

MUSWERE v MUSWERE 1989 (1) ZLR 1 (HC)

Court High Court, Harare

Adam J

Application for leave to sue by edictal citation

16 December 1988

Flynote

Practice and procedure - matrimonial cases - undefended action - attendance of plaintiff required.

Headnote

In undefended trial actions of matrimonial causes, the attendance of the plaintiff to give oral evidence is a prerequisite, since the Court can only enter judgment against the defendant if it is satisfied that the plaintiff has established his or her claim. Although Rule 408 of the Rules of the High Court permits evidence to be given by way of affidavit, if sufficient reasons exist, it would be inappropriate to do so where there are numerous imponderables to contend with, such as custody of minor children.

Case cited:

Walker v Walker (1896) 13 SC 363

F Girach for the applicant.

Judgment

Adam J: In a Chambers application, the petitioner husband sought leave to sue, by edictal citation, his respondent wife for a decree of divorce. That application was refused by me and these are my reasons.

In the petition sworn on 14 December 1988, whilst the petitioner was in Zimbabwe, he stated that he was born in this country and regarded Zimbabwe as his permanent home, but that he was presently working and residing in London, England. The parties were married on 15 August 1960 in Rusape

and there are two minor children of the marriage. Whilst residing together in Britain, the respondent, in October 1986, deserted the petitioner, taking their two minor children. Since then she has not communicated with the petitioner and, despite enquiries, he has not been able to secure an address for her, but he believes that she is still resident in England. The petitioner indicates that he will be unable to attend court as he will not be able to obtain leave of absence from his work to do so and also he is not possessed of sufficient funds to return to Zimbabwe. The petitioner asks that, in the event of the divorce action being uncontested, he be allowed to adduce evidence by affidavit in terms of Order 46 Rule 408 of the High Court of Zimbabwe Rules 1971.

In the plaintiff's intendment, filed with his petition, he seeks a decree of divorce and custody of their two minor children.

I should indicate that it has been the invariable practice of this court to have the plaintiff in an undefended divorce action appear in person and give *viva voce* evidence and, thereafter, on the court being satisfied, judgment is entered against the defendant on non-appearance and in favour of the attending plaintiff.

The High Court of Zimbabwe Rules 1971, in Rules 58, 59 and 60, deal with judgment in default, but these rules specifically do not apply to actions for the restitution of conjugal rights, for divorce, for judicial separation or for nullity of marriage, whereas Rule 223 provides for set down for motions, petitions, applications, undefended trial cases, etc. Matrimonial causes are specifically dealt with under Order 35 Rules 269A to 277A. Under this, Rule 269A allows the use of Form No 30A with the declaration attached to it and indicates that if the defendant fails to enter an appearance the plaintiff's claim will be heard and adjudicated under Rule 272(1), which makes provision for actions which are commenced with the summons (with the declaration served with the summons or subsequently) and the defendant's failure to enter an appearance. Rule 272(2) provides that the plaintiff, in the case of a claim for a final order of divorce, may set the case down for trial, but personal notice of set down must be served on the defendant; and it further provides that the court will not proceed to trial unless it is satisfied that the defendant had personal notice of set down. Rules 275 and 276 allows interviews of the parties and the children by the judge in chambers, while Rule 277 provides for hearings *in camera*. Rule 277A permits the hearing of case in the judge's chambers.

Rule 408 provides as follows:

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"408. In the absence of any agreement in writing, between the attorneys of all parties, and subject to these rules, the witnesses at the trial of any action shall be examined *viva voce* and in open court, but the court may at any time for sufficient reasons order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court may think reasonable, or that any witness, whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogations or otherwise before a commissioner or examiner:

Provided that where it appears to the court that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence

of such witness to be given by affidavit."

It is clear from the foregoing that, in matrimonial causes in undefended trial actions, the attendance of the plaintiff is a prerequisite prior to judgment, since the court can only enter judgment against the defendant if it is satisfied on the evidence that the plaintiff has established his or her claim. Rule 408, which permits, for sufficient reasons, the use of an affidavit to prove any particular fact or facts, is made subject to the provisions of the rules itself. As indicated in the intendment filed by the plaintiff, he seeks custody of their two minor children. It is trite that before custody of minor children is granted to a spouse the court must be satisfied that it is in the best interests of those minor children that custody be awarded. Further, his petition makes it clear that he cannot attend court, which means that if the respondent wife were to enter an appearance to defend, the petitioner would not be able to proceed to trial and an order of this court would be a *brutum fulmen*. This court would not be disposed to the use of affidavit evidence in terms of Rule 408 since there are numerous imponderables with which it would have to contend (such as the issue of the custody of the two minor children) without the benefit of an interview, particularly where the minor children have for close to three years been with the respondent wife and away from the petitioner.

Further, in *Walker v Walker* (1896) 13 SC 363, where the parties were married in the Cape Province, the petitioner wife was a non-resident of the Cape Province and the respondent husband was also absent from the Cape Province and not domiciled there, DE VILLIERS CJ did not grant the wife leave to sue her husband by edictal citation.

I am satisfied on the papers that the facts disclosed do not justify this court

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in exercising its discretion in favour of the petitioner by granting him leave to sue his wife by edictal citation. Accordingly, the application is refused.

Stumbles & Rowe, applicant's legal practitioners

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KOZELUHOVA v HEALTH PROFESSIONS COUNCIL 1989 (1) ZLR 5 (HC)

Court High Court, Harare

Adam J & Greenland J

Appeal under s 45 of Medical, Dental and Allied Professions Act

14 March 1988 & 11 January 1989

Flynote

Professions and trades - Medical, Dental and Allied Professions Act [Chapter 224] - committee of enquiry

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under - proceedings before - necessity to observe rules of procedure provided by Act - appeal therefrom - nature of appeal - s 61(1) - "unfit" to possess drugs - meaning of.

Headnote

A committee of enquiry was set up by the respondent Council under s 12(1)(c) of the Medical, Dental and Allied Professions Act [*Chapter 224*] to enquire into an allegation that the appellant, a medical practitioner, had become "unfit" to purchase, acquire, keep, use, prescribe, order, supply or possess any drug. The committee accepted the allegation and recommended to the respondent that the appellant's name be removed from the register of medical practitioners. The respondent acted on this recommendation. The appellant appealed under s 45 of the Act.

It was pointed out, on behalf of the appellant, that the required notice setting out the allegations against her gave no details, but merely recited the words of s 61(1) of the Act. Further, s 41(5) of the Act required the committee to keep a record of the proceedings and of any evidence heard by it and of the reasons for any decision made by it. The documents filed did not constitute a record and no reasons were given for the committee's decision. Finally, it was argued that there was nothing to show that the appellant was "unfit" to perform the functions listed in s 61(1)(b).

Held, that the provisions of s 41(5) of the Act are peremptory; it was inadequate to file with the court the papers relating to the matter. A formal record was required.

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Held, further, that the committee was not only governed by the rules of natural justice, but also had to adhere strictly to the rules of evidence and procedure provided by the Act.

Held, further, that the right of appeal granted by the Act was that of an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong.

Held, further, that the use of the word "unfit" in s 61 of the Act connoted inability or incapability; and such a finding was not justified on the evidence.

Cases cited:

Tsomondo v Public Service Commission & Anor HH-432-87 (not reported)

McCoan v General Medical Council [1964] 3 All ER 143 (PC)

Libman v General Medical Council [1972] 1 All ER 798 (PC)

Simaan v SA Pharmacy Board 1980 (1) SA 764 (T)

de la Rouviere v SA Medical and Dental Council 1977 (1) SA 85 (N)

Rosenberg v SA Pharmacy Board 1981 (1) SA 22 (AD)

A P de Bourbon SC for the appellant

R Y Phillips for the respondent

Judgment

Adam J: This is an appeal pursuant to the provisions of s 45 of the Medical, Dental and Allied Professions Act [*Chapter 224*] (hereinafter called the "Act") against the decision of the respondent Council. At the conclusion of the hearing we allowed the appeal and announced that our reasons would be furnished later. These are the reasons.

In this matter a committee of inquiry in terms of s 61 of the Act, having been established pursuant to s 12(1)(c), met on 7 July 1987 to inquire into an allegation referred to it by the Executive Committee of the Council. The allegation, in the notice to the appellant dated 20 March 1987, was that -

"you, being a registered medical practitioner, have become unfit to purchase, acquire, keep, use, prescribe, order, supply or possess any drug."

At the end of the inquiry the appellant was advised by the committee of inquiry that it was their opinion that the appellant had -

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"acted in a most irresponsible manner and totally against recognised medical ethics in that you have displayed a total disregard for the dangers inherent in prescribing narcotic drugs. You have therefore become unfit to, purchase, acquire, keep, use, prescribe, order, supply or possess any drugs. We therefore recommend to the Health Professions Council that your name be removed from the register of medical practitioners. In the meantime you are suspended from the practice of medicine in Zimbabwe with immediate effect."

On 4 August 1987 the respondent Council confirmed that recommendation.

For the purposes of this appeal, I will outline certain relevant sections of the Act.

"5. (1) The Council shall consist of twenty-seven members of whom -

- (a) one shall be the Secretary for Health;
- (b) ten shall ...be appointed by the Minister;
- (c) sixteen shall ...be elected.

...

12. (1) For the proper exercise of its functions and powers under this Act or any other enactment, the Council -

- (a) shall establish an executive committee, the function of which shall be to exercise any powers of the Council between meetings:

Provided that -

- (i) the Executive Committee shall not, save in so far as the Council otherwise directs, have power to set aside or vary any decision of the Council;
 - (ii) any action taken by the Executive Committee shall be reviewed by the Council at its meeting next after such action is taken;
 - ...
 - (c) may ... establish ... such other committees as it considers to be necessary or desirable ... on which may be imposed such of the functions and powers of the Council as the Council may direct:
- Provided that -
- (i) the Council shall not vest in any such committee the power which is conferred upon the Council in terms of section *thirty-five* to cancel the provisional registration of a person;
 - (ii) the vesting or imposition of any such functions and powers

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- in a committee shall not thereby divest the Council of such functions and powers;
 - (iii) the Council may amend or rescind any decision of any such committee in the exercise of its functions and powers;
 - (iv) save as otherwise expressly provided in this Act or any other enactment, no such committee shall exercise any disciplinary powers in relation to a person registered under this Act or that other enactment.
- (2) The President of the Council or the chairman of a committee may, at any time and at any place, convene a meeting of that committee.
- (3) Subject to the provisions of this Act, the procedure of a committee established in terms of this Act shall be fixed by the Council.
13. (1) The Executive Committee shall consist of -
- (a) the President of the Council, who shall be the chairman;
 - (b) the Vice - President of the Council;
 - (c) the Secretary for Health;
 - (d) nine members of the Council appointed by the Council ...
 - ...
- (3) At any meeting of the Executive Committee six members ...shall form a quorum.
- (4) If at a meeting of the Executive Committee the President or Vice-President are both absent, the members present shall elect one of their members who is a Medical Practitioner to preside at that meeting.
- (5) All acts, matters or things authorized or required to be done by the Executive Committee shall be decided by a majority vote at a meeting of the Committee at which a quorum is present.

....

14. (1) The Disciplinary Committee shall consist of -

- (a) the President of the Council, who shall be chairman; and
- (b) not less than two and not more than four other persons specially appointed by the President of the Council in consultation with the Executive Committee for the particular inquiry ...

(2) The legal member of the Council shall be present at an inquiry to advise the Disciplinary Committee on matters of law, procedure and evidence:

Provided that, if the legal member of the Council is unable to be present at an inquiry, the President of the Council, in consultation with the Executive Committee or with such members thereof as he is able to consult in the time available, shall appoint some other person who is a legal practitioner...

(3) At any meeting of the Disciplinary Committee, the chairman

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and two other members shall form a quorum.

(4) All acts, matters or things authorized or required to be done by the Disciplinary Committee shall be decided by a majority vote at a meeting of the Disciplinary Committee at which a quorum is present.

....

PART IV DISCIPLINE

40. (1) Subject to the provisions of this Act, the function of the Disciplinary Committee shall be to inquire into an allegation referred to in terms of section *forty-three* that a registered person -

- (a) has been guilty of improper conduct or disgraceful conduct or conduct which, when regard is had to the profession or calling of that person, is improper or disgraceful; or
- (b) is grossly incompetent or has performed any act pertaining to his profession or calling in a grossly incompetent manner;

and to exercise the powers conferred by section *forty-four*.

(2) Before exercising its powers in terms of section *forty-four* with respect to any person, the Disciplinary Committee shall -

- (a) cause to be served upon him a notice setting out the allegations against him; and
- (b) afford him a reasonable opportunity of being heard either by himself or, if he so wishes, by a legal representative.

41. (1) For the purposes of an inquiry in terms of section *forty*, the Disciplinary Committee may take evidence ...

...

(5) The Disciplinary Committee shall, in any inquiry held by it in terms of this Part, record the proceedings and any

evidence heard by it and the decision made by it and the reasons therefor.

...

43. (1) Whenever there is brought to the notice of the Executive Committee an allegation which might be the subject of inquiry by the Disciplinary Committee, the Executive Committee shall have power to call for information, to cause such investigation to be made as it thinks necessary and to seek such legal advice or other assistance as it may require.

(2) After investigation in terms of subsection (1) the Executive Committee shall refer the matter to the Disciplinary Committee for enquiry and may, if it thinks fit, arrange for the employment of a legal practitioner to present a charge on the evidence relating thereto at the inquiry ...

44. (1) If after due inquiry the Disciplinary Committee decides that a

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registered person -

- (a) has been guilty of improper conduct or disgraceful conduct or conduct which, when regard is had to the profession or calling of that person, is improper or disgraceful and that such conduct warrants the cancellation of his registration; or
- (b) is grossly incompetent or has performed any act pertaining to his profession or calling in a grossly incompetent manner;

the Disciplinary Committee shall refer the matter to the Council for the removal of the name of such person from the register and may suspend him from practice pending a final decision by the Council.

...

45. (1) Any person who is aggrieved at the finding of or penalty imposed by the Council, Executive Committee or Disciplinary Committee under this Part may, within three months after the date of such finding or the imposition of such penalty, appeal to the High Court.

(2) On an appeal in terms of subsection (1) the High Court may -

- (a) confirm, vary or set aside any finding or penalty of the Council, Executive Committee or Disciplinary Committee; or
- (b) remit the matter to the Council, Executive Committee or Disciplinary Committee for further consideration;

and may make such order as to costs or otherwise as may to it seem just:

Provided the High Court shall not set aside any finding or penalty by reason only of any informality in the proceedings of the Council, Executive Committee or Disciplinary Committee which did not embarrass or prejudice the appellant in answering the charge or in the conduct of his defence.

(3) For the purposes of any appeal in terms of this section the court may, if it thinks expedient so to do, call in the aid of one or more assessors who are specially qualified and hear the appeal wholly or partly with their assistance but the decision of the court in such appeal shall be made or given by the judge or judges alone.

...

PART VI

GENERAL AND SUPPLEMENTARY

...

61. (1) Whenever there is brought to the notice of the Executive Committee an allegation that a registered person has -

- (a) become mentally or physically disabled to such an extent that it would be contrary to the public welfare to allow him to continue to practise; or
- (b) become unfit to purchase, acquire, keep, use, prescribe,

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order, supply or possess any drug; or

- (c) been using a drug in contravention of any law relating to the use of drugs; or
- (d) become addicted to or dependent upon the use of drugs;

the Executive Committee shall have power to call for information, to cause such investigation to be made as it thinks necessary and to seek such legal advice or other assistance as it may require and may thereafter, if it deems fit, refer the matter to a committee appointed in terms of paragraph (c) of subsection (1) of section *twelve* for inquiry.

(2) Where a matter has been referred in terms of subsection (1) to a committee referred to in that subsection for inquiry, the provisions of Part IV shall, *mutatis mutandis*, apply to such inquiry.

(3) In addition to the penalties which may be imposed in terms of section forty-four as read with subsection (2), the committee to which the matter has been referred may, in the case of a person to whom the provisions of paragraph (b), (c) or (d) of subsection (1) apply -

- (a) prohibit such a person for a specified period from purchasing, acquiring, keeping, using, prescribing, ordering, supplying or possessing any specified drug; or
- (b) impose for a specified period such conditions as it deems fit subject to which such person shall be entitled to purchase, acquire, keep, use, prescribe, order, supply or possess any specified drug."

The appellant's heads of argument challenged the proceedings on a number of different grounds. It was argued on behalf of the appellant that many aspects of Part IV of the Act had not been complied with by the respondent Council. Under the provisions of s 40(2), a notice was required to be served, setting out the allegations, but the notice served on the appellant merely recited the words of s 61(1) of the Act and, it was submitted on her behalf, no details of allegations were given: cf *Tsomondo v Public Service Commission & Anor* HH-432-87 at pp 4-5. It was further stressed that there was no evidence to show that the jurisdictional grounds for setting up of the committee of inquiry had been satisfied, since the correspondence showed that the Council, and not the Executive Committee, carried out the investigation. It was pointed out that pursuant to s 41(5) the committee of inquiry was required to keep a record of the proceedings and of any evidence heard by it and that the documents filed in this matter were

totally inadequate and did not constitute a record. It was also urged that the committee of inquiry was required to give reasons but reasons were totally absent and why the ultimate penalty envisaged by the Act should be imposed was not explained.

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It was suggested that, although the proviso to s 45(2) of the Act states that the High Court shall not set aside any finding or penalty by reason only of any informality in the proceedings which does not embarrass or prejudice the appellant, the errors made were of such a magnitude that they did not amount merely to informality. It was submitted that the restrictive approach, as exemplified by such British cases as *McCoan v General Medical Council* [1964] 3 All ER 143 (PC) at 147 and *Libman v General Medical Council* [1972] 1 All ER 798 (PC) at 799-800, was not justified in this country in view of the wide powers given to the High Court under s 45(2) of the Act - *Simaan v South African Pharmacy Board* 1980 (1) SA 764 (T) at 768-769.

It was also submitted on behalf of the appellant that it may well have been shown that she acted wrongly in the circumstances (as disclosed in the correspondence) but there was no evidence to show that the appellant had become "unfit" to perform the various functions. It was pointed out that what the appellant was alleged to have done was not described as improper or disgraceful conduct under s 44(1) which provides for disciplinary proceedings. It was stressed that "unfit" for purposes of s 61 of the Act connoted the concept "not able to". It was submitted that the evidence did not establish that the appellant was unsuited to prescribe or incapable of prescribing drugs. It was further argued that even if it was accepted that her conduct did render her "unfit", it did not follow that she must be precluded from practicing medicine altogether since the legislation provides for other sanctions under ss 44(2) and 61(3) of the Act. Further, it was urged that in assessing the ultimate penalty the record of the appellant as a medical practitioner for thirty seven years, with no evidence that she had not met the high standards of her profession, was most relevant. It was urged that the whole of the proceedings be set aside.

It was conceded on behalf of the respondent Council that the allegations in the notice were in fact a recitation of s 61(1) of the Act but since the appellant had been engaged in an exchange of correspondence with the Registrar over a period in excess of three months, the notice should not be seen in isolation and the appellant was clearly informed in the correspondence that prescribing of the drug Valoron was under inquiry. Further, it was submitted that since the Registrar was the secretary to all the committees, his notes, together with the other papers filed, clearly formed part of the record; and reference was made to s 9(1) of the High Court (Miscellaneous Appeals and Reviews) Rules 1975 (RGN 451 of 1975). The provisions of s 9(1) indicate as follows:

"9. (1) Within twenty-one days of receipt of a notice, the tribunal or

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officer concerned shall -

- (a) if a formal record of the proceedings was kept, lodge it with the registrar;
- (b) if no formal record of the proceedings was kept, lodge with the registrar reasons for the decision concerned, together with all papers relating to the matter in issue."

Clearly the argument advanced for the respondent Council does not really meet the issue at hand, since the provisions of s 41(5) are explicit and, in our view, peremptory, in that they specifically require that the committee of inquiry shall "record" the proceedings and evidence heard, as well as the decision made and the reasons therefor. The papers filed with the Court can aptly be described as "second best" - which record, in some respects, is of the type mentioned in s 9(1)(b) above. What the provisions of s 41(5) of the Act envisage is a formal record described in s 9(1)(a) above. Without prescribing a specific model, one of the ways of achieving an adequate record of proceedings would be to tape record the proceedings concerned and to provide a certified transcript of it. In our view, the respondent Council failed in providing the type of record as required by s 41(5) of the Act.

It was also submitted that the reasons of the committee of inquiry were "cryptically stated" when it observed:

"The Committee is of the opinion that you have acted in a most irresponsible manner and totally against recognized medical ethics in that you have displayed a total disregard for the dangers inherent in prescribing narcotic drugs."

It was further argued that no precise procedural or evidential rules existed for the committee of inquiry to follow which meant that it was governed by the rules of natural justice - *de la Rouviere v South African Medical and Dental Council* 1977 (1) SA 85 (N) at 99. It was urged that the appeal in terms of s 45(1) of the Act was an appeal in the ordinary strict sense: *de la Rouviere supra* at 90. Also, it was submitted that the recommendation made by the committee of inquiry was not unreasonable and that the appropriate penalty was something peculiarly in the hands of the respondent Council - *de la Rouviere supra* at 97. However, it was conceded on behalf of the respondent Council that "unfit", for the purposes of s 61 of the Act, connoted the concept of "not able to".

In *de la Rouviere's case supra* at 87, 98-103, VAN HEERDEN J stated:

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"There are numerous reported cases in which the provisions ... received judicial interpretation and from which the following principles emerge, namely, that, although the Council is empowered to summon witnesses and to examine them on oath, it is not a court of law but a professional body acting in a *quasi-judicial* capacity ... that the provisions ... did not exclude the right of the accused to a fair hearing ... that the Courts could not interfere with the Council's findings of fact if the Council had before it evidence on which it could reasonably and honestly arrive at the conclusion which it did ...

A question that was much debated before us is whether and to what extent a tribunal of the nature we are here concerned with is bound ... to follow the rules of procedure and evidence. In *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (AD), it was accepted that if a tribunal has disregarded its own rules or the fundamental principles of fairness, a Court can, on review, interfere ... in the case of a statutory tribunal its obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment. After stating that the fundamental principles of justice which underlie our system of law have never been exhaustively

defined and are not altogether clear, BOTHJA JA at p 646 quoted with approval the following from the judgment of LORD TUCKER in *Russell v Duke of Norfolk & Ors* [1949] 1 All ER 109;

'The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'

The learned JUDGE OF APPEAL went on to say:

'The principles of natural justice do not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such a tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing his evidence and of correcting or contradicting any prejudicial statement or allegation made against him ... The tribunal is required to listen fairly to both sides and to observe 'the principles of fair play' ... In addition to what may be described as the procedural requirements, the fundamental principles of justice require a domestic tribunal to discharge its duties honestly and impartially ... They require also that the tribunal's finding of the facts on which its decision is to be based shall be 'fair and *bona fide*' ... It is, in other words, 'under an obligation to act honestly and in good faith ...'

