the elements of the offence were put, quite inadequately, to him, he said: "I introduced accused one to accused three".

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It may well be that he identified himself with accused one's possession, or that he himself at some stage physically possessed one or both of the horns, or that his part in the negotiations between accused one and three established him as a principal or accessory in the sale or disposal of the horns between accused one and three, but without elucidation the matter is not clear.

The conviction of the second appellant must therefore be set aside.

ELEMENTS OF THE OFFENCE

The provisions of s 255(2)(b) of the Criminal and Evidence Procedure Act [*Chapter 59*] require that the court explain the charge and the essential elements of the offence to the accused and inquire from him whether he understands them. *S v Bizwick* S-122-87 (not yet reported); *S v Chirodzero supra*; *S v Zishumba & Ors* 1983 (1) ZLR 10.

The provisions of s 225(3) require that all the above procedures, including the explanations by the court, any statements by the prosecutor, and the reply and statement by the accused, be recorded. *S v Zishumba supra*; *S v Mudingi* S-1-87.

DUMBUTSHENA CJ, GUBBAY JA & McNALLY JJA

This was not done, or at best inadequately done, in the present case. Each accused person should have been dealt with separately. Each should have been questioned to reveal exactly what it was as between "keeping", "possessing", "selling" or "disposing" that he was admitting. The exact nature of the "possessing" that he was admitting should have been clarified.

The purpose of such questioning is not to test the accused person's credibility or to trap him him into further admissions, but simply to determine precisely what it is that he is admitting.

The recording of this exchange should be full, and where there are, as here, four accused persons, the back of the charge sheet does not provide sufficient space.

SPECIAL CIRCUMSTANCES

The law in this regard has been explained in many judgements. We need refer only to three recent decisions, namely, *S v Zvinyenge & Ors supra*; *S v Mbewe and Others* 1988 (1) ZLR 7; and *S v Chaerera supra*.

In the present case the phrase "special circumstances" was never mentioned by the magistrate until he came to impose sentence, and even then he used the incorrect phrase "special reasons". The accused were simply asked, under the heading "mitigation", whether they had anything to say concerning the sentence that should be passed.

This approach is grievously inadequate. It normally leads, as it led in this case, to a recitation of the number of wives, children and dependants who will be discommoded if the accused is sent to prison. The accused should have been told at this stage (indeed, as will be indicated below, at a much earlier stage) that the offence involved a minimum sentence and that the court was obliged to fine each of them at least $15 000 or to send each of them to prison for at least five

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years unless they could establish the existence of special circumstances. Some explanation of special circumstances should then have been proffered, indicating that they may be circumstances peculiar to the offender himself or to the commission of the offence.

Instead of that, the magistrate simply listened to their evidence in mitigation and then said:

> "On what you have told the court there are no special reasons why the mandatory minimum sentence laid down by Parliament should not be passed."

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Quite apart from the circumstances special to the offender, the magistrate does not seem even to have considered whether the facts as set out in the statement of agreed facts might not reveal, in relation to one or other of the accused, special circumstances in relation to the commission of the offence. Some questioning was surely called for in relation to the extent and nature of each accused's possession and of his financial interest in the transaction.

A FAIR HEARING

These considerations lead to the broader issue as to whether the appellants (and their two colleagues who did not appeal) have had a fair hearing. The Court touched upon this question in *Chaerera supra* and mentioned s 18 of the Constitution of Zimbabwe. The matter has also been debated extensively in recent judgements in South Africa, and we refer to the following - *S v Mbonani* 1988 (1) SA 191 (T); *S v Khanyile & Anor* 1988 (3) SA 795 (N); *S v Gwebu* 1988 (4) SA 155 (W); *S v Morrison* 1988 (4) SA 164 (T). The debate in these cases has been in the context of whether or not the accused should have been afforded the opportunity of obtaining legal representation.

It is difficult and, we think, undesirable to attempt to lay down a broad rule of practice at this stage as to the means by which an unrepresented accused person can be assured of a fair trial in complex cases. By "complex" we mean -

1. Cases where the ascertainment of the facts includes difficult questions of legal interpretation, such as arise when issues like "possession", "consent" or "knowledge" are involved;

2. Cases such as *Khanyile supra* where the charge involved an offence committed some seven years previously, the defence was an alibi difficult to establish after so long a time, and the State evidence was no more then fingerprint evidence given by an expert;

3. Cases where the need to prove "special circumstances" or "special reasons" arises if a minimum sentence is to be avoided;

4. Cases where a long prison sentence is likely to follow a conviction.

These are intended as examples and not as an exclusive list.

In our view judicial officers trying such cases should ask themselves three questions:

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DUMBUTSHENA CJ, GUBBAY JA & McNALLY JJA

1. Where the accused has pleaded guilty, would it be appropriate nonetheless to enter a plea of not guilty in terms of the provisions of s 255A of the Criminal Procedure and Evidence Act?

2. Where the accused is unrepresented, would it be fair and appropriate to advise him of the complexities of the matter and enquire whether he has considered obtaining legal representation?

3. If satisfied that the accused should have legal representation but cannot afford it, should the court certify that he should have legal representation in terms of the provisions of s 3 of the Legal Assistance and Representation Act [*Chapter 66*], as amended by s 2 of Act 21 of 1974

We do not mean to suggest, far less to lay it down as a rule of practice, that magistrates should recommend legal aid in every case where a long sentence is possible. In most cases a plea of guilty is quite clear and unequivocal, and the procedures laid down in s 255 will ensure a fair hearing. Equally, there will be many cases where a fair hearing can be ensured by using the procedure set out in s 255A and changing the plea to "not guilty" so that questions of law and admissions of fact can be explored and clarified (see *S v Nyamweda* 1983 (1) ZLR 131 (SC); *S v Malili & Anor* 1988 (4) SA 620 (T)).

Finally, there will be some cases where it will be enough for the magistrate to explain the complexities and enquire whether the accused does not want to engage legal representation at his own expense. This should be done at the earliest possible stage, ideally when the accused is first remanded.

It will thus only be in a minority of cases that the magistrate will conclude that there cannot be a fair trial without representation. In such cases his duty is to act in terms of Chapter 66 and recommend legal aid. Even then, of course, an accused person that waive his right to representation, provided he does so on a properly informed basis.

In the present case legal representation was important. Each man's guilt or involvement should have been looked at separately. The procedures adopted by the magistrate did not give them a fair hearing. The elements of the offence were not adequately put, special circumstances were not sufficiently explored or explained, and sentences were not properly imposed.

Because of these procedural irregularities the only proper approach is to set aside the conviction and sentence, not only for the first appellant, but also, by

DUMBUTSHENA CJ, GUBBAY JA & McNALLY JJA

way of review, of the other two accused who did not appeal. It will be for the Attorney-General to decide whether or not he can proceed afresh against these three. The other person, the

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second accused, who was also the second appellant, cannot be charged again because his appeal has resulted in his acquittal.

In the premises the following order is made:

1. In the cases of the first appellant, Luke Dube, the appeal succeeds and his conviction and sentence are set aside by reason of procedural irregularity.

2. In the case of the second appellant, Vintcent Mtshewu Nyoni, the appeal succeeds and his conviction and sentence are set aside and a verdict of "not guilty and discharged" is substituted.

3. In the case of the third and fourth accused who did not appeal, their convictions and sentences are set aside by way of review, by reason of procedural irregularity.

The Registrar is requested to take the necessary steps to secure the release of the two who did not appeal.

Pro Deo

1988 (2) ZLR p395

S v DYER 1988 (2) ZLR 395 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Korsah JA

Criminal appeal

14 November & 5 December 1988

Flynote

Criminal law - theft - of stock - Stock Theft Act [Chapter 72] - s 3(1)(b) - non-application of Act to "carcass not in lawful possession" of person from whom stolen - meaning of.

Criminal procedure (sentence) - theft of stock - farmer unknowingly slaughtering stolen ox but after discovering theft deciding to keep meat - appropriate sentence.

Headnote

The appellant, a farmer, had killed and then butchered an ox which, unbeknown to him, his employees had stolen from a neighbour. He had instructed them to find one of his own slaughter stock which had gone missing. It was only after he had shot and butchered the animal that he noticed that its hide bore his neighbour's brand. In spite of this, he sold the meat for his own benefit in his butchery. He was convicted of stock theft and sentenced to nine months' imprisonment, of which four months were suspended. He appealed against conviction and sentence.

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Section 3(1)(b) of Stock Theft Act [*Chapter 72*] provides that the Act does not apply to the carcasses of animals which at the time of slaughter were not in the lawful possession of the person from whom such carcasses were stolen.

Held, that the section was intended to mean that one who stole meat from a stock thief was not himself a stock thief, merely a thief.

Held, further, that although the owner of the beast had ceased to have physical possession of it when it was stolen from him, he retained what Voet *Commentary on the Pandects* 41.2.5 called "civil" or "lawful"

McNALLY JA

possession. Section 3(1)(b) therefore did not apply to take this case out of the purview of the Act.

Held, further, that given that the appellant's crime was technically stock theft but in essence theft of property - meat - worth about $300, and given that he was an employer of labour whose incarceration might jeopardize the jobs of may employees, a fine of $2000 would be appropriate, bearing in mind the limits of jurisdiction of the provincial magistrate who tried the case.

Cases cited:

S v Sibanda 1977 (2) RLR 30 (GD); 1977 (4) SA 114 (R)

S v Moyo (1) 1978 RLR 316 (GD); 1978 (4) SA 538 (R)

D R Granger for the appellant

Mrs *M C Mavangira* for the respondent

Judgment

McNally JA: The appellant was convicted of stock theft and sentenced to nine months' imprisonment with labour, of which four months were suspended. He appeals both against conviction and sentence.

The facts of the case show that originally four people were charged with the theft of the animal concerned. Three of them were farm workers employed by the appellant. The fourth was the appellant himself. Two of the three farm workers were convicted on the basis that the actually physically removed the animal from the next door farm, cutting the fence for the purpose. They have not appealed.

The case against the appellant was on a different basis. He was in the cattle business. He ran a dairy herd, a beef herd and two butcheries. It is common cause that he had bought some cattle for slaughter. One of those animals had gone missing. He had apparently felt his workers were to blame. He had had them searching for it for some weeks and he had threatened that unless it

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was found they would not get their annual bonus.

The employees then produced to the appellant an animal which they said was the missing one. The appellant shot it, skinned and butchered it, and sold the meat in one of his butcheries.

Three alternative sets of facts have been canvassed as a basis for finding the appellant guilty.

McNALLY JA

The first is that it was he who deliberately instigated his employees to go and steal one of Mr Muller's cattle if they could not find his own missing one. The magistrate, I think quite rightly, did not find that the evidence justified such a finding. He said: "I suspect that he did, but I cannot say it is proved that he instructed them to steal".

The second possibility is that the appellant recognised, when he saw the beast, and before he shot it, that it was not his missing cow but an ox with Mr Muller's brand on it. Nevertheless he shot it, butchered it, and sold the meat. This is the conclusion reached by the magistrate.

I do not consider this conclusion was justified by the evidence. The three State witnesses who gave evidence as to the appellant's actions were Misheck Mukono, Alford Rusere and Wilson Manyara. All three were at the time employees of the appellant; all three were potentially accomplices whose evidence had to be treated with caution; in addition Wilson Manyara had every reason to bear a grudge against the appellant.

More importantly, however, none of the three testified to any action or statement by the appellant which showed that he had requisite guilty knowledge. Misheck Mukono speculated. He was asked:

> "Q. Do you yourself know whether Mr Dyer was aware that this bull (*sic*) had been taken from Mr Muller's farm?"

and answered:

> "A. Well I do not know whether he knew it but in the manner in which he killed the bull, it seems he knew from where it had come."

That was as far as he could go.

Alford Rusere said his employer (the appellant) would not have sent him to collect one of Mr Muller's beasts, and he (Alford) thought the animal that was brought and shot was one of his employer's cattle.

Lastly, Wilson Manyarara said no more than that he himself knew the animal brought to be shot was not the one that had been lost. He did not speak as to the appellant's knowledge.

There is no substantial evidence, therefore, to contradict the appellant's assertion that he thought he was shooting the beast that had strayed and had

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McNALLY JA

subsequently been recovered. Mrs *Mavangira,* who appeared for the State, very properly conceded that she could not support a finding of guilt on the basis that he decided to steal it before he shot it.

We are left, therefore, with the appellant's own version. He admits that at some stage (and it does not really matter exactly when) between his shooting the ox and the loading of the meat onto his vehicle for transport to his butchery, he saw the brand on the hide and realised that it was not his animal but Mr Muller's that he had killed.

That admission is an admission of theft, given that he proceeded to appropriate the meat to his own use by selling it from his own benefit in his butchery. The question is whether it is an admission of stock theft.

Section 2 of the Stock Theft Act [*Chapter 72*] defines "stock" as follows:

> "(a) any ...bovine ...;
>
> (b) any domesticated game;
>
> (c) the carcass or any portion of a carcass of any stock as defined in para (a) or (b) which has been slaughtered."

It seems clear that the terms of para (c) are wide enough to cover the facts of this case. Mr *Granger* sought to rely on *S v Sibanda* 1977 (2) RLR 30 1977 (4) SA 114 (R). That decision, however, is of no assistance to him because the animal in that case had not been "slaughtered". It had been caught unintentionally in a snare and had died. It was for that reason that GUBBAY J (as he then was) held that the carcass did not fall within the terms of para (c) of the definition of "stock". See also *S v Moyo* (1) 1978 36, 1978 (4) SA 538 (R).

That, however, is not the end of the enquiry. Section 3(1)(b) of the Stock Theft Act reads as follows:

> "The provisions of this Act shall not apply to -
>
> (a) ...
>
> (b) the carcass or any portion of the carcass of an animal which at the time of slaughter was not in the lawful possession of the person from whom such carcass or portion is alleged to have been stolen."

Neither counsel made reference at the hearing to this section, and I have not therefore had the benefit of their views as to how it is to be interpreted.

McNALLY JA

"Lawful possession" and "possession" are complex concepts. Indeed, there are really two meanings of possession. I will use the facts of this case to illustrate what I mean.

While the ox was still on his farm, Mr Muller, its owner, could be said to "possess" it in every sense. He had both the physical detention of it and the intention to hold it as his own. He also

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had the right to possess it, so his possession was lawful possession.

Once it was stolen and removed to Mr Dyer's farm, Mr Muller ceased to have the physical detention of the ox. In that sense he ceased to possess it. The thief, in that same sense, possessed it. He had what *Voet* 41.2.5 calls **natural** possession. But Mr Muller retained what *Voet* calls **civil** possession as in the following illustration he gives:

> "So also is it if a person has set out to market and has left no-one on his farm, but meantime another has seized the farm by stealth. He who has gone off to market keeps possession, and at the same time he who meanwhile trespassed has possession by stealth."

He goes on to say that the owner is in **just** or **lawful** possession while the other is in **unjust** or **unlawful** possession. They both therefore can be said to possess it at the same time.

Yet if we are talking about **natural** possession, says *Voet*, "we should say that two persons can no how each physically possess in whole the same thing at the same time".

Returning, then, to the section under interpretation, one finds the expression "lawful possession" rather than simply "possession". It seems clear that the section was intended to mean that one who stole meat from a stock thief was not himself a stock thief but only a thief. The appellant in this case did not steal meat from a stock thief. His decision to keep the meat when he saw the brand was a decision to steal the meat from Mr Muller. Mr Muller was at the time of slaughter in lawful (civil) possession of the animal. Therefore, it seems to me, the section does not apply to take this case out of the purview of the Stock Theft Act.

It is true that the appellant put up a rather lame defence as to his intent to steal. He suggested that he always intended to square the matter up with Mr Muller. He claimed to have tried two or three times to contact Mr Muller and

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eventually did so. He then told him about his "accident" and offered compensation. Mr Muller refused to accept it at that stage.

The magistrate quite rightly rejected this evidence as untrue. When the appellant approached Mr Muller the Police had already started making enquiries and the appellant had to do something to protect himself. Moreover, his claim to have made earlier attempts to see Mr Muller is in conflict with his warned and cautioned statement and with his defence outline.

In the former, he admitted: "I also erred by not approaching Mr Muller soon after killing his ox".

In the latter his lawyer said on his behalf: "He did not get around to doing so (ie, telling Mr Muller) before he was approached by the Police shortly afterwards".

In my view, therefore, the appellant was properly found guilty of stock theft.

As far as sentence is concerned, this Court is at large in considering sentence afresh because we are concerned with a set of facts which are inherently less morally blameworthy than those found by the magistrate. It is one thing deliberately and knowingly to shoot your neighbour's ox

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and then to sell the meat. It is another matter if you shoot what you think is your own ox for your own butchery, and then discover your mistake and decide on the spur of the moment to go ahead and sell the meat as planned.

In the first situation it would have been perfectly simple for the appellant to say to his labourers: "This is not my ox; it is Mr Muller's; take it back to his farm". But once he had shot it the matter was more awkward. He could not simple dump the carcass over the fence. Confession would have involved embarrassment and humiliation. He may have decided simply to brazen it out.

In my view, given that the appellant's crime is technically stock theft but in essence theft of property (meat) worth about $300, and given that he is an employer of labour whose incarceration might jeopardise the jobs of many employees, a substantial fine will meet the justice of the case. Bearing in mind the limits of jurisdiction of a Provincial Magistrate. I consider a fine of $2 000 will be appropriate.

Accordingly, the appeal succeeds to this extent:

1. The conviction for stock theft is confirmed.

McNALLY JA

2. The sentence imposed by the magistrate is set aside and in its place the appellant is sentenced to a fine of $2000 or, in default of payment three months' imprisonment with labour;

3. The warrant of committal is suspended until 8 January 1989.

It is necessary to refer to the sentences imposed on the two farm labourers who were convicted along with the appellant, and who did not appeal. Their offences, it must be stressed, were quite different from that of the appellant. They were found guilty of stock theft on the basis that they actually cut and untied the fence wires and stole one of Mr Muller's oxen.

It was a feature of mitigation in their case that they were under considerable pressure from the appellant to replace the lost animal. They stole, in short, to protect their bonus.

The magistrate took these considerations properly into account in sentencing Accused 3, Boniface Vunganayi, to nine months' imprisonment with labour and suspending four months of that sentence. But it seems to us that he was much too harsh on Accused 2, John Sibanda, simply because he was older and senior, and had previous convictions for dishonesty and particularly for stock theft. He was sentenced to thirty-six months' imprisonment with labour, none of which was suspended. In our view the disparity in sentence here is too great. Both accused were under pressure from the appellant, so the question of seniority was not important. Moreover, the theft was induced by the possibly unfair threat to their bonuses.

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We have said on numerous occasions that there should not be undue disparity between sentences of persons convicted of the same offence. In this case we find the disparity disturbing. We agree, however, with the magistrate's view that a suspension of part of the sentence is not warranted in Sibanda's case.

Accordingly, in the exercise of our powers of review, the sentence of Accused 2, John Sibanda, is reduced from thirty-six months' imprisonment with labour to fifteen months' imprisonment with labour. The Registrar is directed to bring this reduction to the attention of the relevant authorities. Unfortunately, it will be too late to benefit Sibanda who will already have served his sentence.

Dumbutshena CJ: I agree.

Korsah JA: I agree.

Morris, Beale & Collins, appellant's legal representative

ATTORNEY-GENERAL v HOWMAN 1988 (2) ZLR 402 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Application for leave to appeal on a point of law

24 November & 5 December 1988

Flynote

Criminal law - culpable homicide - child being pursued by accused, running into dam and drowning - accused failing to render assistance - whether liable.

Criminal procedure - acquittal at end of State case - Attorney-General's right of appeal - limited to appeal on question of law, without affecting finality of case - s 69(a) of Magistrates Court Act [Chapter 18] and s 44(6) of High Court of Zimbabwe Act 1981 - effect of - reservation of question of law for consideration of Supreme Court - question arising "on the trial" - meaning of - decision by trial judge not to reserve question of law - whether appealable - when question of law may be reserved.

Headnote

The respondent had been indicted before the High Court on a charge of murdering a juvenile. The allegation was that the respondent, who was at the time chairman of a club on the banks of the Darwendale Dam, chased a group of juveniles who were trespassing on the club's premises. During the chase, the group split up; some continued on the land, pursued by the respondent, but the deceased ran into the dam, where he drowned. It was not necessary for the deceased to enter the dam to escape and the respondent was in no way responsible for the perilous situation in which the deceased found himself. The trial judge (ADAM J) acquitted the respondent at the end of the State case, finding that there was no case for him to answer either

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of murder or of culpable homicide.

The Attorney-General did not seek to appeal against the trial judge's

judgment in terms of either s 188(3a) of the Criminal Procedure and Evidence Act [*Chapter 59*] or of s 44(6) of the High Court of Zimbabwe Act 1981. Instead, about a month later, acting in terms of s 25(1) of the latter Act, he requested that certain questions of law be reserved for the consideration of the Supreme Court. ADAM J declined to do so, on two grounds: firstly, that the test to be applied in determining what constitutes a *prima facie* case of murder or culpable homicide was well established and that there was no important point of law to be reserved; and, secondly, that a question of law arising upon the application for or decision on discharge was not one which arose "on the trial".*(16) The Attorney-General applied for leave to appeal against ADAM J's judgment.

Held, that the phrase in s 25(1) of the High Court of Zimbabwe Act, "arises on the trial", means "comes into existence during the trial". The word "trial" connotes more than the evidential stage of the proceedings; it includes the proceedings after arraignment, up to the time the court has pronounced its verdict and sentence, if any.

Held, further, that under s 188(3a) of the Criminal Procedure and Evidence Act, the Attorney-General's has a right of appeal from a decision to acquit at the end of the State case, but that right is limited to seeking an authoritative pronouncement from the Supreme Court on a point of law, without in any way affecting the finality of the lower court's judgment. A similar right is provided by s 69(a) of the Magistrates Court Act [*Chapter 18*] and s 44(6) of the High Court of Zimbabwe Act, but this right does not cover verdicts given at the close of the State case and is also limited to appeals on points of law without affecting the finality of the judgment.

Held, further, that the trial court has a discretion as to whether to reserve a question of law; but if the trial court improperly refuses to reserve the question of law a *mandamus* may be issued to order the reservation. In any event, the wording of s 44(9) of the High Court of Zimbabwe Act makes clear that a refusal to reserve a question of law is subject to appeal.

Held, further, that the question of whether, in the words of s 188(3) of the Criminal Procedure and Evidence Act, "there is no evidence that the accused committed the offence charged" is a matter of law which is to be determined by the judge alone and which may be reserved for the consideration of the Supreme Court. If the accused is put on his defence there is no question of law to be reserved.

Held, further, that the trial judge had acted correctly in declining to reserve

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the question of law. No important principle of law was required to be decided; the degree of arguability necessary to justify reservation was absent; and no meaningful relief would be

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achieved by the Attorney-General were the application to succeed.

Cases cited:

R v Willem & Ors 1924 TPD 517

R v Tucker 1953 (3) SA 150 (A)

S v Haarmeyer 1970 (4) SA 113 (O)

R v Laubscher 1926 AD 276

R v Adams & Ors 1959 (3) SA 753 (A)

R v Keeves 1926 AD 410

Attorney-General v Bvuma & Anor S-11-87 (not yet reported)

R v Caganoff 1933 AD 51

R v Barlow 1941 AD 1

R v Galperowitz 1941 AD 485

R v Shein 1925 AD 6

R v Mgomezulu & Ors 1955 (3) SA 557 (D)

R v Dhadla & Ors (2) 1961 (3) SA 921 (D)

S v Cooper & Ors 1976 (2) SA 875 (T)

S v Magxwalisa & Ors 1984 (2) SA 314 (N)

R v Lakatula & Ors 1919 AD 362

R v Abrahamson 1920 AD 283

Meskin v Anglo-American Corporation of SA Ltd & Anor 1968 (4) SA 793 (W)

A O Agyemang for the applicant

A P de Bourbon SC for the respondent

Judgment

Gubbay JA: This is an application by the Attorney-General brought under s 44(6)(a) of the High Court of Zimbabwe Act 1981 for leave to appeal to the Supreme Court on a point of law against the judgment of MR JUSTICE ADAM in the matter of *Attorney-General v Howman* HH-272-88 (as yet not reported)*(17), refusing to reserve, at the request of the prosecutor, four questions of law for the consideration of this Court. The application initially came before the learned CHIEF JUSTICE in Chambers and was opposed. It was ordered by him to be set down

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for hearing before the Full Court.

The background to the application in this. On 5 April 1988 the respondent

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was indicted before the High Court on a charge of murdering a nine year old boy, Shorayi Mutsau. It was alleged that on the morning of Sunday 11 August 1985 the respondent, who was at that time the Chairman of the Hunyani Boating and Angling Club, which is located near the banks of the Darwendale Dam, chased a group of six youths, who were trespassing at the boat launching area, along the edge of the Dam. In the course of being pursued the deceased entered the waters of the Dam. There he drowned in full sight of the respondent, who made no attempt to rescue him.

In support of its allegations the State adduced the evidence of one of the youths, Lovemore Zhuweki and of an adult, David Lungu, who happened to be fishing at the Dam. The prosecutor closed the case after producing an extra-curial statement recorded from the respondent, a post-mortem report and a plan of the scene.

The learned judge then called upon the prosecutor to address upon whether the respondent ought not to be discharged. The debate centred upon the existence of any evidence on which a reasonable court might convict the respondent of having entertained a constructive intent to kill the deceased. Thereafter, Mr *de Bourbon*, for the defence, was afforded the opportunity of making his submissions. He argued that there was no evidence that the respondent had committed either the crime of murder or that of culpable homicide and he formally applied for an acquittal.

The trial court adjourned and within the hour the learned judge delivered an *ex tempore* judgment, in which, in terms of the provisions of s 188(3) of the Criminal Procedure and Evidence Act [*Chapter 59*], he returned a verdict of not guilty. His reasoning is revealed in the following passage of the judgment:

> "The State has not established by evidence that the accused intended to bring about the death of the deceased in the sense of actual intention. I have examined the evidence to ascertain whether the evidence led by the State indicates that the accused foresaw that what took place might cause the death of the deceased. Even on the evidence of Lovemore Zhuweki the accused chased the boys and one of them went into the water. On his evidence the choice of going into the water was the deceased's. The other two juveniles did not go into the water. Even at this stage it is the subjective condition as it applies to the accused as to whether he foresaw that the juvenile would enter the water when he was being chased. The evidence does not satisfy me that it can be said that he foresaw the

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> juvenile entering the water when in fact the choice was the juvenile's. It is not as if the accused had deliberately driven the deceased into the river or into the dam. In fact on the evidence by David Lungu the accused was chasing three juveniles on the banks of the river, one went into the dam, the other two continued on land. He chased these two in fact. He ignored the deceased, according to his evidence. In fact, while he was nowhere near

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the deceased, the deceased was already in trouble. On his return he said the accused stood there and watched. There is no legal duty on the accused in those circumstances to do anything. It may be very very reprehensible morally for persons to stand and do nothing. There may be some very good reasons for not doing anything. I would refer to a situation that took place a few years ago in the Zambezi river where people were fishing, where a Mr and Mrs Hunter Coetzee were in a boat on the Zambezi near Chirundu with their friends Mr and Mrs Nel. Mr Nel went into the river to swim; he got into difficulties. Mr Coetzee, who was a strong swimmer, went to assist and he got into difficulties. Mr Coetzee called to his wife to hold out a fishing rod which he could cling to and pull himself into the boat. Mrs Coetzee fell into the river. She got into difficulties. Mrs Nel went into the river. Three people drowned. Mrs Nel was the only one who was later rescued. So there are inherent dangers in trying to assist people.*(18)"

The Attorney-General did not seek to appeal against the judgment of the trial court pursuant to either s 188(3a) of the Criminal Procedure and Evidence Act or s 44(6) of the High Court of Zimbabwe Act. Instead, about one month later, acting in terms of s 25(1) of the latter Act, he requested that the following questions be reserved for the consideration of the Supreme Court:

"1. Whether or not on the facts as outlined in the judgment the evidence established a *prima facie* case of murder against the accused.

2. Whether or not on the facts as outlined in the judgment the evidence established a *prima facie* case of culpable homicide against the accused.

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.

4. Whether or not the judgment *ex facie* considered the legal issue as to whether the accepted facts constituted a *prima facie* case of culpable homicide."

GUBBAY JA

It is clear that an application of this nature must, in the interests of justice, be made as soon as possible after judgment or at any rate within a reasonable time. See *R v Willem & Ors* 1924 TPD 517 at 518 in fine; *R v Tucker* 1953 (3) SA 150 (A) at 160A; *S v Haarmeyer* 1970 (4) SA 113 (O) at 115A.

In giving judgment on the Attorney-General's request ADAM J elaborated the *ratio* for his conclusion that the evidence led by the State was insufficient to put the respondent on his defence. It is only necessary to quote those passages dealing with the issue of culpable homicide, for on any view of the matter (and this much is now conceded) a verdict of murder was out of the question. They read:

"On the facts 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 juvenile's made deliberately. It was not as if the accused had specifically driven the deceased juvenile into the dam."

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And:

> "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 in another way, the evidence was not sufficient to establish the causa nexus for the purpose of legal liability. The trial court did not find that the accused should have foreseen that the deceased juvenile might go into the dam, applying an objective test of foreseeability. It did not find that the conduct on the deceased juvenile's part was within the range of human experience that may happen and which the accused ought to have foreseen."

The learned judge then declined on two grounds to reserve the questions formulated: first, he considered that the test to be applied in determining what constitutes a *prima facie* case of murder or culpable homicide was well settled by judicial authority and that consequently the application did not give rise to any important point of law that merited the attention of the Supreme Court. Secondly, he expressed the opinion that a question of law arising upon the application or decision on discharge is not one which, on the wording of

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s 25(1) of the High Court of Zimbabwe Act, "arises on the trial in the High Court of any person for any offence".

In this Court Mr *de Bourbon*, who appeared for the respondent, was no constrained to support the latter ground relied upon by the learned judge for refusing to entertain the Attorney-General's request. He was right no to do so. In its context the phrase "arises on the trial". See *R v Laubscher* 1926 AD 276 at 280; *R v Adams & Ors* 1959 (3) SA 753 (A) at 760A. And the word "trial" connotes more than the evidential stage of the proceedings. It includes the proceedings after arraignment, whether upon a plea of guilty or not, up to the time the High Court has pronounced its verdict and sentence, if any. See *R v Keeves* 1926 AD 410 at 413; *R v Tucker supra* at 159H. This accords with common sense, for it would be strange and indeed self-defeating of the legislative intendment behind s 25(1) if an important point of law which was mooted in argument at the close of either the State case or that of the defence, or was raised and dealt with in the judgment, could not be submitted to this Court either by the High Court *mero motu* or at the request of the prosecutor or of the accused.

At the outset of his argument Mr *Agyemang* explained that the decision to request the learned judge to reserve the questions of law was influenced by the understanding that the judgment of this Court in *Attorney-General v Bvuma & Anor* S-111-87 (as yet not reported) precluded the Attorney-General from an appeal under s 188(3a) of the Criminal Procedure and Evidence Act. The section reads:

> "Notwithstanding the provisions of any other enactment, no appeal shall lie from a decision in terms of subs (3) [the return of a verdict of not guilty at the close of the case for the prosecution], other than an appeal by the Attorney-General on a point of law where the result in no way affects the finality of the decision of the court."

I am satisfied that Mr *Agyemang* has misconstrued the purport of that judgment. What is specifically spelt out by the learned CHIEF JUSTICE is that -

> "The Attorney-General has a right of appeal in terms of subs (3a) of s 188 of the Code, but has in terms of s 69 of the Magistrates Court Act [*Chapter 18*], (and likewise by virtue of s 44(6) of the High Court of Zimbabwe Act) no

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right of appeal against a verdict of acquittal made at the close of the State case."

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Stated otherwise, a restricted right of appeal is granted to the Attorney-General under s188(3a). It is not a right to seek an alteration to the verdict which acquitted the accused at the close of the case for the prosecution; for finality has been reached at that stage. It is right to seek an authoritative pronouncement from the Supreme Court on the point of law considered by the lower court which would in no way affect the finality of that court's decision. What the provision does then is to afford the Attorney-General, who is dissatisfied with a finding on a point of law in a criminal trial, and is concerned as to its consequence on future cases, an opportunity of having the contentious legal issue resolved by the Supreme Court. In the event of the appeal succeeding, the judgment will not affect the finality of the decision of the lower court. See s 13(3) of the Supreme Court of Zimbabwe Act 1981.

Insofar, therefore, as confessed in argument, that the object of this application is a preliminary step in the desire to obtain an order setting aside the verdict acquitting the respondent of criminal responsibility for the drowning of the deceased, the right provided in s188(3a) is of no avail to the Attorney-General.

I think it as well, for the avoidance of any further confusion, to repeat the ruling of the CHIEF JUSTICE in *Bvuma's* case *supra* that Parliament deliberately enacted s 69(a) of the Magistrates Court Act [*Chapter 18*] and its identical counterpart, s 44(6) of the High Court of Zimbabwe Act, as read in conjunction with s11A of the Supreme Court of Zimbabwe Act -

> "... in order to deal with those matters which were not covered by the provisions of subs (3) and subs (3a) of s 188 of the Code and intentionally left out verdicts given by a court at the close of the State case because (3a) of s 188 had already dealt with that situation".

Accordingly, the Attorney-General's appreciation that it was not open to him to appeal against the discharge under s 44(6)(a) of the High Court of Zimbabwe Act was correct.

Finally on this aspect, the question whether or not the right under s 188(3a) is subject to the grant of leave by judge of the Supreme Court under s 44(6)(a) of the Supreme Court of Zimbabwe Act does not call for determination. The matter was not argued and I prefer to leave it open.

In resisting the grant of leave Mr *de Bourbon* submitted that as s 25(2) of the High Court of Zimbabwe Act enjoins the High Court upon reserving a

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question of law to state the question reserved, that is, to formulate it, this Court is not empowered to issue a *mandamus* directing the High Court to do so. As authority for this proposition counsel cited the cases of *R v Caganoff* 1933 AD 51 at 53 and 54; *R v Barlow* 1941 AD 1 at 5; and *R v Galperowitz* 1941 Ad 485 at 487, in which the effect of an almost identically

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worded provision in the South African Criminal Procedure and Evidence Act No. 31 of 1917 was considered. I have read the passages in the judgments referred to with some care and I am satisfied that they express no more than that where it is not possible to conclude that discretion to refuse to reserve the question of law was exercised improperly, an appellate court will not interfere with its exercise and consequently will not issue a *mandamus*. It is implicit that the exercise of the discretion must be judicious and not attended by any features of impropriety or irregularity. In my opinion the gravamen of these decisions is correctly stated in Swift's *Law of Criminal Procedure* 2 ed at p 708, thus:

> "I there has been an improper exercise of the discretion as eg where an incorrect test has been applied it seems clear that in a proper case a *mandamus* would issue to order the reservation."

See also *R v Laubscher supra* at 280 *in fine*.

Moreover *ex facie* the wording of s 44(9) of the High Court of Zimbabwe Act, the decision of the learned judge *a quo* declining to reserve the question of law is not a "judgment" excluded from appeal, for the provision expressly bars from appeal "a decision of the High Court to *reserve* a question in terms of *section twenty-four or twenty-five*". If the Legislature had intended to deny an appeal against a **refusal** to reserve the question of law it would not have framed the exclusionary wording in the way it did.

Initially my impression was that while the third and fourth questions that the Attorney-General requested to be reserved were undoubtedly matters of law, the first and second questions, as submitted by Mr *de Bourbon*, related to fact. On reconsideration, however, I think the learned judge was right to treat the four as questions of law. They all arose from the determination made under s 188(3) of the Criminal Procedure and Evidence Act that "at the close of the case for the prosecution ... there is **no evidence** that the accused committed the offence charged in the indictment ... or any other offence of which he might be convicted thereon" (my emphasis). No matter what the manner in which the individual questions were formulated the contention that the learned judge erred in granting a discharge in terms of s 188(3) is implicit in each. And whether he was wrong or not in so doing is a question of law which

arose "on the trial". For it is now well settled that the expression "no evidence" in s 188(3) means no evidence upon which a reasonable man might properly convict the accused and that at the close of the prosecution case that question is in itself a matter of law to be determined by the judge alone. See *R v Shein* 1925 AD 6 at 9; *R v Mgomezulu & Ors* 1955 (3) SA 557 (D) at 558A; *R v Dladla & Ors* (2) 1961 (3) SA 921 (D) at 922H; *S v Cooper & Ors* 1976 (2) SA 875 (T) at 888 A-D; *S v Magxwalisa & Ors* 1984 (2) SA 314 (N) at 316H-317A.

In *R v Lakatula & Ors* 1919 AD 362 at 363-364 SOLOMON ACJ drew a material distinction between the position that pertains at the close of the case for the prosecution where the court refuses the application for discharge of the accused, and that where it allows it. He said this:

> "... if at the close of the case for the prosecution the Judge refuses to withdraw the case from the jury because in his opinion there is evidence which would justify them in convicting, the exercise of his discretion cannot be called

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into question under s372 (the provision which permitted the reservation of a question of law). It may very well be that, even if the Judge is wrong in his view, the deficiency in the evidence for the prosecution may be supplied by the witnesses for the defence, and so a case may be established against the accused. But I do not think that in such an event the Court of Appeal would be entitled to set aside the conviction on the ground that the learned Judge ought at the close of the evidence for the prosecution to have withdrawn the case from the jury. That, in my opinion, is not a point of law within the meaning of s372, seeing that it is left by s221(3) to the discretion of the Judge whether or nor he should withdraw the case. If, however, at the close of the trial **there is no legal evidence upon which the jury were entitled to convict, that is a point of law which may be raised under s 372,** and the question should be reserved in that form." (My emphasis.)

It is plain from these remarks that it is only when a verdict of not guilty is returned pursuant to an application made under s 188(3) of the Criminal Procedure and Evidence Act that it is competent to reserve a question of law in terms of s 25(1) of the High Court of Zimbabwe Act. Where the application is refused in accordance with the judicious exercise by the judge of his discretion and the accused is thereby put on his defence, no question of law can be reserved. See also *R v Abrahamson* 1920 AD 283 at 284 where the question reserved, which the Appellate Division refused to consider, was whether the trial judge had erred in declining to accede to an application for

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the discharge of the accused at the close of the prosecution case. That situation differs from the present.

It necessarily follows that I am unable to accept as correct Mr *de Bourbon*'s submission that as the essence of the Attorney-General's four questions is that the learned judge wrongly discharged the respondent, it constituted an attack on the exercise of a discretion and was not therefore susceptible of an application under s 25(1) of the High Court of Zimbabwe Act.

It is not open to question that the use of the permissive wording "may ... reserve any question" in subs (1) of s 25, as contrasted with the imperative phrase "shall state the question reserved" in subs (2), vests in the High Court a discretion to either reserve the question or refuse to do so. And it is the exercise of that discretion by the learned judge which is the relevant factor in determining the fate of this application.

The principles justifying interference by an appellate court with the exercise of an original discretion are firmly entrenched. If the discretion has been exercised on judicial grounds and for sound reason, that is, without caprice or bias or the application of wrong principles, an appellate court will not interfere and substitute its own decision. It is not enough that it considers, if it had been in the position of the lower court, that it would have taken a different course.

In this case it is not possible, in my opinion, to hold that in refusing to reserve the substantive question of law ADAM J acted upon a wrong principle or was affected by extraneous matters. The reasons given by him for the refusal are substantial and convincing.

In the first place, no important principle of law is required to be decided by this Court. The legal issues relating to the crimes of murder and culpable homicide are well established, and the law

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of Zimbabwe can in no way be advanced by the reservation.

Secondly, the degree of arguability necessary to justify reservation is absent. It is apparent from the passages I have quoted that the learned judge gave anxious thought to whether any "guilt *nexus*", as he put it, emerged either from the evidence of the juvenile Lovemore Zhuweki or from that of David Lungu. In respect to the former's testimony he made the telling point that the choice to enter the Dam was the deceased's. It was not as if that was the only avenue of escape from pursuit open to him. And, I would add, there is nothing

inherently dangerous in running into shallow water in the reasonable expectation that your pursuer will not want to get wet.

The respondent was in no way responsible for the perilous situation that ultimately the deceased found himself to be in and stood in no protective relationship to him. He did not increase the peril and he took nothing away from the deceased under jeopardy. He simply failed to confer any benefit upon him. The law does not compel active benevolence between man and man. It is left to conscience whether one shall be the good Samaritan or not. See *Meskin v Anglo-American Corporation of SA Ltd & Anor* 1968 (4) SA 793 (W) at 807H; Hunt *South African Criminal Law and Procedure* 2 ed vol 2 at p 364; Smith & Hogan *Criminal Law* 6 ed at p 48.

It would have been different if, having brought about the dangerous situation, the respondent, at no inconvenience to himself, had allowed the child to drown.

Thirdly, no meaningful relief would be achieved by the Attorney-General were this application to succeed and the ensuing appeal be decided in his favour. It would have no practical effect upon the acquittal of the respondent.

In short, if I had heard the application, my decision would not have differed from that of the learned judge.

The application is accordingly refused, there being no reasonable prospect of the appeal succeeding.

Dumbutshena CJ: I agree

McNally JA: I agree.

Gill, Godlonton & Gerrans, respondent's legal representatives

S v ANAND 1988 (2) ZLR 414 (SC)

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Court **Supreme Court, Harare**

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

Criminal appeal

10 October & 6 December

Flynote

Criminal procedure (sentence) - mandatory minimum sentences - constitutional prohibition against inhuman or degrading punishment - whether breached - Precious Stones Trade Act 1978 - s 3(21) - mandatory minimum sentence for possession of uncut emeralds unless special reasons exist - wife taking blame for offence of husband - whether a special reason.

Headnote

The appellant, a woman, was convicted *inter alia* of possessing uncut emeralds, in contravention of s 3(1) (a) of the Precious Stones Trade Act 1978. She was sentenced on that count to the mandatory sentence provided by s 3(2) of three years' imprisonment. The emeralds had been hidden in a doll in her bedroom and were worth only $150. The probabilities were that it was her husband, as proprietor of the business, who had acquired the emeralds and that they were being held for his benefit. However, the appellant accepted the sole blame, because he was a sick man. On appeal,

Held, that the fact that the appellant probably possessed the emeralds on behalf of her husband and that his moral blameworthiness was far higher than hers constituted special reasons for not imposing the mandatory minimum sentence.

Held, further, that this finding made it unnecessary to decide the main point raised by the appellant, namely, that the imposition of a mandatory sentence of three years' imprisonment for even a minor infringement of s 3(1) might make such a punishment an human or degrading punishment, in violation of s 15(1) of the Constitution.

DUMBUTSHENA CJ

Cases cited:

R v He Kaw Teh [1986] LRC (Crim) 552; (1985) 157 CLR 523

S v Ncube & Ors 1988 (2) SA 702 (ZS)

R v Smith (1987) 40 DLR (4th) 435

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

S v Chisiwa 1981 ZLR 666 (HC)

A P de Bourbon SC for the appellant

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I J Houston for the respondent.

Judgment

Dumbutshena CJ: The appellant was convicted of contravening s 3(1) of the Gold Trade Act [*Chapter 164*], as read with s 2(3) of the Gold Trade Amendment Act No 6 of 1978. She was sentenced to twelve months' imprisonment with labour and the gold was declared forfeit to the State.

She was also convicted of contravening s 3(1)(a) as read with a s 3(2) of the Precious Stones Trade Act No. 8 of 1978. She was sentenced to a mandatory term of imprisonment of three years and the precious stones were declared forfeit to the State.

The sentence of twelve months' imprisonment with labour in respect of count 1 was ordered to run concurrently with the three year sentence imposed in respect of count 2.

The appellant was also convicted of contravening s 5(1) of the Exchange Control Act [*Chapter 170*]. For this offence she was sentenced to a fine of $275,28 or, in default of payment, three months' imprisonment with labour. The foreign currency involved was declared forfeit to the State.

She was acquitted of contravening s 157(2)(b) of the Customs and Excise Act [*Chapter 177*]. She was found in possession of three kruger rand coins which she was alleged to have failed to account for.

She now appeals to this Court against conviction in counts 1 and 2 and against sentence in respect of count 2. At the hearing of the appeal Mr *de Bourbon*, for the appellant, applied for leave to amend the grounds of appeal against sentence by adding the following further ground:

> "The mandatory sentence of imprisonment imposed on count 2 in terms of s 3(2) of the Precious Stones Trade Act 1978, is an inhuman or degrading punishment, and thus in conflict with s 15(1) of the Constitution of Zimbabwe and therefore invalid and unenforceable."

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Briefly the facts of this case are these. The appellant is a housewife. She resides with her husband at house No. 34 Park Road, in Bulawayo. They own a business.

It is common cause that the police searched their house and five dolls in their bedroom. One of the dolls was opened because it had a stitched bottom and was heavier that the others. The police found in it five gold buttons and twenty-eight stones, afterwards ascertained to be emeralds.

The husband told the police that dolls belonged to his wife, the appellant. She was not at home. He called her home from their business. She was not a licensed dealer or authorized in terms of the Gold Trade Act and the Precious Stones Trade Act to possess gold and emeralds. The police also searched their employee's quarters and found 182 South African rands, 52.00 sterling and three kruger rands.

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The appellant denied knowledge of the gold buttons and emeralds discovered in the doll with a stitched bottom. She was present when Section Officer Kapembe opened it. She saw him taking out an envelope from the same doll. She agreed that the foreign currency was given to them by friends whom they had helped. She said in evidence she was going to surrender it to authorized dealers but she had not done so yet.

Mr Anand, the appellant's husband, was at the house when the police started their search. He was shown a search warrant and was with Section Officer Kapembe when he saw the five dolls in his bedroom. He testified that he had nothing to do with the dolls. They were given to his wife by a Mr Doolabh whom he did not know well and who was a personal friend of his wife and children. He said also that he knew nothing about the doll as he was in ill-health. When he was asked by the police whether he knew something about the heavy doll he replied: "... no, I am unaware and the only person who could help you is my wife. " He telephoned her. She came. The police officer opened the stitched doll and found plastic bags containing gold and emeralds.