In *Sem v South African Medical and Dental Council* 1948 (3) SA 571 (T)

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it was held that the rules which govern the admissibility of evidence in our Courts of law cannot rigidly be applied to proceedings before statutory bodies and that evidence given before such bodies should not be as closely scrutinised in that regard as it would be in our Courts. In *Birkett v Accident Fund & Anor* 1964 (1) SA 561(T) at p 566, GALGUT J (as he then was) did not understand these remarks to mean that a medical council must permit inadmissible evidence but rather to indicate that if such evidence were admitted a Court would not interfere unless good grounds existed

In *McLoughlin v South African Medical and Dental Council* 1947(2) SA 377(W) RAMSBOTTOM J expressed the view that the extent to which a domestic or private tribunal was to be held bound ... would depend upon the nature of the tribunal and the rules, if any, which had been laid down for its procedure and at p 395 had the following to say:

'The Council and the disciplinary committee are bodies of a very different kind. They are entrusted with the most important duties; they have the power to compel the attendance of witnesses; evidence is given on oath and any person who gives false evidence on oath before the Council or the committee or who refuses to answer commits an offence; the parties have the right to appear by counsel and witnesses are examined and cross-examined; a legal assessor may be appointed 'to advise on matters of law procedure and evidence' ... In my opinion, a body of this kind should be held much more strictly to the rules of procedure and evidence... And in the case of the South African Medical Council, Parliament has not left it to the Council to apply the principles of 'natural justice' but has provided for precise rules of procedure'.

...

The principle to be extracted from the authorities referred to seems to be that to a large extent it is the nature of the particular tribunal which dictates whether it is at all bound by the rules of evidence. I agree, with respect, with RAMSBOTTOM J that the Council and the Disciplinary Committee, for reasons given by him, are bodies which should more strictly be held to the rules of procedure and evidence.

... Questioning by members of the committee ... was not to elicit information or with a view to elucidate obscurities but the whole tenor thereof was in the nature of a cross-examination to show the appellant was not telling the truth

...

ADAM J

especially is this so in regard to matters whereof members have a peculiar professional knowledge. Allowing for all that, however, a fair reading of the record shows that there is considerable substance in counsel's submissions regarding the questioning of the ... appellant. The following remarks of HOEXTER JA at p 285 in *SA Medical and Dental Council v Lipron* 1949 (3) SA 277 (AD) would not be inapposite here:

'The above conclusions dispose of the appeal, but I think I ought to add that I agree with the learned Judges in the Court below that some of the questions asked by some of the members of the disciplinary committee show a lack of appreciation of the judicial attitude which is proper to an enquiry by such a committee.'

...

It is necessary to consider in general how the disciplinary committee in all probability approached the question of determining whether or not the evidence established the allegations against the appellant. The absence of the committee's reasons makes this Court's task undoubtedly more difficult."

What was said by VAN HEERDEN J in regard to rules of procedure and evidence, as well as the fundamental principles of justice as they pertain to statutory tribunals, is equally applicable in this case.

In enacting s 45(1) of the Act the Legislature undoubtedly gave an aggrieved person a right of appeal to this court against the finding or penalty imposed. As stated by VAN HEERDEN J in *de la Rouviere's case supra* at 90:

"The word 'appeal' is of course capable of different connotations and, as conveniently summarised in *Tiky & Ors v Johannes NO & Ors* 1963(2) SA 588 (T) at 590, may mean:

- (i) an appeal in the wider sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information;
- (ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which only determination is whether that decision was right or wrong;
- (iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly."

ADAM J

The South African Appellate Division in *Rosenberg v South African Pharmacy Board* 1981 (1) SA 22 (AD) at 27 approved the classification described above and MILLER JA at 27-30 pertinently observed:

"The problem of defining the extent of the Court's powers when an appeal to it from the decision of a *quasi-judicial* body entrusted with punitive powers in respect of those subject to its disciplinary jurisdiction has been sanctioned by legislation, has been discussed in many cases ...When considering that problem it is necessary to keep in mind the distinction between the nature and extent of the powers conferred on the Court by the legislation, and the Court's approach to the exercise of such powers in any given case or type of case. It goes without saying that a Court possessed of the power (when it considers that the decision of the body *a quo* was wrong) to substitute therefor its own decision might in the light of the particular circumstances inhibit itself in the exercise of such power ... But that is not to say that the powers statutorily conferred on it thereby suffer diminution; they remain of full force ...The inquiry is primarily into the nature and extent of the powers conferred by the legislation, which is essentially a matter of interpretation of the statute; only when that has been established is it proper to consider what the Court's approach to and the manner of its exercise of its powers should be.

....

The now repealed Medical, Dental and Pharmacy Act 13 of 1928, contained sections (18(2) and 42(5)) similar to but not identical with ss 24(2) and 45(3) of the Act, relative to an aggrieved person's right of recourse to the Supreme Court. Such a person was entitled to 'an application' to the Court whereas ss 24(2) and 45(3) of the Act speak of such a person's right to 'appeal' to the Court.

...

I have entered into some detail in this connection in order to show, not only that the Board is a tribunal which is to keep a record of the proceedings when it conducts an inquiry, but also that the inquiry is both in form and in fact in the nature of a trial. The findings made at the conclusion of such trial are appealable and the clear indications are that an appeal in the ordinary sense, on the record kept by the Board, lies to the Supreme Court."

I can think of no reason why s 45(1) of the Act, as applicable in this case, is not governed by the same principles enunciated above. The appeal to this court is an appeal in the ordinary sense and I am in agreement with

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ADAM J

MULLER JA that the restrictive approach of the Privy Council in cases such as *Libman v General Medical Council supra* is not in accordance with a proper interpretation of the statute.

I should indicate that the Act specifies in some detail the functions of the Council, the Executive Committee and other committees established by the Council. Despite the overlapping of membership in such bodies, it is clear that the legislature intended that each discharge its responsibility in accordance with the provisions of the Act. There is substance to the argument advanced on behalf of the appellant that the Executive Committee did not investigate the allegations as reflected in the correspondence filed by the respondent Council with this court.

We are satisfied that the conclusion reached by the committee of inquiry that the appellant was 'unfit' in the sense of 'not able to' or incapable of prescribing was not justified. In our view, counsel for the respondent Council correctly conceded that the findings of the committee of inquiry could not be sustained on that basis.

Accordingly, the appeal is allowed with costs and the decision of the respondent Council is set aside.

Greenland J: I agree.

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AJA Peck, appellant's legal practitioner

Scanlen & Holderness, respondent's legal practitioners

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GRANT v EAGLE INSURANCE CO LTD 1989 (1) ZLR 19 (HC)

Court High Court, Harare

Adam J

Special plea and exception

10 October 1988 & 11 January 1989

Flynote

Statutes - Road Traffic Act 1976 - ss 23(2) and 25(1) - action against insurer for material damages - whether statutory policy restricted to death or bodily injury - prescription of action under policy - method of calculating time period.

Headnote

While a statutory policy of insurance under the Road Traffic Act must indemnify the insured in respect of liability for death or bodily injury to other persons caused by or arising out of the use of the motor vehicle in question, this does not mean that a statutory policy cannot cover other risks, such as material damage. The Act requires the insurer to indemnify the insured in respect of any liability which the policy purports to cover. If it is established that the policy covers all third party risks, the insurer would be liable for risks other than death or bodily injury.

Section 25(1) of the Act provides that the right of recovery from the insurer shall become prescribed "upon the expiry of a period of two years from the date on which such claim arose". In calculating when this period expires, the provisions of s 28 of the Interpretation Act [*Chapter 1*] apply, not those of the common law. This means that the date on which the claim arose is not included in the period.

Cases cited:

Joubert v Enslin 1910 AD 6

Thomas v Liverpool & London & Globe Insurance Co of SA Ltd 1968 (4) SA 141 (C)

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Kleynhans v Yorkshire Insurance Co Ltd 1957 (3) SA 544 (A)

SA Mutual Fire & General Insurance Co Ltd v Fouche en 'n Ander 1970 (1) SA 302 (A)

Gumbo v Sunganayi Motorways (Pvt) Ltd 1988 (2) ZLR 83 (HC).

D A Matyszak for the plaintiff

D R Granger for the defendant

Judgment

Adam J: The plaintiff served her summons and declaration on 3 May 1988. The defendant's special plea alleged that the plaintiff's claim arising from the collision of 2 May 1986 became prescribed upon the expiration of 2 years from that date, according to s 25(1) of the Road Traffic Act 48 of 1976 (hereinafter called the "Act"). In its exception the defendant maintains that the claim for special damages (in para 8(c) of the plaintiff's declaration) for damage caused to the motor vehicle and for towing charges were bad in law and disclosed no cause of action against the defendant, as this was a claim for material damages which was excluded since s 25(1) of the Act only provides for a statutory policy in respect of any liability for death of, and bodily injury to, any person caused by or arising out of a motor vehicle collision. There is no right of action under the common law against the defendant and the right to bring proceedings under the Act was limited only to a claim arising from death or bodily injury.

The first issue for determination by this court relates to the method of computing the two year period prescribed in the Act. The defendant maintains that for this purpose the provisions of the Interpretation Act [*Chapter 1*] cannot be applied and the court has to resort to the common law method of computation. The plaintiff's contention, on the other hand, is that s 28 of the Interpretation Act has to be relied upon in order to establish the prescriptive period.

Sections 23 and 25(1) of the Act provides as follows:

"23 (1) A statutory policy -

(a) shall -

...

(ii) subject to the provisions of subsection (2), insure such persons ... as may be specified in the statutory policy in respect of any liability which may be incurred by them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the motor vehicle or

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trailer concerned on a road;

...

(2) A person issuing a statutory policy shall -

(a) notwithstanding anything contained in any law, be liable to indemnify the persons or classes of persons specified in the statutory policy in respect of any liability which the statutory policy purports

to cover in the case of such persons or classes of persons; ...

25 (1) A person who has a claim against a person insured or indemnified in respect of any liability in relation to which a statutory policy has been issued shall be entitled -

- (a) in his own name to recover from the insurer any amount, not exceeding the amount covered by the statutory policy, for which the person insured or indemnified is liable; and
- (b) to claim and recover from a person insured or indemnified only so much of his claim as exceeds the amount recovered by him from the insurer:

Provided that -

- (i) the rights of any such person who claims directly from the insurer shall, subject to the provisions of subsection (2), be no greater than the rights of the insured against the insurer;
- (ii) the right of recovery directly from the insurer shall become prescribed upon the expiry of a period of two years from the date on which such claim arose.

(2) Any condition in a statutory policy purporting to restrict -

- (a) the insurance of the persons insured thereby; or
- (b) the indemnification of the persons indemnified thereunder;

shall not, subject to the provisions of subsections (3) and (4), be of any force or effect.

(3) Nothing in this section contained shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of such liability.

(4) Any sum paid by an insurer in or towards the discharge of any liability of a person which is covered by the statutory policy by virtue only of the provisions of this section shall be recoverable by the insurer from the person."

The Interpretation Act provides under ss 2 and 28 (2), (3), (4), (5) and (6) as follows:

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ADAM J

"2. (1) The provisions of this Act shall extend and apply to every enactment ...except in so far as any such provisions -

- (a) are inconsistent with the intention or object of such enactment; or
- (b) would give to any word, expression or provision of any such enactment an interpretation inconsistent with the context; or
- (c) are in such enactment declared not applicable thereto.

(2) Nothing in this Act shall exclude the application to any enactment of any rule of construction applicable thereto and not inconsistent with this Act.

28. (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.

(4) Where the time limited by an enactment for the doing of anything expires or falls upon a Saturday, a Sunday or

a public holiday, the time so limited shall extend to, and the thing may be done on, the first following day that is not a Saturday, a Sunday or a public holiday.

(5) Subsections (2), (3) and (4) shall apply whether or not the number of days concerned is expressed to be clear days.

(6) In an enactment -

...

(c) a reference to a month shall be construed as a reference to a calendar month;

(d) a reference without qualification to a year shall be construed as a reference to a period of twelve months".

The South Africa Appellate Division in *Joubert v Enslin* 1910 AD 6 outlined the common law method of computation, which CORBETT J in *Thomas v Liverpool & London & Globe Insurance Co of South Africa Ltd* 1968 (4) SA 141 (C) at 145 termed as the 'ordinary civilian' method of computation and which was described by him as follows:

"As I understand this method (as applied to a period fixed by days), it first entails counting the requisite number of days as from the date of commencement by commencing the count with the following day. In this way the last day of the period is determined. Thus in the case of a period of 60 days commencing as from 30 March 1967 the last day would be determined by commencing the count with 31 March 1967. This

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would bring one to the 29 May 1967 as the last day. According to this method of computation, however, the last day was 'nominally included but practically excluded': by a fiction it was regarded as completed at the moment of its birth (*ultimus dies coeptus pro completo habetur*) with the result that the period was practically treated as expiring at midnight on ... 28 May 1967. In order then to make up the full number of units the date from which the period ran (in this case 30 March 1967) was then included. In the result, therefore, the computation involves including the first day and excluding the last day ... Applied to the facts of this case it would result in the sixty-day period commencing with the 30 March 1967 and ending at midnight on 28 May 1967."

The decision in *Joubert v Enslin supra* was applied by SCHREINER ACJ in *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (AD), when he held that in enacting s 11 of the South African Motor Vehicle Insurance Act 29 of the 1942 the Legislature did not intend that the ordinary civil rule should not apply. He went on to observe that clear wording of the statute may lead to the rejection of the ordinary civil rule. It must be pointed out that in that case the South African Appellate Division did not consider the provisions of the South African Interpretation Act. However, in *Thomas v Liverpool & London & Globe Insurance Co of SA Ltd supra* CORBETT J specifically dealt with ss 1 and 4 of the South African Interpretation Act when considering ss 11(2) and 11 *bis* (2) of the South African Motor Vehicle Insurance Act. Sections 1 and 4 of the South African Interpretation Act provided as follows:

"1. The provisions of this Act shall apply to the interpretation of every law ... unless there is something in the language or context of the law ... repugnant to such provisions or unless the contrary intention appears therein.

4. When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and

exclusively also of every such Sunday or public holiday."

The South African Motor Vehicle Insurance Act, in ss 11(2) and 11 *bis* (2), provided as follows:

"11(2)(a) The right to claim compensation ... shall become prescribed upon the expiration of a period of two years as from the date upon which

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that claim arose:

Provided that prescription shall be suspended during the period of 60 days referred to in sub-section (2) of section 11 *bis*.

11 *bis* (2) No such claim shall be enforceable by legal proceedings commenced by a summons served on the registered company before the expiration of a period of 60 days as from the date on which the claim was sent or delivered, as the case may be, to the registered company ..."

CORBETT J observed at 142-143 that -

"The determination of the issues raised ... involves the interpretation of ss 11(2)(a) and 11 *bis* of the Motor Vehicle Insurance Act 29 of 1942 and of s 4 of the Interpretation Act ...

The effect of these provisions upon the prescription of claims for compensation under the Act is shortly as follows. The period of extinctive prescription relating to such claims is fixed at two years. This period must be computed by applying the ordinary civil method of computation (see *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (AD)). This period commences to run as from the date upon which the claim arose (ie normally the date upon which the accident giving rise to the claim occurred) and, applying the ordinary civil method of computation, the period ends at midnight on the previous calendar date of the second ensuing calendar year ... Thus, to take the facts of this case, the plaintiff's claim having arisen on 31 March 1965, the two-year period of prescription laid down by s 11(2)(a) would have ended at midnight on 30 March 1967 ...

The proviso to s 11(2)(a), which makes provision for the suspension of prescription, is clearly linked with s 11 *bis* (2) ...

Applying the method of computation laid down by s 4 to the provisions of s 11 *bis* (2) of Act 29 of 1942 ... the 'first day' ... must be excluded in the computation of the period of sixty days as from that date ... Accordingly in the present case 30 March 1967 would constitute the first day; the count of sixty days would commence on 31 March 1967; and the last (60th) day would fall on 29 May 1967. Turning to the proviso to s 11(2)(a), the period of suspension is there unambiguously defined as being 'during the period of sixty days referred to in sub-section (2) of section 11 *bis* (2)'. The period thus referred to would, in this case, be the period commencing with 31 March 1967 and ending on 29 May 1967. It would seem to follow from this that suspension could not have

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commenced prior to 31 March 1967 ... The anomaly is made obvious where the act occurs on the last day of the prescriptive period ... As I have indicated, no such anomaly arises if the civilian method of computation is applied ... It is necessarily inherent in the line of argument advanced by plaintiff's counsel that the whole of the first day ... should be included in the suspensive period. Only if this were done could it be said that, after the termination of the suspensive period, there remained one day upon which legal proceedings could be commenced ... Such an interpretation would, however, have the effect of introducing a period of suspension of sixty-one days. This result is manifestly not in accordance with the terms of the proviso to s 11(2)(a) which speaks of suspension 'during the

period of sixty days' referred to in s 11 *bis* (2) ...

My conclusion, therefore, is that the application of s 4 of the Interpretation Act to ss 11(2) and 11 *bis* (2) of Act 29 of 1942 does lead to the anomalous situation already described, viz that the suspensive effect of the sending or delivery would commence only upon the following day ...

It was argued that the application of s 4 to ss 11(2)(a) and 11 *bis* (2) did not result in repugnancy and that no contrary intention was apparent. I cannot agree with this argument. As I have already indicated, such application has the effect of truncating the period of prescription in the sense that a claim for compensation sent or delivered on the last day of the period of prescription does not have any suspensive effect prior to the termination of the prescriptive period: and in that no action to enforce the claim can be instituted prior to the sending and delivery of such a claim and the lapse thereafter of the sixty-day period. In terms of s 11(2)(a) ... a claimant for compensation was granted a full two years within which to institute action ... If, as I have held, the application of s 4 of the Interpretation Act has the effect of thus truncating this period of two years, then, in my view, there is a repugnancy which justifies a departure from the provisions of the Interpretation Act. Moreover, the application of s 4 results in the period of suspension commencing on the day after the act which brings about the suspension. This also seems anomalous ..."

The above reasoning of CORBETT J was approved by the South African Appellate Division in *South African Mutual Fire and General Insurance Co Ltd v Fouche en 'n Ander* 1970 (1) SA 302 (A) at 314. It was taken for granted by CORBETT J, on the authority of *Kleynhans v Yorkshire Insurance Co Ltd supra*, that the two year period had to be reckoned by applying the ordinary civilian method. He did not consider whether s 4 of the South African

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Interpretation Act applied to the two year period, without reference to the 60 day suspension period, and whether this led to repugnancy.

It was also argued on behalf of the defendant that where a peremptory or directory period was mentioned in a statute the provisions of the Prescription Act did not apply and so by analogy the same principle applied to the Interpretation Act. However, the provisions of the Prescription Act are not in any way similar to those of the Interpretation Act and so the decisions interpreting those provisions of the Prescription Act are of no assistance to this Court.

It was submitted for the plaintiff that, in terms of s 28(2) of the Interpretation Act, in reckoning two years from 2 May 1986, 2 May 1986 is not included and the period commences from 3 May 1986; and since 2 May 1988 was a public holiday, pursuant to the provisions of s 28(4) of the Interpretation Act, the first following day which was not a Saturday, Sunday or public holiday, was 3 May 1988, and so the declaration was served properly within the prescriptive period.

I should point out that in *Gumbo v Sunganayi Motorways (Pvt) Ltd* 1988 (2) ZLR 83 (HC) REYNOLDS J held that the terms of the Interpretation Act must be resorted to for purposes of ss 14 and 15 of the Prescription Act, and he stated as follows at p 84C:

"It is my view that the Interpretation Act applies here, for it effectually codifies the common law where applicable, and there is no room to consider the common law at all."

However, if he was referring to the common law method of computation or the ordinary civilian method, with due respect to him, the authorities cited above indicate the contrary and in fact

the provisions of s 28(2) of the Interpretation Act do not codify the common law.

The validity of the defendant's contention depends on the applicability of the ordinary civilian method in computing the prescriptive period. But, as indicated previously, s 2 of the Interpretation Act specifically states that the provisions of that Act applies to every enactment, unless those provisions are inconsistent with the intention or object of such enactments. It follows from this that the statutory method of computation must be applied unless there is something in the language or context of the provisions of the Road Traffic Act which prevents this. It has not been established by the defendant that in

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ADAM J

applying s 28(2) and (4) of the Interpretation Act to s 25(1) of the Act an anomaly arises as was shown in *Thomas v Liverpool & London & Globe Insurance Co of South Africa Ltd supra*. This Court is not satisfied that the provisions of the Interpretation Act are in any way inconsistent with the intention or object of the Road Traffic Act. The South African courts have relied upon *Kleynhans v Yorkshire Insurance Co Ltd* in applying the ordinary civilian method of computation to the two year prescriptive period of the South African Motor Vehicle Insurance Act. In that case, as mentioned, the South African Appellate Division did not consider the provisions of the South African Interpretation Act.

In light of the foregoing I accordingly conclude that the method of computation prescribed in the Interpretation Act applies in determining the two year prescriptive period of s 25(1) of the Act and so the declaration was properly served on 3 May 1988.

The determination of the exception involves the interpretation of ss 23 and 25(1) of the Act. It was argued on behalf of the defendant that the statutory policy of insurance under s 23(1) of the Act was restricted only in respect of the death of, or bodily injury to, any person involved in a motor vehicle collision and so the right to proceed against the insurer under s 25(1) of the Act does not cover material damage. It was the plaintiff's contention that s 23(1) of the Act specifies the minimum requirements for a statutory policy and so a statutory policy may include all third party risks including these for material damage. Further, s 23(2) of the Act species that the insurer shall be liable to indemnify in respect of any liability which the statutory policy purports to cover.

It is clear from the plaintiff's declaration that the claim against the defendant is on the basis of an approved insurer for purposes of Part 3 of the Road Traffic Act and that the motor vehicle in question was covered by a written declaration of insurance in terms of Part 3 of that Act issued by the defendant. It follows that for the plaintiff to succeed in her claim against the defendant she would have to establish that the written declaration of insurance issued by the defendant covered all third party risks, including those for material damage as reflected in para (c) of her declaration. I am not convinced by the defendant's submission that the statutory policy under s 23 of the Act cannot include material damage coverage.

I should mention that it was open to the defendant to seek further particulars from the plaintiff as to her claim for special damages. It may well transpire

ADAM J

that the written declaration of insurance, issued under Part 3 of the Act by the defendant, may or may not cover special damages. To that extent the defendant's exception was premature. On the papers I am not satisfied that the defendant has established that the plaintiff's claim as it stands presently is bad in law and discloses no cause of action.

Accordingly the defendant's special plea and exception are dismissed with costs.

D W Aitken & Co, plaintiff's legal practitioners

Granger & Harvey, defendant's legal practitioners

S v LAWRENCE & ANOR 1989 (1) ZLR 29 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

22 November 1988 & 27 January 1989

Flynote

Criminal procedure (sentence) - bribery of public officer - businessman bribing officer in Ministry of Trade and Commerce to circumvent import procedures - appropriate sentence.

Evidence - documentary - evidence in document relating to trade, business etc - Criminal Procedure and Evidence Act [Chapter 59] - s 262B(2) - need to prove that person supplying information is not available to give evidence.

Evidence - witness - accomplice - conviction on single evidence of - Criminal Procedure and Evidence Act [Chapter 59] - s 254 - requirements of - imperfections in accomplices's evidence - approach of court - accomplice offered remission of sentence in return for giving evidence in accordance with affidavit to police - dangers of such a course - need to inform court of inducement - court, not Attorney-General, should decide whether evidence satisfactory.