In his evidence the husband said he had very little to do with the contents of the house. He handled the dolls when the police asked him to compare their respective weights. He said he was unaware that his wife had been given the dolls by Mr Doolabh until he heard her saying that to the police.

The appellant's testimony was that she did not open the dolls. She left them like that from the time they were given to her. What belied her story was the

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envelope found in the stitched doll containing gold and emeralds. Its significance was the date stamp with 25 November 1985 embossed on it. The police ignored the date stamp. It was observed by the learned regional magistrate. It can be inferred from its presence that it was put in the doll together with the gold buttons and the emeralds as late as 1985. That fact points to the falsity of the appellant's testimony that the stitched doll was not opened since it was given to her in 1981.

What it all means is this. The appellant and her husband had knowledge of the presence of the gold and the emeralds in the doll with a sewn bottom. They had physical control and possession of the gold and the emeralds. See *R v He Kaw Teh* [1986] LRC (Crim) 552 at 607; (1985) 157 CLR 523 at 589 *per* BRENNAN J With aid of the envelope the State proved beyond reasonable doubt the necessary element of possession. The husband's reluctance to have the doll opened in the absence of his wife established that he knew what was hidden in it.

In this appeal the important point in issue is s 3(2) of the Precious Stones Trade Act which prescribes a mandatory minimum sentence of three years' imprisonment with labour for contravening s 3(1) of the Act without special reasons. Section 3(2) reads:

> "Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and, on conviction, shall be sentenced to imprisonment for a period of not less than three years and not more than five years and, in addition, be liable to a fine not exceeding ten thousand dollars, unless the convicted person satisfies the court that there are special reasons in the particular case, which reasons shall be recorded by the court, why such a sentence should not be imposed, in which event he shall be liable to a fine not exceeding five thousand dollars or

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imprisonment for a period not exceeding three years or to both such fine and imprisonment."

Mr *de Bourbon*, who appeared for the appellant, contends that s 15(1) of the Constitution of Zimbabwe prohibits the imposition on any person of an inhuman or degrading punishment. Section 15(1) reads:

"No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

In *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 (2) SA 702 (ZS) at 715G-H GUBBAY JA discussed the full import of s 15(1). He said this:

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"On its face s 15(1) is aimed primarily at the quality or nature of punishment. Certain types of punishment are acknowledged to be inherently inhuman and degrading. Those involving the rack, the thumb screw, the pillory, burning alive or at the stake, prolonged periods of solitary confinement and starvation, fall unquestionably into this category. But s 15(1) is not confined to punishments which are in their nature inhuman or degrading. It also extends to punishments which are "grossly disproportionate"; those which are inhuman or degrading in their disproportionality to the seriousness of the offence, in that no-one could possibly have thought that the particular offence would have attracted such a penalty - the punishment being so excessive as to shock or outrage contemporary standards of decency."

For a full discussion, see *S v Ncube & Ors supra* at 715I-716F. Mr *de Bourbon* argued that this Court accepted in *S v Ncube & Ors* the principle that a sentence which is grossly disproportionate to the offence committed would constitute an inhuman or degrading punishment.

The question to be answered in this appeal, that is, if it is necessary to do so, is whether s 3(2) is in violation of s 15(1) of the Constitution. As I see it, a sentence of three years' imprisonment with labour in a country in which a sentence of imprisonment is not generally held to be inhuman or degrading cannot, standing alone, be said to violate s 15(1) of the Constitution. What Mr *de Bourbon* is challenging, however, is not simply that the punishment of three years imposed by the magistrate but the fact that it is a mandatory sentence. Because it is mandatory, the court which imposes it, has no discretion. It is the absence of the exercise of a judicial discretion in sentencing the appellant in this case that tends to suggest that the mandatory punishment of three years prescribed by s 3(2) may be an inhuman or degrading punishment. In imposing such a sentence the judicial officer is not permitted to discriminate between a person who has committed a minor infringement of s 3(1) and one who has been convicted of a serious contravention of the section. It is the arbitrary manner in which a mandatory sentence is imposed that may offend against the prohibition in s 15(1) of the Constitution.

I do not intend to come to any defined decision. I feel that the constitutionality of s 3(2) ought to be argued fully bearing in mind that the section is in two parts. One part compels a mandatory punishment, that is, in the absence of a finding of special reasons. Here the court's discretion is excluded. The other part is concerned with the imposition of a sentence upon a finding that

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DUMBUTSHENA CJ

special reasons exist. Here the court's discretion is not excluded.

It might be advisable to argue that the very existence of the two parts introduces a disparity or an inbuilt disproportionality in the sentencing procedure. This issue needs to be argued in depth.

The Canadian Supreme Court dealt with the constitutionality of a mandatory sentence in *Smith v The Queen* which the Supreme Court decided on 25 June 1987 (see (1987) 40 DLR (4th) 435). In that case the appellant had contravened s 5 of the Narcotic Control Act which reads:

> "5. (1) Except as authorized by this Act or the regulations, no person shall import into Canada or export from Canada any narcotic.
>
> (2) Every person who violates subsection (1) is guilty of an indictable offence and is liable to imprisonment for life but not less than seven years."

Under this section it is irrelevant that the accused imported the drug for trafficking or for personal consumption. The quantity imported is also irrelevant to guilt. The majority of the Supreme Court held that the seven years' minimum term of imprisonment provided by s 5(2) of the Narcotic Control Act infringed the prohibition in s 12 of the Canadian Charter of Rights and Freedoms which reads as follows:

> "12. Everyone has the right not to be subjected to any cruel or unusual treatment or punishment."

I do not consider it right for this Court to express a definitive opinion upon the constitutionality of s 3(2) of the Precious Stones Trade Act in view of the conclusion I have reached that the court below erred in not finding special reasons. I would merely point out that s 3(2) of our Act is different from s 5(2) of the Canadian Narcotic Control Act which prescribes a minimum mandatory sentence for the importation of narcotics because the latter leaves no room for the exercise of a judicial discretion. No finding of special reasons is required. That is the difference between s 5(2) of the Canadian Act and s 3(2) of our Act. Subsection (2) of s 3 allows for the exercise of a judicial discretion when there are special reasons. While the section prescribes a sentence which is mandatory and which is not less than three years and not more than five years' imprisonment and, in addition, a fine not exceeding ten thousand dollars it also prescribes the use of a discretion upon a finding of special reasons.

DUMBUTSHENA CJ

I am satisfied that special reasons are to be found in this case. Mr Anand lied when he denied knowledge of the gold buttons and emeralds found in the doll. His reaction when the police officer wanted to open it in the absence of his wife shows that he had knowledge of what was inside that particular doll If he were innocent he would not have intervened. The probabilities are that it was he, as the proprietor of the business, who had unlawfully acquired both the gold and the emeralds, that they were being held for his benefit and that their ultimate disposal rested with him. He decided to sacrifice his wife by shifting responsibility for the possession upon her. This resulted in the arrest of the appellant. It was foolish of her to accept to bear the sole blame.

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But one can understand why she did it. He was a sick man and he was her husband. Of the two, his moral blameworthiness was far higher than hers, for she possessed on his behalf - the likelihood being that the gold and the emeralds were his property and not hers.

These features constitute special reasons. There are special reasons which are special to the facts of this particular case. See *S v Rawstron* 1982 (2) ZLR 221 at 233H. Whether one looks at the factor which in this case constitutes special reasons in a different way as SQUIRES J did in *S v Chisiwa* 1981 ZLR 666 at 671B-C, one will still come to the conclusion that there exists in this case special reasons. The learned judge said at 671A-C:

> "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, and by definition, therefore, not all mitigatory factors may be special reasons. On the other hand, if they are 'special reasons' they will always be mitigatory, whether they arise from the commission of the offence, or the facts and conditions affecting the offender. It should be clear from this that the court may have regard to factors arising either out of 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. And, furthermore, by use of the plural 'reasons' it should be borne in mind that the Legislature clearly allowed for the cumulative effect of a number of reasons to be taken into account by the court in arriving at its decision."

Mr *Houston* for the respondent, conceded that there were special reasons because Mr Anand had a greater part to play in the commission of the offence. Mr *de Bourbon*, who had not taken up this point, was of the same view. The Court is therefore at large to impose a sentence which is not mandatory.

DUMBUTSHENA CJ

Counsel are agreed that in the event of the Court finding special reasons the sentence of twelve months' imprisonment for contravening s 3(1) of the Gold Trade Act [*Chapter 164*] as read with s 2(3) of the Gold Amendment Act No. 6/78 ought to be reconsidered.

A sentence of imprisonment is, in the circumstances of this case, inappropriate. The appellant, it seems, put herself into trouble in order to save her husband from going to prison. She is the first offender. There is no doubt that the value of the gold buttons ($3 553,47) was substantial but that alone does not warrant a sentence of imprisonment. The emeralds were valued at $150. Having regard to the secondary role of the appellant played in this whole affair, I am of the view that a sentence of a fine is appropriate. The fine must be such as will bring home the seriousness of the offence to the appellant. Both the appellant and her husband are people of means. This must be borne in mind when assessing the sentence. I think it would be fair and just to treat counts 1 and 2 as one for sentence because gold buttons and emeralds were found in one doll.

Accordingly the appeal against conviction is dismissed. But the appeal against sentence succeeds to this extent. Both the sentences of twelve months' imprisonment with labour in count 1 and three years imprisonment with labour in count 2 are set aside and the following sentence is substituted:

> "Taking counts 1 and 2 together, a fine of $2 000 or, in default of payment, six months' imprisonment with labour."

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Gubbay JA: I agree

McNally JA: I agree

Manyarara JA: I agree

Korsah JA: I agree

Brassel Sigidi & Partners, appellant's legal representatives

NYAMWEDA v GEORGIAS 1988 (2) ZLR 422 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Civil appeal

8 November 7 6 December 1988

Flynote

Practice and procedure - third parties - joinder of - third party having potential interest in case but parties to case not wishing it to be joined - approach trial court should take - approach of appeal court where matter arises on appeal.

Contract - illegality - par delictum rule - relaxation of.

Headnote

The respondent (plaintiff in the court *a quo*) has succeeded in an action against the appellant, his former mistress, for an order directing her to transfer a house into his name. He had bought the house in her name because the building society he dealt with, having bonded one of his houses, would not lend him money for another. No misrepresentation was made to the building society when the bond was applied for by the appellant; it was simply not disclosed that she was acting an agent for an undisclosed principal. The respondent was party to the bond agreement in the capacity of surety and coprincipal debtor.

On appeal, it was argued on behalf of the appellant, firstly, that the contract, being in furtherance of the parties' immoral affair, was contrary to public policy and therefore void; and secondly, that since the transaction involved a conspiracy to defraud the building society, the maxim *in pari delicto melior est conditio defendentis* applied.

The Supreme Court raised the question of whether the interests of the third party, the building society, had been sufficiently considered and postponed the hearing to enable the society to determine its attitude in the question of joinder. The appeal was heard after the society indicated that

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McNALLY JA

it did not wish to be joined, but both parties sought guidance on the question of whether it was necessary to join the society as a party.

Held, that the transaction had nothing whatever to do with the parties' illicit relationship; it involved an investment on the respondent's part and he used the appellant in the capacity of agent for an undisclosed principal.

Held, further, that it was difficult to imagine how the building society's rights could have been prejudiced, since it accepted the respondent as surety and co-principal debtor; but even if there was some form of fraud on the building society, this was a case in which the *par delictum* rule should be relaxed.

Held, further, that where a third party may have a significant potential interest in the outcome of a legal dispute but the parties are reluctant to inform it of the dispute, it may be appropriate for the trial court of its own motion to consider advising the third party of the fact of the proceedings so that it can decide whether or not it wishes to be joined. Where real rights are involved, the question of joinder (or of advising the third party) may be more important. Where the Supreme Court is of the view that it is necessary of expedient in the interests of justice to ascertain the standpoint of a third party who is not party to an appeal, it will do so under the powers conferred by s 20(1)(b)(ix) of the Supreme Court of Zimbabwe Act 1981, preparatory to determining whether or not to act in terms of s 20(1)(b)(iv).

Cases cited:

Thornicroft v Vas 1957 R & N 376; 1957 (3) SA 754 (FSC)

Dube v Khumalo S-103-86 (not yet reported)

Zuvaradoka v Franck 1980 ZLR 402 (AD); 1981 (1) SA 226 (ZA)

Adam v Jhavary & Ors 1926 AD 147

Strydom & Anor v de Lange & Anor 1970 (2) SA 6 (T)

Dadabhay v Dadabhay & Anor 1981 (3) SA 1039 (A)

Vandervell Trustees Ltd v White & Ors [1971] AC 912; [1970] 3 All ER 16 (HL)

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

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

E Chatikobo for the appellant

M T O'Meara for the respondent

Judgment

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McNally JA: This is a dispute about the ownership of a house in Northwood, Harare. The respondent (who was the successful plaintiff

below) claimed that he was entitled to an order directing the appellant to transfer the property into his name. Alternatively, he claimed payment of some $17 000. The appellant resisted this claim, saying he bought the house for her as a gift because she was his mistress. He, while admitting the relationship, contended that he bought it as an investment, and merely used her name, with her consent, because the Building Society, already having bonded one of his houses, would not lend him money for another.

When the appeal first came before us we were concerned that insufficient thought had been given to the interests of the third party involved, namely the Building Society. It has a real right in the property by virtue of the registered mortgage bond. Granted, the order of the High Court was conditional on "a discharge by the plaintiff of the mortgage bond registered by the defendant over the said property in favour of the Central Africa Building Society". Nonetheless it was our view that the Building Society should be advised of the situation so that it could determine its attitude on the question of joinder.

For these reasons the matter was postponed on 24 March and 23 May 1988.

The Building Society has now advised that it does not wish to be joined as a party and that its position is secured whichever way the appeal is decided. (One cannot say whether it would have taken the same stance on a falling property market.) Accordingly we proceeded to hear the appeal on 8 November 1988.

Mr *Chatikobo*, for the appellant, made his attack on the judgment of the court *a quo* on two levels. In the first place, he submitted that, on the facts, the learned judge came to the wrong conclusion. Secondly, he contended, after amending his notice of appeal by consent, that "the learned trial judge erred in not considering the effect of the maxim *in pari delicto potior est conditio defendentis* on the contract entered into by the appellant and the respondent".

As far as the facts are concerned I must begin by saying that I am completely in agreement with what was said in the High Court by SAMATTA J The learned judge declined, correctly, I think, to use the presumption against donations (see *Thornicroft v Vas 1*957 R & N 376; 1957 (3) SA 754) in support of the respondent, and held that the onus of proof of his contention was on him.

He then examined the evidence of the respondent's witnesses. The evidence was unusually strong. He called four witnesses. The first was a business acquaintance who worked for the Old Mutual. He testified that the respon-

dent had spoken to him in 1980 or 1981 about a house he wanted to buy as an investment. He

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even showed the house to him. It was in Northwood. He (the witness) advised the respondent that he would never get a Building Society loan to buy the house because he was already committed, in respect of his own house, to the limit acceptable to the Society.

Thereafter, two other witnesses, one admittedly a relative and the other a close friend, testified that at about that time the respondent had tried to persuade them, separately, to allow him to buy a house in their names. Neither of them could assist. Both remembered later being told by the respondent that he had found a lady willing to help. One recalled advising the respondent never to trust a woman.

The fourth witness called by the respondent was a lawyer. He was a lawyer who, on the respondent's instruction, handled the transfer of the property from the original owner to the appellant. He confirmed that the respondent paid the deposit and the costs, but, more importantly, he recalled the respondent saying that he was doing this because he could not raise a bond himself. When the lawyer expressed doubts and suggested a legal contract with the appellant he brushed the suggestion aside and said he trusted the appellant.

All this evidence is consistent with the respondent's version, and I am not persuaded otherwise by the appellant's arguments. Nor am I persuaded that his conversations with these four witnesses were designed to build up his case in advance. After all he was under no obligation to donate the property to her. I have no quarrel either with the learned judge's reasons for rejecting the evidence of the appellant.

In my view therefore the appeal on the merits must fail. I turn therefore to consider the legal point made by Mr *Chatikobo*.

His first point was that it was contrary to public policy for the court to make a finding which was "in furtherance of their immoral affair". This is not a valid point. Once one comes to the conclusion, as I have, that the respondent's version is the correct one, then the transaction had nothing whatever to do with the illicit relationship. The transaction involved an investment on his part, and he used her in the capacity of agent or trustee for an undisclosed principal. The fact that there was an immoral relationship between the agent/trustee and the principal was neither here nor there as far as the investment was concerned.

McNALLY JA

Mr *Chatikobo's* second submission was that the transaction involved a conspiracy to defraud the Building Society. This submission requires closer consideration. There are both similarities and differences between this case and the case of *Dube v Khumalo* S-103-86 (not yet reported). In *Dube's* case, the house was bought in furtherance of the illicit relationship. Moreover, the representations made by the nominal purchaser to the Municipality as to her occupation and income were false. Nonetheless this Court, in *Dube's* case, having come to the conclusion that there was a conspiracy to defraud the Municipality, decided that it would be proper to relax the *par delictum* rule. We therefore gave judgment in favour of the plaintiff, who was in the position of the respondent in this case. (See also *Zuvaradoka v Franck* 1980 402; 1981 (1) SA 226 (ZA).)

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I can see no difference between *Dube's* case and the present one which would make the present case worse than *Dube's* case. In both cases the potentially prejudiced third party has indicated its acquiescence in whatever order the court chooses to make.

Mr *O'Meara* has argued forcefully that there was no fraud in this case because the respondent was a party to the bond agreement in the capacity of surety and co-principal debtor. All that happened, he says, was that the Building Society's policy was circumvented. One might say the same in the case of *Dube*. It was merely the Municipality's policy that one person should have only one house. But again the distinction is that in *Dube's* case there was a material misrepresentation made to the Municipality.

In the present case it is difficult to imagine any circumstance arising in which the Building Society's rights could be prejudiced. It could have prevented any transfer of the property into his name by declining to allow him to take over the bond; and if he was in a position to pay off the bond and buy the property outright (as he now claims he can) it would not be prejudiced either. In the meanwhile the appellant continued, in its eyes, to be the mortgagor. It had accepted her financial status and it is not suggested, as it was in *Dube's* case, that she had deceived it. It had even accepted the respondent as surety and co-principal debtor.

It has not been shown that any misrepresentation was made to the Building Society in the course of the appellant's application for a bond. I do not know whether a bond applicant is required to state, or to warrant, that she is acting on her own behalf and not as agent for an undisclosed principal. On the facts before us I cannot assume that that was the position.

McNALLY JA

I am inclined therefore to see merit in Mr *O'Meara*'s submission that there was not in this case shown to have been fraud on the Building Society. If that is the situation then of course the question of the application of the maxim does not arise. Respondent is in the position of the appellant in *Adam v Jhavary & Ors* 1926 AD 147. See also *Strydom & Anor v de Lange & Anor* 1970 (2) SA 6 (T), and *Dadabhay v Dadabhay & Anor* 1981 (3) SA 1039 (A) at 1047F *et seq.*

But if I am wrong, and in fact I prefer to leave the matter open because we have not had the benefit of submissions from the point of view of the Building Society, then this is a case in which the *par delictum* rule should be relaxed. The reasoning in *Dube*'s case must prevail. The result is the same. The appeal fails.

It remains only to deal with the procedural aspect of the case as to which both parties sought guidance. I refer to the question whether or not it was necessary to join the Building Society as a party.

Mr *O'Meara* has correctly submitted that the matter is dealt with in Order 13 Rule 87 of the Rules of the High Court. He further points out that that Rule is basically similar to Order 15 Rule 6 of the English Rules, as to which see p 179 of the Supreme Court Practice ("the White Book") 1988, Vol I Finally he points out that our Supreme Court Rules do not specifically deal with the matter and therefore, in terms of the provisions of our Rule 58(1), we will in general follow the

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practice of the High Court.

Rule 87(1) reads as follows:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interest of the persons who are parties to the cause or matter."

I note that we do not have a section in our Rules equivalent to the English Rule 6(2)(b)(ii) which reads:

> "(2) Subject to the provision of this Rule, at any stage of the proceedings and in any case or matter the Court may on such terms as it thinks just and either of its own motion or on application -
>
> (b) order any of the following persons to be added as a party, namely -

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> (i) any person between whom and any party to the cause or matter these may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to that case or matter."

I note further that subrule 6(2)(b)(ii) was added precisely because the House of Lords, in *Vandervell's Trustees Ltd v White & Ors* [1971] AC 912; [1970] 3 All ER 16 (overruling LORD DENNING'S decision in the Court of Appeal in *Re Vandervell's Trusts* [1969] 3 All ER 496), held that in the absence of such a rule the Court had no jurisdiction to act in that way (see the White Book, Vol I, at pages 184-185).

I do not think it would be appropriate for me, by way of *obiter dictum*, to lay down a rule of practice which might have the effect of coming down on the side of the Court of Appeal as against the House of Lords without even hearing argument directed to the point in issue. I will restrict myself therefore to the following observations:

1. Situations may arise, as in this case and in *Dube v Khumalo supra,* where a third party may have a significant potential interest in the outcome of a legal dispute.

2. It may happen, again as in these cases, that neither of the parties is particularly anxious to inform the third party of the dispute for fear that the third party's intervention may result in their both losing what they are disputing. Accordingly Third Party Procedure (Order 14) may not be adopted.

3. In such cases it may be appropriate for the trial court of its own motion to consider, not, at that stage, whether that third party should be joined, but whether it should be advised of the fact of the proceedings so that it can decide whether or not it wishes to be joined.

4. Where real rights are involved, as here, the question of joinder (or of advising the party

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concerned) may be more important. It may be noted that the wording of Rule 87:

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> "... may determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties ..."

is more appropriate in relation to personal rights than in relation to real rights. Personal rights are indeed rights which exist as between the disputing parties whereas real rights are rights against the world.

5. Where this Court is of the view that it is necessary or expedient in the interests of justice to ascertain the standpoint of a third party, not a party to the proceedings, it will do so, under the wide powers conferred on it by the provisions of s 20(1)(b)(ix), preparatory to determining whether or not to act in terms of s 20(1)(b)(iv) of the Supreme Court of Zimbabwe Act 1981. Compare: *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659; *Toekies Butchery (Edms) Bpk en Andere v Stassen* 1974 (4) SA 771 (T) at 774H; and *Dube v Khumalo supra* at pp 10-11.

In the result the appeal fails and is dismissed with costs.

Manyarara JA: I agree.

Korsah JA: I agree.

Chirunda, Chihambakwe & Partners, appellant's legal representatives

Winterton, Holmes & Hill, respondent's legal representatives

S v NEMAPARE 1988 (2) ZLR 430 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Korsah JA

Criminal appeal

24 October & 14 December 1988

Flynote

Criminal law - Prevention of Corruption Act [Chapter 70] - s 3(1)(f) - agent concealing from principal full nature of transaction carried out in course of agency - purpose of section.

Criminal procedure - evidence - Criminal Procedure and Evidence Act [Chapter 59] - s 262B - admissibility of

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documents made in the ordinary course of business - statement made by third party forming part of records of business - whether admissible under section to establish truth of what is stated therein by third party.

Criminal procedure (sentence) - senior official of statutory body concealing sale of body's property from his superiors - appropriate sentence.