Headnote

The appellants, a husband and wife, were convicted of nine counts of bribery.

The husband was a businessman and his wife was employed in the Ministry of Trade and Commerce. It was alleged that they had bribed one Marechera, another official in the Ministry, to issue Customs Clearance Only (CCO) authorities for goods which the husband imported for his business. This enabled the husband to import the goods without following the proper procedure for obtaining No Currency Involved (NCI) licences, which involved obtaining the

authority of the Reserve Bank of Zimbabwe. The goods were allegedly sent by foreign "donors".

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Under the proper procedure the Reserve Bank would be able to check the genuineness of the alleged donations. The inducements included gifts of a motor car and a television set, together with cash and a promise of a percentage of the value of the import licences issued.

The only witness against the appellants was Marechera himself. His evidence was shown to be full of contradictions, inconsistencies and prevarications. He had also, unbeknown to the trial magistrate, been promised, by the Attorney-General, a two-year remission of his sentence if he gave 'truthful and satisfactory' evidence consistent with an affidavit he had made to the police. The appellants were, nevertheless, convicted and sentenced to seven years' imprisonment, of which portions were suspended. They appealed against both conviction and sentence.

Held, that s 254 of the Criminal Procedure and Evidence Act [Chapter 59] allows for a conviction based on the single evidence of an accomplice, provided that the offence has been proved by evidence *aliunde* to have been committed. This requires a two-pronged enquiry. The court must first satisfy itself that the offence with which the accused is charged has been committed. Secondly, it must look for corroboration. If there is no evidence *aliunde* of the commission of the offence, there can still be a conviction if there is corroboration in a material respect which convinces the court that the accomplice can be relied on. In this case, the documents produced, the motor vehicle, the television set and the probabilities left no room for false implication of the appellants.

Held, further, that it is in accordance with public policy that persons who commit serious crimes should be brought to trial and that those of their partners in crime who can be induced by promises of pardon or other such inducements to give evidence against them should do so. However, this course should not be encouraged because of the possibility of abuse.

Held, further, that it is desirable to inform the court of any inducement or promise when the accomplice is called to testify, because the mere possibility of undue influence working on the mind of a witness may go against the concept of a fair trial. The danger of false incrimination is greater when an accomplice has been promised a pardon or a remission of part of his sentence.

Held, further, that it is for the court, and not for the Attorney-General or his representative in court, to decide whether the accomplice has given evidence to the satisfaction of the court.

Held, further, that an insurance cover note produced as an exhibit in terms of s 262B(2) of the Criminal Procedure and Evidence Act [Chapter 59] failed to satisfy the requirements of s 262B(2)(c), since the person who

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compiled the information was not proved to be outside Zimbabwe or unknown or unavailable to give oral evidence. The State did not bother to look for him although it was known he was in

Harare.

Held, further, that a sentence of seven years' imprisonment for the sort of crimes committed by the appellants was not manifestly excessive nor unduly harsh. On the contrary, it was an appropriate sentence, having regard to the need to discourage bribery and corruption and to assure society that the courts do not tolerate this type of crime. However, there was no reason to differentiate between the appellants in the portion of sentences suspended, and both appellants should serve an effective term of five years' imprisonment.

Cases cited:

R v Juwaki & Anor 1964 RLR 604 (AD); 1965 (1) SA 792 (RA)

S v Mubaiwa 1980 ZLR 477 (AD)

S v Paweni & Anor 1985 (2) ZLR 133 (SC); [1986] LRC (Crim) 431

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

R v Tapera & Ors 1965 RLR 142 (AD)

S v Hlapezula & Ors 1965 (4) SA 439 (A)

S v Narker & Anor 1975 (1) SA 583 (A)

S v Kelly 1980 (3) SA 301 (A)

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

A P de Bourbon SC, with him *E Chatikobo*, for the appellants

Y Omerjee, for the respondent

Judgment

Dumbutshena CJ: The two appellants and their son, Richard Depores Lawrence, were jointly charged with nine counts of bribery and in the alternative with nine counts of contravening s 3(b) of the Prevention of Corruption Act No. 34 of 1985. They denied the charges. At the end of the trial Richard Lawrence was acquitted. The two appellants were convicted. The first appellant was sentenced to seven years' imprisonment with labour. Two years of that sentence was suspended on appropriate conditions. The second appellant was also sentenced to seven years' imprisonment with labour. One year of that sentence was suspended on appropriate conditions. Both appellants now appeal against conviction and sentence.

The first appellant is the wife of the second appellant. She was at the relevant time employed by the Ministry of Trade and Commerce as a senior inspector in the investigations branch of the Ministry. She was responsible for the investigation of matters relating to import and export. She checked company

DUMBUTSHENA CJ

books of account and import and export documents of people applying for currency.

The second appellant is a businessman. He is himself a retired postmaster who went into business immediately after his retirement. He controlled and managed family companies. Some of the companies were concerned with the business of import and export. The main company, perhaps the holding company, was E Zambara Enterprises (Pvt) Ltd, trading as Inter Rural Enterprises and Import and Export Services. Because he was in the business of import and export he was keen to learn about the making of applications for foreign currency allocations. In this regard he consulted his bank and the Ministry of Trade and Commerce.

Both husband and wife had an interest in their family business. It appears from their evidence that they wanted to import foreign goods into the country. They must have planned to make more money, as was proper for them to do. The wife became useful as she was employed by the Ministry of Trade and Commerce. She must have known about the issuing of import and export permits and applications for foreign currency allocations. In regard to their own businesses, she did not follow the normal procedures. She approached a Mr Marechera, who was a senior administrative officer in the Ministry. He was employed in the foreign currency allocation section. She arranged for her husband to meet him. The three of them, that is, the two appellants and Marechera, met in her office.

From what went on afterwards, it appears the three struck a deal. The terms of the deal are not very clear from the evidence on the record. Marechera says the appellants agreed to pay him for his services. His story on this aspect is full of imperfections. Simply, it is this: He issued Customs Clearance Only (CCO) authorities. On the authority of these, CCO licences were issued. He says he was paid \$1 000 with still more money to come. He was given a Datsun Pulsar motor vehicle and a colour television set. The motor vehicle belonged to the first appellant and the television set belonged to the second appellant. Of course, the appellants deny giving Marechera these things. They say they gave Marechera the motor vehicle to use in his driving test. As for the television set, they say he was interested in buying it. Marechera told his father-in-law, Mr Mano, that the motor vehicle was given to him in order that he could drive to and from Bulawayo during the week-end. Marechera says he was afraid to tell his father-in-law the truth.

Let me first deal with the method of importing goods into the country. It

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forms the centrepiece of the transactions carried out by the appellants and Marechera. The goods we are concerned with were sent to the appellants by donors who lived in foreign countries. The appellants were required to apply for No Currency Involved (NCI) licences. To obtain the NCI licence, the intending importer applies to his bank. His bank forwards the application to the Reserve Bank. If the Reserve Bank approves the application it issues an Exchange Control Authority. On receipt of the Exchange Authority the intending importer applies to the Ministry of Trade and Commerce for the NCI licence. In the Ministry the application is

considered by a person holding the rank of Assistant Secretary or higher rank. The applicant is issued with the original authority, a copy is sent to the Ministry Licensing Office and a further copy is placed in the Ministry Registry file. The applicant takes his authority to the Ministry Licensing Office for the issuing of the NCI licence. Once he has the NCI licence he is free to import his goods.

In this case these procedures were not followed. Marechera knew the procedures. The first appellant must be assumed to have known them. The second appellant was good enough to consult both his bank and the Ministry on these procedures. Why then were they not followed? Marechera and the appellants ignored them. They decided to short-circuit them in order to obtain CCO authorities illegally. The appellants' applications ought to have gone through the Reserve Bank because they were importing goods of high value sent to them by donors.

As we have seen above, Marechera, a senior administrative officer, had no power to issue CCO authorities. He knew that CCO licences were not used for imports involving a great deal of money. The total value of the licence issued was \$96 256. Why did he take the risk?

Marechera testified that he knew that what he was doing was wrong and illegal. He hoped that it would not be discovered because of the incompetency in the Ministry. He was going to be paid for his services. The State case was that he agreed to issue CCO authorities because he was to be paid 10% of the value of the import licences issued, plus the Datsun Pulsar motor vehicle and the colour television set. He was paid \$1 000 with more to come. The percentage of the money he was to be paid varied, as will become clear later in this judgment.

I have no intention of narrating the full facts in this appeal. The learned regional magistrate covered all the facts and evidence adduced by witnesses in a detailed and thorough judgment. Let me just put down the salient facts.

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Sometime between March and April 1986 the first appellant discussed with Marechera how to make money through the importation of goods for re-sale. All they wanted were authorities for import licences. Marechera agreed, provided he received one-tenth of the value of the licence.

On or about 20 May 1986 the first appellant asked him to issue a CCO Authority for a licence to import calculators and spares. He did. Licence No. 803943A was issued in the name of Inter Rural Enterprises for \$5 600.

Again the first appellant requested Marechera to issue another authority. As a result licence No. 804598M was obtained for the import of photocopiers valued at \$20 000. The licence was in the name of Inter Rural Enterprises. On the same day Marechera was paid \$1 000 already referred to. He was promised to be paid more money.

On or about 15 June 1986 the first appellant obtained an authority from Marechera. On this authority licence No. 804931Z was issued in the name of E Zambara Enterprises for the importation of sewing machines and spares worth \$20 000.

Between June and July 1986 the appellants went to South Africa. Marechera says the first appellant telephoned him. She wanted a licence to import a motor vehicle and a washing machine valued at \$5 000. Their son fetched licence No. 812293B in the name of the first appellant. When the appellants returned from South Africa Marechera was given a colour television set. This is denied by the appellants.

On or about 10 July 1986 as a result of an authority issued by Marechera licence No. 812616C in the name of Inter Rural Enterprises was issued. They wanted to import ink worth \$25 000. The appellants gave to Marechera the Datsun Pulsar motor vehicle belonging to the second appellant.

On 18 August 1986 the appellants asked Marechera to issue two authorities. As a result two licences were issued, licence No. 833192S in the name of E Zambara Enterprises for the importation of a photocopier and spares worth \$12 000 and licence No. 833195W in the name of their son for the importation of two motor vehicles valued at \$6 000.

On 22 August 1986 the appellants' son obtained two licences - licence No. 835011V in the name of Import/Export Services to import four motor vehicles and spares worth \$12 600 and licence No. 835010T in the name of

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the second appellant for the importation of items valued at \$56.

The appellants denied any wrongdoing. They said they did not know that the authorities were illegally issued. They did not corruptly and unlawfully reward Marechera. Their defence was that they made applications in the ordinary way. They say applications were made by them, with documents accompanying such applications. They rely on Exhibits 23, 25 and 26. Exhibit 23 was an application written to the Ministry of Trade and Commerce by R Lawrence for "NCI licence for customs clearance purposes only...". Exhibit 25 is a letter from CH Meyer confirming that she made a donation of two motor vehicles. It contains a sworn statement made by Meyer. Exhibit 26 contains the sworn statement of Meyer donating a motor vehicle to R Lawrence. The State case was that they were put there long after the authorities and licences had been issued.

The first appellant did not deny that she was involved in the family business and that she applied for licences through Marechera. Her defence was that she did so in all good faith and in innocence. Both appellants deny offering Marechera any bribe.

This appeal presents uncommon difficulties. The evidence relied upon by the trial magistrate to convict the appellants is that of an accomplice, Marechera. His evidence was full of contradictions. He varied it with abandon. In spite of that, the learned magistrate convicted the appellants. Marechera was the only witness who implicated the appellants.

The question is whether the inconsistencies, contradictions and prevarications in Marechera's evidence are fatal to the State case. In *R v Juwaki & Anor* 1964 RLR 604; 1965 (1) SA 792 QUENET JP at 606 C-D (794 of the SA report), when confronted by similar situation, answered

the question this way:

"Where there are imperfections in the evidence of an accomplice and there is no corroboration of his evidence implicating the accused, the question remains whether there are other features which reduce the danger of false incrimination and, if there are, whether they reduce it to the point where there is no reasonable possibility that the accused has been falsely implicated. Indeed, that was the manner in which CLAYDEN CJ approached the question of the correctness of the second appellant's conviction in *Lembikani's* case (1964 R & N 7). And may I say that, in considering whether the danger of false incrimination has been satisfac-

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torily removed, the need that the other features should be strong and significant must, in each case, be related to the quality and character of the accomplice's evidence and the degree of its imperfection."

There is no doubt in this case that there are contradictions in the evidence of Marechera. He must have told the police that the gifts or considerations he was to receive from the appellants were in some cases 10% of the value of the licence issued and that he received \$1 000. He was given a colour television set and a Datsun Pulsar motor vehicle. These gifts were particularised in the schedule to the charge sheet. In his evidence he testified that he was to receive 50% of the value of the licence on Count One after all expenses had been deducted. In the remaining counts he said he was to be paid two-thirds of 10% of the profit and not 10% as was alleged in Count Three. In as far as Counts Four to Nine were concerned, he was to be paid two-thirds of 10% instead of the television set and Datsun Pulsar. He, however, testified that he was given a television set and a car instead of two-thirds of 10% of the profits. It is true there are many imperfections in his evidence. The question is: are they fatal to the State case?

It is common cause that there were discrepancies in Marechera's evidence. That is not the end of the matter. The court has still to ask itself

"....whether there are other features which reduce the danger of the false incrimination and, if there are, whether they reduce it to the point where there is no reasonable possibility that the accused has been falsely implicated"

(per QUENET JP in *R v Juwaki & Anor supra*). That is what this court has to find out.

In this case the trial court was not dealing with people who were ignorant of NCI and CCO applications. The two appellants knew what was required and what methods to follow when making such applications. The first appellant knew more than the second appellant about such applications. She had, in her personal capacity, applied in 1984 for the importation of a television set and personal items brought into the country by her children after overseas visits. She knew what to do and how to distinguish personal items from items of greater value imported for business purposes. When she imported a video recorder she applied to the Reserve Bank for an exchange control authority. She testified that she got it. The second appellant informed himself on this.

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Why did the appellants choose to obtain CCO licences illegally? And why did they do it through a senior administrative officer instead of applying through their bank to the Reserve Bank for exchange control authorities? Why did they choose to avoid putting their applications through the Ministry registry? They knew they had struck an illegal deal with Marechera who was not authorised to grant CCO authorities. Marechera testified that there was something for him. He was to be paid in one way or another.

There is the fact that the Datsun Pulsar was found in the possession of Marechera. The television set was also in his possession. It was only removed by someone after his arrest. Was Marechera wrong when he said the car and television set were pay-offs? The gifts fit the huge amounts of profits the appellants were going to make from the sale of goods imported through licences illegally issued. One may ask: if the car was not given to him why did Marechera bother attempting to insure it? I agree with Mr *Omerjee*, for the respondent, who argued that Marechera would not have spent money to insure the motor vehicle which had been loaned to him for a few days only. The only reason for his doing so was that he had been given the car. The appellants knew what they were doing when they offered Marechera the car, the television set and a percentage of the value of the licences issued. These gifts were given as rewards for his issuing CCO authorities.

Let me go back to the admissibility of the insurance cover note, exhibit 27. Mr *de Bourbon* contended that exhibit 27 was inadmissible in terms of subs (2) and (3) of s 262B of the Criminal Procedure and Evidence Act [*Chapter 59*]. Subsections (2) and (3) read as follows:

"(2) In any criminal proceedings in which direct oral evidence of a fact would be admissible, any statement of such fact contained in a document, whether such document purports to be an original or a copy, shall, upon the mere production of the document by any person, be admissible as evidence of that fact if -

- (a) that fact relates to any transaction or intended transaction, either inside or outside Zimbabwe, in the course of any trade, business or occupation of whatsoever kind or to any other matter in connexion with such trade, business or occupation; 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

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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 which the statement is contained or, in the case of a document received from outside Zimbabwe, from the form or content of any other document which accompanied such document when it was received in Zimbabwe."

In my opinion, the insurance cover note, exhibit 27, falls within the ambit of subs (2) of s 262B of

the Code. Under ordinary circumstances it would be admissible upon its mere production by any person. It is a document taken from records of Hudson Adams (Pvt) Ltd, which was kept in the course of its trade or business. And it was compiled in the ordinary way in the course of that business by a person who was supplied with information by Marechera.

However, the document concerned fails to satisfy the requirements of para (c) of subs (2) of s 262B, because the person who compiled the information was not proved to be outside Zimbabwe or to be unknown or to be unavailable to give "oral evidence for any reason whatsoever". The State did not bother to look for him although it was known that he was in Harare.

In terms of subs (3), in the circumstances of this case, the court cannot "draw any reasonable inference from the form or content of the document in which the statement is contained" because the contents of exhibit 27 bear some distortions. Some figures were superimposed on others, which seems to suggest that the impositions were done at a later time or date. No engine and chassis numbers were taken down. It is for these reasons that in my opinion Exhibit 27 should not have been admitted. That, however, is not the end of the matter. There are strong probabilities that suggest that Marechera attempted to insure the motor vehicle. Those probabilities cannot lightly be brushed aside.

The law is clear on the approach to be taken when considering the conviction based on the evidence of a single accomplice. Section 254 of the Code reads:

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"Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any accomplice:

Provided that the offence has, by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed."

However, the offence must be proved by competent evidence other than the single and unconfirmed evidence of the accomplice. Counsel are agreed that the section requires a two-pronged enquiry. The court must first before convicting, satisfy itself that the offence with which the accused is charged has been committed. Secondly, the court must look for corroboration. If there is no evidence *aliunde* confirming the commission of the offence, there can still be a conviction if the court is satisfied that there is corroboration of the evidence of the accomplice satisfying the court that the accomplice can be believed. I am satisfied that the learned regional magistrate was aware of these requirements. He satisfied himself that the evidence adduced fulfilled those requirements.

The leading authority on s 254 is *S v Mubaiwa* 1980 ZLR 477. LEWIS JP explained the requirements of s 254 in clear and unambiguous words. He commented as follows at 479H-480A:

"The purpose of this section is that the court must be satisfied that the crime to which the accomplice testifies has, in fact, been committed. If not, there can be no conviction at all. Even where there is no proof *aliunde* that the crime has been committed, the statutory requirement can still be satisfied if there is corroboration in a material

respect which convinces the court that the accomplice can safely be relied on when he says the crime was committed, though it need not directly implicate the accused. In such a case the requirement is satisfied because, despite the lack of proof *aliunde* of the commission of the offence, the accomplice evidence is no longer 'single and unconfirmed evidence'. See *R v Troskie* 1920 AD 466 per INNES CJ at pp 468-9 citing *R v Thielke* 1918 AD 373 at 377 and *R v Lakatula* 1919 AD 362 at pp 364-5."

In this case there is an added reason why the evidence of Marechera should be looked at with great scrutiny: he was promised by the Attorney-General a two year remission of sentence. The promise was contained in a letter dated 9 March 1988, exhibit 45. The promise made to him is no different in its influence on the accomplice than that which pervades the mind of an

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accomplice before he is sentenced - the hope of clemency. Here the promise is definite. Paragraph (b) of the letter reads:

"The Attorney-General however undertakes to recommend to the Minister that your client be awarded a 2 year remission of his sentence if he gives truthful and satisfactory evidence at the trial of the Lawrences to wit evidence consistent with the affidavit statement made to the Police in February 1987."

It is true that the letter emphasised that everything depended on Marechera testifying "in this matter truthfully and to the satisfaction of the court and should not be construed in any way as being any form of inducement for his giving evidence".

The inducement is the two year remission. How it worked on and influenced Marechera no one can ever know. It might have made him stick to the contents of his affidavit even if he realised under cross-examination that the fact or matter he deposed to in his affidavit was wrong. Even the mere possibility of undue influence working on the mind of the witness may go against the concept of fair trial. This is why it is desirable to inform the court of the inducement or promise when the accomplice is called to testify. The magistrate or judge will then assess and evaluate his evidence in the knowledge that he was promised clemency or remission of sentence.

See *S v Paweni & Anor* 1985 (2) ZLR 133 (SC); [1986] LRC (Crim) 431 at 433G-434C, a case in which a similar promise or undertaking was made to accomplices. It is the approach of the court *a quo* in that case that is relevant to the facts of the instant case.

It is well to remember, however, that it is public policy that persons who commit serious crimes should be brought to trial and those of their partners in crime who can be induced by promises of pardon or other such inducements to give evidence against them should do so. This course should not be encouraged because it may lead to abuse.

It is, in my view, within the discretion of the court to decide whether such an accomplice has adduced evidence to the satisfaction of the court. If the court is of the opinion that he has told lies then the undertaking ought not be fulfilled. It is the court that should inform the accomplice of this likely result. The court, in the exercise of its discretion, should decide on this and not the Attorney-General or his representative in court.

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It is also proper that the court be informed of the undertaking in order to keep a record of it. Such a record is useful to the court when it comes to assessing the evidence of the accomplice and his credibility as a witness. It will also assist the appellate court when the matter comes on appeal. In my judgment the danger of false incrimination is greater when an accomplice has been promised a pardon or a remission of part of his sentence.

In the instant case it is clear from the evidence adduced by Marechera and the appellants that the crime was committed. What the Court must look for is corroboration of Marechera's evidence. A thorough reading of the evidence on the record reveals that there are factors, documents and probabilities which corroborate his evidence.

Marechera's evidence is corroborated by the following factors and probabilities. Both the appellants and Marechera knew the correct method of applying for CCOs and NCIs. That what they were doing was illegal is supported by the fact that the applications for CCO authorities were never filed in the Ministry registry. The applications were not processed by the Assistant Secretary in the Ministry. They were not registered. They knew, because of the large sums of money involved, that they had to apply to the Reserve Bank for NCI authority. They did not do so. All this is supported by the fact that Marechera pleaded guilty to contravening s 3(1)(f) of the Prevention of Corruption Act. The fact that he afterwards changed his mind and wanted to change his plea does not matter. He was convicted on the five counts with which he was charged. Those counts related to some of the matters for which the appellants were convicted. Here was an accomplice, who himself admitted his wrongdoings, who now says he was asked by the appellants to commit the offences. He says the appellants and himself did this together. In spite of the imperfections in his evidence everything points to the truth of his testimony.

There is also the matter of the Datsun Pulsar motor vehicle. Why did Marechera attempt to insure it? The only reasonable inference to be drawn from this fact is that it was given to him as a gift or consideration for the favours he rendered to the appellants. Then there is the television set. If the television set was given to Marechera because he wanted to buy it, why was it removed from his house when the appellants were arrested. It was found concealed in the appellants' store room. If it had not been given to Marechera as a consideration for illegally issuing CCO authorities, it would not have been removed from his possession in the manner indicated. It is proper to assume that it was removed in order to destroy any evidence of any

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consideration given to Marechera for the favours he did to the appellants.

Marechera's evidence that he received Exhibits 23, 25 and 26 in August 1986, after he had already issued the authorities, is corroborated by the fact that they were not attached to the written applications and had no Ministry date stamps on them. They did not bear evidence of their having been processed by the Registry. They corroborate Marechera's evidence that the authorities were illegally issued in material respects.