Headnote

Under s 3(1)(f) of the Prevention of Corruption Act [*Chapter 70*],*(19)* it is an offence for any agent, with intent to deceive his principal or to obtain any gift or consideration for himself, to fail to disclose to his principal the full nature of any transaction carried out in the course of his agency. Section 4 of the Act creates a presumption that the agent acted with that intent if it is proved that he failed to disclose to his principal the full nature of such a transaction. In s 3, the statute seeks to create an offence which falls short of the common law offence of fraud. It may thus be possible for

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the State to establish an offence under the statute even where all the elements of fraud are not present.

The object of s 262B of the Criminal Procedure and Evidence Act [*Chapter 59*] is to render admissible as evidence statements of fact recorded by a person in the ordinary course of his trade, business or occupation which may be supposed to be true precisely because they were recorded in the ordinary course of business and not with litigation in mind. The section records of a Government agency and sworn by an accomplice (who refuses to attend court to give oral evidence) in the course of questioning by the staff of that agency, since the facts recorded in the affidavit related to the accomplice's business, not to the business of the Government agency concerned.

The appellant, who was at the time Assistant General Manager of the National Railways of Zimbabwe, had, without informing the Railways Board or the General Manager of the proposed transaction, arranged for the sale of five Railways houses in Botswana at a price of less than one-sixth of their market value. It was clear that he was proposing to cheat the Railways, and thus the public, in order to share in the profits on the resale of the properties. He and the other persons involved stood to gain around 265 000 Botswana Pula A sentence of three and a half years' imprisonment was held not to be manifestly excessive.

Cases cited:

S v Bhaiwa 1988 (1) ZLR 412 (SC)

S v Strydom & Ors 1980 ZLR 364 (AD); 1981 (1) SA 236 (ZA)

Rolls v Miller (1884) 27 ChD 71

Myers v DPP [1965] AC 1001; [1964] 2 All ER 881 (HL)

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S v Mushimba & Ors 1977 (2) SA 829 (A)

S v Ngara S-44-87 (unreported)

S v Stephens S-53-88 (unreported)

A P de Bourbon SC for the appellant

Y Omerjee for the respondent

Judgment

McNally JA: The appellant was charged before the Regional Magistrate for the Western Division, firstly with a contravention of s 3(1)(f) of the Prevention of Corruption Act [*Chapter 70*] and secondly with a contravention of s 165 of the Customs and Excise Act [*Chapter 177*]. There were two alternative charges to the latter charge, involving ss 157(2)(b) and 203(2) of the same Act.

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He was convicted on the first count and on the main charge in the second count. On count one, he was sentenced to three-and-a-half years' imprisonment with labour. On count two, he was sentenced to a fine of $500 or, in default of payment, two months' imprisonment with labour. In addition the Sharp video recorder, the subject of the second count, was declared forfeit to the State.

I will deal with the two counts separately. The charge under the Prevention of Corruption Act (and one must bear in mind that we are not concerned with the current Prevention of Corruption Act No. 34 of 1985, because the relevant events took place in late 1984) reads as follows:

> "Charged with the crime of contravening section 3(i)(f) of the Prevention of Corruption Act in that whereas the said accused was employed by the National Railways of Zimbabwe, a statutory body thereby, in the capacity of Assistant General Manager in charge of Administration; and whereas during the period 15 August 1984 and 30 November 1984 and at Bulawayo in the said Division the said accused engaged and instructed legal practitioners to seek out and entertain to negotiate contracts for the sale of Property vested in the National Railways of Zimbabwe (particulars of which are annexed hereto); and whereas the said accused did by means of signing various powers of attorney in favour of the legal practitioners concerned, effect the transfer of all the rights of National Railways of Zimbabwe in the property affected, and whereas the said accused obtained falsely and fraudulently the deed of title in respect of the properties concerned from the National Railways of Zimbabwe and did convey the same to the said legal practitioners to facilitate the transfer of title in the said properties; and whereas on the strength of the foregoing the said properties were conveyed to United Bag and Nail Co (Pvt) Ltd, to the prejudice of the National Railways of Zimbabwe or the General or Deputy-General Managers of the same; and thus did the said accused wrongfully and unlawfully and with intent to deceive the National Railways of Zimbabwe; fail to disclose to the National Railways of Zimbabwe the full nature of any of the transactions aforementioned and carried out (by him) in connection with the affairs or business of the National Railways of Zimbabwe."

In order to understand the charge one has to understand the statute. The reason for this, in broad terms, is that the statute seeks to create an offence which falls short of the common law offence of fraud. Thus even where all the elements of fraud are not present, it may be possible

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for the State to establish an offence under the statute.

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It is important, therefore, to determine what it is that constitutes an offence under s 3(1)(f) of the statute, as read with the presumptions in favour of the prosecution which are contained in s 4 of the Act, as amended by Act 28 of 1983.

Section 3(1)(f) of the act, as amended, reads as follows:

> "If any agent, with intent to deceive his principal or to obtain any gift or consideration for himself, fails to disclose to his principal the full nature of any transaction carried out in the course of his agency, he shall be guilty of an offence."

Section 4, a new section introduced by Act 28 at 1983, reads as follows:

> "If it is proved in any prosecution for an offence in terms of section *three* that -
>
> (a) any agent has accepted, obtained, agreed to accept or attempted to obtain any gift or consideration for himself or any other person, it shall be presumed, unless the contrary is proved, that the agent did so in contravention of section *three*;
>
> (b) any person has given, agreed to give or offered any gift or consideration to an agent for himself or for any other person, it shall be presumed, unless the contrary is proved, that the person did so in contravention of section *three*;
>
> (c) any agent has failed to disclose to his principal the full nature of any transaction carried out in the course of his agency, it shall be presumed, unless the contrary is proved, that the agent did so with intent to deceive his principal and to obtain a gift or consideration for himself."

Reading the charge and the Act together, it becomes apparent that there is no allegation that the appellant sought "to obtain any gift or consideration for himself". The allegations against him may be summarised as follows:

1. that he was an agent of the NRZ;
2. that he did certain acts and undertook certain transactions in the course of his agency;
3. that he did them without reference to the Boards of the NRZ or to the General or Deputy General Manager of the NRZ;

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4. that he thus failed to disclose to the NRZ the full nature of the transactions;
5. that in so acting he manifested an intent to deceive.

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The "actions" referred to are generally speaking actions in pursuance of the "transactions", and the transactions were the sale of five railways properties in Botswana to a company in that country.

The relevant presumption in s 4 of the Act is that set out in subs(c) cited earlier in this judgment. Once it is proved by the State that there has been a failure to disclose "the full nature of any transaction" it is presumed, unless the contrary is proved on a balance of probabilities, that there was an intent to deceive.

Thus only the first four of the five propositions set out above had to be proved by the State. The first is undoubted and was common cause at the trial. That leaves three.

Before I deal with the substance of the allegations there are one or two peripheral matters to be considered.

One of the curious and unexplained aspects of the record is that it begins as a record of a trial of two people on a charge of fraud and changes into a trial of one person on a charge of corruption. There is no explanation on the record as to why the charge against the second accused, one Herbert Moresby-White, was abandoned.

Also part of the record is a State Outline relevant to the charges against the appellant and Mr Moresby-White. This outline contains averments which point to the involvement of two other persons. One of them was a Francistown attorney, Mr Johan Gideon Venter. The other was the then Minister of Transport. It is a matter for astonishment that such averments are left, as it were "on the table" without either being withdrawn, if they are of no substance, or followed up, if they are of substance. Compare *S v Bhaiwa* S-81-88*(20).

Finally there is a more substantial interlocutory matter. The State had intended to call the lawyer, Mr Venter, but it appears that he declined to make

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himself available. Accordingly the State produced, as Exhibit 49, an affidavit by Mr Venter which was sworn by him in the course of his questioning by a member of the staff of the Auditor-General. The defence objected to its production and the court's ruling is to be found at pp 221-223 of the record.

In producing the affidavit the State relied on the provisions of s 262B of the Criminal Procedure and Evidence Act. Clearly without that provision, introduced by Act 32 of 1985, an extra-curial statement by a co-conspirator would not be admissible against an accused person - see *S v Strydom & Ors* 1980 ZLR 364 (AD) at 366; 1981 (1) SA 236 at 239A-C. The question is whether the section makes it admissible.

The section reads as follows:

> "262B.(1) In this section -
> 'document' includes any thing on or in which information is recorded;

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'statement' includes any representation of fact, whether made in words or figures or otherwise.

(2) In any criminal proceedings in which direct oral evidence of a fact would be admissible, any statement of such fact contained in a document, whether such document purports to be an original or a copy, shall upon the mere production of the document by any person, be admissible as evidence to the fact if -

(a) that fact relates to any transaction or intended transaction, either inside or outside Zimbabwe, in the course of any trade, business or occupation of whatsoever kind or to any other matter in connexion with such trade, business or occupation; and

(b) that document is part of or that fact has been obtained from records kept in the course of that trade, business or occupation and compiled from information supplied, directly or indirectly, by a person who had or who may reasonably be supposed to have personal knowledge of the matter dealt with in that information; and

(c) the person who supplied that information is outside Zimbabwe or is unknown or is not available to give oral evidence for any reason whatsoever.

(3) For the purpose of deciding whether or not a statement is admissible as evidence in terms of subsection (1), the court may draw any reasonable inference from the form or content of the document in

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which the statement is contained or, in the case of a document received from outside Zimbabwe, from the form or content or any other document which accompanied such document when it was received in Zimbabwe."

The magistrate noted that the wording of the section "more or less followed its English counterpart, the Criminal Evidence Act, 1985". He noted however that it was wider in its meaning because of the addition of the words "occupation of whatever kind" which are not in the English Act. In the event he ruled that the affidavit was admissible.

In fact the wording of the English Act is quite significantly different, but it is true that our Act uses the phrase "in the course of any trade, business or occupation of any kind" whereas the English Act speaks of "a record relating to any trade or business". On the other hand, it has been said in England that "the word business means almost anything which is an occupation" - see *Rolls v Miller* (1884) 27 ChD 71. So the difference may not be significant.

The object of the legislation, it seems to me, is to render admissible as evidence facts recorded by a person in the ordinary course of his trade business or occupation which may be supposed to be true precisely because they were recorded in the ordinary course of business and not with litigation in mind.

The English Act was introduced because of the decision in the House of Lord in *Myers v DPP* [1965] AC 1001; [1964] 2 All ER 881. In that case it was held that manufacturers' records of cylinder block numbers were inadmissible to confirm the identification of stolen cars because this evidence was hearsay.

It seems to me, on the facts of the present case, that the magistrate in applying the statute was confused as to whose records and whose "trade, business or occupation of any kind" he was considering.

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It is clear from his judgment that he began by regarding Mr Venter's affidavit as a document which was part of the records of the Auditor-General's staff. The evidence of Oliver Kusemwa justifies such a view. I accept furthermore that the document complies with the requirements of s 262B(2)(b) in that it is part of records kept by Mr Kusemwa in the course of his trade, business or occupation and that it was compiled from information supplied directly by a person (Mr Venter) who had or may reasonably be supposed to have personal knowledge of the matter dealt with in that information.

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I accept also that Mr Venter is such a person as is described in s 262B(2)(c).

The difficulty I have is with the provisions of subs (a). It seems to me that the "facts" in the document - if indeed one can describe as "facts" the possibly self-serving allegations of fact made by an alleged accomplice - relate to transactions in the course of a totally different "trade business or occupation" from the trade business or occupation of Mr Kusemwa. They relate to Mr Venter's business as a conveyancer or his occupation as a company Director, or both. That is what his statement is all about.

Once it is accepted that the "facts" in Mr Venter's affidavit relate to his conveyancing or business transactions with Mr Nemapare, the appellant, then it becomes clear that the document is only admissible if it is "part of records kept in the course of **that** trade, business or occupation". I stress the word **"that",** which appears in subs (b). It is the key word.

Clearly the document does not fall into that category. Mr Venter did not make the statements in his affidavit in the course of his business dealings with the appellant. The affidavit does not come from the records of those dealings kept in the course of that business.

In short, the magistrate has had regard to two different "trades, businesses or occupations" when the section entitles him to have regard only to one. The section would have permitted the State to produce documents from Mr Venter's records, recording facts relating to his business dealings with the appellant (Exhibit 9, for instance, is such a document). But it did not permit the State to produce documents from Mr Kusemwa's records unless those documents contained statements of fact relating to Mr Kusemwa's business or occupation. They did not.

In my view, and for this reason, Exhibit 49 was inadmissible in evidence. It was not such a document as the section envisages.

Mr *de Bourbon* argued that the acceptance by the magistrate of Exhibit 49 so influenced his mind as to the guilt of the appellant that it would be proper for this Court, if it finds Exhibit 49 to have been inadmissible, to acquit the appellant on the grounds that there has been a failure of justice. He relied for this proposition or certain *dicta* of RUMPFF CJ in *S v Mushimba & Ors* 1977 (2) SA 829 (A) at 844C (page 413 of the translation).

The context in which the learned CHIEF JUSTICE made his remarks about a

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"failure of justice" (our Supreme Court of Zimbabwe Act calls it a "substantial miscarriage of justice", but I do not think the difference is material) was this. In the course of preparation for a trial involving security matters, the Security Police had had informers working for the attorneys instructed by the accused. These informers had supplied the Security Police with all sorts of privileged information. While the full extent of that information was not apparent, it included statements by defence witnesses and one of the accused and coded telex messages from SWAPO in London.

The learned CHIEF JUSTICE found that "by reason of the nature and extent of the breach of the privilege of the appellants it has to be found that the appellant's privilege before and during the trial disappeared totally through the action of the Security Police, that thereby the trial did not comply with what justice required in this respect and that a failure of justice occurred". He made the point that "the justice referred to here is not a concept which assumes that the accused is necessarily innocent".

The facts in the present case are by a wide margin different from those in *Mushimba's* case *supra*. It does not seem to me that there has been a substantial miscarriage of justice in terms of s 11(2) of the Supreme Court of Zimbabwe Act. Moreover, s 11(3) of the Act reads as follows:

> "If any point raised is decided in favour of the appellant and it consists of a misdirection by the trial court of tribunal of itself on a question of law or a question of fact or a question of mixed law and fact, the Supreme Court shall dismiss the appeal if it is satisfied that the evidence which has to be considered has not been substantially affected by the misdirection, and that the conviction is justified having regard to the evidence."

I propose to consider the admissible evidence in the light of that section. Compare the judgment of GUBBAY JA in *S v Ngara* S-44-87 at p 6.

The evidence against the appellant has been set out in great detain in the magistrate's judgment and I do not propose to set it all out in such detail once again. But a broad survey is necessary.

The appellant was appointed Secretary of NRZ on 9 September 1982. On 28 February 1984 the General Manager advised the Assistant General Manager (Manpower) that the Minister of Transport had directed that the appellant be appointed Assistant General Manager (Administration). In that position, and partly because of his background in the law, he was required to work with,

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but not to control the Estates Officer, who came under the Chief Civil Engineer and the Assistant General Manager (Engineering & Supplies).

The appellant's involvement in the sale of five developed properties in Botswana began with a memorandum, he addressed to the Estates Officer on 27 July 1984.

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There are features of this memorandum (Ex 2) which are strange.

1. It is headed "unused land" and deals initially with the undesirability of NRZ holding on to unused land "for purely speculative reasons" when such land might be expropriated by Government without compensation.

2. It goes on to ask for a list of all land in Zimbabwe and Botswana owned by NRZ and the Unitary System "which falls under the above".

3. It states an intention to recommend to the appropriate Board disposal of such assets to best advantage so as to forestall expropriation by Government.

It is difficult to understand how, in pursuance of the policy enunciated in this memorandum, five houses in Botswana, occupied by Railways personnel, came to be handed to Mr Venter for disposal, even if one assumes at this stage that he was not supposed to sell them until prices were fixed and the authority of the NRZ Board and the Unitary System Board was obtained. Clearly land on which a house had been constructed and which is occupied by a Railways official is not "unused land" held for "purely speculative purposes". For convenience I will use the word "house" or "houses" to describe what in technical legal terms is "land with improvements".

The five houses, four of them belonging to the Unitary System and one to the NRZ, were transferred by Mr Venter, in his capacity as a conveyancer, to a company, United Bag and Nail (Pty) Ltd, and the transfer was registered in the Botswana Deeds Office on 2 November 1985. The selling price (which was never actually paid) was P47 183.60, which was 10% above the value of the properties as shown in the books of the Railways. The valuation of the properties as at that date (2.11.85) later carried out by Knight Frank and Rutley Botswana, Chartered Surveyors, showed an estimated total value of P314 000, over six times the sale price.

The appellant denies that he gave instructions to Mr Venter for the sale of these properties, although he admits he was proposing to sell them through

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Mr Venter once the necessary approvals of the Boards had been obtained and a price agreed.

It is true that without the evidence of Mr Venter, Mr Moresby-White and the Minister, and without evidence as to who were the directors and shareholders of the United Bag and Nail (Pty) Ltd, it is not possible to say exactly what was going on. But it is not necessary to go so far. The State has to prove only:

1. That the appellant was an agent of the NRZ and the Unitary System Board, which is admitted;

2. That he did certain acts and undertook certain transactions in the course of his agency;

3. That he failed to disclose to the NRZ and to the Unitary Board the full nature of these

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transactions.

It is also important to note that the transactions with which we are concerned, from their very nature, could not be wholly concealed. To say therefore that they were not concealed is not in itself a defence. If the facts reveal that the full nature of the transactions was not revealed, the offence committed unless the defence rebuts the presumption that there was an intent to deceive or to obtain a gift or consideration.

In assessing the evidence the first striking point is that at every vital turn the evidence of the appellant conflicts with the evidence of the State witnesses. Thus:

1. *Mr Avery,* the then General Manager, had no idea the houses were being sold, until March 1985, some five months after the event, and was so horrified that he instituted immediate steps to reverse the sale. He confirmed that the appellant appeared nonchalant and ignorant of any such transaction when challenged in March.

   Even on his own version one would have expected the appellant to say "Well I am in the process of arranging it but Venter seems to have jumped the gun".

2. *Mr Chideme,* the NRZ representative in Gaborone, only learnt his house was for sale when people came to view it. He was telephoned by the appellant who confirmed it was for sale. If he is telling the truth (and he was sure it was the appellant, otherwise he would not have acted on the call) then the appellant is lying when he says he thought the pieces of land he was selling were unused (ie undeveloped).

3. *Mr Widdows,* the Estates Officer, who was directly in charge of NRZ immovable property, was also completely taken aback to learn that the properties had been sold. He was adamant that he had told the appellant that these particular properties were occupied and could not be sold in the immediate future.

4. *Mr Caddick*, who worked under Mr Widdows, confirmed that the writing on Exhibit 3 was his and was there when the exhibit was given to the appellant. If this is so the appellant could not have failed to know that the properties were occupied. Caddick also confirmed that the appellant obtained the originals of the Title Deeds, when normally only photocopies were issued, by insisting that the Minister wanted them. The originals were quite unnecessary for the purpose for which the appellant said he wanted them. But they were of course essential for selling the properties.

5. *Mr Desai,* the Secretary for Transport and a member of both Boards, knew nothing of any intention to sell the houses.

6. *Mr Gillman*, Assistant General Manager (Engineering and Supplies), and the person to

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whom Widdows was directly responsible, denied any knowledge of the sale and protested very strongly when he heard of it in March 1985.

7. *Mr Masango*, the General Manager of NRZ, never discussed the sale of the Botswana houses with the appellant. Nor did he intend the General Power of Attorney which he gave the appellant (and others) to be used for the purpose of this particular sale.

8. *Mr Gorejena,* Chief Accountant, NRZ, met the appellant and Venter in Francistown and they looked at various occupied railway houses in October/November 1984 (the reference on the record to 1985 must be an error). No one mentioned the fact that they had been sold or were about to be sold. He had no idea that there was ever under consideration, and he was a member of the NRZ Board.

9. *Mr Hinksman*, NRZ Secretarial Officer and assistant to the appellant, looked for the vital file in the appellant's cabinet in April 1985 and could not find it. It has not since been found. He found a document loose in the cabinet (Exhibit 38) which, if the appellant knew of its existence, would have shown that he knew the properties were being bought from NRZ for resale at a profit.

10. *Miss Mayers*, the appellant's secretary, did not type two important letters, Exhibits 4 and 6. The latter instructed Mr Venter, who was not the Railways' normal attorney, to handle the sale of certain land to be identified.

    This was at a time, 15 August 1984, when there had been no agreement in principle by the Boards to sell land in Botswana.

In his defence the appellant has pointed to a number of features which might suggest that Widdows or Gillman might have known or suspected or had some inkling of what he was doing. But the fact of the matter is that they say they did not know, and their reaction when they later say they found out was so spontaneously horrified that it is impossible not to believe their evidence. Even the appellant conceded that they were conscientious, meticulous long term employees of the Railways.

Quite apart from anything else, Exhibit 6 seems to me to constitute in itself a transaction the full nature of which he did not disclose to his principal. This exhibit is a letter, written by him in his official capacity to Venter and Company and typed by someone other than his secretary on 15 August 1984. Although it is in general terms, it is a letter in which the appellant purports, without any authority from the Board:

a. To instruct an attorney, other than their normal representatives, to act for the Railways.

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b. To instruct that attorney in the following terms:

"This letter serves as an instruction for you to handle on our behalf:

1. The identification of all land owned by the NRZ in Botswana registered in the Deeds Office in that country.

2. The handling of the sale of such land as will have been identified for disposal in terms of the attached copy of a letter from the Minister of Transport."

c. To give the impression that he is acting in terms of a policy decision by the Board, as when he says:

"The administration wishes to dispose of all land which is outside the use of normal Railway operations. In this regard Railways own some land in Botswana which falls in this category. . ."

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and later:

"I shall in due course forward to you the necessary Power of Attorney to enable you to act on our behalf ..."

And, of course, he did in fact send "the necessary Power of Attorney" but he says he signed it in blank and for Mr Venter's convenience, not dreaming that Mr Venter would use it until everything had been cleared with the Board. Finally he denies ever receiving the damning Exhibit 9, which is a letter from Mr Venter, taken from Mr Venter's files, dated 5 September 1984, which confirms the agreement to sell the named properties at the agreed price. The file number quoted on that letter was the appellant's private file number.

I may say in passing that in my view Exhibit 9 is classically the sort of document envisaged by s 262B of the Criminal Procedure and Evidence Act, and is admissible in evidence by virtue of the provisions of that section, whether or not the appellant ever received it. It came from Mr Venter's files, on the evidence of Mr Widdows; it relates to the relevant transaction between Mr Venter and the appellant; it was compiled by a person (Venter) who had personal knowledge of the matter dealt with. Its relevance lies in its being addressed to the appellant, quoting his private file number, and "confirming our recent discussions". It then goes on to set out what was discussed and agreed, including the sale of the properties, the agreed price and the method of payment. It thus gives the lie to the whole of the defence version, namely that there were no such discussions and no such agreement. Its weight, judged by the criteria set out in s 262C, is, in all the circumstances, substantial, even accepting that Mr Venter must be regarded as an accomplice.

Surprisingly, perhaps, the appellant admits receiving Exhibit 13 which clearly shows that the process of selling the properties is now almost irreversibly set in motion, still without the knowledge or authority of the Boards of NRZ or the Unitary System.

I have not the slightest doubt that the appellant is shown on all this evidence to have acted in relation to these properties in such a way that he came squarely within the terms of s 3(1)(f) of the Act. He failed to disclose to his principals, the two Boards, the full nature of his transactions,

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in that he pretended to be carrying out investigations into the possibility of the disposal of unused land, when he was in fact committing his principals to the sale of land which was both developed and occupied. His actions make it clear that

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he intended to deceive his principals, and indeed he succeeded in doing so for a number of months. He has failed to rebut the presumption that he intended to obtain any gift or consideration for himself.

I noted earlier that transactions of this nature, the sale of fixed property involving transfers in the Deeds Registry, cannot be wholly concealed. But it is perfectly clear that if a transaction such as this one can be carried out clandestinely, then the objectives of those behind the transaction need not necessarily be thwarted if their actions subsequently come to light. It may have been hoped to brazen things out, to invoke the protection, whether justified or not, of the Minister's name, to make use of the confusion and dissension in the upper echelons of the NRZ. Fortunately, it is not necessary to speculate on these matters. I mention them merely to show that the presumptions in the Act are not rebutted merely by showing that the appellant could not have hoped to keep the transactions concealed forever.

I would therefore dismiss the appeal against conviction on count one.

I turn next to deal with count two, the smuggling count. The allegation is that he smuggled into Zimbabwe a Sharp Video Recorder worth $800 between 13 September 1984 and 21 March 1986. The evidence is as follows:

A Mr Ebrahim, proprietor of a shop in Francistown, sold a television and video recorder to Mr Venter. The invoice was made out to Mr P Nemapare at the request of Mr Venter. It was produced as Exhibit 40. Mr Ebrahim produced his suppliers invoice showing the receipt by him of five VC-381 video cassette recorders. He had written the serial numbers of the five on the document, Exhibit 45, and he claimed that the one he sold to Mr Venter was No 920585. This was on 13 September 1984.

Mr Venter had said that the goods would be collected by Mr Sibanda, the Station master. Subsequently Mr Sibanda came in and collected them.

Mr Sibanda confirmed this. He said the appellant phoned him and asked him to collect these goods. He did so. The appellant told him someone would in turn collect the goods form him, and in due course someone came and did so. The appellant later confirmed, when they met, that all was well and Mr Sibanda assumed that the goods had reached Mr Nemapare.

It was put to Mr Sibanda in cross-examination that when telephoned, the appellant had given a non-committal reply because he was unaware of any one

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collecting it on his behalf. In reply Mr Sibanda said that he might have been unaware that it had been collected already, but he seemed clearly aware that someone was to collect it. It was also put to him that the deal with Mr Ebrahim's shop "fell through" because the appellant later bought a different video recorder from Mr Venter. Mr Sibanda knew nothing of this. The appellant later gave this version in his evidence.

The third and final State witness on this count was Mr Mavingire, a Customs Investigator. He confirmed that in March 1986 he called at the appellant's house and placed a television and video cassette recorder under embargo. Later, when he heard no more, he went back and saw the appellant. The latter produced documents to show the television had been cleared, but not the video. He gave conflicting explanations. The VCR was seized. It was produced as Exhibit 39. Nobody seems to have bothered to place on record the description and serial numbers. He ruled that the VCR found in the appellant's possession was the same as the one sold by Mr Ebrahim to Mr Venter because "it seems very co-incidental that the accused should have the same make and model in his house as the one purchased by Venter for the accused".

I do not think it is permissible for the magistrate to come to a conclusion based on probability when the facts are before him. He should have asked for the serial number of Exhibit 39. I have sent for the exhibit and examined it. Its serial number is 920585. That is the one originally sold by Mr Ebrahim to Mr Venter and collected by Mr Sibanda.

The appellant's evidence is thus demonstrated to be untrue. The State case is established. The appeal against conviction on count two fails.

Mr *de Bourbon*, while not abandoning the appeal against sentence on count two, did not address any argument to us on the subject. I see no basis for interference. As far as count one is concerned, the submission was that the sentence was manifestly excessive No specific misdirection on the part of the magistrate was alleged. It was accepted that a prison sentence was appropriate. It was merely the length of that sentence that was questioned. It was pointed out that the maximum sentence was one of five years' imprisonment with labour.

It is trite law that this Court will not normally interfere with he discretionary exercise of the power of punishment by a lower court if the penalty imposed is within the bounds prescribed by the statute and the jurisdiction of the

sentencing officer, and that officer has not materially misdirected himself. In such cases we can intervene only if the sentence is manifestly excessive or, as it is often put, if the sentence is so severe as to induce a sense of shock.

In this case a very senior official of a statutory body abused his power and authority in a very high handed way and for a very corrupt purpose. It is clear, applying the presumptions in the Act, that he was proposing to cheat the Railways, and thus the public, by selling off valuable Railway property at low prices, in order to benefit himself (and no doubt others) financially. We can only guess at the extent of that benefit, and the share of it that was to be his. The valuation suggests that someone, or some group of persons, undoubtedly including the appellant, stood

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to gain something in the region of 265 000 Botswana Pula. The facts in *S v Stephens* S-53-88 are simply not comparable.

In those circumstances I do not consider that I can say that the sentence is manifestly excessive.

I would therefore dismiss the appeal in its entirety.

Dumbutshena CJ: I agree

Korsah JA: I agree.

Ben Baron & Partners, appellant's legal representatives

GROBLER v BOSHOFF 1988 (2) ZLR 447 (HC)

Court **High Court, Bulawayo**

Muchechetere J

Opposed application

23 September & 16 December 1988

Flynote

Practice and procedure - attachment to found jurisdiction - purpose of - peregrinus - who is - whether person who was an incola when action commenced but has since left the jurisdiction is a peregrinus.

Headnote

Founding and confirming jurisdiction is not the only purpose of attachment; a further object is to furnish an asset on which execution may be levied to satisfy the judgment which may be given in favour of the person seeking attachment, so that the court's judgment will not be rendered nugatory.

Where the respondent was a resident of Zimbabwe before the action commenced but left permanently after the service of the summons, she could not for practical purposes be regarded as an *incola* and attachment of her property (or the deposit with her legal practitioners of a sum of money equal to the value of the property) was necessary to confirm jurisdiction and to provided security for the judgment which might be given against her.

Cases cited:

Ex p *Mor-Tal Construction Co (Pvt) Ltd* 1962 R 7 N 248; 1962 (2) SA 664 (SR)

M P Mahlangu for the petitioner

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E S Wolhuter for the respondent

Judgment

Muchechetere J: The petitioner seeks confirmation of the rule *nisi* issued by this Honourable court on 15 February 1988. Of the original rule

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nisi it only remains to adjudicate on whether the respondent has shown cause why:

> "(c) the Deputy Sheriff should not be ordered and authorised to attach and retain in his possession the Respondent's household furniture and goods presently kept at Trek Express Services (Pvt) Ltd, Mafeking Road Light Industrial Sites Bulawayo *ad confirmandam jurisdictionem;*
>
> (d) she should not be ordered to pay costs of these proceedings."

The other two matters in the rule *nisi*, that is, the attachment and retention of a Datsun Pulsar Sedan motor vehicle registration number 353-950C (hereinafter referred to as "the motor vehicle") and of the proceeds of the sale of stand 8894 Bulawayo Township of Bulawayo Township Lands in the district of Bulawayo (hereinafter referred to as "the immovable property"), pending the determination of the petitioner's claim fell through because before the rule *nisi* was served the vehicle had already been removed from the jurisdiction and the proceeds of the sale had already been distributed.

The facts in the matter are that sometime between 1977 and 1981 the parties met and fell in love with each other and that an intimate relationship developed between them resulting in an understanding that they would get married. The petitioner was at the time married but contemplating divorce whilst the respondent had already been divorced from her husband. In 1985 the petitioner's marriage was dissolved and he left his matrimonial home and all its contents and went to live with the respondent at the immovable property. However, just before or after the dissolution of the petitioner's marriage, the relationship between him and the respondent began to sour for a number of reasons. This resulted in it breaking up in September 1987 and the petitioner was constrained to leave the immovable property.

On 7 October 1987 the petitioner, through his legal practitioner, demanded that the respondent vacate the immovable property and surrender the motor vehicle to him within that month and stated that, although the two properties were registered in the respondent's name, they however belonged to him. The respondent replied (also through her legal practitioner) on 19 October 1987, refusing to vacate the immovable property and also refusing to hand over the motor vehicle and refuting the allegation that the two properties belonged to the petitioner. By letter dated 26 November 1987 the petitioner's legal practitioners advised those of the respondent that he did not accept the allegations in their letter of 19 October 1987 and that legal action would be

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taken thereupon. On 23 December 1987 the petitioner caused summons against the respondent to be issued. This was served on the respondent on the same day. The respondent entered an appearance to defend the summons on 24 December 1987.

On 5 January 1988, out of concern for the manner in which the motor vehicle was being used and for the immovable property, the petitioner's legal practitioners wrote to the respondent warning against the disposal or sale of either. A reply to the letter was received on 13 January 1988 and on that day the petitioner somehow learnt of the sale of the immovable property.

A search in the Deeds Registry in Bulawayo confirmed that the respondent had sold the immovable property to G and S Mining (Pvt) Ltd for $12 000,00 on 8 January 1988. Suspecting that the respondent was about to leave Zimbabwe with the motor vehicle, the petitioner commenced these proceedings and obtained the said rule *nisi*. The respondent left Zimbabwe with the motor vehicle before the rule *nisi* was served on her and is now living in South Africa. Her only remaining possessions in the country appear to be the household furniture and goods kept at Trek Express Services (Pvt) Ltd.

[The learned Judge considered the evidence and continued:]

In connection with the rule *nisi* the respondent states that as matters stand at present storage charges are being incurred at the rate of $93-60 per month while at the same time the goods will deteriorate if they remain in storage. She considers that the goods and furniture are not worth much more than $5 000,00 but would, for the sake of having the goods released and delivered to her, thereby avoiding the storage and the deterioration, accept the valuation of $10 000,00 initially placed on them by the petitioner. In the answering affidavit he now values them at approximately $16 000,00. In the circumstances, whilst, in the main, the respondent prays for the rule *nisi* to be discharged, alternatively she prays for an order that the household furniture and goods be released so that they can be delivered to her in South Africa and she in turn will deposit an amount of $10 000,00 with her legal practitioners to be held in a trust savings account pending the outcome of the action.

Mr *Mahlangu*, for the petitioner, submitted that the rule *nisi* should be confirmed. In his view the respondent is now a *peregrinus* because she has now permanently left Zimbabwe. He also stated that from the papers before the court it was clear that the petitioner has established a *prima facie* case in the main case.

1988 (2) ZLR p450

In reply to Mr *Wolhuter*'s submission that, for the purposes of the main case, the respondent was an *incola* because those proceedings were commenced and service effected when the respondent was still a resident of Zimbabwe. Mr *Mahlangu* submitted that the summons in the main case was issued when the respondent had made up her mind and was making preparations to leave Zimbabwe permanently. Indeed, she left soon after it was served and the proceedings in this matter could not be served on her because she had already left Zimbabwe. In the circumstances, the respondent could not be regarded as an *incola* in the practical sense.

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An attachment is therefore necessary to confirm, if not to found, jurisdiction. He added that, although the main object of attachment is to found or confirm jurisdiction, a further object is to furnish as asset on which execution can be levied to satisfy judgment which may be given by the court in favour of the petitioner. In this connection he pointed out that, so far as the petitioner was aware, the furniture and goods presently in the custody of Trek Services (Pvt) Ltd were the only alleged property of the respondent remaining in Zimbabwe and therefore the only asset on which execution can be levied to satisfy any judgment which may be given.

He further submitted that, if the property was released from attachment, it would be shipped to South Africa and out of this court's jurisdiction. The reason why the property is presently at Trek Services (Pvt) Ltd's premises is because the respondent had instructed Trek to ship it to South Africa. I agree with Mr *Mahlangu* that in the circumstances the attachment is necessary to confirm jurisdiction. I also agree that founding and confirming jurisdiction is not the only purpose of an attachment. See Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed p 782 to 783, where the learned authors state as follows:

> "The fact should not be lost sight of that although possibly the main object of attachment is to found (or confirm) jurisdiction, a further object of attachment is to furnish an asset on which execution can be levied to satisfy the judgment which may be given so that the court's sentence will not be rendered nugatory or, as it has been called, a *brutum fulmen*."

See also ex p *Mor-Tal Construction Co (Pvt) Ltd* 1962 R & N 248 1962 (2) SA 664 where BEADLE CJ said at p 65 D-E:

> "But the courts have been careful not to detail all the circumstances in which an order for an attachment would be made. Examples of the type of cases in which orders of attachment have been made are cases where property which is sought to be attached is property which is the subject

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> of the very dispute in question, or cases where it is quite clear that the only property which the respondent has within the jurisdiction is the **property which is sought to be attached and there is danger that, if it is not attached, he will make away with the property and then the court's judgment would possibly be a brutum fulmen**"

(the emphasis is mine).

I am also satisfied that the petitioner has established a *prima facie* case in the main case. Although the respondent disputes that the petitioner provided all the monies for the purchase of the properties he claims in the main case, she nevertheless admits that he provided substantial amounts towards their purchases. Her allegations that the petitioner can only have a claim for the monies he allegedly advanced on her behalf, that the monies were given to her as a present and that in any event his claim to those monies as now prescribed are seriously challenged given the unclear nature of the relationship between them and the contents of Annexure 2A. There are therefore serious issues to be decided in the main case.

In conclusion I am satisfied that real hardships might result if the rule *nisi* is not confirmed, in as much as the property may be immediately removed from the jurisdiction and, if removed, the petitioner would be deprived of any property on which to levy execution. I however consider that

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it is, for the reasons advanced by the respondent, more appropriate for an order in the form suggested by the respondent to be issued instead of the present attachment. In that connection I will accept the estimate value of the household furniture and goods to be $10 000,00. Although the petitioner now values them substantially higher, she was the person who initially estimated their value and his revised valuation is not supported by any analytical re-assessment of the property in question.

On costs I see no reason why I should depart from the usual practice of reserving them for the main case. There is, in my view, nothing which distinguishes this case from other similar cases and therefore warranting an award of costs to either party at this stage.

In the circumstances the rule *nisi* is confirmed but the order is amended by the deletion of the whole of it and substituting it with the following:

"(a) that the respondent deposits an amount of $10 000,00 with Messrs Joel Pincus, Konson & Wolhuter to be held by them in a Trust

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Savings Account pending the outcome of Case No. HC 1153/87.

(b) that Messrs Joel Pincus, Konson & Wolhuter furnish the Petitioner's legal practitioner with a guarantee that they will retain such sum, together with accumulating interest, in Trust until such time as the case has been resolved or until judgment has been granted, and in the event that judgment is granted in favour of the petitioner, that they will pay the petitioner's legal practitioners such amount together with the accrued interest less storage charges, or the amount for which judgment has been granted, together with any cost awarded less storage charges, whichever shall be the lesser.

(c) that the attachment of the household furniture and goods be an is hereby removed so that they be delivered to the respondent.

(d) that the question of costs be reserved for the main case."

Lazarus and Sarif, petitioner's legal practitioners

Joel Pincus, Konson & Wolhuter, respondent's legal practitioner

TA HOLDINGS LTD v MACEYS CONSOLIDATED (PVT) LTD & ANOR 1988 (2) ZLR 453 (SC)

Court **Supreme Court, Harare**

Manyarara JA

Review of taxation

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30 November & 29 December 1988

Flynote

Costs - taxation of - employment of two counsel - whether allowable - reasonable fees - determination of.

Headnote

In terms of Rule 58 of the Rules of the Supreme Court, as read with Order 38 Rule 311 of the Rules of the High Court, the reasonable fee consequent upon the employment of two counsel (in addition to the instructing legal practitioner) is allowable, unless a special order to the contrary is made by the Court. In this context, the fee to be considered is the composite fee for both counsel. In making his ruling as to what fee is reasonable, the Taxing Master must take into account the factors set out in proviso (b) to Rule 311(a). Where senior counsel leads a junior, the junior's fee cannot be ascertained until that of his senior has been fixed.

Cases cited:

Williams v The Taxing Master 1982 (2) ZLR 122 (HC)

May & Ors v Reserve Bank of Zimbabwe 1986 (3) SA 107 (ZS)

Doyle v Salgo 1958 R&N 218 (FSC)

Gundelfinger v Norwich Union Fire Insurance Society Ltd 1916 TPD 341

Maceys Consolidated (Pvt) Ltd & Anor v TA Holdings Ltd 1987 (1) SA 173 (ZS)

Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor 1984 (1) ZLR 274 (SC)

Koekemoer v Parity Insurance Co Ltd & Anor 1964 (4) SA 138 (T)

MANYARARA JA

Horseshoe Caterers (Green Point) (Pty) Ltd v Burnkloof Caterers (Pty) Ltd 1977 (3) SA 383 (C)

Wellworths Bazaars Ltd v Chandlers Ltd & Ors 1947 (4) SA 453 (T)

Shott & Anor v Poupard & Anor 1972 (1) SA 686 (A)

Legal and General Assurance Society Ltd v Lieberum NO & Anor 1968 (1) SA 473 (A)

D P Carter for the applicant

M J Gillespie for the respondents

Judgment

Manyarara JA: In this matter the respondents (which I shall call "Maceys") instituted notice of motion proceedings in the High Court against the applicant (which I shall call "TA Holdings") and lost. An appeal to this Court was noted and Maceys instructed Mr Slomowitz of the

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Johannesburg Bar as senior counsel to Mr Donovan of the Harare Bar. The latter had represented Maceys in the High Court proceedings. The appeal succeeded to the extent I shall mention in due course. The order of costs which was made by the Court was that TA Holdings should pay one half of Maceys' costs on appeal.

The bill of costs presented to the Registrar of this Court for taxation by the legal practitioners acting for Maceys claimed a fee of $12 615,30 for Mr Slomowitz and $4 000 for Mr Donovan. At the taxation, which was contested, the Registrar, as Taxing Master, taxed off $4 615,30 from Mr Slomowitz's fee and allowed Mr Donovan $4 000, being one half of the $8 000 allowed to Mr Slomowitz.

A notice of review of the taxation was duly filed by the legal practitioners acting for TA Holdings and Mr *Carter* was instructed to argue the review.

Mr *Carter's* first ground of objection to the taxation is that in terms of Rule 311(a) of the High Court Rules, as read with Rule 58 of the Supreme Court Rules, the Taxing Master was only entitled to allow the fee of one "Advocate" and not two as he did. He argues in the second place that in any event the Taxing Master erred in allowing the fees of both advocates, because their employment in this case was luxurious. The third limb of Mr *Carter's* argument is that the fees allowed to Mr Slow-motion and Mr Donovan are excessive and against the principles of taxation on a party and party basis, because they exceed by $6 000 and $2 000 respectively the fee paid to Mr *de Bourbon*, who represented the other side.

MANYARARA JA

Both Mr *Carter* and Mr *Gillespie*, who appears for Maceys, are agreed that the starting point is to look at the Rule as originally published in RGN 1047/71. It read:

> "311. The taxing officer shall, unless the court when awarding costs orders otherwise, allow as party and party costs -
>
> (a) in any matter where two counsel are employed, the reasonable fee consequent upon such employment:
>
> Provided that he may disallow the fee of more than one counsel in unopposed matters and in matters in which counsel has not appeared on the other side, and in matters in which no award of costs has been made by the court; ..."

There can be no doubt that at the time the Taxing Master's power to allow the fee of two counsel employed by the instructing attorney was indisputable.

Consequent upon the enactment of the Legal Practitioners Act, 1981 the terms "advocate" and "counsel" and "attorney" were repealed and the single definition "a legal practitioner" was substituted. Of relevance to the present case was the new definition provision introduced by Statutory Instrument 277/81, which says:

> "'another legal practitioner' means a legal practitioner who is instructed by a legal practitioner not of the same association or firm of legal practitioners;"

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And the insertion of a new Rule 4B, which states that any references to the repealed definitions shall be read and construed as references to "a legal practitioner". Similar provisions were inserted in the Supreme Court Rules by Statutory Instrument 278/81.

Mr *Carter* has argued that the effect of these amendments is to preclude the Taxing Master from allowing the fee of "two counsel" in addition to that of the legal practitioner instructing them. He has also submitted that *Williams v The Taxing Master*, 1982 (2) ZLR 122 (HC) is no longer good law as it was heard before the further amendments made to Rule 311(a) by SI 278/83 and SI 356/84 which had "radically altered" the basis upon which that case was decided.

MANYARARA JA

I cannot agree with Mr *Carter.* The phrase "another legal practitioner" existed in the Rule when *Williams* case *supra* was heard on 25 August 1982. The judgment was handed down on 8 September 1982. The phrase had been introduced into the Rule by SI 277/81 on 5 June 1981. All that SI 278/83, relied upon by Mr *Carter*, did was to correct what appears to have been an oversight on the part of the draftsman, that where the term "counsel" previously appeared for the first time in Rule 311(a) it was preceded by the numeral "two". The republication of the Rule in the form set out in SI 278/83 corrected this mistake.

Statutory Instrument 356/84 only split the proviso as amended into two paragraphs which it numbered, rather confusingly, as (a) and (b). The Rule itself has similarly numbered paragraphs, 311(a) and 311(b). The apparent reason for the numbering was to enable the draftsman to give the new subparagraphs of proviso (b) the numbers (i) to (v). These subparagraphs, which I set out in full later, state some of the factors which the Taxing Master shall take into account in allowing the fee of "another legal practitioner" in (1) unopposed matters, (2) matters in which another legal practitioner has not appeared on the other side, and (3) matters in which no award has been made by the court. None of these considerations arise in the instant case.

The form of the Rule as dealt with in *Williams* case *supra* therefore read as follows:

> "311 (a) The taxing officer shall, unless the court when awarding costs orders otherwise, allow as party and party costs
>
> (a) in any matter where another legal practitioner is employed, the reasonable fee consequent upon such employment:
>
> ..."

There is no reason to suggest that the meaning of the Rule has been changed. See the judgment in *May & Ors v Reserve Bank of Zimbabwe* 1986 (3) SA 107 (ZS), in which the learned CHIEF JUSTICE and the other members of the Court took for granted the correctness of McNALLY JA's exposition of the law at 130 D-F as follows:

> "In the premises it remains only to say that in my view the appeals should be dismissed with costs. In terms of the provisions of Rule 58 of the Rules of this Court, as read with the provisions of Rule 311 of the Rules of the High Court, it is not necessary to make an order as to the fees of two counsel. The reasonable fee consequent upon

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the employment of

MANYARARA JA

two counsel is allowable unless a special order to the contrary is made. 'Counsel', as Squires J pointed out in *Williams v The Taxing Master* 1982 (2) ZLR 122 (HC) at 126C means, in the context of Rule 311 (a), a practitioner instructed by another practitioner for the case. Thus, as he said earlier at 126A: 'The Rule still only applies to the use of two legal practitioners in addition to the instructing legal practitioner'. This is a case where clearly the use of three legal practitioners was justified."