I find it difficult to believe that the first appellant was unaware of the correct procedures to be

followed when applying for import licences. If she did not know the correct procedures why did Marechera get involved in these illegal deals without being offered a bribe and without having been asked by the appellants to issue CCO authorities? In any event why did she lie? It seems proper to conclude that she lied because she knew she was in trouble. The game was up.

In my judgment the evidence against the appellants is amply supported by the probabilities, the documents produced as exhibits and by the circumstantial evidence. The licences issued as a result of the illegal CCO authorities issued by Marechera speak for themselves. They confirm and corroborate Marechera's evidence in material respects. They are on the record. The appellants agree they were issued. Why were they issued? To enable the appellants to import goods. Was there anything for Marechera? There was money, a Datsun Pulsar motor vehicle and a television set.

The learned regional magistrate was aware of the application of the cautionary rule in a case in which the State depends for conviction on the single evidence of an accomplice. He analysed the principles laid down in *S v Mupfudza* 1982 (1) ZLR 271 and *S v Mubaiwa, supra*. After having warned himself of the danger of convicting on the uncorroborated evidence of an accomplice, he appreciated the danger of doing so. He contrasted the evidence of Marechera with that of the appellants. He considered all the circumstances, the general probabilities of the case and the circumstantial evidence, and came to the conclusion that the danger of false incrimination had been eliminated. See *S v Mubaiwa supra*, at 481A-B; *S v Mupfudza supra*, at 275C-276D.

I am more than satisfied that the learned regional magistrate applied his mind to all the issues raised in this appeal and came to the right decision.

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It is true that this case is not ordinary. It involves the testimony of an accomplice who seemed to vary his evidence whenever it suited him. As a result there were many imperfections in his evidence. But his evidence was corroborated. The documents produced in evidence, namely the authorities issued by Marechera and the licences issued on the strength of those authorities, the motor vehicle, the television set, and the probabilities in this case leave no room for false implication of the appellants. See *R v Juwaki & Anor supra* at 606 C-D and *R v Tapera & Ors* 1965 RLR 142 (AD) at 145 B-D.

Although this appeal presents many points of law and fact which are unusual in the cases where the conviction is based on the evidence of an accomplice, the court *a quo* considered all the evidence and satisfied itself that the risk of false incrimination had been excluded.

The reason why accomplices falsely implicate others were succinctly expressed by HOLMES JA in *S v Hlapezula & Ors* 1965 (4) SA 439 (A) at 440E:

"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for

convincing description - his only fiction being the substitution of the accused for the culprit."

The learned regional magistrate was aware of these factors. In a careful judgment he considered all conceivable points for and against the appellants and came to the conclusion he did.

While I appreciate the many unsatisfactory features pointed out by Mr *de Bourbon*, I am of the opinion that the court *a quo* reached its decision on good grounds. There was proof beyond reasonable doubt. In my judgment, having regard to the imperfections referred to above and the overwhelming evidence in support of the convictions, the convictions are safe. The appeals against convictions cannot succeed.

The appeals against sentence were based on one ground. It was said: "The effective sentence of imprisonment imposed on each of the appellants is manifestly excessive, and induces a sense of shock". In the appellants' heads

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of argument it is conceded that bribery is a serious offence.

The first appellant was a civil servant employed as an inspector by the Ministry of Trade and Commerce. It was her duty to examine the books of account of businesses that applied for currency allocations. She had to see that scarce foreign currency the country has was not irregularly allocated. Yet she engaged in irregular and corrupt practices in order to supply her family businesses with commodities that were themselves scarce in the country. It was she who approached Marechera. She introduced him to the second appellant. They together hatched a scheme that would bring them a great deal of money. They both stood to gain huge profits accruing from the sale of imported goods.

In *S v Narker & Anor* 1975 (1) SA 583 (A) HOLMES JA described bribery at 586A in these words:

"Bribery is corrupt and ugly offence striking cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration."

DIEMONT JA said in *S v Kelly* 1980 (3) SA 301 (A) at 313E:

"In the business world it undermines integrity for the temptations offered are often, as in this case, great. It is an insidious crime difficult to detect and more difficult to eradicate. It can, if unchecked or inadequately punished by the courts, have a demoralising effect on business standards and fair trading."

Similar sentiments have been expressed in this court. See *S v Paweni & Anor supra* at 444d; and *S v Ngara* 1987 (1) ZLR 91 (SC) at 101C, in which GUBBAY JA, having stated that corruption is difficult to detect and more difficult to eradicate, went on to say:

"If unchecked or inadequately punished it will disadvantage society by depriving it of a good, fair and orderly administration. Deterrence and public indignation are the factors which must predominate above all others in the assessment of the penalty."

These utterances by eminent judges of appeal represent the views shared by this court on the

punishment of people found guilty of corruption.

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In this case the system that the appellants sought by corrupt means to circumvent is the lifeblood of the country's economic system. They corruptly distorted the system for their own good and to the disadvantage of society.

It is true the learned regional magistrate erred when he took the first appellant's previous conviction for bigamy as relevant to sentence. He thought she had been convicted for theft. Bigamy is not a relevant previous conviction in this case. I agree with Mr *de Bourbon* that it should not have been taken into account. However, it did not affect the regional magistrates view of the factors compelling him to impose a deterrent sentence.

For the purpose of this appeal both the appellants are first offenders. That will be taken into account. That fact pales into insignificance when compared with factors of aggravation, namely, the prejudice to the State, and the fact that bribery of the public officials is a most serious evil in society. In the case of the first appellant she was a public official, occupying a position of trust. She deserves a sentence that is harsh enough to remind her of the folly of her ways. The moral blameworthiness of the second appellant is equally high.

Mr *de Bourbon* argued that the sentence served by Marechera ought to have been taken into account. I do not think it is proper to have regard to the sentence he served. If there is to be any comparison it should be the sentence of five years imposed on Marechera for five counts he was convicted on for contravening s 3(1)(f) of the Prevention of Corruption Act. If regard is had to that sentence, and the sentence of seven years' imprisonment with labour imposed on those who bribed him and who were convicted on nine counts of bribery, his sentence seems to be on the harsher side. In my opinion it was appropriate and he deserved it.

In my view, a sentence of seven years' imprisonment for the sort of crimes committed by the appellants is not manifestly excessive, nor unduly harsh. It is an appropriate sentence, having regard to the need to discourage bribery and corruption and to assure society that the courts do not tolerate this type of crime.

In my opinion there should be no difference between the two appellants in the portion of the sentences suspended. The appellants are equally to blame. If anything, the moral blameworthiness of the first appellant is a little higher than that of the second appellant. But both of them stood to gain. If the first appellant had not introduced the second appellant to Marechera it is proper

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to assume that he might not have committed this crime. I therefore intend to suspend the same number of years in each case.

In the result the appeals against conviction are dismissed. In the case of the first appellant the appeal against sentence is dismissed. In the case of the second appellant the appeal against sentence succeeds to this extent: the sentence of seven years' imprisonment with labour with one year suspended is set aside and in its place is substituted a sentence of seven years' imprisonment with labour of which two years' imprisonment with labour is suspended on the conditions imposed by the regional magistrate. Both appellants will serve an effective term of imprisonment of five years.

Gubbay JA : I agree.

McNally JA : I agree.

Gollop & Blank, appellants' legal practitioners

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SABAWU v HARARE WEST RURAL COUNCIL 1989 (1) ZLR 47 (HC)

Court **High Court, Harare**

Greenland J

Application on notice of motion

2 November 1988, 18 January & 1 February 1989

Flynote

Courts - contempt of court - litigant in contempt - when litigant may be heard before contempt has been purged.

Headnote

It is the plain and unqualified obligation of every person against whom an order is made by a court of competent jurisdiction to obey that order, unless and until it is discharged. A person who disobeys an order of court is in contempt and may be punished therefor. Unless such a person purges his contempt, the court has a discretion to decline to hear any application by him. In exercising that discretion, a court will not lightly deprive a party of his right to be heard, but will do so where the contempt itself impedes the course of justice and where there is no other effective means of securing his compliance with the court order.

Cases cited:

Kotze v Kotze 1953 (2) SA 184 (C)

Allan v Allan 1959 (1) R & N 499; 1959 (3) SA 473 (SR)

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

Jackman v Jackman 1969 (2) RLR 534 (GD)

S T D Katsere for the applicant

A M Donagher for the respondent

Judgment

Greenland J: In this case the applicant seeks an order -

"1 That the interdict granted by this Honourable Court on the 6th of

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March, 1985 be and is hereby set aside.

2 That the Respondent pay the costs of this application."

It is necessary to set out shortly the history of this matter so as to lend proper perspective to the issue.

(a) On 31 August 1984 the applicant, as purchaser of immovable property (being Lot 1 of Good Hope, District of Harare, measuring 40,4158 hectares), made application to the respondent in terms of s 27(3) of the Regional, Town and Country Planning Act 22 of 1976 for permission to alter the permitted use of the property from agricultural to commercial with a view to constructing a 20 - bedroom motel and shopping complex thereon.

(b) For reasons which need not be reproduced herein, but which include the fact that owners and occupants of neighbouring properties objected, the respondent refused to give the special consent required and communicated its refusal by letter dated 16 November 1984.

(c) Applicant's response was open defiance. Despite being served with an Enforcement Order and Prohibition Order, issued in terms of s 33 of the Act, he continued building and constructing the complex. When the Enforcement Order was served on him he communicated to the serving officer, Section Officer Moyo, his intention not to comply with the order and to "take the matter up politically, if necessary".

(d) Respondent had no option, in the circumstances, but to obtain an interdict from the High Court. After issue of a rule *nisi* this court confirmed the rule on 6 March 1985. The terms of this interdict required the cessation of building and construction works on the property.

(e) Despite all those legal prohibitions the applicant's attitude continued to be defiant. When warned of the possibility of being sent to prison if he proposed breaching the High Court interdict his response was:

"I do not care if I spend five years in gaol. When I come out the buildings will still be here, and I will put chickens in them."

(f) True to his word he continued in brazen defiance of the Court Order and the result was that the High Court, in terms of a judgment (HH-116-85) issued by REYNOLDS J found him to

be in contempt of this court and committed him to 30 days' civil imprisonment, and ordered also that he pay costs on the punitive scale.

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(g) It should be noted that the applicant did not invoke his statutory rights in terms of the Act to appeal against the Enforcement Order and Prohibition Order of 20 November 1984 and 19 December 1984 respectively. He chose, instead, to flagrantly flout and breach the orders.

(h) He did, however, file an appeal against the respondent's decision to refuse change of use on the 19 December 1984. The appeal was dismissed by the Administrative Court on 21 June 1985.

(i) Despite this, the applicant continued operations and again application to have him held in contempt was made to the High Court. Fortunately for the applicant the JUDGE PRESIDENT, in judgment HH-41-86, excused his conduct on the basis that he was not satisfied that the applicant had acted wilfully and *mala fide*.

(j) Encouraged, it seems, by this result the applicant continued operations and once again application was made before the JUDGE PRESIDENT in case No HC 2686/88 to have him held in contempt. Applicant denied the allegation. The Judge President conducted an inspection *in loco*, which inspection revealed that building operations were actually in progress. The JUDGE PRESIDENT considered that enough of the court's time had been wasted and, *ex tempore*, held the applicant to be in contempt, ordering that he be committed to prison for 270 days and that he pays costs on the punitive scale. Despite every effort the Deputy Sheriff has been unable to arrest the applicant and the Judge President's committal has, as yet, not been executed.

That then, in summary, is the history of the matter. As can be seen, the applicant has, over a period of four years, proceeded in open and flagrant defiance of the law. He has also treated the High Court with contempt. He is still in contempt of this court, as he has not purged his contempt which was determined *ex tempore* by the JUDGE PRESIDENT on 28 July 1988.

Not surprisingly, Mr *Donagher*, who appears for the respondent, submits that as the applicant has not purged his contempt, the court should decline his usual right to be heard. See *Kotze v Kotze* 1953 (2) SA 184, followed by HATHORN J (as he then was) in *Allan v Allan* 1959 (1) R&N 499; 1959 (3) SA 473 (SR). In these cases the approach of ROMER LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA) commended itself. He stated, *inter alia* -

"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged."

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He went on to say that two consequences flow from that obligation:

"The first is that anyone who disobeys an order of the court ...is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to court by such person will be entertained until he has purged himself of his contempt."

It is clear to me that the Court has a discretion in the matter. In exercising that discretion a Court will not lightly deprive a party of his right to be heard. As DENNING LJ (as he then was) said in *Hadkinson supra*:

"It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave consideration of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and where there is no other effective means of securing his compliance."

This approach was adopted by GREENFIELD J in *Jackman v Jackman* 1969(2) RLR 534 (GD), who proceeded to hear a party still in contempt because of the particular facts of the case.

In the present case the applicant has advanced no reasons as to why the Court should condone the fact that he has not purged his contempt. As already stated, SANDURA JP ordered his committal in July 1988, some seven months ago. Applicant is well aware of his obligation to submit to this order. Not only has he not submitted but the Deputy Sheriff has failed to secure his person. He attempted, via his counsel, to mislead this Court into believing that the reason for all this was that the Minister of Local Government, Rural and Urban Development had arranged a stay of execution, whereas the truth of the matter is that the arrangement was only effective for a period of approximately two weeks (according to information furnished by counsel for the respondent and then agreed to by the applicant's counsel).

In my view, the fact that the applicant has not purged his contempt must be viewed against the full background of the whole matter in order to see whether or not it can be said to prejudice justice. The background facts have been set out above. Simply put, it is plain that, *ab initio*, the applicant adopted a stance in open defiance of the law. He is in persistent disobedience of the Enforcement and Prohibition Orders lawfully issued by a statutory body in discharge of its duty in accordance with the will of the legislature. He has ignored the decision of the Administrative Court which is the appellate forum

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on the issue. He is in persistent defiance and contempt of the High Court. It is now patent that he duped the JUDGE PRESIDENT (in case no HH-41-86) into thinking that he had not acted wilfully and *mala fide* in continuing prohibited construction and building work.

To my mind, the fact that the applicant has succeeded in defying the law and the High Court over a period of some four years (ie since August 1984 when the respondent refused his application) does prejudice justice in an insidious way. It tends to subvert the psychological bond that exists between the lawgiver and the subjects of the realm. People in general accept the law and submit to its dictates and circumscriptions in the knowledge that such submission ensures peace and good order. What they do demand is equality before the law as being the guarantee of sacred human rights. Actions such as those by the applicant, in which a subject

sets himself outside or above the law, prejudices this relationship, if only for the reason that other persons are then entitled to question why they should be expected to be law-abiding. In effect the applicant is now "thumbing his nose" at the JUDGE PRESIDENT. He is demonstrating to the world his ability not only to defy the law but to emasculate the court's power to enforce its orders. Success in this stance makes a mockery of the law and tends to bring the administration of justice into disrepute. It also subverts the State's power over its subjects to ensure compliance with its laws via the court which is the State's constitutional vehicle for enforcement.

From the papers, it is patent that the applicant has been much encouraged by the fact that the Minister has been sympathetic to his plight. Via his counsel he made it plain that the Minister would like to see this court come to his aid. I have to assume, firstly, that the Minister has been misinformed of the facts, implications and ramifications of the matter. Where a statutory body has made a decision in accordance with its duty and that decision is upheld by an appellate court there can be no question of assisting in the defiance of that body and in the frustration of its lawful orders. Such a course is to defy parliament itself. This must be especially so where such defiance and frustration is persistent and contemptuous. Secondly, I do not believe nor do I accept that a Minister of this Government would intend to insidiously influence this court in its decision. I have put it that way because, although the applicant, via his counsel, did not expressly submit that the court should assist the applicant because he had the sympathies of the Minister, he persisted, despite objections by the court, in repeatedly conveying the message to the court that the Minister would like to see the applicant relieved of his plight. The court's reaction to this aspect is that this court is satisfied that

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the Minister, like any judge, is sworn to uphold the law and will do just that without fear, favour or prejudice.

Lastly, it is obvious that to hear the applicant and grant his application will have the effect of subverting and contradicting all the lawful orders and sanctions against him already in force. This court will, in effect, be giving its blessing to the unlawful stance he has hitherto adopted. It is not in the interests of justice that this court either does that or, perhaps more importantly, be seen to be doing that.

In my discretion, therefore, I hold that public policy demands that the applicant should not be heard in his request to have the interdict set aside. The court must not be seen to be in sympathy with a person who openly defies the law and the court's orders. If the applicant has a remedy it is to apply to the JUDGE PRESIDENT for the committal order to be set aside or suspended, assuming there are proper grounds for such an application.

As regards costs, it is pertinent to note that the whole application rested on the spurious submission that the interdict ought to be set aside as it is an impediment to the proper resolution of the dispute between the parties. The applicant has obstinately misconceived the position. There is no dispute between the parties. The dispute ended once the appellate court had pronounced on the matter. What remains is the problem of applicant's unilateral defiance of the

law.

The other basis for the application was that the applicant has since made application to have the premises, since constructed in breach of the law, used as a restaurant. It is imperative, necessary and desirable, so the submission goes, that the interdict be set aside until the respondent adjudicates upon this application, which adjudication it is declining to perform.

On the facts it is plain to me that the application for restaurant use is simply a device to delay and frustrate respondent's lawful orders. The applicant can entertain no genuine belief that the application has any chance of succeeding in view of the appellate court's refusal to sanction commercial use of the property.

The position is that the applicant has persistently involved a statutory body in needless and vexatious litigation. The present application is without merit. For this reason the court has declined to hear the applicant, even though it has had to consider the matter to see if there is a basis for hearing him. There is

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no *bona fides* in the application.

The application is refused with costs to be paid on the scale of legal practitioner and client.

Surgey, Pittman & Kerswell, applicant's legal practitioners

Ziumbe & Mtambanengwe, respondent's legal practitioners

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WHALEY & ORS (LAW SOCIETY OF ZIMBABWE INTERVENING) v CONE TEXTILES (PVT) LTD 1989 (1) ZLR 54 (SC)

Court Supreme Court, Harare

Gubbay JA, McNally JA & Manyarara JA

Civil appeal

14 December 1988 & 7 February 1989

Flynote

Contract - stipulatio alteri - appointment of conveyancer under contract of sale of immovable property - whether a stipulatio alteri in favour of conveyancer.

Appeal - right of intervention at appeal stage of person who was not party to proceedings in the lower court.

Legal practitioner - conveyancing tariff fixed by Council of Law Society - validity of.

Headnote

The respondent company entered into a contract with another company, Karina Textiles (Pvt) Ltd, for the purchase of an immovable property. One clause of the agreement of sale provided that the conveyancing be carried out by the appellants, a firm of legal practitioners, at the cost of the respondent. The respondents regarded the fees, which were based on the current tariff of fees issued by the Council of the Law Society of Zimbabwe, as excessive and paid under protest. It later instituted proceedings in the High Court against the appellants to recover the sum which was in excess of what it claimed was a reasonable fee for the work done. The respondent's action was based on the *condictio indebiti*, which is enforceable only against the *recipiens* of the undue payment, who is not necessarily the person into whose hands the money was actually put when it was paid. It also claimed that the tariff of fees, having been fixed by the Council of the Law Society and not by the members in general meeting, was *ultra vires* the powers of the Council.

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The High Court (EBRAHIM J) gave judgment in favour of the respondent, subject to an order that the amount of fees overpaid be held in trust pending the issue of a properly promulgated scale of fees. In view of the Judge's finding in respect of the validity of the tariff of fees, the Law Society applied on notice of motion to the Supreme Court to intervene as a party in the pending appeal.

Held, that it was proper for the Law Society to be permitted to intervene in the appeal. Since no provision was made for this matter in the Supreme Court of Zimbabwe Act or in the Rules, the matter fell to be dealt with in conformity with the law and practice of the Court of Appeal in England. The practice there is that a person who is not a party to an appeal but who is either bound by the earlier judgment or is aggrieved by it cannot appeal without leave. However, if that person can make out even a *prima facie* case why he should have leave, he will get it.

Held, further, that the agreement of sale between the respondent and Carina was not, and was not intended to be, a contract for the benefit of the appellants. It created no contractual liability on the part of the respondent towards the appellants, only a liability to meet the costs incurred by Karina in the registration of the transactions. If the appellants had refused to attend to the transaction or unreasonably delayed it, the respondent could not have brought an action against them to compel delivery or to claim damages arising out of the delay. The appellants were the agents of Karina, which was liable to them for their fees. Payment of the fees by the respondent to the appellant was a matter of convenience; the true *recipiens* of the fees was the principal, Karina.

Held, further, that under s 47 of the Legal Practitioners Act 1981, by-laws fixing a tariff of charges had to be made by the members of the Law Society in general meeting; such by-laws are of no force until they have been approved by the Minister and published in the Gazette. The delegated power given to the Council of the Society by s 69 of the By-laws to fix or prescribe tariffs without publication in the Gazette was *ultra vires* the Act, the Society having no authority under the Act to fix a minimum tariff by any means other than a by-law approved by the Minister and published in the Gazette. This did not mean that the tariff was unlawful or invalid or should not be regarded as a recommended tariff. It meant only that the tariff was not binding and that

no member of the public may be told that it is fixed and non-negotiable as a matter of law.

Cases cited:

In re Securities Insurance Co [1894] 2 Ch 410 (CA)

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Re B (an infant) [1957] 3 All ER 193 (CA)

Phillips v Hughes 1979 (1) SA 225 (N)

James v Liquidators of the Amsterdam Township Co 1903 TS 653

Blundell v McCawley 1948 (4) SA 473 (W)

Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd 1984 (3) SA 155 (A)

Barnett & Anor v Abe Swersky & Associates 1986 (4) SA 407 (C)

Aluchem (Pty) Ltd & Anor v Minister of Mineral & Energy Affairs & Ors 1985 (3) SA 626 (T)

Attorney-General OFS v Cyril Anderson Investments (Pty) Ltd 1965 (4) SA 628 (A)

City of Salisbury v Mehta 1961 R & N 1000; 1962 (1) SA 675 (FSC)

L H Cook, with him *D M Campbell*, for the appellants

J Back for the intervener

A P de Bourbon SC for the respondent

Judgment

Gubbay, McNally & Manyarara JJA: During May and June 1984 the respondent, a large textile company, entered into negotiations with another company, Karina Textiles (Pvt) Ltd ("Karina") for the purchase of the immovable property known as Stand 148A Norton Township ("the premises") together with the improvements thereon. Ultimately a written agreement of sale was concluded by the parties on 18 July 1984, in terms whereof the total purchase price to be paid by the respondent to Karina was \$1 240 000. Clause 4. (7) of the agreement provided:

"Transfer of the premises and the registration of the bonds shall be registered by Messrs Coghlan, Welsh & Guest as Karina's Legal Practitioners, at the cost of Cone Textiles and the bonds shall include all such other terms and conditions as are consistent with the provisions of this agreement and the *pro forma* mortgage bond annexed hereto."

Pursuant to its contractual obligation to pass transfer of the premises and cause the mortgage bonds to be registered, Karina instructed the firm known as Messrs Coghlan, Welsh & Guest to attend to the transactions. The appellants, who are registered legal practitioners, practise in co-partnership in the name of the firm.