I have never heard it doubted that the above statement correctly sets out the established practice in our courts as, unlike South Africa, we do not have a provision for a "special order" in favour of the fees of more than one counsel. See Rule 69 of the South African Uniform Rules of Court.

In essence, the Practice Note issued in *Doyle v Salgo* 1958 R&N 218, on the then Federal Supreme Court Rules (since repealed) still holds good. It says:

"TREDGOLD CJ (in Chambers): I consider that the Registrar was right in both rulings in this taxation and

(a) that under section I of Appendix D the Taxing Master has no discretion, but must allow the fees of two counsel - where two have been employed - except where there is a direction of the Court to the contrary;

(b) that he has a discretion as to the amount of the fees and may disallow any portion of such fees which he considers to be unreasonable."

The weight of authority is clearly against Mr *Carter* and the first of his submissions must fail.

I proceed to consider his next submission, that even if the Taxing Master were empowered to allow the fees of two counsel he nonetheless erred because their employment in this case was luxurious.

Mr *Carter*'s submission is inseparable from the rest of his argument, that the fees allowed by the Taxing Master in this case are excessive as between party and party. All these issues must be considered together.

Mr *Carter* relies on the statement which appears in *Gundelfinger v Norwich Union Fire Insurance Society Ltd* 1916 TPD 341 at 348, which reads:

MANYARARA JA

"Of course, if a litigant wishes to employ eminent counsel who requires a very large fee before he comes into Court, he is entitled to do so, but the Court should not allow him to saddle the losing side with the cost of a specially large fee, which he has thought fit to allow his counsel."

The facts of the instant case emerge clearly from DUMBUTSHENA CJ's summary in his separate judgment on the costs of the appeal, S-166-86 (not yet reported)*(21). The learned CHIEF JUSTICE says:

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"The appeal in this matter arose from a dispute between the parties who had entered into an agreement of sale of the businesses and properties belonging to the appellants (Maceys). Because of that dispute the appellants applied to the High Court claiming from the respondent (TA Holdings) a total of $1 410 272. That amount was made up as follows:

> $100 000 was the balance on the purchase price of the Hypermarket plus mora interest at the rate of 13 per cent per annum; $610099 was the amount outstanding on the price of the stock-in-trade plus mora interest at the rate of 13 per cent per annum with effect from 15 December 1984; and
>
> $700 173 was the price of fixtures, fittings and motor vehicles plus mora interest at 13 per cent per annum with effect from 15 December 1984.

In addition the appellants claimed compound interest or capitalised interest from the date each of the above amounts became due."

The summary continues in the following manner:

"When the respondent filed its replying affidavit it paid $100 000 for the purchase of the Hypermarket plus interest. The total amount paid was $165109,93. That claim fell away before the application in the High Court was heard.

The remaining claims of $610 099 the balance for the purchase of stock-in-trade plus interest, $700 173 for the price of fixtures, fittings and motor vehicles plus interest and the claim for compound or capitalised interest were dismissed by the High Court.

MANYARARA JA

On appeal to this Court we allowed the claim in the sum of $700173 with interest at the rate of 13 per cent per annum from 15 December 1984. We upheld the decision of the court below in regard to the rest of the claims."

Referring to the merits of the appeal, the learned CHIEF JUSTICE says:

"There were two issues of substance on appeal. The first was the dispute over the obsolescence allowance. As can be seen from the heads of argument much time was devoted to that issue. In this regard the respondent remains entitled to deduct from the claim in respect of the stock-in-trade the sum of $610 099 for obsolescence allowance in respect of slow-moving stock.

However, we said in our judgment in 'determining the price of slow-moving goods and the obsolescence allowance to be deducted therefrom regard must be had to the year the goods were bought by the appellants'. That brings into the determination of the purchase price of slow-moving goods an element which was not considered in the court below. The extent of the deduction is still to be determined by arbitration, but, as pointed out by Mr *Donovan* in his written submission, it cannot exceed the amount of $147 324 which the respondent claims, and the appellants will recover not less than $462 775 in respect of the price of the stock-in-trade."

The unanimous view of the Court was that Maceys had achieved substantial success on appeal in respect of its claim for $700173 plus interest, and judgment in that amount was granted.

The Court arrived at the order that TA Holdings should pay one half of Maceys' costs in the following manner:

"We appreciate Mr *de Bourbon*'s submission that it would be unsafe to try and evaluate success in this matter based solely on the figures in monetary terms. We have applied our minds to that problem but we cannot shut our eyes to the fact that the appellants initially claimed $1 410 272 and that that amount by their success in this appeal has been reduced, as rightly pointed out by Mr *Donovan*, by a deduction of an amount not exceeding $147 324 for obsolescence allowance. And although the appellants lost the appeal on their claim for compound or

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capitalised interest they are still entitled to mora interest at 13 per cent per annum. Besides, it was necessary for the appellants to come to Court to achieve their success on their claim for $700 173 plus interest."

MANYARARA JA

Mr *Gillespie* is correct in his submissions that, whilst the record of the proceedings (115 pages) is not voluminous, neither is it scanty; that it had been necessary for the Court to deal with the question of the valuation of stock made by the valuer; that the facts had not been of a simple order; that the law involved questions of the interpretation of a somewhat complex contract; and whether or how the courts could intervene in the disputed obsolescence allowance clause. I agree that, generally speaking, all these matters are away from the normal run of legal problems brought before our courts.

Mr *Gillespie* also says that the large amount of money involved clearly demonstrates the importance of the case and that the prosecution of the appeal required considerable learning, resulting in a judgment reported in the South African Law Reports (1987 (1) SA 173).

I am with Mr *Gillespie* in all those submissions and in his earlier submission that the outcome of the case demonstrates that "two heads were undoubtedly better than one" for the reasons eloquently set out by SQUIRES J with characteristic clarity in *Williams* case *supra*.

I agree that the Taxing Master's ruling can only be interfered with on the grounds set out in *Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor* 1984 (1) ZLR 274 (SC) and that Mr Donovan's fee should not be compared with that of Mr *de Bourbon*, who appeared for TA Holdings in the appeal, because his fee was a matter between himself and his own clients. I also accept it as settled that Mr Donovan's fee should be fixed at one half of Mr Slomowitz's fee (*ibidem*).

However, I am not persuaded to the view that the Taxing Master has taken into account the factors set out in SI 356/84 in his ruling.

As Mr *Gillespie* has pointed out, these factors were lifted verbatim from *Koekemoer v Parity Insurance Co Ltd & Anor* 1964 (4) SA 138 (T) at 144H to 145 (top). They are set out in proviso (b) to Rule 311(a) as follows:

"Provided that he (the Taxing Master) -

(a) ...

(b) shall give due consideration to -

(i) the volume of evidence (oral or written) dealt with by another legal practitioner or which he could reasonably have expected to be called upon to deal with;

(ii) the complexity of the facts or the law relevant to the case;

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(iii) the presence or absence of scientific or technical problems, and their difficulty if they were present;

(iv) any difficulties or obscurities in the relevant legal principles or in their application to the facts of the case;

(v) the importance of the matter in issue, in so far as that importance may have added to the burden or responsibility undertaken by that legal practitioner."

The Taxing Master's terse report does not show that he has considered any of the above factors. There is even a note of desperation in his frank admission that he has "often found it difficult" to understand how counsel arrive at a fee which is not itemised or broken down in any manner. The Bar Rules only lay down a minimum fee of $150 and the Taxing Master is correct in his statement that it is not the usual practice to explore the *quantum* as it is generally accepted that the fee claimed is reasonable. It is axiomatic that Counsel usually marks his fee honestly: *Horseshoe Caterers (Green Point) (Pty) Ltd v Burnkloof Caterers (Pty) Ltd* 1977 (3) SA 383 (C) at 387E.

The Taxing Master refused to comment on Mr de Bourbon's fee, and quite correctly so, I may add. It should perhaps be stated that Mr de Bourbon's ultimate fee was not $2 000 as suggested by Mr *Carter*, but $3 000 as pointed out by Mr *Gillespie.* It is fair to deduce from the additional amount he was ultimately paid that he and his clients felt that he had charged considerably less than the case merited. However, as I have said, this is extraneous to the determination of the fee to be allowed to his opponents, Mr Slomowitz and Mr Donovan.

The Taxing Master suggests that he first accepted Mr Donovan's fee as "a fair fee due to local Junior counsel (and) foreign counsel's (Mr Slomowitz's) fee was thus adjusted accordingly". He was wrong. It is trite that he has put the cart before the horse, as a junior's fee cannot be ascertained until that of his senior has been fixed: *Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd supra* at p 275.

Therefore, I am at large to substitute my opinion for that of the Taxing Master because he has misdirected himself: *Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd supra* at p 279.

In *Gundelfinger v Norwich Union Fire Insurence Society Ltd supra* CURLEWIS J, after stating that it is an unpleasant task for a judge to interfere with counsel's fees, proceeded at 347 to 348 as follows:

MANYARARA JA

> "I realise, as laid down in more than one case, how desirable and necessary it is for the Court not to do anything to discourage men of talent, brain and ability, from adopting the profession of the law. Personally I have felt much indebted to the assistance of counsel, in deciding difficult points of law, or in coming to a conclusion on facts, in connection with most cases that have come before me. And, realising how valuable the assistance of counsel maybe in the administration of justice, I personally would like to see counsel liberally remunerated, ..."

There follows the passage on which Mr *Carter* relied, theta client is perfectly entitled to pay his counsel "a specially large fee" at the risk of having the amount drastically reduced on taxation

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as between party and party.

My reading of CURLEWIS J's judgment is that there is as much emphasis to be placed on his reason for reducing senior counsel' fees in that case, which reads as follows:

> "I have come to the conclusion that if the senior counsel in this case had been allowed a fee of sixty guineas it would have been ample remuneration for the work entailed in the trial. It was suggested that, as the case did not come into Court, that was a matter for the Court to take into consideration. As at present advised I do not think that is a matter that I should take into consideration because the practice in this country, and in the whole of South Africa, where the profession of advocate is distinct from that of attorney, has been to look upon counsel's fees as due at the handing over of the brief to him, and the fact that the parties choose to settle the case before the day of trial does not in my opinion affect the question whether the fee marked 'brief on trial' is reasonable or not. I think the amount allowed to senior counsel should be reduced from one hundred to sixty guineas and that the amount allowed to the junior counsel should be two-thirds, viz forty guineas."

See also *Wellworths Bazaars Ltd v Chandlers Ltd & Ors* 1947 (4) SA 453 (T) at 459 to 460.

In order to determine a reasonable *quantum* of the fees due to counsel in this case, I have examined all the documents filed of record in the appeal. The record leads me to the conclusion that, although this was not an ordinary or uncomplicated appeal and the merits involved some matters of not inconsiderable complexity, a composite fee of $12 000 for both Mr Slomowitz and Mr Donovan is excessive as between party and party.

MANYARARA JA

As the learned CHIEF JUSTICE observed, there were only two issues of substance on appeal. The first was a dispute over the obsolescence allowance which took up much of the Court's time, as reflected by the Heads of Argument. The second was the element this dispute brought into the determination of the price of the slow-moving goods which had not been considered in the High Court. The record itself comprised 115 pages and Mr Slomowitz's Heads of Argument eighteen pages. The hearing was completed within a day.

A perusal of the cases satisfies me that it is only in cases of an *exceedingly complicated nature* either as to the facts or involving very difficult and novel points of law that a composite fee approximating to the fee now under consideration will be allowed. Reference to the record and the Heads of Argument will assist in estimating the time reasonably required to prepare for the appeal. The fact that counsel had appeared in the court appealed from, for which due allowance should be made, should also be considered as, if counsel did so appear, he will be already acquainted with the facts and the law when briefed on appeal. See *Shott & Anor v Poupard & Anor* 1972 (1) SA 686 (A) and the cases referred to therein.

Against the fact that Mr Slomowitz did not appear in the court appealed from in this case, one must balance DUMBUTSHENA CJ's assessment of the appeal as not being one which may properly be described as of extreme complexity or great bulk.

I have borne in mind that, inasmuch as much depends on the particular facts of the case, it is impossible in the field of the discretionary aspects of taxation to define precise boundaries:

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Shott's case *supra* at 692H.

At the end of the day, I am satisfied in my own mind that the fees at which I have arrived in this case may perhaps amount to a liberal remuneration to counsel, but I have no doubt that the remuneration cannot be said to be niggardly by any standards for the work done. See *Legal and General Assurance Society Ltd v Lieberum NO & Anor* 1968 (1) SA 473; Cillier's *Law of Costs,* 2 ed para 13.19; and Jacobs end Ehlers on the *Law of Attorney's Costs and Taxation* (1979 ed) Chapter 15.

Mr *Gillespie's* criticism of TA Holdings for not seeking a restriction of the order as to costs in the written argument drawn on behalf of TA Holdings is not borne out by the facts because the argument referred to says otherwise. It prayed for each side to be ordered to bear its own costs or, at worst for TA

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Holdings, that Maceys should be granted "a small portion of their costs on appall".

It is clear that Maceys gained as much on appeal as they had lost below. It would be clearly unjust to appear to be penalising them for instructing Mr Slomowitz on appeal to lead Mr Donovan who was familiar with the facts as he had appeared in the court below. If the fee agreed with senior counsel struck the Taxing Master as reasonable, he was not entitled to tax it off as a matter of course, because the effect would be to deny Maceys the advantage of a full indemnity for costs: *Horseshoe Caterers supra* at 387D. The fact that the counsel who is instructed is in silk is irrelevant *(Wellworths'* case, *supra,* at 461), but allowance for the rate of inflation should always be made.

In my judgment I have endeavoured to show that in this case the Taxing Master's ruling must be set aside because he failed to exercise his discretion at all in the matter. I also believe that my interference amounts to more than just a question of degree.

It is with all these considerations in mind that I have come to the conclusion that a proper composite fee for both counsel representing Maceys on appeal is the sum of $9 000. This means that Mr Slomowitz shall be allowed $6 000 and Mr Donovan $3 000.

To that extent, the application is allowed with costs.

Scanlen & Holderness, appellant's legal practitioners.

Winterton, Holmes & Hill, respondents' legal representatives

S v NDLOVU 1988 (2) ZLR 465 (SC)

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Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Korsah JA

Criminal appeal

5 & 29 December 1988

Flynote

Evidence - statements or remarks made by accused while pointing out - admissibility of - Criminal Procedure and Evidence Act [Chapter 59] - s 243(2).

Headnote

Section 243(2) of the Criminal Procedure and Evidence Act [*Chapter 59*] renders admissible anything that was pointed out by the accused or any fact discovered in consequence of information given by the accused, even if the pointing out or information forms part of a confession or statement that is not admissible. The section does not, however, render admissible the statements or remarks made by the accused while he is pointing out the object or scene in question, nor does it cover statements he may make on the way to the scene. If the police wish to give evidence about what the accused said in these circumstances, he must be given the usual opportunity to say whether or not he made the statements freely and voluntarily and without undue influence. If he puts the matter in issue, and if the statements have not been confirmed, there must be a "trial within a trial".

Cases cited:

S v Nduze S-178-88 (unreported)

S v Tuge 1966 (4) SA 565 (A)

R v Moyo 1967 RLR 317 (GD); 1967 (4) SA 613 (R)

S v Bvuure (1) 1973 (2) RLR 171 (GD); 1974 (1) SA 206 (R)

S v Shabalala 1986 (4) SA 734 (A)

McNALLY JA

D P Carter for the appellant

B Mtetwa for the respondent

Judgment

McNally JA: The appellant was convicted in the High Court, Bulawayo, of two counts of murder and sentenced to death on 17 March 1986. The offences were allegedly committed in September and November 1983. The State case is that the appellant was a dissident operating in the Kezi area. The first offence arises out of a "contact" between a platoon of soldiers and a

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group of dissidents on 8 September 1983. In the ensuing firefight a soldier was shot dead. In the second offence a villager was accused of being a sell-out and was dragged from his house to a place in the bush nearby where he was bayoneted to death in November 1983, and his body put in an antbear hole.

In each case it was alleged that the appellant was a member of the group of dissidents concerned.

Evidence was led which clearly established the commission of the offence in each case. But there was no identification of any of the dissidents and therefore no eye-witness evidence as to the presence of the appellant in either group, nor of the role that he played.

The evidence of the appellant's involvement comes solely from the warned and cautioned statements which he made, and which were confirmed, and from his subsequent indications. The confirmed warned and cautioned statement in relation to the second count is quite clear. He said the following:

> "I admit to the charge, that myself and Kitshini, Reuben, Dought, Silwani, Roy, Robbie and Joe we killed Themba Bhule Moyo. Kitshini and Silwani are the ones who took this person from the village. Myself and others were in the bush. They came with him in the bush and we killed him. We bayoneted him, and threw him in an antbear hole. All of us were armed and I was armed with an AK rifle."

On the first count the evidence is far less clear.

[The learned Judge of Appeal reviewed the evidence relating to Count 1 and continued:]

In my view the appellant should have been found not guilty and discharged on the first count.

McNALLY JA

The second count involves us in considerations of a different nature. To start with, the appellant applied on notice of motion to adduce further evidence on appeal. He sought to lead evidence on two matters:

1. His mental state; and

2. Assaults on him by members of the Central Intelligence Organisation (the "CIO").

The State opposed the re-opening of the trial. We decided to hear argument both on the application and on the merits of the appeal at the same time.

[His Lordship dealt with the application to lead further evidence, and continued:]

I turn then to the last aspect of the appeal, which concerns the admissibility/weight of the various statements and indications.

It is necessary at the outset to draw attention to an irregularity which has tended on occasion to creep into proceedings in the High Court in relation to statements by accused persons (compare

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S v Nduze S-178-88). The irregularity relates to a failure to deal properly with statements which accompany indications.

The provisions of s 243 of the Criminal Procedure and Evidence Act govern the situation in relation to the admissibility of facts discovered by means of an inadmissible confession. That section, however, does not render admissible the statements or remarks made by the accused person while he is pointing out the object or the scene or the sites. Nor does it cover statements he may make on the way to the scene. If the police wish to give evidence about what an accused person said in such circumstances he must be given the usual opportunity to say whether or not he made the statements freely and voluntarily and without influence. If he puts the matter in issue, and if the statements have not been confirmed, there must be a trial within a trial.

I am speaking here, of course, of a situation in which the State wants to lead evidence of the actual words of the accused person. What s 243 (2) does permit is that a policeman may say, for example:

> "In consequence of information given by the accused we reached a certain place near the village where the accused pointed to an antbear hole."

McNALLY JA

What the policeman may **not** say, unless the proper procedures have been followed, is:

> "... and he told us this was where they buried the deceased after bayoneting him to death."

Nor may he say, again unless the proper procedures have been followed:

> "... and on the way there he was chatting to us about why he joined the dissidents and why it was necessary to kill sell-outs."

This is all trite procedural law. See *S v Tuge* 1966 (4) SA 565 (A) at 574D et seq; *R v Moyo* 1967 RLR 317; *S v Bvuure* (1) 1973 (2) RLR 171; and *S v Shabalala* 1986 (4) SA 734 at 748H *et seq*. But it was not followed in *Nduze's* case *supra,* nor in this case.

Thus it was that the police witness gave evidence about the whole of the conversation they had with the appellant before and during the indications, without the appellant being given the opportunity to object. His counsel (not Mr Carter) should, of course, have objected, but, being inexperienced, did not do so. That failure on his part does not, however, bind the appellant because it is clear from the defence outline that the freedom and voluntariness of the statements was in issue.

In view of the failure to establish the requirements of admissibility laid down in s 242 (1) of the Criminal Procedure and Evidence Act, this Court must ignore all the evidence given by various policemen as to what the appellant said, apart from what is in his confirmed statements.

The confirmed statements stand clearly on a different footing, by virtue of the provisions of s 242 (1a) of the Criminal Procedure and Evidence Act. They are admissible upon mere production. The *onus* was on the appellant to prove, on a balance of probabilities, that the

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statements were either not made by him or not made freely and voluntarily. I am quite satisfied that the appellant failed completely to discharge this *onus.*

It is not necessary to go into a great deal of detail. The fact is that whatever may have occurred in Stops Camp when the appellant was in the hands of the CIO (and he alleges a relatively limited assault followed by a confession which was not recorded) he was not again questioned for some three weeks when the police took him over. The evidence of Detective Patrol Officer

McNALLY JA

Chidaura was particularly convincing when he said that when he took the appellant over he did not even know precisely what it was that the appellant was admitting. He only found out by asking the appellant. The CIO had only told him about one murder, and he did not know the names of the deceased.

The police witness said they did not assault the appellant and he concedes that. He says they threatened him by calling him a dissident, and in fear he confessed, or rather wrote statements and signed statements at their direction and dictation. He was disbelieved by the court. I see no basis for disagreeing with its assessment that his evidence was highly improbable and his demeanour most unsatisfactory, whereas the police version was clear and probable. The fact that he was able to lead the police to the antbear hole near the house of Themba Bhule Moyo is of significance even if one ignores what he said in the process of doing so. But even without that evidence the requirements of s 255B of the Criminal Procedure and Evidence Act are satisfied.

In the absence of extenuating circumstances there is no basis for interfering with the sentence imposed by the learned trial judge.

In the premises:

1. the defence application is refused;
2. the appeal on Count One is upheld and the conviction and the sentence are set aside; and
3. the appeal on Count Two is dismissed and the conviction and sentence of death are confirmed.

Gubbay JA: I agree.

Korsah JA: I agree.

Scanlen & Holderness, appellant's legal practitioners.

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S v JANYURE 1988 (2) ZLR 470 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

12 & 29 December 1988

Flynote

Criminal law - Sales Tax Act - Chapter 1841 - s 44- "without reasonable cause" - meaning.

Criminal procedure - charge - particulars in - failure to allege that act was done "without reasonable cause" - whether fatally defective.

Evidence - receipt of document - extent to which receipt may he inferred from fact that document was posted.

Headnote

The appellant, a trader, was convicted of several charges under the Sales Tax Act [*Chapter 184*], the charge alleging that he had failed, for twenty-seven months, to submit sales tax returns and that he had failed to pay the estimated assessments of tax for the same period. He had applied for a certificate of registration as a registered operator in respect of a new business. A certificate was issued and it appeared from the evidence that in the ordinary course he would have received it, but he denied having done so. Not having received the certificate, he said, he did not realise that he was a registered operator. Because of that and because the projected business did not materialise, he did not submit returns nor did he pay the tax assessed on his projected turnover.

The sections of the Act cresting the offences with which the appellant was charged used the phrase "without reasonable cause, the proof whereof shall be on him". However, the charges as drafted, did not include those wards. On appeal,

Held, that the failure to allege in the charge that the acts complained of were done "without reasonable cause, the proof shall be on him" did not render

the charge defective.*(22) In fairness to an undefended accused, though, prosecutors should include that phrase (or similar ones, such as "without lawful excuse" or "without lawful authority") so that the accused's attention may be directed to the fact that even though he may have done the thing which the Act prohibits, he may escape conviction if he proves the reasonable cause. In any event, whether the words are included in the charge or not, the judicial officer trying the case, in informing the accused of his rights, should always draw attention to the fact that he can escape conviction if he shows reasonable cause.