For the purpose of attending to the registration of the transfer of the premises and the transfer of the two mortgage bonds the applicants applied to the respondent for payment of the costs which were to be incurred, comprising

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their professional fees and anticipated disbursements. The fees amounted to \$11 920, of which \$5 684 was in respect of the transfer and \$6 236 in respect of the mortgage bonds. They were based upon the current Tariff of Fees issued by the Council of the Law Society of Zimbabwe.

It is normal practice for legal practitioners handling such conveyancing transactions to send a *pro forma* account in advance to the purchaser so as to raise payment in advance for the stamp duty payable, which in the instance represented 77% of the total account.

While making no objection to the disbursements, the respondent complained that the amount charged for professional fees was unreasonably high in relation to the value of the services actually rendered. Its attitude emerges clearly from the letter of 11 September 1984, which reads in part as follows:

"Secondly, we are prepared to pay a reasonable fee for both the transfer and bond, but the amount of work in no way depends on the purchase price or the amount of the bond. We are quite aware of the fact that conveyancing charges are not taxable by the Registrar of the High Court, and we are also aware of the fact that you follow a tariff of charges, but this tariff is in no way binding on members of the public who cannot be required to pay any charges no matter how excessive."

The appellants stood firm. They considered that to charge less than the prescribed fees was to risk disciplinary action by the Law Society of Zimbabwe ("the Law Society"). Accordingly they were unwilling to proceed with the registration of the transfer of the premises and the registration of the mortgage bonds until the fees were paid in full.

On account of an impending increase in stamp duty, which made immediate transfer of the premises commercially desirable, the respondent paid the fees charged under protest, reserving its rights and advising that if necessary it would take action to recover the amount paid less a reasonable sum.

Registration of the transfer and of the mortgage bond was effected on 27 September 1984. Thereafter the respondent wrote to the appellants, asserting that a reasonable fee for the services rendered was not in excess of \$1 000. It sought in effect a refund of the sum of \$10 920.

Faced with an adamant refusal to refund any portion of the fees charged, the respondent instituted proceedings against the appellants by way of notice of

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motion in the High Court for an order that they refund to it the sum of \$10 920 with interest thereon and costs. It founded its claim for relief essentially upon two grounds: first, that it was

only obliged to pay a fee that was fair and reasonable; that any fee in excess of \$1 000 did not qualify for that description, was accordingly not due and had only been paid under protest in order to secure the registration of the transfer which the appellants were withholding. Second, that the tariff upon which the fees were based, having been fixed by the Council of the Law Society and not by the members in general meeting, was *ultra vires* the powers of the Council.

The application was heard by EBRAHIM J who gave judgment in favour of the respondent, subject, however, to an order that the amount of fees over-paid was to be held in trust pending the issue of a new tariff of conveyancing fees properly promulgated in terms of s 47 of the Legal Practitioners Act 1981, quantifying the reasonable fees due to the appellants.

An appeal was noted against the judgment and a cross-appeal against the directive. Nothing need be said about the cross-appeal, for in the event of the appeal being dismissed the appellants, properly in our view, declined to support the competence of the restrictive order placed by the court *a quo* upon the judgment, while if the appeal succeeds the cross-appeal falls away.

The Law Society was not a party to the proceedings in the High Court. After it was learned, however, that EBRAHIM J had held that by-law 69 of the Law Society of Zimbabwe By-Laws 1982, insofar as it purported to grant the Council the power to fix tariffs and charges (and any consequent tariff issued in terms thereof by the Council), was *ultra vires* s 47 of the Legal Practitioners Act 1981, the Law Society applied on notice of motion to this Court for leave to intervene as a party in the pending appeal. It did so because it had a material interest in the validity of its Tariff of Fees and because it was concerned that possibly the appeal would be decided upon its particular facts and the issue of the validity of the Tariff left open. The respondent filed an opposing affidavit, but later intimated that it did not wish to be represented or submit any written argument.

The application came before a Judge in Chambers, who granted the Law Society leave to intervene in the appeal. It is as well that the reasons for doing so be stated briefly, especially as the matter appears to have been the first of its kind.

It is enacted in s 6 of the Supreme Court of Zimbabwe Act 1981 that in any

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matter relating to records, practice or procedure, in which no special provision is contained in the Act itself or in the Rules of the Supreme Court, the matter is to be dealt with by the Supreme Court or a Judge thereof as nearly as may be in conformity with the law and practice for the time being observed in England by the Court of Appeal.

As both the Supreme Court of Zimbabwe Act and the Rules were silent upon the right of a person who was not a party to proceedings in a lower court to intervene at the appeal stage, regard to the position presently adopted by the Court of Appeal in England justified the decision that it was proper that the Law Society be permitted to intervene in the appeal. In the words of LINDLEY LJ in *In re Securities Insurance Co* [1894] 2 Ch 410 (CA) at 413:

"...the practice (is) perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out a *prima facie* case why he should have leave he will get it: but without leave he is not entitled to appeal."

See also *Re B (an infant)* [1957] 3 All ER 193 (CA) at 195 E-G; *Halsbury's Laws of England* 4 ed vol 37 at p 520; *The Supreme Court Practice* 1988 vol I at p 860.

That the Law Society was aggrieved or prejudicially affected by the judgment and that it had made out a *prima facie* case for the grant of leave was undeniable.

It is not in contention that the respondent's claim to recover the sum of \$10 920 was based on the *condictio indebiti*, it being alleged that (i) such money was not due, (ii) having been paid involuntarily under protest, (iii) in order to secure a right to property which was being wrongfully withheld from it by the appellants.

The *condictio*, however, is enforceable only against the *recipiens* of the undue payment, who is not necessarily the person into whose hands the money was actually put when it was paid. The *recipiens* is the person who must be considered in all the circumstances of the case truly to have received payment. See *Phillips v Hughes* 1979 (1) SA 225 (N) at 229C-F.

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It was thus essential for the respondent to show that the appellants were the true *recipients* of the sum of \$11 920 charged for professional services rendered for registering both the transfer of the premises and the two mortgage bonds.

Not surprisingly, this was the first area upon which the correctness of the judgment was challenged by the appellants, it being contended on their behalf by Mr Cook that the true *recipients* of the payment made by the respondent was Karina, the appellants having been appointed as Karina's agents to receive it simply as a matter of convenience.

Although the only parties to actually conclude the written agreement of sale were the respondent and Karina, they being the sole signatories, the question is whether the nomination of the appellants as Karina's legal practitioners to affect transfer of the premises and registration of the mortgage bonds at the cost of the respondent constituted a stipulation for the benefit of the appellants which they had accepted. If it did not then no contractual liability was established on the part of the respondent towards the appellants only a liability to meet the costs incurred by Karina in the registration of the transactions concerned.

The effect of a clause in a contract nominating a firm of attorneys to attend to the registration of transfer of the immovable property sold has been the subject of a series of decisions in South Africa.

One of the earliest is *James v Liquidators of the Amsterdam Township Co* 1903 TS 653 at 656, where INNES CJ remarked:

"Does the mere fact that the conditions of sale provide that the purchaser shall be obliged to pay all costs of

transfer entitle him to nominate the conveyancer? In my opinion that fact does not give the purchaser the right to dictate to the seller what agent he shall employ. The condition merely amounts to a promise on the part of the purchaser **to recoup the seller the expenses of transfer**" (emphasis added).

This *dictum* sets out the common law of South Africa, save for the Province of Natal where by custom the purchaser has a right to appoint his own conveyancers to pass transfer to him. See Jones *Conveyancing in South Africa* 3 ed at p 187.

In this country it has always been accepted that, if the purchaser desires to

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have the right to nominate a professional agent, he must expressly contract for it. In the absence of such a stipulation the right to do so vests in the seller.

In *Blundell v McCawley* 1948 (4) SA 473 (W), clause 3 of the deed of sale of an immovable property provided that -

"The purchaser shall pay transfer duty, all costs of transfer of this deed of sale and transfer shall be registered by Messrs Morris L Goodman & Ritoff."

The purchaser failed to pay the costs of transfer and upon action being instituted by the seller raised an exception to the declaration on the ground that only the firm of attorneys specified had the right to sue, and not the seller. CLAYDEN J (as he was then) had no difficulty in rejecting this contention. He said at 478:

"Clause 3 does not in my view give to the plaintiff's attorneys the right to recover these fees against the buyer. It is the duty of the seller to pass transfer and, to ensure that transfer is passed, he has to pay the duty and pay the fees of the persons who act on his behalf. Clause 3, in my view, is a special clause by which the buyer undertakes to pay those fees, but, I think, to pay them to the seller. The nomination of the seller's attorneys does not pass to those attorneys a right in their own behalf to claim the fees."

Much the same issue came before the Appellate Division in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A). CORBETT JA, who delivered the judgment, held that a contract providing *inter alia* that transfer of the property was to be passed to the purchaser by the seller's conveyancers, Joel Melamed and Hurwitz, as soon as the full purchase price and all costs had been paid, did not constitute a *stipulatio alteri* entitling the conveyancers to be appointed to do the necessary conveyancing. The purpose of the provision had been to regulate the passing of transfer between the seller and the purchaser, not to confer a benefit upon the firm. The learned JUDGE OF APPEAL went on to say at 173A-B:

"Melamed and Hurwitz are merely mentioned incidentally in connection with the stipulation that transfer shall be passed by the seller's conveyancer. No doubt it was considered convenient that the purchaser should know who the seller's conveyancer was. I think that both parties would have been surprised to be told that in agreeing to clause 10 they were not

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only conferring this 'benefit' on Melamed and Hurwitz but also permitting the latter, by acceptance, to come in as

a party to the contract."

Lastly, there is the case of *Barnett & Anor v Abe Swersky & Associates* 1986 (4) SA 407 (C), where a firm of attorneys claimed:

"The purchaser undertakes and agrees to effect payment to Abe Swersky & Associates of all their costs as between attorney and client relating to the drafting and drawing of these presents and the implementation of the terms and conditions thereof as also stamp duty on this agreement."

The defendants (later the appellants), who were the contracting parties, denied that in concluding an agreement containing the clauses quoted they had intended to enter into a contractual relationship with Abe Swersky & Associates or to confer a benefit on them which they were entitled to accept. In allowing the appeal VAN HEERDEN J pointed out at 411I-412B:

"The fact that the name of plaintiff is inserted in the contract does not make it a contract for his benefit. On a proper construction against the background that plaintiff acted as the seller's attorneys it amounts to a contractual undertaking given by the purchaser to and in favour of the seller that the purchaser will pay the seller's attorney's fees for which the seller is liable in terms of the relationship of attorney and client existing between it and its attorneys, the name of the attorneys being merely inserted for identification purposes. Nor does the fact that payment is to be made direct to the attorneys alter the position. **This was probably stipulated as a matter of convenience to the parties and amounts to no more than that the purchaser by paying plaintiff direct would render a performance in which the seller had a 'personal and appreciable interest in its being done'** - Pothier on *Contracts* s 58" (emphasis added).

An application of the approach and principles laid down in these decisions makes it clear in our view that the agreement of sale entered into by the respondent and Karina was not, and was not intended to be, a contract for the benefit of the appellants. It created no contractual liability on the part of the respondent towards the appellants - only a liability to meet the costs incurred by Karina in the registration of the transactions concerned. Karina was obliged under the agreement of sale to deliver the premises upon payment and to register the mortgage bonds, under which the unpaid balance of the purchase price was to be secured. To do this it employed the appellants

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as its agents. In this sense only was there a contractual relationship between Karina and the appellants. But in contracting with the appellants Karina was merely carrying out the obligation that it had undertaken to deliver the premises to the respondent through its nominated agents and to ensure the registration in its favour of the security against which delivery was to be made. Thus in the event of the appellants refusing to attend to the transaction or unreasonably delaying the same, the respondent could not have brought any action against them to compel delivery or to claim damages for delay. It would have been compelled to seek the requisite relief against Karina.

Nor does the fact that the respondent signed a Power of Attorney in favour of the appellants in order to enable the mortgage bonds to be registered, alter the position; for what was done under that Power of Attorney was done on Karina's behalf.

The appellants regarded Karina as their client and correctly so. This appears to have been

accepted by the respondent's director, Joseph Pitluk, for he deposed in his affidavit as follows:

"I agree that the respondents were not at any time the legal practitioners of the applicant, and that they were the legal practitioners of Karina Textiles (Pvt) Limited."

And later:

"...I understood from the terms of the agreement of sale that the applicant was bound to pay the fees raised by the respondents (implying necessarily that such fees would be reasonable) as had been incurred on behalf of Karina Textiles (Private) Limited."

Mr *de Bourbon* strove valiantly to persuade us that the true *recipients* of the money paid by the respondent were the appellants, for it was they and not Karina who had sought payment from the respondent and it was into their hands that the fees were put and retained. But a person is not the *recipients* merely because payment was intended or happened in the result to benefit him.

Although the ultimate beneficiaries of the payment made were the appellants, one must look to the pertaining circumstances and in particular to the contractual setting. Under the agreement of sale the respondent's obligations were to Karina and to no one else. It had no obligation to pay the appellants and could have lawfully refused to do so.

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Once it is accepted that the appellants were the agents of Karina and that the latter was liable in terms of that relationship for their fees, it must necessarily follow that payment of such fees was made to the appellants by the respondent as a matter of convenience. It could just as well have paid the money to Karina. In the event of any default on the appellants' part in attending to the mandate it was not open to the respondent to take action against them. It would have to look to Karina for relief. The true *recipients* was, therefore, the principal, Karina.

This conclusion makes it unnecessary to consider the further argument advanced by Mr *Cook*, that in any event the respondent had failed to establish the first essential to the *condictio*, that is, that the money paid was not due.

The second and more general issue which was raised in this appeal is the issue as to the validity of the Law Society's Tariff of Conveyancing Fees.

It is important to bear in mind that legal practitioners, acting in their capacity as conveyancers, have a monopoly over conveyancing. No other professional person may undertake conveyancing work. No unqualified person may act on his own behalf in a conveyancing matter. Anyone who wishes to transfer his own immovable property, or to mortgage his own immovable property, or to register the subdivision or consolidation of his own immovable property, must employ a legal practitioner. This is the effect of s 13 and 14 of the Deeds Registries Act [Chapter 139] which read as follows:

"13. No deed or transfer, certificate of title, mortgage bond, other than a mortgage bond intended to be registered as security for a loan or advance referred to in paragraph (c) of subsection (1) of section *forty-two*, cession of a mortgage bond, agreement referred to in paragraph (o) of section *five* or consent mentioned in subsection (1) of

section *forty-nine* shall be attested, executed or registered by a registrar unless it has been prepared by a legal practitioner.

14. Subject to the provisions of this Act or any other law -

- (a) the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by a registrar;
- (b) other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a legal practitioner and registered by a registrar;

Provided that attestation by a legal practitioner shall not be

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necessary in respect of the conveyance of real rights acquired under a mortgage bond."

Not only must everyone employ a legal practitioner, he must also pay him or require the purchaser to pay him, unless the legal practitioner acts without charge in a proper case. The fee is regarded as non-negotiable. It is a fee fixed in terms of a tariff. The tariff is an *ad valorem tariff*. That means that the fee increases in proportion to the size and value of the property concerned. The fee is fixed by the legal profession.

Because this fee is said to be fixed and non-negotiable, and because there is no way it can be avoided by a person buying immovable property or undertaking one of the other relevant transactions, it is important to know how it is fixed. To clarify this we must go a little way back into history.

Before the Legal Practitioners Act came into effect on 22 May 1981, the legal profession was regulated in its conveyancing aspect in two Acts. One was the Attorneys, Notaries and Conveyancers Act [*Chapter 218*], as amended. The other was the Law Society of Zimbabwe (Private) Act [*Chapter 223*].

It was Chapter 223 which provided for the making of by-laws (in s 19), and specifically for the making of by-laws for the purpose of fixing tariffs (in s 20 (m)). Under that authority by-laws were made from time to time. Such by-laws were required to be "approved by the President and published in the *Gazette*."

In this way Tariffs of Minimum Conveyancing Fees were approved by the President and published for general information in the *Gazette* in 1960 and 1964. See for example SRGN 353/64.

After that the Conveyancing Tariff remained unchanged for some fourteen years. The next tariff appeared in 1978. On this occasion, however, it was neither approved by the President nor published for general information in the *Gazette*. It was simply circulated to all members of the

Law Society and articled clerks by the Secretary of the Law Society.

In his circular, dated 11 September 1978 the then Secretary of the Law Society said of the proposed new conveyancing tariff:

"Attached is a copy of a new Tariff of Conveyancing Fees which the Council of the Law Society recommends be applied to conveyancing

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matters, the instructions for which are received on or after the 1st of October 1978.

Attention is drawn to the fact that the Tariff is intended to cover all normal routine work attaching to the transaction and no departure from the provisions of this Tariff should be permitted without adequate justification."

It will be noted that this tariff was not binding on members. They could not be disciplined for unprofessional conduct if they charged less than the minimum. They were simply advised that "no departure from the provisions of this Tariff should be permitted without adequate justifications."

In 1981 the tariff changed again. The Law Society circulated a proposed new conveyancing tariff to be effective as from the 1st February 1981. The fee in respect of transfers and bonds were altered only in respect of transactions worth over \$35 000. The same advice as to departure from the tariff without adequate justification was given. Once again the change was not approved by the President nor published for general information in the *Gazette*. Indeed the minimum fees gazetted in 1964 remained unaltered and unrepealed. They were repealed only on 28 May 1982, as will appear below.

The new Legal Practitioners Act came into effect, as indicated earlier, on 22 May 1981. The Law Society of Zimbabwe By-Laws 1982 were then promulgated in Statutory Instrument 314/82. Section 69 of those By-Laws authorised the Council of the Law Society to "fix, prescribe or recommend tariffs." The full wording of s 69 is as follows:

"69. The council may from time to time fix, prescribe or recommend tariffs or charges and commissions or minimum or maximum charges and commissions for services rendered by legal practitioners in matters not provided for by the rules or any competent court of law, and no legal practitioner shall charge fees other than so fixed or less than any minimum fee prescribed or more than any maximum fee prescribed:

Provided that -

- (i) no tariff so fixed or prescribed shall prohibit any legal practitioner from acting in any proper case or matter without making any charge therefor;
- (ii) until tariffs are so fixed or prescribed by the council, legal practitioners shall not charge less than the minimum fee for

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conveyancing and for non-litigation work other than conveyancing set out in the Second and Third Schedules, respectively, to the Law Society of Southern Rhodesia By-Laws, 1939."

It is of interest to note proviso (ii). For some reason it ignores the "recommended" tariffs of 1978 and 1981 and binds practitioners only to the gazetted tariffs last updated in 1964 and expressed in pounds, shillings and pence. It seems unlikely that any practitioner would have been tempted to charge less than the 1964 rates.

Thereafter followed the tariff applicable to all matters in respect of which instructions were received on or after 1 July 1983. this is the tariff applicable to the present case. Like all its predecessors since 1964 it was not approved by the President (or Minister, as the new Act provided), nor was it published for general information in the *Gazette*. It was, however, regarded as binding and not merely as a recommendation, because of the wording s 69 of the 1982 By-Laws.

In summary therefore there have been three phases in the modern history of the tariff of minimum conveyancing fees:

1. Up to 1978 the tariff was adopted by the majority of the members of the Law Society, approved by the Governor President, and published for general information in the *Gazette*.
2. From 1978 to 1983 the tariff was recommended by the Council of the Law Society to its members, not submitted to the Government for approval, not published for general information in the *Gazette*, and thus not binding on legal practitioners, although no doubt universally applied.
3. From 1983 onwards the Council of the Law Society, acting under a purported new power to fix tariffs, had done so on the basis of authority delegated to it by its members. Tariffs are thus still not approved by the Minister or published for general information in the *Gazette*. They are however now allegedly binding, not only on members of the Law Society but on other legal practitioners who may have opted out of membership in terms of s 35.

The question raised by Mr *de Bourbon* is whether the Act permits such delegation. Can the Law Society delegate a power, and a very important

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power which effects the purse of the man in the street, to its governing body the Council, when the effect of that delegation is to avoid the procedures of Ministerial approval and publication in the *Gazette*?

We begin by looking at the statute. Section 36 of the Act sets out the objects and powers of the Law Society and, perhaps understandably, makes no mention of minimum fees. It should be noted, however, that by a 1981 amendment the Society is empowered to define and enforce correct and uniform practice and discipline among legal practitioners (not just among members as was previously the case).

Section 38 provides that the management and control of the Society:

"...shall be vested in the Council which may exercise all such powers and do all such things as may be exercised or done by the Society save those which are expressly directed or required by this Act or by by-laws made thereunder to be exercised or done by the Society in general meeting."

Then comes s 47 which reads in part as follows:

"47. (1) By-laws may be adopted by a majority of members present personally or by proxy at a general meeting of the Society.

(2) By-laws may be made in terms of sub-section (1) for any or all of the following purposes -

...

- (1) fixing a tariff of charges and commissions or minimum or maximum charges and commissions for services rendered by legal practitioners in matters not provided for by the rules of the Supreme Court, High Court or of magistrates courts:

Provided that no by-laws made in terms of this paragraph shall prohibit any registered legal practitioner from acting in any proper case or matter without making any charge therefor.

...

(3) By-laws made in terms of sub-section (1) shall not have effect until they have been approved by the Minister and published in the *Gazette*."

The effect of s 69 of the By-Laws, set out earlier in this judgment, is to allow the **Council** of the Law Society, as opposed to the **members-in-general-**

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meeting of the Law Society, to fix tariffs. The wording is '... fix, prescribe or recommend tariffs...'. Clearly there can be no objection to the Council recommending tariffs. The question is whether it can lawfully fix or prescribe tariffs. That in turn depends on whether the members-in-general-meeting, who undoubtedly have that power subject to the provisions of the Act, can delegate that power to the Council. Note that the Minister, in approving the by-laws, has clearly approved the delegation.

It does not seem necessary to delve too deeply into the learning on the subject of delegation. the maxim *delegatus delegare non potest* is clear and the principles giving rise to it are well established. They have most recently been set out by McCREATH J in *Aluchem (Pty) Ltd & Anor v Minister of Mineral and Energy Affairs & Ors* 1985 (3) SA 626 (T) at 631. BOTHA JA in *Attorney-General OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 said at 639D:

"It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers."

Section 38 of the Act expressly empowers the Council to act for the Society in all matters except in those "which are expressly directed or required by this Act or by by-laws made thereunder to be exercised or done by the Society in general meeting".

Mr Cook's first point for the appellants was that s 47 of the Act was permissive. Members may make by-laws. They are not obliged to do so. Paragraph (o) of sub-section (2) of s 47 expressly permits the members to make a by-law "providing for the Council to decide and act as it may think proper in matters not provided for by the by-laws."

Thus, he argued, where members choose not to fix tariffs in by-laws, they may provide in the by-laws that the Council may do so instead. That is what they have done. It is perfectly legal.

This is an attractive argument. But it falls down because it assumes that the members-in-general-meeting of the Law Society have an untrammelled power to fix tariffs, which power they can delegate.

They do not have that power. It is limited by s 47(3). By-laws made by the members-in-general-meeting **shall not have effect** until they have been

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approved by the Minister and published in the *Gazette*. In other words, the power of the members-in-general-meeting to fix tariffs is subject to two limitations. Unless the Minister approves the tariff, and unless it is published in the *Gazette*, the fixing of the tariff is ineffective.

Yet somehow, by delegating the power to the Council it is claimed that the members-in-general-meeting can circumvent these restrictions. Tariffs can be fixed without the Minister's approval and without publication in the *Gazette*. This is a proposition which has only to be stated to be demonstrated as false. No one can delegate to another a power greater than he himself has.

It is submitted by way of rejoinder to this point that the Minister's approval has not been circumvented. The Minister, it is pointed out, approved the by-law. He has thus waived his right to approve such individual tariff. Moreover he has good practical reason to do so because he is represented on the Council. See s 37(1)(b) of the Act.

This argument is not wholly convincing. It may be doubtful whether the Minister is entitled to waive his public duty to approve tariffs specifically and personally: it may be contended that his three nominees on the Council are not necessarily his watch dogs; it may be said that they might be absent or outvoted - the quorum at a Council meeting is five out of twelve members in terms of s 31 of the By-Laws. But it is not necessary to decide this point.

What is beyond doubt is that the purported delegation avoids the requirement of publication in the *Gazette*. In our view publication in the *Gazette* is very much more than a mere formality (as to which see Baxter *Administrative Law* p 444 *et seq*). The public has a considerable interest in the tariff, for reasons set out earlier in this judgment. Publication of the tariff in the *Gazette* may not afford the public much protection, but it is the only form of protection which the public has. It should not be removed.

This really disposes of the matter and makes it unnecessary to consider the other submissions. We would add, however, that we are not convinced by the argument based on the alleged

"permissiveness" of the use of the word "may" in s 47. we accept that "may" is permissive, in the sense that the Society is not obliged to make by-laws fixing minimum fees. It is empowered to do so. But it seems to us that when the Society, as a creature of statute, is given a power to fix a minimum tariff by means of a by-law, then it has no authority to fix a minimum tariff by any means other than a by-law. It follows that, since the Council cannot make by-laws, it cannot fix a minimum tariff. To

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put the matter another way, the "permissiveness" relates to the Society's discretion to fix or not to fix a minimum tariff. It may do either. But once it decides to fix a minimum tariff it must do so by means of a by-law. It may not do so by means of a conciliar fiat. That this must be correct may be seen by looking at the proviso to subs 47(2)(1). Obviously the Council could not get around this proviso by saying "we have fixed a minimum tariff, but we have not done so in a by-law so the proviso does not apply. We are therefore prohibiting all waivers of fees". Compare *City of Salisbury v S N Mehta* 1961 R & N 1000 at 1001C, 1005 *in fine et seq*, and 1019-1020; 1962 (1) SA 675.

It will be seen that our view of the interpretation of the statute is governed by our concern for the public interest. We are satisfied that the purported delegation of the power to fix and prescribe minimum tariffs by the members in general meeting to the Council is *ultra vires* the enabling statute. Such a power of delegation would enable the Council to do precisely what the members themselves cannot do, to fix a tariff without publication in the *Gazette*. The members are giving their representatives greater powers than they themselves possess. That is not only logically impossible but administratively undesirable. It goes beyond what the Legislature contemplated when it gave powers to the members and then restricted those powers. It could not have intended the members to delegate the powers and by so doing to shrug off the restrictions.

It follows that we are in agreement with the learned judge a quo where he said at p 3 of the cyclostyled judgment, that -

"It is clear that insofar as By-law 69 purports to authorise the Council to fix or prescribe fees it is *ultra vires* the legislative powers conferred by s 47 of the Act."

It does not however follow from this that the tariff is unlawful or invalid. There seems no reason why it should not be regarded as a recommended tariff. but it must then be clearly understood that no legal practitioner is bound by it, and no member of the public may be told that it is fixed and non-negotiable as a matter of law. That would only be the position if the tariff were incorporated in a By-law properly promulgated.

It is not for us to advise the Law Society how to conduct its business. It must therefore be left to the Society to decide whether to operate on the basis of a recommended non-binding and ungazetted tariff or on the basis of a fixed minimum tariff which is available for public scrutiny. If the former course

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is chosen, however, it is to be hoped that the public and practitioners will be made aware of the fact that the tariff is no more than a recommended one.

We have given some thought to the question whether the Law Society should pay some of the costs of the successful appellants on appeal. We have concluded that it should not be ordered to do so. Our reasons are briefly as follows.

The Law Society was not seeking any relief as against the respondent. Although it did not in fact ask for any specific relief, it was clearly seeking what might loosely be called a declaratory order as to the validity of its method of laying down a tariff of minimum fees. Accordingly, even if it had succeeded we think it might not have been entitled to costs as against the respondent.

If the Law Society's unsuccessful intervention had resulted in increased costs for the unsuccessful respondent we might have considered ordering the Society to bear a proportion of the appellants' costs related to that increase. But in fact the Law Society did no more than support the appellants with regard to one leg of their argument. The issue would still have had to be argued even without the intervention. We do not consider that we can say that any significant increase in costs was occasioned by the intervention.

No order as to costs is made in relation to the application by the Society to intervene or in relation to the affidavit filed in opposition thereto by the respondent. Each party in the application will therefore bear its own costs.

Accordingly the appeal is allowed with costs and the judgment in the court *a quo* is altered to read: "The application is dismissed with costs". The costs of the intervening Law Society of Zimbabwe are to be borne by that Society, since it has not succeeded on the point on which it was given leave to intervene.

Coghlan, Welsh & Guest, appellants' legal practitioners

Kantor & Immerman, respondent's legal practitioners

EAGLE INSURANCE CO LTD v MACHAKA 1989 (1) ZLR 73 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil appeal

28 November 1988 & 9 February 1989

Flynote

Insurance - motor insurance - obligation of insured to keep vehicle "in efficient condition" - meaning of in relation to vehicle's braking system.

Headnote

The appellant insurance company sought to repudiate liability under a contract of insurance, on the ground that the vehicle, a horse and trailer, was not maintained "in efficient condition", as required by the policy. It was conceded by the respondent that there were no brakes on the rear axle of the trailer, which caused a 20% reduction in the braking effectiveness of the vehicle.

Held, that in the absence of specificity of the standard at which the appellant required the respondent to maintain the brakes, the *contra preferentem* rule had to be brought into operation and the interpretation of the condition favourable to the respondent adopted.

Held, further, that the phrase "efficient condition" did not require that the brakes be 100% efficient. The appellant had to show that the brakes had reached a stage where they would not have been considered efficient by an ordinary, reasonable man. Efficiency must be considered in relation to the purpose for which it is intended, and the appellant had failed to show that the brakes were not sufficient for the purpose for which they were intended.

Cases cited:

Hunt, Leuchars & Hepburn Ltd v SA Fire & Accident Insurance Co Ltd 1966 (3) SA 773 (W)

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National Employers Algemene Versekeringsmaatskappy Bpk v van Wyk & Ors 1970 (3) SA 82 (W)

Kemp v Santam Versekeringsmaatskappy Bpk 1970 (3) SA 332 (C)

Eagle Star Insurance Co Ltd v Willey 1956 (1) SA 330 (A)

Nathan NO v Ocean Accident & Guarantee Corp Ltd 1959 (1) SA 65 (N)

Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd 1961 (1) SA 103 (A)

Barker v Union Government 1930 TPD 120

J B Colegrave, for the appellant

I A Kurawley, for the respondent

Judgment

Korsah JA: During the currency of motor insurance policy issued by the appellant to the respondent in respect of a Foden Truck, the truck was destroyed by fire that suddenly swept

across the road upon which the truck was travelling. The appellant sought to repudiate liability under the policy on the ground that the respondent was in breach of a condition which required him to take all reasonable steps to maintain the vehicle in an efficient condition. The condition reads:

"6 The insured shall take all reasonable steps to safeguard any vehicle described in Schedule hereto from loss or damage and to maintain it in efficient condition..."

The vehicle in question consisted of a horse and a trailer. It was not disputed that in that part of the policy entitled "General Exceptions", the term "vehicle" is to be construed to include both horse and any trailer. See also *Hunt, Leuchars & Hepburn Ltd v SA Fire & Accident Insurance Co Ltd* 1966 (3) SA 773 (W) at E-F; *National Employers' Algemene Versekeringsmaatskappy Bpk v van Wyk & Ors* 1970 (3) SA 82 (W) at 85H; *Kemp v Santam Versekeringsmaatskappy Bpk* 1970 (3) SA 332 (C) 334B.

It was common cause that the onus was on the appellant to establish that the respondent had failed to maintain his vehicle in an efficient condition in breach of condition 6 of the policy. In making such common cause the parties relied on para 439 of vol 25 of *Halsbury's Laws of England* 4 ed; ERH Ivamy *General Principles of Insurance Law* 3 ed para 269; and *dicta* from the following cases: *Eagle Star Insurance Co Ltd v Willey* 1956 (1) SA 330 in which CENTLIVRES CJ cites with approval at p 334 D-H *dicta* from *Munro, Brice & Co v War Risks Association Ltd & Ors* [1918] 2 KB 78; *Pretorius v Aetna Insurance Co Ltd* 1960 (4) SA 74 at 75G; and *Auto Protection*

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KORSAH JA

Insurance Co v Hanmer Strudwick 1964 (1) SA 349 at 354 A-B.

By agreement between the parties in the event of the respondent's claim succeeding, he was to recover the sum of \$24 500 from the appellant in respect of the loss sustained by him.

The appellant alleged that the respondent failed to maintain the vehicle in an efficient condition for the following reasons:

- (a) the brakes on both the right hand and left hand sides of the rear axle were defective in that there was no brake lining or operating mechanism installed, the bushes were worn and some bushes were missing;
- (b) on the front axle on the right hand side, the brake lining and retaining pins were very badly worn and the brake shoe was not inside the drum;
- (c) the brake air hose was disconnected and blanked;
- (d) the right hand rear air pack rod was missing, having broken off.

[The next several paragraphs have been omitted from this report - *Editor*.]

It was conceded on behalf of the respondent that there were no brakes on the rear axle of the trailer. It was, however, contended by Mr Kurawley that even though the absence of brakes on

the rear axle rendered the braking system of the articulated vehicle less efficient than if all the brakes on the trailer were working, it was sufficient for the respondent to have brakes on the front axle of the trailer.

Mr *Colegrave*, on the other hand, submitted that even if the brakes on the front axle of the trailer were capable of functioning efficiently, the vehicle would still be in an unsafe condition as there would be a 20% reduction in the braking efficiency of the articulated vehicle.

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

Recalling to mind the submission by Mr *Colegrave* that if only the brakes on the front axle of the trailer were capable of functioning efficiently, then there would be a 20% reduction in the braking efficiency of the articulated vehicle, the question that arises is this: can it be said that a vehicle with a braking efficiency of 80% has not been maintained in an efficient condition?

As Mr *Kurawley* rightly pointed out condition 6 of the policy of insurance,

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under cover of which the appellant sought to repudiate liability, does not stipulate any specific standard at which the respondent is required to maintain the brakes. In the absence of such specificity of the standard in which it required the respondent to maintain the brakes the *contra proferentem* rule must be brought into operation and the interpretation of the condition favourable to the respondent adopted. See *Nathan NO v Ocean Accident & Guarantee Corp Ltd* 1959 (1) SA 65 (N) at 74B; *Kliptown Clothing Industries (Pty) Ltd v Marine & Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (A) at 106H-107B, wherein SCHREINER JA quoted with approval the following words of KOTZE JA in *Norwich Union Fire Insurance Society Ltd v SA Toilet Requisite Co Ltd* 1924 AD 212 at p 222.

"The construction of warranty is generally taken in favour of the assured and against the insurer; and this is particularly the case where the warranty is expressed in doubtful or ambiguous language. It is laid down that, as insurance is a contract of indemnity, it is to be construed reasonably and fairly to that end. Hence conditions and provisos will be strictly construed against the insurers because they have for their object the limitation of the scope and purpose of the contract."

Applying such a liberal interpretation in favour of the respondent to condition 6, "efficient condition" does not require that the brakes should be one hundred per cent efficient. Such a requirement would place the insured in an unbearably burdensome position.

It is a notorious fact that the effect of the consistent use of brakes on a vehicle is to wear down the brakes and gradually reduce their efficiency. There is thus a stage in the progression when the brakes on a vehicle become inefficient. It was for the appellant to prove that the brakes on the vehicle had reached a stage when they would not have been considered efficient by an ordinary reasonable man.

In *Auto Protection Insurance Co v Hanmer Strudwick supra* at p 354H OGILVIE THOMPSON JA (as he then was), considering the meaning of the phrase "efficient condition", said:

"Importing, as they do, a relative concept, the words 'in efficient condition' are, however, not words of precise

meaning. One of the meanings of 'efficient' given by the Oxford Dictionary is 'adequately operative'. In this connection, reference may appositely be made to what was said in *Lewis v The Union Steel Corporation of South Africa Ltd* 1926 WLD 166..."

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He continued a little later:

"In *Lewis's* case, GREENBERG J, after mentioning that he took "efficient" to mean that which would effect the purpose intended, but that there 'must be some limitation of its efficiency', went on at p 171 to say:

'I have therefore come to the conclusion that "efficient" means what the ordinary reasonable man, the *diligens paterfamilias*, would consider sufficient. The question of what is efficient must be decided in relation to the danger which is to be avoided, ie it must be reasonably efficient to prevent injury from that particular danger; and once the test of reasonableness is imported into the question of what is meant by "efficient" then it follows that the same test governs the question what dangers are to be guarded against."

Both from the practical view point and the authorities, it is abundantly clear that the phrase "efficient condition" can only mean that a thing is reasonably efficient for the purpose for which it was intended. It was only a matter of degree whether a thing is reasonably efficient or not.

In my view, the learned trial judge rightly accepted the evidence of Mr Williams as "a workman fitted to equip a trailer, new or old, with an efficient and acceptable braking system", and who had actually done the brake repairs on the trailer in question. Of his evidence that the Vehicle Inspection Depot would pass as acceptable a trailer with 50% braking efficiency, the learned trial judge commented as follows:

"His evidence that the Vehicle Inspection Depot of the Ministry of Transport will and does to his experience and knowledge, pass a trailer with 50% of its braking mechanism rings true. I accept Mr Williams' above assertion as being true, and note that this is consistent with the provisions of s 45(1) of the Roads and Road Traffic (Construction Equipment and Use) Regulations, SI 412/72, which provides that it is sufficient for a vehicle drawing a trailer other than a light trailer with no more than two wheels if it has brakes which operate on at least half the number of wheels on the trailer, (provided that the number of braked wheels is equally disposed and located on either side of the vehicle, and that the wheels acted upon are not steering wheels)."

No exception can be taken to this finding.

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KORSAH JA

It was common cause that there were brakes on the front axle of the trailer but none on the back axle. This complies with the Regulations above cited.

To maintain "in efficient condition", as regards the braking mechanism on the trailer must be construed as meaning no more than an obligation to take all reasonable steps to keep the brakes on the trailer in such a state as the ordinary reasonable man would consider adequate for the purpose for which it was intended. There was thus an onus on the appellant to establish that the brakes on the trailer were not sufficient for the purpose for which they were intended and not merely that they might not be effective. See *Barker v Union Government* 1930 TPD 120

at 129.

As I stated earlier in my judgement, without actually testing the brakes or dismantling them to find flaws in the mechanism, it would be impossible to determine whether the brakes on the trailer were adequate for the purpose for which they were intended. The visual inspection by Mr Butler notwithstanding, the omission to test or dismantle the brakes leaves the appellant with no proof of the assertion that they were insufficient for their purpose. Clearly then the appellant failed to discharge the burden that the respondent was in breach of condition 6 of the agreement.

Having found that the appellant failed to prove that the brakes on the trailer were insufficient, it is not necessary to pronounce on the failure of Mr Williams to produce a carbon copy of invoice No. 99, or the writing of the respondent's name on Exhibits 9 and 10, as any such pronouncement will not assist the appellant in the discharge of the burden of proving that the vehicle was not maintained in an efficient condition.

Accordingly the appeal is dismissed with costs.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Granger & Harvey, appellant's legal practitioners

Gollop & Blank, respondent's legal practitioners

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MANGWANA v MPARADZI 1989 (1) ZLR 79 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Civil appeal

24 January & 9 February 1989

Flynote

Contract - restraint of trade clause - reasonableness of clause - when clause may be enforced in part.

Headnote

The appellant and respondent were both legal practitioners. The appellant joined the respondent's firm in Harare as a professional assistant, but after a month was sent to open a branch of the firm in Chinhoyi. He was the sole legal practitioner there for some sixteen months, after which he left the respondent's firm and opened a practice in Chinhoyi under his own name. This he did in spite of a clause in his contract of employment, restraining him

"from entering into competition with [the respondent's] practice wherever situate in Zimbabwe within the next five years following upon [his] severance of employment with [the respondent]".

The respondent instituted proceedings in the High Court to enforce this clause. The High Court granted an interdict, preventing the appellant from setting up or continuing, whether on his own account or in partnership, a practice in law within the municipal area of Chinhoyi, the restraint to remain in force for three years. The appellant contended that he has discharged the onus resting on a person breaching such a contract to justify his breach by showing that the restraint is contrary to public policy or the public interest, being unreasonable as to period and geographic extent.

Held, that there is nothing inherently wrong or immoral in a restraint of trade clause between a legal practitioner and his professional assistant.

Held, further, that the principle that contracts are to be obeyed takes precedence over the principle of freedom of trade. The *onus* is on the

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McNALLY JA

employee to show that the enforcement of the provision will be contrary to the public interest. In deciding this point, the court must have regard to the circumstances prevailing at the time it is asked to enforce the provision. It is not limited to a finding that a restrictive provision is enforceable or unenforceable as a whole, nor does it have to have regard to the artificiality of the test of severability; it has the power to decide that part of such a provision is enforceable or unenforceable. This was the approach taken by the court *a quo*.

Held, further, that the appellant had made no effort to show where the line should be drawn between the reasonable and the unreasonable elements of the restraint clause, as he might have had if, for instance, he had allowed a year or more to elapse and had then given notice to the respondent that he proposed to open a practice in Chinhoyi or if he had suggested that it was unreasonable that he be restrained from practising in Harare. His conduct showed the most flagrant and blatant and unrepentant rejection of the whole concept of the restraint clause.

Cases cited:

Book v Davidson 1988 (1) ZLR 365 (SC); 1989 (1) SA 638 (ZS)

Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)

Dickson v Jones [1939] 3 All ER 182 (ChD)

Roffey v Catterall, Edwards and Goudre (Pty) Ltd 1977 (4) SA 494 (N)

National Chemsearch (SA) (Pty) Ltd v Borrowman & Anor 1979 (3) SA 1092 (T)

Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C)

J Louw & Co (Pty) Ltd v Richter & Ors 1987 (2) SA 237 (N)

Carthew-Gabriel v Fox and Carney (Pvt) Ltd 1977 (2) RLR 152 (AD); 1978 (1) SA 598 (RA)

J B Colegrave for the appellant

M J Gillespie for the respondent

Judgment

McNally JA: This is an appeal about a contract in restraint of trade. It involves two lawyers. The appellant joined the respondent's firm of legal practitioners in February 1986. After a month at the firm's Harare Head Office he was sent to Chinhoyi. He opened the Chinhoyi offices of Brian Mparadzi and Co. He was the sole legal practitioner in the office from its inception until he left the firm on 30 June 1987. Immediately thereafter he started a legal practice of his own, MP Mangwana and Partners. He operated from premises about one kilometre away from the offices of Brian Mparadzi and Co in Chinhoyi.

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McNALLY JA

Mr Mparadzi objected. He drew attention to a restraint clause in the appellant's contract, signed on 24 January 1986, immediately before the appellant started to work for him. In fact he drew attention to the clause as soon as the appellant gave notice that he was intending to leave, even though the appellant had not told him he was going to set up in practice just down the road.

The appellant did not respond to the letter of June 1987 in which his attention was drawn specifically to the restraint clause. He gave no warning that he intended to ignore it. He offered no justification. He simply wrote to his former employer on 3 July 1987 announcing that he had opened his new law practice and expressing the hope that "our firms shall co-operate in our mutual pursuit for justice".

The hope was not realised. On 20 August 1987 Mr Mparadzi instituted proceedings against him by notice of motion asking for an interdict (and other relief which he later abandoned). The interdict sought to prevent the appellant from "continuing in practice as a Legal Practitioner of this Honourable Court directly or indirectly for a period of five years commencing on the 1st day of July 1987 and terminating on the 30th June 1992".

The High Court (Greenland J) heard the matter on 1 October 1987 and handed down its judgment on 25 November 1987. The order was in the following terms:

- "1. That the respondent be and is hereby interdicted from setting up or continuing, whether on his own account or in partnership, a practice in law within the municipal area of Chinhoyi.
2. That this restraint shall remain in force for a period of three years.
3. That the respondent pay the costs of this application."

The appellant noted an appeal against this order, asking that the judgment be altered to one dismissing the application with costs. We are informed by the parties that an application was made to enforce the judgment pending the appeal, but that that application was dismissed.

Thus the appellant remains in practice in Chinhoyi while this appeal is pending.

The restraint clause itself reads as follows:

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McNALLY JA

"It is covenanted that you shall be restrained from entering into competition with this practice wherever situate within Zimbabwe within the next five years following upon your severance of employment with this practice. This covenant applies to both clientele as well as trade secrets."

The wording of the clause is far from ideal. Mr Mparadzi seems to have thought it meant that the appellant could not practice as a legal practitioner anywhere in Zimbabwe for five years. That interpretation is wrong on two counts, as the learned trial judge correctly found. First, it bars the appellant from practising only in those places where "this practice" is "situate", namely Harare and Chinhoyi. Second, it bars the appellant only from practising on his own account as a principal or partner in a firm. It does not prevent him from being employed as a professional assistant. An employee does not compete with another firm. Only his employers can be said to compete.

But, however much one limits the clause, it is clear that its term prohibit the appellant from doing what he actually did, which was to walk out of his employer's office in Chinhoyi at close of business on the last day of June 1987, and open up his own practice down the road the following morning.

His breach of contract is therefore beyond doubt. In the light of the law as expounded recently in *Book v Davidson* 1988 (1) ZLR 365 (SC); 1989 (1) SA 638 (ZS), the onus rests upon the person breaching the contract to justify his breach by showing that the restraint is contrary to public policy or the public interest. See p 385C-D (p 651G-H of SALR) of the judgment in *Book v Davidson, supra*

This was the approach adopted by the learned judge in the court *a quo*, foreshadowing the later decision of this Court. It was the correct approach.

The appellant's contention is simply that he did succeed in discharging the onus upon him because he proved that "the restraint was unreasonable and thus unenforceable as contrary to public policy" (I quote from para B2 of Mr *Colegrave's* heads of argument).

Mr *Colegrave* has submitted that the restraint was proved to be unreasonable in two respects -

1. It was for too long a period:
2. It was geographically too wide.

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McNALLY JA

As to the length of time, he has a point, because the learned judge decided to enforce the

prohibition for three years instead of the five contracted for. As to the geographical extent, the learned judge came to no conclusion. But insofar as he granted no interdict against practice in Harare, it might be said that he was accepting that the restraint should not have extended to Harare.

To approach the problem this way is, however, to misunderstand the attitude of the learned judge *a quo*. His attitude was rooted in the attitude of the Appellate Division in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). It is necessary therefore to say something about the *Magna Alloys* case and the extent to which it has been adopted into our law through the medium of *Book v Davidson supra*.