Held, further, that the term "reasonable cause" or "reasonable cause" means something less than "awful cause" or "lawful excuse". Whether an excuse is "just" or "reasonable" is to be

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determined, not by the strict application of the law to the problem, but by the application of the principles of natural justice. The question whether a "reasonable cause" exists in a given case is a question of law.

Held, further, that if the appellant established that he had never received the certificate of registration and in addition did not open the premises, he would have established reasonable cause for failing to submit sales tax returns.

Held, further, that there was no direct evidence that the certificate was posted to the appellant, simply evidence that in the normal course it would have made its way to him and that the office copy remained on file. In civil cases this would create a presumption that the document had been received, but in the present case such an inference could not be drawn.

Held, further, that as the assessed tax was based on a projected turnover but the appellant's proposed business did not in the event materialise, it would be reasonable for the appellant to decline to pay the tax.

Cases cited:

R v Sikenti GB-71-64 (unreported)

R v Jessie 1964 RLR 412 (AD); 1965 (1) SA 325 (RAD)

R v Mackay 1964 R & N 51; 1964 (3) SA 176 (FSC)

R v Parker 1966 RLR 15 (AD); 1966 (2) SA 56 (RAD)

R v Allan NO 1956 (4) SA 208 (SR)

Cape Coast Exploration Ltd v Scholtz & Anor 1933 AD 56

R v Botha 1960 (4) SA 6 (T)

Gundani v Kanyemba 1988 (1) ZLR 226 (SC)

McNALLY JA

G T Mutendadzamera for the appellant

M J Boylan for the respondent

Judgment

McNally JA: In this matter the appellant was convicted by the Senior Magistrate, Mbare, of twenty-seven counts of contravening s 14(1) as read with s 44(3) of the Sales Tax Act [*Chapter 184*], and twenty-seven counts of contravening s 15(2) as read with subsections 15(1), 30(1)

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and 44(4) of the same Act.

What that means is that he was alleged to have failed for twenty-seven months to submit sales tax returns, and in respect of the same periods to have failed to pay the estimated assessments of tax.

The evidence revealed quite clearly that the appellant applied for a Certificate of Registration as a Registered Operator. He did so in writing on 8 March 1982. The application is Exhibit 5. The application revealed that he proposed to trade under the name of Janyure Investments and that the "full address of each shop, store or fixed place of business for which registration is required" was PO Box 45, Bromley. It also recorded that lousiness was to commence on 1 April 1982 and that "estimated annual turnover (all premises)" was $25 000. Clearly therefore he was applying in respect of a new business.

A Certificate of Registration was issued on 20 March 1982, showing his address as PO Box 45 Bromley, and in the ordinary course of events would have been sent to him, although no evidence was led to prove it was sent to him and he denied receiving it. Nonetheless the Certificate, Exhibit 4, is clear proof that he was a Registered Operator with effect from 1 April 1982.

The point of being a Registered Operator, in simple terms, is that you are enabled to buy tour stock from wholesalers without paying them sales tax. You pay the sales tax later, when you sell the goods. That, of course, is why you are obliged to submit monthly returns.

It is not disputed that the appellant did not submit monthly returns. Because of this, an estimated assessment was issued on 16 August 1984. Taking the appellant's own estimate of turnover, the Department of Taxes calculated the tax he would have paid on that turnover and added the 100% penalty authorised by s 30(1)of the Act. The total came to $17 955,46, which he was required to pay on or before 14 September 1984. He did not do so.

The appellant's defence was that he never traded as Janyure Investments

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McNALLY JA

because he could not raise the money for the lease of the premises. He never received the Certificate of Registration. He was trading in a smaller way from premises in Seke as Janyure Mini Market, but he paid sales tax on the goods he bought for that store. He ceased trading there at the end of January 1983. It must be recorded that, at that time, only traders with a turnover in excess of $20 000 per annum were required to register.

The appellant produced, without objection, letters from two wholesalers which tended rather vaguely to support his assertions. One wholesaler confirmed that it sold goods to Janyure Investments "from 1981 to 1983" and "he does not appear on our list of registered operators". The other certified that Janyure Mini Market of Seke "was a customer here in 1981 and 1982, buying cash and paying sales tax".

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Vague and unsatisfactory and, strictly, inadmissible as these documents are, they do tend to bear out the appellant's contentions. One bears in mind that he was unrepresented, and it seems that he is completely at sea as far as the paperwork is concerned.

The penalty section, which in the case of the first twenty-seven counts is s 44(3), and in the case of the next twenty-seven counts is s 44(4), provides in each case an avenue of escape for the accused person. Section 44(3) reads, in part:

> "Any person who, without reasonable cause, the proof whereof shall be on him, fails to comply... shall be guilty. . ."

Similarly s 44(4) provides, in part:

> "Any person who, without reasonable cause, the proof whereof shall be on him, contravene any provision ... shall be guilty. . ."

Clearly, therefore, these are not strict liability offences. Failure to comply with the requirement to make returns is only an offence if the person concerned does not prove that he had reasonable cause to fail to comply. The same is true of failure to pay the tax.

The magistrate does not appear to have applied his mind to this question, except in a most cursory fashion, in relation to the first twenty-seven counts, where he noted in his judgment that -

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McNALLY JA

> "it is compulsory from the wording of the statute that a registered operator must submit returns of all sales he has transacted - can only escape liability if he shows reasonable cause."

He made no mention of this provision in relation to the second group of counts. Nor did he ask himself the question - has reasonable cause been shown?

The most useful source of authority in considering the phrase "without reasonable cause the proof whereof lies on him" is the case law on the Law and Order (Maintenance) Act [*Chapter 65*]. Similar words appear in s 32(1) ("without just cause or excuse, the proof whereof lies on him") and s 37(1) ("without lawful authority or reasonable excuse, the proof whereof lies on him").

I mention in passing that it was held in *R v Sikenti* (unreported Bulawayo Judgment No 71/64) that a charge which did not specify that the act done was done "without lawful excuse" was fatally defective. This decision was overruled by the Appellate Division in *R v Jessie* 1964 RLR 412; 1965 (1) SA 325. However, the following comments by BEADLE CJ in *Jessie's* case *supra* are worth repeating:

> "I would point out however, that, in fairness to undefended accused, I think it advisable that prosecutors, when framing their charges, should include the words "without lawful excuse" so that the attention of the accused may be directed to the fact that even though he may have done the thing which the Act prohibits, if he can prove the lawful excuse, he can still escape conviction. In any event, whether these words are included in the charge or not, I think the judicial officer trying the case, in informing an accused of his legal rights, should always draw his attention to the fact that he can escape conviction if he shows lawful excuse."

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I draw the attention of magistrates and prosecutors to this comment, which is of course equally applicable whether the phrase is "without lawful excuse", "without reasonable cause", "without lawful authority" or any other similar expression.

In the present case I am satisfied that the appellant was not prejudiced by the absence of any specific reference to the phrase "without reasonable cause, the proof whereof lies on him" because the whole of his defence was addressed

McNALLY JA

to this aspect of the case. Clearly he had failed to submit returns and he had failed to pay the assessed tax. The only question is therefore whether he proved, on a balance of probabilities, that he had reasonable cause for failing to do what he should have done. I proceed to examine the question in relation to each group of counts, starting a general consideration of the meaning of "without reasonable cause".

THE LAW ON "REASONABLE CAUSE"

In *R v Mackay* 1964 R & N 51; 1964 (3) SA 176, the Federal Supreme Court had to consider the phrase "without lawful excuse". At p 57F of the Report in the Rhodesia & Nyasaland Law Reports (183F of the SALR) CLAYDEN CJ had this to say:

> "In this case the appellant had two reasons for keeping publications known to him to be prohibited, two excuses for contravening the Act. One was that he wanted the publications for accounting purposes. That would perhaps be a reasonable excuse if those had been the words used, but there was nothing lawful, in accordance with law, about it. The other was that he thought that the law required a publisher to keep a copy of all publications for seven years. There is no such law. Again I think the excuse was reasonable, having regard to his view of the law, but the excuse cannot be shown to be in any way in accordance with the law."

The appeal was dismissed, but the importance of the decision lies in the distinction between "lawful excuse" and "reasonable excuse" which latter phrase I consider to be indistinguishable from "reasonable cause". In other words a 'reasonable excuse" may be something less than a "lawful excuse". 'Reasonable cause" may be something less than "lawful cause".

This view was confirmed in *R v Parker* 1966 RLR 15 (1966 (2) SA 56), where, at p 16E-H, QUENET JP said:

> "It is not easy however to draw a clear line between such words as 'sufficient', 'reasonable" and 'just" - they would of course include a 'lawful excuse" but not necessarily so ... I am of the opinion there is a difference between 'lawful excuse" and 'just excuse'."

Later at p 18 *in fine*, MACDONALD JA, as he then was, said:

> "... it is possible that even in a trial an excuse amounting to a 'just' excuse but falling short of a 'lawful' excuse might be offered."

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McNALLY JA

Again at p 19B he said:

> "Whether an excuse is 'just' is to be determined not by the strict application of law to the problem but by the application of the principles of natural justices. The difference between 'a lawful excuse' and 'a just excuse' is the difference which existed in England between law and equity."

In an earlier case, *R v Allan NO* 1956 (4) SA 208, QUENET J (as he then was) with whom MORTON J concurred, held that the question whether or not "reasonable cause" existed on the facts of a given case was a question of law "and in the determination of that question this Court is in a position no less favourable than the magistrate."

In the light of those decisions I turn to consider the facts of this case to determine whether the appellant succeeded in proving, on a balance of probabilities, that he had reasonable cause for failing to do what the statute required him to do.

THE FAILURE TO SUBMIT RETURNS

Here the appellant put forward two "causes" for his failure. The first was that he never received the certificate containing his sales tax number. The second was that his projected business never in fact materialised, because he could not pay the rent for the premises.

The second "cause" standing on its own, can be dismissed quite easily. Any reasonable businessman, applying for registration as a registered operator, should be aware of the consequences of his application. He should know that he will be issued with a valuable document which will empower him to buy goods from wholesalers without paying sales tax to them. He should realise that it is necessary for the Sales Tax authorities to keep a check on his use of that document, and that he must make returns even if they are nil returns. He could, after all, have used his certificate to buy goods for his other store. It would therefore have been unreasonable of him to think that, simply because he did not open a business at these particular premises, he was excused from making returns.

If, however, he never received the certificate and in addition he did not open the premises, he might be forgiven for thinking that there was no point in bothering about his application or his returns. This is particularly so because businessmen commonly describe the process of registration as a registered

operator as "being given a sales tax number". If he did not have the number, he could not abuse the process. Since he had not opened the business he did not need the number. I am inclined to think that if those were the facts proved he would have established reasonable cause.

It is necessary therefore to examine his claim that he did not receive the certificate of

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registration. The evidence for the State was given by two officials, Joseph Taziva and Bernard Jamela.

Taziva said his duty was to collect the money which had been assessed by tax assessors. He does not do the assessing. "All I know", he said, "is accused was registered with department. "He then went on to speak of the correspondence with the appellant after he had been assessed for tax in the sum of $17 955,46. He did not know about the issuing of certificates. He was asked "How do you know I am registered?" and he replied "We have copies of registration certificates". He then produced the department's copy of the certificate of registration. There is nothing on the face of the document to show that the original was sent to the appellant, but obviously that is what would happen in the normal course of events. Indeed s 9(4) of the Act requires the revenue officer to issue the applicant with a certificate. It can only be effective when received. The only presumption in relation to the certify case is that contained in s 41(2). It is *prima facie* proof of its contents.

Jamela gave evidence in his capacity as a tax examiner. He first became involved with the appellant when the latter came to query his prosecution. He did not know personally that the certificate had been sent to the appellant at the address provided, but he said that that is what normally happens. That of course must be so.

It is also relevant to note that Taziva made the admission that the first letter he sent to the appellant (long after the date of issue of the certificate of registration) was wrongly sent to PO Box 54 Bromley instead of to PO Box 45 Bromley. So mistake can be made. He added that when a registered letter was subsequently sent to the correct address it was not collected by the addressee.

We have therefore no direct evidence that the certificate was posted. We have simply evidence that in the normal course of events it would have been conveyed in some way to the appellant and we have the fact that the office copy remained on the official file. As WESSELS CJ said in *Cape Coast Exploration Ltd v Scholtz & Anor* 1933 AD 56:

McNALLY JA

> "We must presume that an official will carry out the ordinary work of his office, for in our experience that is what actually 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."

A study of the learned Chief Justice's reasoning in the case shows however, that he was careful to stress that "there is a difference between the proof required by courts of law in civil cases and that required in criminal cases" (p 75). And lower on that page he made the point that -

> Naturally the probability must be strong; it must not amount to a mere conjecture or surmise. Where the proof depends on the recollection of busy officials whose acts are often mere routine work and who in the course of time move from one place to another. . . grave injustice might be done if we are not to decide **civil cases** [my emphasis] on the probabilities which arise from those circumstances which are capable of proof."

Furthermore, he had before him the evidence of the witness who wrote the letter (but who of

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course could not remember the details or confirm that his staff had posted it) as well as a finding that the denial of receipt by the recipient was palpably false and quite inconsistent with what he did subsequently.

In *R v Botha* 1960 (4) SA 6, the court approved the *dictum* in the *Cape Coast Exploration Ltd* case *supra*. That was a criminal case involving the posting of an assessment form to a taxpayer who denied receiving it. The court had before it the evidence of the official who wrote the letter. The recipient did not give evidence or deny receipt. In the final analysis the court relied on a statutory presumption which cast the *onus* on the accused to prove that no assessment form was sent to him or received by him. In the present case the presumption does not extend to the delivery or receipt of the Certificate.

The remarks from the *Cape Coast Exploration* case *supra* were cited with approval in this Court by GUBBAY JA in a recent civil case *Gundani v Kanyemba* 1988 (1) ZLR 226 (SC), but of course here he was dealing with the presumption of regularity arising from a return of service by a messenger of the court.

McNALLY JA

Finally on this aspect I refer to the judgment of STRATFORD JA in the *Cape Coast Exploration* case *supra* where, speaking of the maxim *omnia praesumunter rite esse acta*, he said:

> "The maxim itself rests upon probabilities, and obviously it could never be legitimately applied in a case where, viewing the question in issue from a reasonable stand point, the probabilities did not to some extent support the presumption."

See generally Hoffmann & Zeffertt *SA Law of Evidence* 3 ed pp 428-9.

The appellant's own evidence was not very satisfactory. After adhering to his defence outline, in which he had said he did not receive the Certificate of Registration, he was asked:

> "Why did you not submit returns?"

and he replied:

> "I was stupid on that one."

He was then asked:

> "Were you supposed to make returns?"

and he said:

> "No."

The magistrate does not appear to have made any finding of fact as to whether or not the certificate of registration was posted to and received by the appellant. He should have done so.

All in all it seems to me that the State in this case is asking the Court to go further by way of inference than courts have gone in previous cases. We are asked to infer, from the mere fact

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that a copy of a certificate is on file in the tax office, and that in the normal course of events the original is conveyed to the person concerned, that that is what happened. No attempt was made to identify the signature of the official who signed the certificate. He might have been able to give useful evidence. If he could not be traced someone from his office might have been able to explain the system. Was there a covering letter? Were they sent by registered post? Are recipients asked to acknowledge receipt? Are there ever complaints about non-receipt? Are they posted or are people invited to collect and sign for them?

McNALLY JA

As it is we know nothing about the process. Moreover the appellant denied receipt. There has been no finding as to his credibility.

After anxious consideration I am unable to conclude that the State had proved beyond a reasonable doubt that the certificate was sent to or received by the appellant.

If it was not received by him and, as is his unchallenged evidence, he did not open the new premises for which he wanted the sales tax number, it seems to me that he had reasonable cause for not making returns. Indeed the certificate had a note at the front which reads "Please quote above registration number in all returns, correspondence etc". How could he quote the number if he did not know it? How could he be required to make returns if he did not know he was a registered operator? Why should he pursue the matter if his need for a sales tax number had fallen away with the collapse of his plans to open the new bottle store and general dealers supermarket?

I do not think these convictions can stand.

THE FAILURE TO PAY ASSESSED TAX

The appellant did not pay the assessed tax because he said it was not due. As a matter of law, of course, it was payable because s 15 of the Sales Tax Act says so. But on the other hand it seems to me that the appellant has established by his uncontradicted evidence that he never opened his new premises. It is clear that the estimated assessment made by the revenue officer was based (quite reasonably, on the information before him) on the projected turnover in those new premises of $25 000 per annum. If the store was never opened projected turnover never became a reality and therefore the assessment in fact teased on a false premise. That being so it seems to me reasonable that the appellant should decline to pay it.

It should not be difficult for the State, if it wishes to recover the tax it claims, to establish whether or not in fact these new premises were opened by the appellant. All I am saying is that on the evidence presented in this case the appellant's story is neither improbable nor disputed. He should not be held criminally liable for his failure to pay when he may be able to establish civilly that he is not obliged to pay.

As it happens, perhaps fortunately, the magistrate did not give summary judgment in favour of the Minister for the tax assessed, as he might have done in terms of s 44(6) of the Act.

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McNALLY JA

It seems from the evidence we have seen that this would be a proper case for the Controlling Officer to accept a late objection in terms of the proviso to s 32 of the Act. It should not be difficult to establish the truth of the appellant's claim if they are indeed true.

CONCLUSION

I find therefore that the appellant has established on a balance of probabilities, that he had reasonable cause both for his failure to make returns and for his failure to pay the assessed tax.

I would allow the appeal and set aside the convictions and sentences on all 54 counts.

Gubbay JA: I agree.

Manyarara JA: I agree.

Mkushi, Foroma & Partners, appellant's legal practitioners.

MAKWINDI OIL PROCUREMENT (PVT) LTD v NATIONAL OIL COMPANY OF ZIMBABWE 1988 (2) ZLR 482 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Civil appeal

12 & 29 December 1988

Flynote

Practice and procedure - judgment expressed in foreign currency - whether and in what circumstances court may give such a judgment - date at which amount of foreign currency is to be converted to local currency.

Headnote

The ability of a court to express its order in foreign currency has been the subject of a spate of judicial decisions in England and South Africa. Until 1975, it was settled law in England that a court there could only give judgment expressed in sterling, even if the money of account and the money of payment were a foreign currency and that the date for conversion of the foreign

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currency into sterling was not the date of judgment or payment but the date of the breach. In *Millangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801, however, the House of Lords took the revolutionary step of reversing their previous decision on the subject and ruled that where the justice of the case so required the court could give judgment in favour of the plaintiff for the amount of foreign currency due to him or its sterling equivalent at the time of payment. The specific case concerned a claim for foreign money obligation arising under a contract whose proper law was that of a foreign state and where the money of account and payment was of that country or of some country other than that in which the action was brought. subsequent decisions made it clear that this rule applied even where the English and not foreign law was the proper law of the contract; and in 1978 the House ruled that the approach followed in the *Millangos* case was to be

extended to claims for damages and restitutions for unjust enrichment.

In the absence of any legislative enactments requiring the courts of Zimbabwe to order payment in local currency only, the innovative lead taken in *Millangos* and the subsequent extensions to the rule there enunciated should be adopted in Zimbabwe. This would bring Zimbabwe into line with many foreign legal systems.

Fluctuations in world currencies justify the acceptance of the rule that not only may a court order be expressed in units of foreign currency, but also the amount of foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment. To apply any other date could mean that the successful party would suffer an irrecoverable loss. Justice requires that a plaintiff should not suffer by reason of a devaluation of the local currency between the date on which the defendant should have met his obligation and the date of actual payment or the date of enforcement of the judgment.

In claims for damages, it is for the plaintiff to select the currency in which to make his claim. It is for him to prove that a judgment in that currency will most truly express his loss and accordingly most fully and exactly compensate him for that loss. While the currency of account is a factor of importance, it is not decisive of the currency in which the claim should be made and judgment given.

Cases cited:

Makwindi Oil Procurement (Pvt) Ltd v National Oil Co of Zimbabwe (Pvt) Ltd 1988 (2) SA 690 (ZH)

National Food Distributors v Weltman 1985 (2) ZLR 310 (HC)

Re *United Railways of the Havana and Regla Warehouse Ltd* [1960] 2 All ER 332 (HL)

Schorsch Meier GmbH v Hennin [1975] 1 All ER 152 (CA)

Beswich v Beswick [1967] 2 All ER 1197 (HL)

Miliangos v George Frank (Textiles) Ltd [1975] 3 All ER 801

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Barclays Bank International Ltd v Levin Bros (Bradford) Ltd [1976] 3 All ER 900 (QB)

Federal Commerce and Navigation Co Ltd v Tradax Export SA [1977] 2 All ER 41 (CA)

Owners of the mv Eleftherotria v Owners of the mv Despina R (The "Despina R"); Service Europe Atlantique Sud (SEAS) v Stockholms Rederiaktibolag SVEA ("The Folias") [1979] 1 All ER 421 (HL)

Société Francaise Bunge SA v Belcan NV (The Federal Huron) [1985] 3 All ER 378 (QB)

BP Exploration Co (Libya) Ltd v Hunt (No 2) [1982] 1 All ER 925 (QB)

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Murata Machinery Ltd v Capelon Yarns (Pty) Ltd 1986 (4) SA 671 (C)

Voest Alpine Intertrading GmbH v Burwill & Co SA (Pty) Ltd 1985 (2) SA 149 (W)

Barry Colne & Co (Transvaal) Ltd v Jackson's Ltd 1922 CPD 372

Malilang & Ors v MV Houda Pearl 1986 (3) SA 960 (A)

Cosmopolitan National Bank of Chicago v Steinberg 1973 (1) RLR 23 (GD); 1973 (4) SA 579 (R)

Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc [1973] 3 All ER 498 (CA)

Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd 1988 (4) SA 671 (N)

M J Gillespie for the appellant

J B Colegrave for the respondent

Judgment

Gubbay JA: This is an appeal from the High Court consequent upon the grant of leave. The plaintiff, now the respondent, issued summons against the defendant, the appellant, for payment in the sum of US$161 953,87, representing the damages allegedly sustained by reason of fraudulent, alternatively negligent, misrepresentation made to it by the defendant.

Both parties to the action are Zimbabwean companies. The material facts averred by the plaintiff in its declaration, as further particularised, may be summarised thus:

1. On 8 March 1984, an pursuant to a written agreement entered into at Harare, the defendant undertook to supply the plaintiff with 21 032,97 metric tonnes of petroleum products, payable as follows:

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(a) United States dollars 2,80 per metric tonne, to be paid in Zimbabwe dollars;

(b) the remainder to be paid in United States dollars; and

(c) the freightage to be paid in United States dollars.

2. In order to enter into the agreement the plaintiff was required to obtain, and did so obtain, the permission of the Reserve Bank of Zimbabwe to make part payment for the petroleum products and payment in full for the freightage, in United States dollars.

3. In the course of negotiations on 7 March 1984 the defendant, with the intention of inducing the plaintiff to pay a higher freight rate and well-knowing that in accordance with normal commercial practice the freight

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rate increased with the distance travelled from the loading port to the discharging port and back to the loading port, represented to the plaintiff that the shipment of the petroleum products was being made from Curacao in the Netherlands West Indies, being the loading port, to Beira in Mozambique, being the discharging port.

4. Relying on the truth of such representation, which was material to the agreement, the plaintiff accepted that the freight rate in respect of the petroleum products would be US$12,50 per metric tonne.