I begin by observing that there is nothing inherently wrong or abnormal in a restraint of trade clause between a legal practitioner and his professional assistant. FARWELL J said this fifty years ago, in *Dickson v Jones* [1939] 3 All ER 182 (ChD):

"It is quite plain that any restraint of trade is *prima facie* illegal, and not enforceable, but that an employer may require and may take from his employee a restriction, so long as it is not more than is reasonably necessary for the protection of the employer, and so long as it is not against public policy."

Dickson was a solicitor and Jones was his former managing clerk.

The primary effect of *Magna Alloys*, as accepted into our law by *Book v Davidson*, was to determine that the principle that contracts are to be obeyed takes precedence over the principle of freedom of trade. Hence the shifting of the *onus* from (in this case) the employer to the employee.

But at once a question arises - a question which did not arise in *Book v Davidson*, but which does arise frequently. Suppose the employee succeeds in showing that the restraint is too wide. Does the court have to strike it down completely or can it modify it? If the court modifies the restraint how can it do so without being guilty of rewriting the contract for the parties?

In the Roman-Dutch Law the initial response to this problem was the introduction of the test of severability. By this test if one part of the restraint was unreasonable, but could be excised, leaving behind a restraint that was reasonable and could stand on its own, the court could strike down the

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unreasonable restraint and enforce the restraint that was reasonable.

The insistence that the restraint had to be separate and distinct led to the use of the term "blue pencil test". The court could strike words out, but could not write words in.

The artificiality of this approach was trenchantly underlined by DIDCOTT J in *Roffey v Catterall, Edwards and Goudre (Pty) Ltd* 1977 (4) SA 494 (N) at 507 when he said:

"Thus tested, a covenant is severable when, for instance, it provides for a restraint in Durban and also throughout the rest of Natal, but not when it more simply imposes one throughout Natal; and the reason for this odd distinction is that, while in the former case the reference to the rest of Natal can be deleted by the notional blue

pencil, and the remainder of the parties' agreement left intact, that cannot be done in the latter case and, because the Court is powerless to redraft the contract, nor can anything else."

Then in *National Chemsearch (SA) (Pty) Ltd v Borrowman & Anor* 1979 (3) SA 1092 (T), the Transvaal Full Bench took the next step when BOTHA J said at 1116D:

"[W]hen a restraint according to its terms as agreed upon is found to be unreasonably wide in its scope of operation, the Court can, in a proper case, enforce the restraint partially, by issuing an order incorporating the addition of such limiting words to the restraint as agreed upon as are appropriate to restrict its scope of operation to what is found to be reasonable."

It will be seen that the accent had shifted from rewriting the contract to enforcing its terms. This was made even cleaner by VAN DEN HEEVER J in *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (C) at 313E, when she said:

"The Court may decide, not that it is prepared to carve out a new and valid contract for the parties, but that it is prepared to lend its muscle to one of those parties in regard to only one or some of the areas or purposes falling within the terms of their agreement."

And so one come finally to *Magna Alloys*, where RABIE CJ said, at p 896B-F:

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McNALLY JA

"It could perhaps be said that to enforce something less than the restriction on which the parties originally agreed results in the court's order being tantamount to an amendment of the agreement concluded by the parties, and in a certain sense that is of course so.

If however one bears in mind that the point at issue is the enforceability or otherwise of the restrictive provision, and, in addition, that considerations of public policy dictate whether such a provision ought to be enforceable, then it is in my view logical and realistic to adopt the attitude that, if the enforcement of any part of a restriction would be prejudicial to the community at the relevant time, the court must have the power to order that that part cannot be enforced.

This view - that the court must not be limited to saying that a restriction is either enforceable or not enforceable as a whole, but that it must also have the power, in an appropriate case, in the light of the requirements of public policy, to say that a restriction is only partly enforceable or unenforceable - has already been expressed in certain recent decisions, and I agree therewith" (unofficial translation of the original Afrikaans).

The learned CHIEF JUSTICE then went on to refer to the remarks of BOTHA J and VAN DEN HEEVER J in the judgments to which I have already referred.

Although it was not necessary for this court in *Book v Davidson supra* to endorse any aspect of *Magna Alloys* beyond the change of *onus*, it must be clear that there is a unity between the various parts of *Magna Alloys*. Indeed, when he summarised his conclusion at p 897-898 the learned CHIEF JUSTICE set out the following seven propositions, and it will be seen that proposition 7(c) is stated as a consequence of proposition 6. I quote again from an unofficial translation of the original judgment:

- "(1) There is nothing to be found in our common law which states that a covenant in restraint of trade is invalid or unenforceable.
- (2) The approach followed in many South African decisions, that a contractual provision placing a restriction on the freedom of trade of a party thereto is *prima facie* invalid or unenforceable, is an approach derived

from English law.

- (3) English law is to the effect that any restriction of a party's freedom of trade is *prima facie* unenforceable as being contrary to the public interest, and that a party seeking to enforce such a provision bears the burden of proving that the provision is reasonable *inter partes*. As regards the question of burden of proof, there is a further rule to

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McNALLY JA

the effect that the party alleging that a restrictive covenant is against the public interest must prove that it is so.

- (4) It is a principle of our law that agreements that are against the public interest cannot be enforced, and one can accordingly say that an agreement which restricts a party's freedom of trade is against the public interest, and is therefore unenforceable, if the circumstances of the particular case are such that the court is of the opinion that the enforcement of the agreement would harm the public interest.
- (5) It is in the public interest that agreements freely entered into must be honoured. Generally speaking, however, it is also in the public interest that anyone must as far as possible be able to participate in the business and professional world. It can be assumed that an unreasonable restriction of a person's freedom of trade would probably also harm the public interest if the person concerned were to be held bound thereby.
- (6) In our law the question whether a restrictive provision is enforceable must be determined in the light of the question whether the enforcement thereof would harm the public interest.
- (7) Acceptance of the view mentioned in (6) above entails certain consequences, inter alia that, when someone alleges that he is not bound by a restrictive provision to which he has consented in an agreement -
- (a) he bears the burden of proving that the enforcement of the provision will be contrary to the public interest;
 - (b) the Court must have regard to the circumstances prevailing at the time it is asked to enforce the provision; and
 - (c) the Court is not limited to a finding that a restrictive provision is enforceable or unenforceable as a whole, it also has the power to decide that a part of such a provision is enforceable or unenforceable."

(See also *J Louw & Co (Pty) Ltd v Richter & Ors* 1987 (2) SA 237 (N) at 242J to 243C)

Accordingly it must be held that the learned judge *a quo* was right in approaching the problem, not in terms of rewriting the restraint clause, but in terms of deciding the extent to which it had been shown that the court should not enforce the contract of restraint.

The appellant really made no effort to suggest in his affidavits where the line should be drawn between the reasonable and unreasonable elements of the restraint clause. It may be noted in passing that the appellant, a qualified legal

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practitioner, signed the clause in January 1986, a year after the decision in *Magna Alloys* was available in published form. He must have been aware of the trend of the law. He might have been expected to ask himself the question: If the thinking which led up to *Magna Alloys* is followed in our Courts, can I rely on such decisions as *Carthew Gabriel v Fox and Carney (Pvt) Ltd* 1977 (2) RLR 152 (AD); 1978 (1) SA 598 (RAD)? The answer, fortified by Professor Christie's comment at p 362 of his *Law of Contract*, would inevitably have been - No.

If he had given serious consideration to the lawfulness and morality of his decision to break the contract he might have been expected to look at the recent cases before reaching his decision. He might have noted, for example, BOTHA J's remark in the *National Chemsearch* case *supra* at p 1117G that -

"... it may be that the Court will decline to enforce the restraint partially...where the employee's conduct is not in flagrant or obviously defiant conflict with his former employer's legitimate interests."

If for instance, the appellant had allowed a year or more to elapse and had given notice to his former employer that he considered that his legitimate interests had adequately been protected by such a time lapse and he therefore proposed to open a practice in Chinhoyi, or if he had told his employer that in view of his seventeen month service in Chinhoyi he did not believe it reasonable that he was restrained from practice in Harare, he might have hoped for more sympathetic approach by the court.

The facts of this case, however, reveal the most flagrant and blatant and unrepentant rejection of the whole concept of the restraint clause and of the sanctity of contracts. The employer was hit at his most vulnerable spot. It was the employer who had taken the risk of opening up the practice in Chinhoyi. The appellant was, for practical purposes, the embodiment of Brian Mparadzi and Co in Chinhoyi for the whole seventeen months of its existence there. If the restraint had validity anywhere it had validity in Chinhoyi. And if the restraint was not valid for as long as five years, or was it not possibly valid for three years, or one year, a month, or even for twenty four hours?

Yet, as I have said, the appellant made no attempt to suggest that the restraint clause was partially unenforceable. Perhaps he realised that having done what he did, it was all or nothing. Whatever the reason the fact is that in his affidavit he contented himself with saying:

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1. That the contract was void for vagueness;
2. That it was unenforceable because it was oppressive and unreasonable on the grounds that the period was too long and the area too wide.

He failed to establish the first point, and he failed to appreciate that even if he established the allegations in the second point, he remained faced with the question "How long and how wide do you say the restraint ought to be?"

In the absence of any evidence at all on these matters the learned trial judge was quite correct in declining to come to any decision as to whether a bar against practice in Harare was

reasonable. He was not dealing with a breach of the restraint clause in regard to practice in Harare.

In spite of the total lack of relevant evidence he took the view, favourable to the appellant, that the period of restraint was too long. He reduced it to three years. It might well be that if evidence had been adduced he would have reduced it further. But certainly on the evidence before him he had no reason to reduce it further.

I would amend the learned judge's order in this matter only in one technical though perhaps significant respect. In deciding upon a period of three years, he worded his order in such a way that the period ran from the date of the order. It should have run from the date when the appellant left the employ of the respondent. I would therefore add to para 2 of the order the words "with effect from the 30th June 1987".

This alteration was not sought by the appellant but was raised *mero motu* by the court during the course of the appeal.

I cannot see any reason why it should affect the court's order as to costs.

Accordingly the appeal is dismissed with costs and the order of the court *a quo* is confirmed save that the words "with effect from 30 June 1987" are added at the end of para 2 thereof.

Manyarara JA: I agree.

Korsah JA: I agree.

Ziumbe & Mtambanengwe, appellant's legal practitioners

DW Aitken & Company, respondent's legal practitioners

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S v SNYMAN 1989 (1) ZLR 89 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Korsah JA

Criminal appeal

14 February 1989

Flynote

Criminal law - Parks and Wild Life Act 1975 - s 29(1)(a) - hunting in a safari area without a permit - when proof that accused was in safari area may be dispensed with - s 84(15) - accused in possession of weapon deemed to have entered upon land for purposes of hunting - effect of section.

Headnote

The appellant was convicted of hunting in a safari area without a permit, in contravention of s

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29(1)(a) of the Parks and Wild Life Act 1975. He had on two occasions been in possession of a gun and had accompanied a hunting party which had the requisite permits to hunt in the Hurungwe Safari Area. His evidence was that he accompanied the hunting party to protect them, but had no intention of shooting any animals; he was acting as a gun-bearer. It was also argued on appeal that there was no evidence that the hunting had taken place in the safari area mentioned in the charge. The point had not been taken in the trial court, although there was evidence that the incidents had taken place in the hunting party's approved hunting ground. It was also argued that he had discharged the onus placed on him by s 84(15) of the Act, which provides that a person who is found on land on which there are animals in possession of a weapon capable of killing any animal by the discharge of any missile is deemed to have entered on such land for the purpose of hunting without authority, unless he proves that he was not there for that purpose.

Held, that the witnesses who gave evidence at the trial knew the safari area well, it being one of their hunting grounds. By his silence on the point, the appellant accepted that he had been in a safari area.

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Held, further, that the word "deemed" used in s 84(15) can be interpreted to mean, whatever may be the true purpose for his entering an area, that a person found in possession of weapons capable of killing animals entered the area for the purpose of hunting. To escape conviction, the appellant had to show that he had some other purpose, and this he failed to do; his admitted role was that of a co-hunter, for whom a permit is required.

Cases cited:

S v Mavingere 1988 (2) ZLR 318 (SC)

Steel v Shanta Construction (Pty) Ltd & Ors 1973 (2) SA 537 (T)

R v Gilison; R v Matanda & Anor; 1968 (2) RLR 104 (GD); 1968 (4) SA 557 (R)

R M Fitches for the appellant

Miss E F Ndewere for the respondent

Judgment

Dumbutshena CJ: The appellant was convicted of contravening s 29(1)(a)(ii), as read with s 84(15)(a) and as read with s 115(2)(a) of the Parks and Wild Life Act No. 14 of 1975. He was sentenced to a fine of \$400 or, in default of payment, two months' imprisonment with labour. He now appeals against both conviction and sentence.

By consent, the phrase "a male lion trophy" in the charge was amended to read "a male lion".

The appellant is by occupation a safari outfitter. On 10 June 1987 Mr van Loggerenberg was issued with a hunting permit, No. 000354 (Exhibit 3), for which he paid \$7 521,69. The name of

Mr C Wood appears on the permit as a co-hunter. Mr van Loggerenberg was authorised to hunt in Hunt Number "Nyakasanga" of the Makuti Area M10 Safari Area. The two were to hunt in the area between 10 and 19 June 1987.

Section 1 of the terms and conditions of the permit states:

"The holder of this permit and a person who is specified as a co-hunter shall comply with the requirements of the Parks and Wild Life Act, as amended, and any regulations made thereunder."

Section 11 prohibits the holder of the permit or his co-hunter "to cede, sell, transfer or make over the rights to hunt any animal unless prior written

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permission has been obtained from the Director". It is clear from s 11 of the terms and conditions that permission is given only "in cases of illness, compassion or for reasons beyond the control of the holder of the permit". Should permission be granted for these reasons, a new permit must be issued and the old permit nullified.

It is said by the State that the appellant was a safari outfitter for Mr van Loggerenberg's hunting party. He was not allowed to carry a gun or hunt any animal in the specified Safari Area. Yet, between 12 and 14 June 1987 while in possession of a .375 H & H Magnum rifle he wrongfully and unlawfully hunted a buffalo cow and a buffalo bull in the Hurungwe Safari Area. He also hunted a male lion while he was in possession of a 12 bore shotgun. During these dates and times the appellant was not a holder of a permit in terms of s 30 of the Act.

Mr C Wood, the co-hunter of Mr van Loggerenberg, was not present during these hunts. When a Mr Onias Bepe was giving evidence the defence counsel said:

"...the defence accepts that the accused carried the two guns and also accepts the purposes of the guns."

It was also common cause that the co-hunter may assist the hunter by finishing off an animal that the hunter has failed to kill. The co-hunter also carries a gun for the protection of the members of the hunting party. He must himself be a professional hunter, registered with the Director of National Parks and Wild Life Management. Mr Bepe testified that the appellant was not a professional hunter and had no authority to protect members of a hunting party.

Mr Bob Towel testified that Mr van Loggerenberg and the appellant were carrying guns and tested them. The appellant tested his weapon by firing twice. He also said Mr Wood was not present. He accompanied the hunting party. His testimony was never challenged. He testified that on the first day the appellant was carrying a rifle. On the second day he left the shotgun in the car. On the third day, when Mr van Loggerenberg and the appellant were hunting a male lion, the appellant carried a shotgun. All this evidence is common cause.

From his own evidence it is clear that the appellant accompanied the hunting party in order to protect them should they be attacked by a dangerous animal,

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but he testified that he had no intention to shoot any animal. He said he was a gun-bearer. Mr Wood, his defence witness, testified that he used Ginger as a gun-bearer. Why, then, was the appellant carrying a gun in the presence of Ginger? The magistrate did not believe the appellant. There was ample evidence to prove the appellant's guilt.

In spite of this, Mr *Fitches*, who appeared for the appellant, submitted that there was no evidence to prove that the appellant had contravened s 29(1)(a)(ii) as read with s 84(15) of the Act. Section 29(1)(a)(ii) reads:

"No person shall -

- (a) hunt any animal in a safari area...except in terms of -
 - (i) ...
 - (ii) a permit issued in terms of section *thirty*".

Mr *Fitches* argued that no evidence was led by the State to prove that the appellant was carrying a gun contrary to s 29(1)(a)(ii) of the Act in a Safari Area. He said there was no evidence to show that he was in a Safari Area. However, the particulars of the charge did allege that the appellant did hunt in the Hurungwe Safari Area.

The facts of this case are distinguishable from the ordinary run of cases in which the State fails to prove a technical point which is essential to prove the guilt of the accused.

In this case, the appellants, Mr Bepe, Mr Towel and Mr Wood were people who knew the Safari Area very well. They were all involved in one way or another with the business of hunting. The area in which the appellant was in possession of guns was one of their hunting grounds. By this silence the appellant accepted the allegation that he was hunting in a Safari Area. If he had not been in a Safari Area, one would have expected him to have challenged or denied the allegation.

The question is: should this court remit the case to the magistrates' court in terms of s 15(d) of the Supreme Court of Zimbabwe Act No. 28 of 1981? I do not think so. The point is so technical that it can be resolved without remitting the case to the magistrates' court. Besides, remitting the case would result in the appellant incurring additional expenses by way of legal fees. See *S v Mavingere* 1988 (2) ZLR 318 (SC) a case in which McNALLY JA set out the law applicable in cases of this nature and in which the learned Judge of Appeal considered a number of cases on this particular point.

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In any event, this court is satisfied that there is more than sufficient evidence on the record to support the appellant's conviction. Mr *Fitches*, properly in my view, abandoned his submission on this technical point.

Mr *Fitches* submitted that the appellant had discharged the presumption in s 84(15) of the Act,

which places the onus of proof on the appellant to prove, on a balance of probabilities, that he was not carrying a weapon capable of killing animals in a Safari Area.

Section 84(15) of the Act reads:

"(15) If any person is seen or found -

- (a) on any land, on which there are animals, in possession of any weapon capable of killing any animal by the discharge of any missile or with a free ranging dog; or
- (b) within one hundred metres of any waters in possession of any gear, device or appliance capable of being used for fishing;

he shall be deemed to have entered upon such land for the purpose of hunting or fishing, as the case may be, without authority in terms of this Act unless it is proved that he -

- (i) had such authority to enter upon such land for the purpose of hunting or fishing; or
- (ii) was not upon such land for that purpose."

All that the appellant was required to do was to adduce evidence to show that he was not in the Huringwe Safari Area for the purpose of hunting and that he was not in possession of guns which fall into the ambit of s 84(15). This he failed to do, because he was in the area in the capacity of a co-hunter but without a permit. In the appellant's written heads of argument it is said:

- "1. The Appellant admitted carrying a weapon but specifically stated that it was to assist the hunter and for protection in case of attack by wild animal."

That submission states the duties of a co-hunter, whose name must be included in the permit. Mr van Loggerenberg's permit, Exhibit 3, indicated that Mr Wood was the co-hunter and the appellant was not.

The appellant was in possession of weapons capable of killing animals by the discharge of missiles. In my view, when one considers that the word "deemed" used in s 84(15)(b) can be interpreted to mean, whatever may be

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the true position, that the person found in possession of weapons capable of killing animals entered the prohibited area for the purpose of hunting, even if that may not have been the true purpose for this entering the area, the appellant was correctly convicted.

In *Steel v Shanta Construction (Pty) Ltd & Ors* 1973 (2) SA 537 (T) at 541A COETZEE J expressed the above thus:

"When 'deemed' is used as meaning 'considered' or 'regarded' and not in one of its other meanings (such as, for instance, to 'think') it is a very strong word to denote, frequently exhaustively, that something is a fact regardless of the objective truth of the matter. It is an indispensable word, in legal parlance, to convey that enquiry into this truth is irrelevant for the purpose of the particular instrument. Struggle as one may against such deemed meaning, it is inevitable that the struggle will be in vain (cf the remarks of HATHORN JP in *Collins v Durban*

Corporation 1946 NPD 785 at 786)."

In the present case the words are clear. The appellant could still do something about it. All he had to do was to prove the contrary was the truth. He did not do that. Instead he proffered a defence which, on the evidence before the court, could not be believed. He failed to prove that he was in the Safari Area for some purpose other than the hunting of animals. Mr van Loggerenberg's permit was for hunting animals in a specified Safari Area. His co-hunter was not with him. It can be inferred from the surrounding circumstances that the appellant was performing the duties of a co-hunter. His own evidence supports that conclusion.

There is, besides this, sufficient evidence on the record that the appellant was in the Safari Area for the purpose of hunting. The appeal against conviction must, therefore, fail.

The appeal against sentence does not deserve serious consideration. Mr *Fitches* submitted that the learned magistrate misdirected himself when he said: "The appellant's conduct in this case could cost the country thousands of dollars in foreign currency". It is not clear what the magistrate meant. If what he said was a misdirection it did not influence him in assessing sentence. He went on to impose what I consider to be a lenient sentence.

In *R v Gilson: R v Matanda & Anor* 1968 (4) SA 557 (R), a case cited by Mr *Fitches* in his heads of argument, LEWIS J (as he then was), when considering

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an appropriate sentence for contravening s 16(1) of the Wild Life Conservation Act [Chapter 199] (repealed by the Parks and Wild Life Act), said at 558A:

"In assessing the amount of the fine, regard should be had to the amount of the fee which the accused has avoided paying by his failure to obtain the requisite licence. Unless the fine is in excess of this fee, then, of course, hunters are encouraged to take the commercial risk of continuing to hunt without taking out a licence because such unlawful conduct then becomes 'worth the candle'. This principle must prevail over the general principle laid down in *R v Taurayi* 1963 R & N 926, that the amount of the fine must be related to the accused's means."

The hunting permit issued in terms of s 30 of the Act and which was issued to Mr van Loggerenberg was worth \$7 521,69. Besides, s 115(2)(a) prescribes a fine of \$1 500 or imprisonment for a period not exceeding eighteen months, or both such fine and such imprisonment. The fine imposed by the magistrate was a mere \$400 or, in default of payment, two months' imprisonment with labour. In terms of the principle laid down in *R v Gilson supra* a sentence of \$400 or, in default of payment, two months' imprisonment with labour in the circumstances of this case can be regarded as a very lenient sentence.

It was for these reasons that we dismissed the appeal against both conviction and sentence at the end of hearing argument.

McNally JA : I agree.

Korsah JA: I agree.

NYAKABAMBO v MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS & ORS
1989 (1) ZLR 96 (HC)

Court **High Court, Harare**

Mtambanengwe J

Civil trial

30 May 1988 & 15 February 1989

Flynote

Constitutional law - Attorney-General - independence of - Constitution of Zimbabwe, ss 31(D) & 76 - absence of control over his decisions by Minister - delict - State liability - vicarious liability - master and servant relationship necessary - Attorney-General acting in terms of statutory powers rather than on direction of Executive - control of servant essential if State to be liable - qualified immunity of Attorney-General.