5. The said misrepresentation was false, in that, to the knowledge of the defendant, the shipment of the petroleum products was not being made from Curacao to Beira, but from Aden in the Republic of South Yemen, being the loading port, to Beira.

6. Alternatively, if the defendant was not aware of the falsity of the representation when it made it, in breach of duty of care owed to the plaintiff, it was negligent in making such representation, in that it took no measures to confirm that the shipment was being made from Curacao to Beira.

7. As a consequence of the misrepresentation the plaintiff, on 6 April 1984, paid the defendant freightage at the rate of US$12,50 per metric tonne, instead of US$4,80 per metric tonne, thereby sustaining a loss amounting to US$161 953,87.

The defendant's ultimate response to the declaration was to institute an application to strike out the reference, both in the final paragraph of the declaration and in the related paragraph of the prayer thereto, to "US$161 953,87", being the currency in which the claim for damages is expressed, on the ground that a Zimbabwean court is obliged to give judgment in its own currency.

The application was heard by ADAM J Before him it was urged on behalf of a the defendant that the relief sought should be granted because either it was not competent for the courts in

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this country to give judgment sounding in a foreign currency or, alternatively, on the facts as pleaded by the plaintiff the loss alleged to have been suffered was not in United States dollars but in local currency. having reviewed the authorities pertinent to the first and main contention, the learned judge proceeded to dismiss the application with costs. The judgment has been reported as *Makwindi Oil Procurement (Pvt) Ltd v*

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National Oil Co of Zimbabwe (Pvt) Ltd 1988 (2) SA 690 (ZH). It gives no reasons for the rejection of the second contention, but it appears that the learned judge considered, wrongly in my view, that where the loss immediately sustained by one party is in one currency he is entitled to obtain an order for payment in that currency, no matter that the loss was effectively felt or borne by him in another currency (see at 693I).

In support of the appeal Mr *Gillespie* argued that the learned judge had erred on both issues raised before him.

The ability of a court to express its order in foreign currency has recently been the subject of a spate of judicial decisions in England and of three in South Africa. In this jurisdiction the judgment of MFALILA J in *National Food Distributors v Weltman* 1985 (2) ZLR 310 (HC) is in conflict with that of ADAM J

Until 1975 it was settled law in England: (i) that a court could only give judgment in sterling, even if the money account and the money of payment were a foreign currency; and (ii) that the appropriate date for conversion of the foreign currency into sterling was not the date of judgment or the date of payment but the date of the breach (the breach-date rule). This longstanding rule was reaffirmed in 1960 by the House of Lords in Re *United Railways of the Havana and Regla Warehouses Ltd* [1960] 2 All ER 332 (HL), and it was held applicable not only to a claim for damages but also to a claim for a debt in a foreign currency. Two alternative propositions were advanced to explain this result: the first was that foreign currency is a commodity and the remedy for failure to deliver a commodity is damages, not debt; the second was that, assuming foreign currency to be money and not a commodity, still an English court could not order specific performance of a contract to pay foreign currency, and the remedy was therefore to give damages for the sterling equivalent of the foreign currency at the date of the breach. The effect of the rule was, of course, that if the value of sterling in relation to the designated foreign currency declined between the date of breach and the date of judgment, the creditor suffered an irrecoverable loss.

In *Schorsch Meier GmbH v Hennin* [1975] 1 All ER 152 (CA), the Court of Appeal departed from this rule and gave judgment in Deutschmarks, stipulating that if payment of the judgment was made in sterling that conversion should be made as of the date of payment The case concerned a debt for sale and delivery of goods in terms of a contract which provided for payment in German funds. Following the date of the breach by the debtor, the value of

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sterling declined relative to the value of German currency. The Court of Appeal based its decision primarily on certain provisions of the Treaty of Rome which authorised payment for goods supplied in the currency of the creditor's own State, if that was the currency of the contract. But of greater interest is the fact that it supported its judgment on the basis that the economic and legal conditions underlying the House of Lords decision in the *Havana Railways* case no longer existed. According to LORD DENNING MR, who almost fifteen years before had spoken as a member of the House of Lords, the rule restricting payment to English currency evolved because of two factors - faith in the stability of sterling, and procedural difficulties; the latter being the prime factor. As "(s)sterling floats in the wind (and) changes like a weathercock with every gust that blows" (see at 155h), and as procedural changes had since altered the form of judgment and permitted the specific performance of a contract to pay money expressed in foreign currency (see *Beswick v Beswick* [1967] 2 All ER 1197 (HL)), LORD DENNING felt compelled to change a rule he considered obsolete by economic changes. At 156g-157a he said:

> "Seeing that the reasons no longer exists, we are liberty to discard the rule itself. *Cessante ratione legis cessat ipsa lex*. The rule has no support amongst the juridical writers. It has been criticised by many. *Dicey* says:
>
> > 'Such an enroachment of the law of procedure upon substantive rights is difficult to justify from the point of view of justice, convenience or logic.'
>
> Only last year we refused to apply the rule to arbitrations. We held that English arbitrators have jurisdiction to make their awards in a foreign currency, when that currency is the currency of the contract: see *Jugoslavenska Oceanska Plovidba v Castle Investment Con Inc*. The time has now come when we should say that when the currency of a contract is a foreign currency - that is to say, when the money of account and the money of payment is a foreign currency - the English courts have power to give judgment in that foreign currency; they can make an order in the form: 'It is adjudged this day that the defendant do pay to the plaintiff' so much in foreign currency (being the currency of the contract) 'or the sterling equivalent at the time of payment'."

It is doubtful that the Court of Appeal was entitled to depart from the rule confirmed by the House of Lords in the *Havana Railways* case on the basis propounded by LORD DENNING.

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> Be that as it may, in *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 (HL), the majority of the members of the House of Lords (LORD SIMON OF GLAISDALE dissenting) took the unusual step, termed by some as "revolutionary", of reversing their earlier decision. Their Lordships laid down a new rule that where the justice of the case so required the court could give judgment in favour of the plaintiff for the amount of the foreign currency due to him or its sterling equivalent at the time of payment. With regard to the proper conversion date, LORD WILBERFORCE noted that changes in the value of currency between the breach date and the date of judgment or payment were the rule rather than the exception. Taking account of current economic conditions and recognising a need for the law to conform to commercial realities, he remarked at 810c-d:

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> "... it would be an intolerable situation if a different rule were to prevail as regards arbitrations on debts expressed in foreign currency on the one and actions on similar debts on the other. Counsel for the appellants was therefore obliged to argue that if he was to succeed the decision in the *Jugoslavenska* case must either be overruled, or narrowly confined. I can find no limits within which it can be confined which would not still enclose the present case, so, if the appeal were to be allowed the case have to be overruled. But if I am faced with the alternative of forcing commercial circles to fall in with a legal doctrine which has nothing but precedent to commend it or altering the doctrine so as to conform with what commercial experience has worked out, I know where my choice lies. The law should be responsive as well as, at times, enunciatory, and good doctrine can seldom be divorced from sound practice."

LORD CROSS OF CHELSEA was of the same view (see at 838d-g), as were the other two LAW LORDS whose speeches followed his.

Their Lordships left open the question whether a similar rule should be adopted in claims for damages for tort or breach of contract (see at 813b-c). They limited their reasoning to the problem before them, that is, claims for foreign money obligations arising under a contract whose proper law was that of a foreign State and where the money of account and payment was of that country or some other country other than the one in which the action was then being brought.

Thereafter other decisions made it clear that the rule applied even where English and not foreign law was the proper law of the contract. See *Barclays*

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Bank International Ltd v Levin Bros (Bradford) Ltd [1976] 3 All ER 900 (QB) b-h; *Federal Commerce and Navigation Co Ltd v Tradax Export SA* [1977] 2 All ER 41 (CA) at 51 b-h. And on 19 October 1978 the House of Lords in giving judgment on two appeals concurrently - *Owners of the mv Eleftherotria v Owners of the mv Despina R ("The Despina R") and Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag SVEA ("The Folias")* [1979] 1 All ER 421 (HL) - was unanimous that the approach followed in the Miliangos case was to be extended to claims for damages. See also *Société Francaise Bunge SA v Belcan MV (The Federal Huron)* [1985] 3 All ER 378 (QB) at 383b-c. Lastly, it has been held that in the case of restitution for unjust enrichment the award will be made in the currency in which the defendant's benefit can be most fairly and appropriately valued. See *BP Exploration Con (Libya) Ltd v Hunt (No 2)* 1982 1 All ER 925 (QB) at 973b-e.

This then is an overview of the change to and development of the law in England on the topic of judgments in foreign currencies.

In South Africa VAN DEN HEEVER J, without citing any of the English decisions mentioned above, came to the same conclusion in *Murata machinery Ltd v Capelon Yarns (Pty) Ltd* 1986 (4) SA 671 (C). The learned judge held that when a contract provides for payment in foreign currency there is no absolute bar to the court ordering payment in that form (see at 673C-674B), and that the date of conversion of the foreign debt into South African currency should be the date when payment is actually effected and not when payment falls due (see at 674E).

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This decision is at variance with that of NESTADT J in *Voest Alpine Intertrading GmbH v Burwill & Co SA (Pty) Ltd* 1985 (2) SA 149 (W), who held that South African courts were obliged to give judgment in rand only and not in a foreign currency, although he could not ascertain the source of the rule. The main issue in that case was the date on which the damages suffered by the plaintiff in the amount of US$777 612,38 had to be converted into rand. Was it the date of summons, the date of payment, or the date when the breach occurred? Seeking to apply by analogy to the contractual claim for damages the principle expressed by GARDINER J in *Barry Colne & Co(Transvaal) Ltd v Jackson's Ltd* 1922 CPD 372 at 376, that in the absence of agreement as to the date on which the rate of exchange is to be determined, the relevant date is the date when payment falls due, the learned judge considered that the appropriate date was the date when the damages were due, that is, when the breach was committed. At 151A-C he stated:

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> "Though only quantified by the judgment, the damages are assessed as at this date. Accordingly, defendant's liability in rand must likewise be determined. Subsequent fluctuations in the value of currency are to be ignored. In a case such as the present, defendant's refusal to then pay, will of course have led to the plaintiff sustaining a large additional loss. It may be (the point was not in issue and was therefore not argued) that this could be claimed as a further head of damages. It would not, however, in my view, justify the quite fortuitous and often delayed date of judgment, which may only be established on appeal, being taken as the relevant date for converting defendant's dollar liability to rand."

It is to be noted that the learned judge did not feel constrained to follow the English development, although he described the reasoning as attractive and persuasive -

> "... because I do not believe the cases in question can avail the plaintiff. The ability to do the conversion as at the date of judgment (or even thereafter) rests, as I understand them, on the Court's power to give judgment in a foreign currency. **It was not argued on behalf of the plaintiff that this was the position in South Africa and that I could or should accordingly give judgment in a foreign currency, ie US dollars"** (the emphasis is mine).

(See at 152 C-D). Had it not been assumed that the court was confined to giving judgment in Rand, and if the contrary proposition had been argued before him, the learned judge might well have arrived at a conclusion in with the English development and that subsequently reached by VAN DEN HEEVER J Certainly his judgment has not remained immune from criticism. See Radesich 1987 THR-HR Vol 50 at pp 223-237; Tager *1985 Annual Survey of South African Law* at p 119; *Shaw Admiralty Jurisdiction and Practice in South Africa* at p 84.

Mention must tee made of *Malilang & Ors v MV Houda Pearl* 1986 (3) SA 960 (A), the judgment in which was delivered seven weeks prior to that in the *Murata machinery* case but in all probability not brought to the attention of VAN DEN HEEVER J It decided that a South African Court of Admiralty, exercising jurisdiction in terms of the Colonial Courts of Admiralty Act 1890, which requires that the court should apply English admiralty law as enunciated by the English High Court exercising jurisdiction in 1890, should follow the ruling in the *Havana Railways* case suitably adapted by the substitution of rends for sterling, and not the rules laid down in the *Miliangos* case (see at 966H-I).

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GUBBAY JA

It was urged by Mr *Gillespie* that the Appellate Division judgment must be taken to have overruled that in *Murata Machinery Ltd v Capelon Yarns (Pty) Ltd.* I do not agree. I think the two cases are clearly distinguishable. The Malilang concerned a South African Court of Admiralty exercising jurisdiction under an English statute of 1890. At that time the High Court in England, exercising its admiralty jurisdiction in the action before the South African Court of Admiralty, would undoubtedly have given judgment in sterling and converted the claims into that currency as at the date upon which they arose. As explained by CORBETT JA at 966I-J:

> "... it would be wholly unrealistic to regard the *Miliangos* decision which relates essentially to matters of a procedural nature as reflecting the law and practice current in the English Court of Admiralty in the years 1890."

In short, the *Malilang* case has no application to the common law of South Africa. The merits and demerits of the majority decision in *Miliangos* did not there fall for consideration.

Mr *Gillespie* relied heavily on the minority speech of LORD SIMON in the Miliangos case for his contention that it was proper for the courts of Zimbabwe to decline to give an order for the payment of an amount expressed in a foreign currency. The main ground for LORD SIMON'S dissent, as expressed in his own words at 832g-j, was that -

> "... this type of issue is unsuitable for law reform by judiciary. It is the sort of case where, in my view, a wide range of advice, official especially but also commercial, is required. The training and experience of a judge is unsuitable for this type of decision-making unaided: his circumspection is too narrow; his very qualities of keen perception of his immediate problem tend to militate against sound judgment of the wider and more general issues involved. But if courts are to undertake legislative responsibilities, something might be done to equip them better for the type of decision-making which is involved. Official advice and a balanced executive view might be made available by a law officer or his counsel acting as *amicus curiae*. I venture to suggest consideration of some such machinery."

In this jurisdiction no issue of law reform arises. The English decisions are not binding on our courts but are merely of persuasive value. Until 4 December 1985, when MFALILA J gave judgment in *National Food*

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Distributors v Weltman supra, the point had never been argued. It was *res nova*, although this may have been due to the belief that the court was restricted to giving judgment only in the currency of the country. In coming to a decision this Court is not therefore met with the principle of *stare decisis*, unlike the members of the House of Lords who in 1975 were confronted with what had been established law for nearly four hundred years. That the majority of the Law Lords succeeded in surmounting such an obstacle and opted for a more realistic approach to modern economic conditions, is strongly illustrative of the concept, never to be overlooked, that the law is living system that adapts to the necessities of present times and is to be given new

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direction where on principle and in reason it appears right to do so.

Notwithstanding the weight to be accorded to the speech of so eminent a jurist as LORD SIMON and to those of the redoubtable VISCOUNT SIMONDS and LORD REID in the *Havana Railways* case, to which Mr *Gillespie* referred, I am firmly of the opinion that in the absence of any legislative enactments which require our courts to order payment in local currency only, the innovative lead taken both in *Miliangos* and the subsequent extensions to the rule there enunciated, and in the *Murata Machinery* case in South Africa, is to be adopted. This will bring Zimbabwe into line with many foreign legal systems. See Mann *The Legal Aspect of Money* 4 ed at pp 339-340.

Fluctuations in world currencies justify the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also that the amount of the foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment. Justice requires that a plaintiff should not suffer by reason of a devaluation in the value of currency between the due date on which the defendant should have met his obligation and the date of actual payment or the date of enforcement of the judgment. Since execution cannot be levied in foreign currency, there must be a conversion into the local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement.

It necessarily follows that the judgment of ADAM J is to be preferred to that in *National Food Distributors v Weltman*. The latter was given without the benefit of the cogent reasoning of VAN DEN HEEVER J in the *Murata Machinery* case and upon the mistaken, albeit irrelevant, distinction that there was no exchange control legislation in force in England at the time of the *Miliangos* ruling.

For the sake of completeness I would add that the comment of MACAULAY J

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in *Cosmopolitan National Bank of Chicago v Steinberg* 1973 (1)RLR 23 at 33F-G; 1973 (4) SA 579 (R) at 581F that the *quantum* of a debt is fixed on the date the foreign judgment refuting thereto is handed down and the conversion into local currency calculated at the exchange rate then prevailing is, with respect, wrong.

Although it is my view that this appeal must be allowed on the ground that the facts alleged by the plaintiff are totally inadequate to establish an entitlement to judgment in United States dollars, I have considered it necessary to deal at some length with the first question debated before this Court because of the undesirability of leaving the law on the point the subject of conflicting decisions in the High Court.

The case of *the Despina R supra* decided that it is for the plaintiff to select the currency in which to make his claim for tortious damages and it is for him to prove that a judgment in that currency will most truly express his loss and accordingly most fully and exactly compensate him for that loss. And that, whereas the currency of account is a factor of importance, it is not decisive of the currency in which the plaintiff should make his claim and in which judgment should be given. The facts were that the Eleftherotria and the Despina R two Greek shipping

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vessels, came into collision off the coast of Shanghai. A settlement was arrived at under which it was agreed that the owners of the Despina R were to pay the owners of the Eleftherotria damages of 85% of the loss and damage resulting from the collision. The expenses of repair were incurred in four different currencies, though predominantly in United States dollars, the currency in which the plaintiffs conducted their affairs. LORD WILBERFORCE, who delivered the lead speech, dealt with the question of what foreign currency the plaintiffs were entitled to claim in. He stated at 427d:

> "It appears to me that the plaintiff, who normally conducts his business through a particular currency, and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation, he uses to obtain those currencies. This is the currency in which his loss is felt, and is the currency which it is reasonably forseeable he will have to spend."

and continued at 428a-b:

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> "I wish to make it clear that I would not approve of a hard and fast rule that in all cases where a plaintiff suffers a loss or damage in foreign currency the right currency to take for the purpose of his claim is 'the plaintiff's currency'. I should refer to the definition I have used of this expression and emphasise that it does not suggest the use of a personal currency actualized, like nationality, to a plaintiff, but a currency which he is able to show is that in which he normally conducts trading operations."

In similar vein LORD RUSSELL OF KILLOWEN remarked at 432 e-f:

> "In this case the plaintiffs' business was conducted in US dollars, it being managed in New York. The other foreign currency was necessarily acquired in exchange for US dollars. The true loss of the plaintiffs was a loss of US dollars, and in pursuit of the remedy of *restitutio in integrum*, or full and proper compensation, I conclude that the claim and judgment should be for the US dollars lost."

Adopting that approach, which is really no more than an application of the normal principles of *restitutio in integrum* and the reasonable foreseeability of the damage sustained, which govern the assessment of damages, I am unpersuaded that on the facts pleaded the plaintiff has laid the foundation necessary to express its claim for delictual damages in United States dollars.

In order to meet its contractual obligations in respect of payment, the plaintiff, a Zimbabwean company which conducts its business in the country, was compelled to obtain the permission of the Reserve Bank of Zimbabwe to purchase with local currency the requisite amount of United States dollars. It is not alleged that the plaintiff's normal currency of use is United States dollars, nor that it owns any foreign currency at all. Notwithstanding, therefore, that the currency in which the loss was immediately sustained was in United States dollars (the expenditure currency), the currency in which the loss was effectively felt or borne has the closest, if not the only, connection. Thus the loss of foreign currency was effectively felt or borne, not by the plaintiff, but by the national foreign currency reserve.

Mr *Colegrave* submitted that considerations of public policy prompted the plaintiff to address its claim in the manner it did. What it is aiming to achieve is to recover from the defendant on behalf of the country the foreign exchange that has been lost. Plainly the plaintiff's motive,

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however laudable, is irrelevant to determination of what currency reflects the true loss or damage it, and no one else, has suffered. That is the sole enquiry.

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It was further contended that a pertinent factor to the plaintiff's entitlement to recover damages in United States dollars is the existence of an arbitration clause in the written agreement between the parties, under which in the even of a dispute going to arbitration it would be permissible for the arbitrators to make an award for payment of an amount in a foreign currency. Of course, the ability to make such an award would depend on whether a foreign currency is the currency with which the parties under the contract have to closest and most real connection. However that may be, as recognised in *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc* [1973] 3 All ER 498 (CA) at 501e-g, the fact that arbitrators may be empowered to make such an award is no justification upon which to hold that a court of law is able to grant a judgment for delictual damages in a foreign currency other than in compliance with the test laid down in the *Despina R*.

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

"1. The application to strike out para 8 of the Declaration and para (a) of the prayer is allowed with costs.

2. The plaintiff is granted leave to make the necessary amendments to the Declaration and prayer within twenty-one days, if so advised."

McNally JA: I agree.

Manyarara JA: I agree.

POST SCRIPTUM:

The full Bench decision of the Natal Provincial Division in *Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N), which came to the notice of this Court shortly after judgment had been delivered, is in accordance with the view expressed that there is no bar to the grant of an order in foreign currency.

Ali Ebrahim, appellant's legal practitioners

Surgey, Pittman & Kerswell, respondent's legal practitioners

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Endnotes

1 (Popup - Popup)

See 1988 (1) ZLR 7 (HC) - *Editor*.

2 (Popup - Popup)

See O 15 R 104(2) of the Rules of the High Court, 1971 - *Editor*.

3 (Popup - Popup)

An appeal was noted; the Supreme Court's judgement (which overruled GREENLAND J's) is reported later in this volume - *Editor*.

4 (Popup - Popup)

* See 1988 (1) ZLR 143 (SC) - *Editor*.

5 (Popup - Popup)

On the subject of the categorization of enactments as "directory" or "peremptory", see the judgement of GUBBAY JA in *Sterling Products International Ltd v Zulu infra* in this volume - *Editor*.

6 (Popup - Popup)

See 1988 (1) ZLR 143 - *Editor*.

7 (Popup - Popup)

The exact meaning of the subsection is discussed in *S v Dube & Anor infra* in this volume - *Editor*.

8 (Popup - Popup)

Note: in *S v Dube & Anor infra* in this volume, the Supreme Court clarified what the minimum sentence is - *Editor*.

9 (Popup - Popup)

See above in this volume - *Editor*.

10 (Popup - Popup)

See *ante* in this volume - *Editor*.

11 (Popup - Popup)

See 1988 (1) ZLR 83 - *Editor*.

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12 (Popup - Popup)

See *ante* in this volume - *Editor*.

13 (Popup - Popup)

See *ante* in this volume - *Editor.*

14 (Popup - Popup)

See *ante* in this volume - *Editor*.

15 (Popup - Popup)

See *post* in this volume - *Editor*.

16 (Popup - Popup)

See *Attorney-General v Howman* 1988 (1) ZLR 352 - *Editor*.

17 (Popup - Popup)

See 1988(1) ZLR 352 (HC) - *Editor*.

18 (Popup - Popup)

* See *Standard Trust Ltd NO v Master of the High Court* 1983 (1) ZLR 192 (HC) - *Editor.*

19 (Popup - Popup)

The Prevention of Corruption Act [*Chapter 70*] has been replaced by the Prevention of Corruption Act No. 34 of 1985, in which the equivalent section is also s 3(1) (f) - *Editor*.

20 (Popup - Popup)

See 1988 (1) ZLR 412 - *Editor*.

21 (Popup - Popup)

See 1986 (2) ZLR - *Editor*.

22 (Popup - Popup)

In this connection, see also s 133(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*], which provides that exceptions, exemptions, provisos, excuses or qualifications need not be specified in the charge - *Editor.*

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