Headnote

The plaintiff was detained on an allegation of murder, of which, a year after her arrest, she was acquitted. She claimed damages for wrongful deprivation of liberty and malicious prosecution. The first defendant, the Minister, raised a plea in abatement that he had been wrongly joined as nominal defendant, on the grounds that the other two defendants (the Attorney-General and the Director of Public Prosecutions), although servants of the State, were not subject, in respect of the actions complained of, to the Minister's direction or control. The Attorney-General raised the point *in limine* that he was immune from civil liability when he acted in terms of s 76 of the Constitution; alternatively, that the plaintiff's detention was not due to any culpable act on his part. The same points were raised in respect of the third defendant.

Held, that for the State to be liable in delict under the State Liabilities Act [Chapter 54] the civil servant whose acts gave rise to the action must have been subject to the directions and control of the Executive. Where he was instead carrying out a duty entrusted to him by statute and where

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the Executive had no power to direct or control him in carrying out that duty, he could not be regarded as a servant of the State. In terms of s 76(4) of the Constitution, power and responsibility over all prosecutions in Zimbabwe is vested in the Attorney-General; subs (7) provides that in exercising these functions the Attorney-General is not subject to the directions or control of any other person or authority. Consequently, the citing of the Minister was a

misjoinder.

Held, further, that the immunity from liability afforded to the Attorney-General by the proviso to s 13(5) of the Constitution is a qualified one; he is immune only if he acts reasonably and without malice and without culpable ignorance or negligence. In so providing the Constitution recognised and adopted the common law's position on the matter. The point taken *in limine* therefore failed.

Cases cited:

Mhora & Anor v Minister of Home Affairs 1986 (1) ZLR 88 (HC)

Nguruve v Secretary of the Commission of Inquiry 1988 (1) ZLR 244 (SC)

Swarts v Minister of Justice 1941 AD 181

British South Africa Co v Crickmore 1921 AD 107

Union Government (Minister of Justice) v Thorne 1930 AD 47

Enever v The King (1906) 3 CLR 96

Attorney-General of Fiji v DPP [1983] 2 AC 672 (PC)

McLoughlin v Minister of Social Welfare & Anor [1958] IR 1

Riches v DPP [1973] 2 All ER 935 (CA)

Imbler v Pachtman (1976) 96 S Ct 984; 47 L Ed 2d 128

Nelles v The Queen in right of Ontario [1985] 51 QR 2nd Series 513; (1985) 21 DLR (4th) 103

Matthews & Ors v Young 1922 AD 492

Brennan v United Hatters of North America (1906) 9 LRA (NS) 254

Partridge v General Council of Medical Education (1890) 25 QB 90 (CA)

Penrice v Dickinson 1945 AD 6

A P de Bourbon SC for the plaintiff

E Chatikobo for the defendants

Judgment

Mtambanengwe J: The plaintiff in this matter sues the three defendants claiming against them jointly and severally: firstly, compensation, by virtue of s 13 of the Constitution of Zimbabwe; secondly, damages for malicious prosecution; and costs of suit.

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The plaintiff was, up to 3 January 1985, employed as a maid at the home of the then Minister of State for Defence, Mr Ernest Kadungure, in Greendale, Harare. The Minister's infant daughter was allegedly murdered on that date and the plaintiff was arrested as a suspect. On 7 January 1985 the plaintiff appeared in the magistrates court on initial remand. She appeared on numerous other occasions thereafter and was remanded in custody on each such occasion until 29 October 1985 when she was summarily committed for trial on a charge of murder. She remained in custody until the conclusion of the five-day trial on 9th January 1986 when she was found not guilty and acquitted.

THE TWO CLAIMS

The first claim is based on various allegations of wrongful deprivation of her personal liberty during various periods from the time of her arrest, including the various remands in custody to the time she was committed for trial and the period thereafter till her trial and acquittal, ie from 29 October 1985 to 9 January 1986. She avers that s 13(1) of the Constitution was contravened in that -

- "(a) At no time were there in existence any reasonable grounds for suspecting that the plaintiff had committed the offence for which she was charged and detained or any other offence which might have been a competent verdict upon such charge; alternatively, and in any event,
- (b) If [there were] such grounds upon which plaintiff was originally suspected of committing any such offence were reasonable, the further investigations carried out by the Police by the end of March 1985 and from time to time thereafter as the plaintiff was further remanded on the same charge, revealed that there were no longer any reasonable grounds for continuing to suspect that she had committed any such offence ...

Furthermore, plaintiff was not brought to trial within a reasonable time or released upon reasonable conditions pending her trial in contravention of the provisions of subsection 4 of section 13 of the Constitution of Zimbabwe and her continued detention after the end of July 1985 accordingly ceased to be authorised by law ..."

This, she claims constituted a further ground upon which plaintiff was deprived of her personal liberty, in contravention of s 13(1) of the Constitution. These acts were done by the second defendant, the Attorney-General, as represented by the third defendant, who is the Director of Public Prosecu-

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tions, and divers public prosecutors and law officers acting under the Attorney-General's authority in terms of Part II of the Criminal Procedure and Evidence Act [*Chapter 59*] and s 76 of the Constitution of Zimbabwe, and/or by the third defendant. For these breaches, she claims compensation in terms of s 13(5) of the Constitution in the sum of \$30 000,00.

The second claim, for damages for malicious prosecution, is based on the allegation that in doing the various acts complained of in the first claim and

"in proceeding with the trial on 11th December 1985 when the nature and quality of the evidence available against the plaintiff remained such that there was no reasonable possibility that she might be convicted of any such

offence",

the Attorney-General and the Director of Public Prosecutions were acting maliciously without reasonable or proper cause. These acts, she avers, prevented her from earning a salary and injured her in her good name and reputation and in her dignity and self esteem, as a result of which she suffered damages in the sum of \$10 000,00.

The first defendant, the Minister of Justice, Legal and Parliamentary Affairs, filed a plea in abatement and claimed that the plaintiff wrongly joined him as nominal defendant and, as such, has no cause of action against him. In particular, he says:

- "1. As second defendant was appointed in terms of s 76(1) and (2) of the Constitution of Zimbabwe, the headship of his Department or office has not, and cannot in law be assigned, as envisaged by s 3 of the State Liabilities Act [Chapter 54] to first defendant; and
2. The decision by second defendant (or any of his officers, if such was the case) to put plaintiff on initial and subsequent remands pending completion of Police investigations and thereafter to cause her to be summarily committed for trial on a charge of murder, as alleged, was not, and could not be subject to first defendant's direction and control.

At some point before trial, the plea in abatement was set down for argument, but it was not heard. Mr *Chatikobo*, for the defendants, indicated that the Minister wished to resuscitate his plea in abatement, and that the Attorney-General wished to raise a point *in limine*: that he is immune from civil liability when he acts in terms of s76 of the Constitution; secondly, that even if not immune, the detention of plaintiff was not brought about by any

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culpable act on his part, but by operation of law. He submitted that if his submissions regarding the immunity of the second defendant are sound they would apply to the same effect in respect of the third defendant, the Director of Public Prosecutions.

Mr *de Bourbon*, for the plaintiff, submitted, correctly, in my view, that the second leg of the point *in limine* raised by Mr *Chatikobo* could not and should not be decided until evidence has been led. This judgment will therefore deal with the Minister's plea in abatement and the first leg of the point *in limine* taken by Mr *Chatikobo*.

Mr *Chatikobo* argued that the Minister was appointed in terms of s 31(D) of the Constitution with responsibility for the Ministry of Justice, Legal and Parliamentary Affairs. In terms of s 31(D) he is empowered to exercise general direction and control over the Ministry, expressly "subject to the provisions of this Constitution". He submitted, therefore, that where such power conflicts with another power granted in terms of the same Constitution, such power must subordinate itself to the other power especially where such other power is not made "subject" to other terms of the Constitution. Since s 76(4) of the Constitution confers on the Attorney-General power and responsibility over all prosecutions in Zimbabwe, and s 76(7) provides that in exercising these powers and functions the Attorney-General "shall not be subject to the directions and control of any other person or authority", the Minister's power to direct and control some of the Attorney-General's functions in terms of s 31(D)(3) is limited to those cases not listed in s 76(4).

Therefore, in exercising his powers under s 76(4), the Attorney-General did not act and could not have acted under the direction and control of the Minister. It followed, therefore, that the Minister could not be held liable for the wrongful acts of the Attorney-General and the Director of Public Prosecutions committed during the exercise by the Attorney-General (or the Director of Public Prosecutions on behalf of the Attorney-General), of the powers contained in s 76(4).

The basis of this argument, and the rest of Mr *Chatikobo's* submission in this regard, is that the Minister, and therefore the Government of Zimbabwe, is being sued vicariously for the alleged wrongful acts of the Attorney-General and/or the Director of Public Prosecutions as servants of the State. I accept that that must be so, although Mr *de Bourbon*, for the plaintiff, contended that the Minister was not being cited as vicariously liable but as nominal defendant. He drew attention to para 5 of plaintiff's declaration which avers:

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- "5. The second and third defendants are servants of the State within the Ministry controlled by the first defendant and they acted as servants of the State and within the scope of their authority as such at all times relevant to this matter."

That means, he continued, that the plaintiff holds the State vicariously liable in terms of s 2 of the State Liabilities Act [*Chapter 54*] which allows a citizen to sue the State. In this country, one sues the State in the name of a Minister, as provided in terms of s 3 of Chapter 54.

The State Liabilities Act provides in s 2 and 3 as follows:

"2. Any claim against the State which would, if that claim had arisen against a subject, be the ground of an action in any competent court, shall be cognizable by any such court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant:

Provided that nothing in this section contained shall be construed as affecting the provisions of any law which limits the liability of the State or any department thereof in respect of any act or omission of its servants or which prescribes specified periods within which a claim shall be made in respect of any such liability or imposes conditions on the institution of any action.

3. In any action or other proceedings which are instituted by virtue of section two, the plaintiff, the applicant or the petitioner, as the case may be, may make the Minister to whom the headship of the department concerned has been assigned nominal defendant or respondent."

The point taken by Mr *Chatikobo* in this case was considered by GIBSON J in *Mhora & Anor v Minister of Home Affairs* 1986 (1) ZLR 88 (HC), where the learned Judge held that the Minister of Home Affairs was correctly cited as nominal respondent in a notice of motion action in which the applicants challenged their discharge from the Police Force. The dismissal was conveyed to the applicants in a letter signed by the Minister but the dismissal was done by the President. In that case it was contended for the Minister that he was not the correct person to cite as he had merely signed the respective letters and had not tendered any advice to the President. In that case it was pointed out that the President had powers to discharge an officer acting on the advice of the Prime Minister or such other minister as may be designated for

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the purpose by the Prime Minister. The clear point in that case was that the applicants had a right in terms of the State Liabilities Act to sue the State, and the Minister of Home Affairs was, in terms of SI 285 of 1980, the person to whom the administration of the Police Act [Chapter 80] was assigned. The learned judge's decision that the Minister was correctly cited was, with respect, correct in the circumstances of that case (see also *Nguruve v Secretary of the Commission of Inquiry* 1988 (1) ZLR).

Although the State failed in the Mhora case, *supra*, after argument was advanced by State counsel similar to the argument advanced by Mr *Chatikobo* in the present case, this does not, however, conclude the matter. At p 80 of his book *The Law of Delict* 7 ed McKerron says:

"When it is sought to make the State liable, proceedings should as a rule be instituted against the Minister of the department concerned as a nominal defendant."

This would appear to determine the issue raised in the plea in abatement in this case. However, I think the further point made by Mr *Chatikobo* needs to be more closely examined. It was, briefly, to the effect that in order for the Minister to be liable as employer, the Attorney-General and the Director of Public Prosecutions must have been subject to his orders and control; and that, as in terms of the Constitution he and/or the State is precluded from exercising any such control, neither can be held accountable. I think that what is implied by the concept of "nominal defendant" or "representative capacity" is that the person whom or the entity which the nominal defendant is meant to represent has to be accountable. In this case, the State must be held to be vicariously accountable for the Minister to be held properly cited in a nominal or representative capacity.

In *Swarts v Minister of Justice* 1941 AD 181 the Minister of Justice was sued "in his capacity as Minister of Justice, and as such representing the Government of the Union of South Africa, for £500 damages alleged to have been suffered as a result of wrongful and unlawful imprisonment". In excepting to the declaration as disclosing no cause of action, the defendant pleaded over, admitting that for a period of some days the plaintiff was illegally detained. In that case, a magistrate had failed to cause the plaintiff to be liberated after receiving notification from the Attorney-General declining to prosecute the plaintiff who had been committed for trial and lodged in jail. It was claimed in the declaration that the magistrate was at all material times the servant of the defendant acting within the scope of his authority. The

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Attorney-General had declined to prosecute and acted in terms of s 90(1)(a) of the Criminal Procedure and Evidence Act 31 of 1917 which provided that:

"After considering the preparatory examination transmitted to him as aforesaid ... the Attorney General may - (a) decline to prosecute the accused and shall thereupon cause his decision to be transmitted to the magistrate who, if the accused is in custody, shall cause him to be liberated forthwith, or if he is not in custody, shall inform him of

the Attorney General's decision."

The exception was upheld by the court *a quo* on the ground that a magistrate, when acting under that subsection, was not acting as a servant of the Crown, but was discharging a duty specially imposed upon him by the Legislature in respect of which he was independent of Crown control.

FEETHAM JA considered the question raised by the exception in that case in the light of s 2 of the Crown Liabilities Act 1911, which was as follows:

"Any claim against His Majesty in His Government of the Union which would, if that claim had arisen against a subject, be the ground of an action in any competent Court, shall be cognizable by any such Court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the Crown or out of any wrong committed by any servant of the Crown acting in his capacity and within the scope of his authority as such servant."

He went on to say:

"It is, I think, clear that the term 'the Crown' in the phrase 'servant of the Crown', as used in this Act, means the Crown in its executive capacity, and that 'servant of the Crown' therefore means a servant of the Executive Government."

In affirming the decision of the court *a quo*, that the declaration in that case disclosed no cause of action, the learned JUDGE OF APPEAL referred to a number of cases in which the same principle had been stated, notably:

1. *British South Africa Co v Crickmore* 1921 AD 107, where it was held that the company then administering Southern Rhodesia was not liable for the alleged wrongful arrest of appellant by a constable because the constable in effecting the arrest was **"not acting as a servant of or on behalf of the**

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company but was carrying out a duty entrusted to him by the Legislature" (my emphasis).

He went on to say:

"In dealing with the question of the liability of the company SOLOMON JA referred to the decision in *Lawford v Minister of Justice* 1914 NPD 284, that the Minister was not liable under the Crown Liabilities Act of the Union for wrongful arrest and malicious prosecution by a sergeant of the police, and, in accepting that decision as correct, quoted with approval (at p 112) the following passage from the judgment of BROOME J -

'The public duties of a policeman are entirely different from those of a servant acting within the scope of his duties and subject to the specific directions and control of his master ... His appointment was to perform police duties which have been determined by the Legislature. In performing these duties he is acting not by virtue of the authority of the Government but by virtue of something imposed as a public obligation to be done not by the Government but by himself in terms of the Ordinance' (ie Ordinance No. 18 of 1845)."

2. *Union Government v Thorne* 1930 AD 47 about which he commented at pp 188-189: -

"In declining to apply the rule to such a case DE VILLIERS CJ said (at pp 51- 3):

'The mere fact that the duty is a statutory one is not enough. To take the case out of the Act there must be a lack of one or more of the essentials of the law relating to master and servant, such as that the police officer was performing a duty of a personal nature which made him independent of the control of the Crown *pro hac vice* ... In our opinion it does not matter whether the duty be statutory or imposed by the common law. In either case the officer would be carrying out a duty imposed by law. That fact by itself, however, would not prevent him being a servant of the Crown. **It is only when that duty has the effect of depriving the Crown of the power to direct or control him in carrying out his duty that *pro hac vice* he cannot be regarded as the servant of the Crown** ... To come to the facts of this case, the native constable was acting under the direct instructions of the sergeant at the time. To say that he was not under the control of his superior officers is therefore directly contrary to fact.'

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It appears from this judgment that, for the purpose of deciding whether or not a duty imposed upon a magistrate by Statute is a duty which makes him independent of the Crown *pro hac vice*, it is necessary to ascertain whether or not the duty is a duty of personal nature which 'has the effect of depriving the Crown of the power to direct or control him in carrying out his duty'. Section 90(1)(a) requires that the magistrate who has conducted a preparatory examination shall, on the transmission to him of the Attorney-General's decision not to prosecute, cause the accused concerned, if in custody, to be liberated forthwith: this is a personal duty imposed on that particular magistrate and on no one else, though, it may be that, by virtue of the provisions of s 11(3) of Act 32 of 1917, another magistrate appointed to act in his place may be substituted for him in respect of the performance of that duty" (my emphasis).

3. Then (at p 190): *Enever v The King* 3 CLR 96, where he says:

"In that case damages were claimed from the Crown for wrongful arrest by a constable. The Tasmanian Act governing the liability of the Crown provides that the Crown shall be liable in respect of any act or omission, neglect or default of an officer, agent or servant of the Government of Tasmania, which would be the ground of an action at law or suit in equity between subject and subject. The Court held that the Crown was not liable on the ground that 'a constable, when acting as a peace officer, is not exercising a delegated authority but an original authority, and the general law of agency has no application'. The following passage from the judgment of BARTON J is of interest as showing why, where a duty is imposed by law upon a public officer as such, the officer cannot in respect of the performance of that duty be regarded as subject to the control of the Executive Government -

'For the maxim *respondeat superior* to apply, the person for whose act it is sought to attach responsibility to the superior must have been under the control of that superior at the time of the doing of the act. I am of the opinion that that is not the case where a constable is obeying a Statute, an order not to do it is one which has no weight or validity, while the order of the Executive Government to do the duty imposed by the Statute gives no added force to the command of the Statute.'

The principle excluding State liability for acts of a person, *prima facie* a servant of the State but acting under statute and not subject to State control or direction, was discussed in 1932 SALJ 8. This was before *Swarts'* case *supra*. Whatever doubts were raised in that article, which dealt with the cases

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later referred to by FEETHAM JA in *Swarts'* case *supra*, they relate to liability of the State for

wrongful arrests by the police. Apart from this, I am not aware of, and no authority has been drawn to my attention, any change in the principles gathered from the cases referred to above. It is trite in the law of delict that, to hold someone vicariously accountable for the acts of another, the latter must have been subject to the orders and control of the former, not only as to the acts in question but as to how those acts were to be done.

In *Union Government (Minister of Justice) v Thorne* 1930 AD 47 DE VILLIERS CJ remarked that the South African Crown Liability Act was passed owing to the anomalous state of the English Constitutional Law on the subject of state liability and largely to meet that very evil. He said that to give an interpretation which would 'stultify the law would give full rein once more to the mischief the Act was passed to combat'. However, he went on to say at p 51:

"A construction which leads to such results can obviously not be allowed. As was pointed out in the case of *South Africa Railways & Harbours v Edwards* 1930 AD 3 the Act placed the Crown upon the same footing as a subject, and makes it liable in tort for the wrongful acts of its servants committed within the scope of their employment. All members of the police force are *prima facie* servants of the Crown. When, therefore, the wrongful act is committed by a member of that force in the course of his duty, the Crown is *prima facie* liable. **It is then for the latter to show that the nature of the duty upon which the police officer was engaged at the time is such that it takes him out of the category of servants for the time being.** The mere fact that the duty is a statutory one is not enough. **To take the case out of the Act there must be a lack of one or more of the essentials of the law relating to master and servant, such as that the police officer was performing a duty of a personal nature which made him independent of the control of the Crown *pro hac vice***" (my emphasis).

He then discussed exceptions to the liability of the Crown which had been recognised by the courts. These have already been referred to in this judgment. Then, at the end of the judgment, at p 53, the following passage appears:

"The magistrate on the bench, or the magistrate in issuing a lunacy order, is clearly an independent officer free to exercise his judgment as his conscience dictates, and therefore not under the control of any superior."

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That being so, he cannot be regarded as a servant of the Crown."

The Crown Liability Act under discussion in that judgment and in *Swarts's* case *supra* was substantially in the same terms as our State Liabilities Act [Chapter 54].

Mr *Chatikobo* cited the case of *Attorney-General of Fiji v DPP* [1983] 2 AC 672 (PC). One of the issues raised in that case was the constitutionality or otherwise of a direction by the Governor-General assigning to the Attorney-General certain responsibility in relation to the office of the Director of Public Prosecutions. The Fijian Attorney-General's position is equivalent to that of our Minister of Justice, Legal and Parliamentary Affairs, and their DPP's position to that of our Attorney-General. At p 679G LORD FRASER OF TULLYBELTON said, in delivering the judgment of the Board and remarking on the relevant provisions of the Fijian Constitution:

"Section 85(7) contains the constitutional provisions on which the Director of Public Prosecutions primarily relies in this appeal. Their Lordships agree with the Court of Appeal that this subsection amounts to a constitutional guarantee of independence from the direction or control of any person in the exercise by the Director of Public Prosecutions of his powers under the preceding subsections of s 85..."

Then at p 681B-C -

"On the first issue, the majority of the Supreme Court held that the direction was unconstitutional. One of the reasons for their decision was that they held that the office of Director of Public Prosecutions was not a department of the Government within the meaning of s 76(1) of the Constitution. On appeal, the Court of Appeal held, and the Director of Public Prosecutions now accepts, that the office of Director of Public Prosecutions was a 'business of the Government' within the meaning of s 76(1) and counsel for the Director of Public Prosecutions conceded before the Board, rightly in their Lordships' view, that it was also a 'department of the Government'. It follows therefore that assignment of responsibility in respect of that office is permissible in principle, provided that the assignment does not offend against s 85(7) by encroaching upon the powers conferred on the Director of Public Prosecutions by s 85(4) and (5)."

What the above passage emphasises is the complete constitutional independence of the department of the Director of Public Prosecutions, although, as

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it concludes, that department is a business of the Government and also a department of the Government. It is, however, a department that is not subject to the direction or control of the executive Government.

At p 40 of his book *The Office of the Attorney-General in Ireland* JP Casey quotes two passages from the case *McLoughlin v Minister of Social Welfare* [1958] IR 1 at 11-12, one, by MAGUIRE CJ and the second by KINGSMILL MOOR J, to the same effect, thus:

- (i) "The Attorney-General, it is conceded, is the final and only arbiter in regard to the enforcement of the criminal law ...";
- (ii) "The Attorney-General is in no way the servant of the Government, but is put into an independent position. He is a great officer of State with grave responsibilities of a quasi-judicial as well as executive nature ...But while he is in office he holds, and if he is to do his duty and discharge his responsibilities must hold, an independent position. He is specifically excluded from being a member of the Government, which again underlies his special position."

In the present case I have already referred to the provisions of our Constitution which guarantees the Attorney-General's independence. It seems to me axiomatic that if one has to apply the control test, as I think one must, it inevitably follows that the State cannot be held vicariously liable for the Attorney-General's wrongful acts. It also seems to me that the Attorney-General can be sued independently of the State, in his official capacity, and that the question as to satisfaction of any judgment that might be entered against him is a domestic matter which does not concern the principle of law here involved. The position would be much the same as when one sues the Public Service Commission or its Chairman without the necessity of citing the Minister.

It is, therefore, my conclusion that the citing of the Minister of Justice, Legal and Parliamentary Affairs as nominal defendant in this case is a misjoinder. It will be ordered accordingly, that he ceases to be party to this action.

IMMUNITY FROM CIVIL SUITS : THE ATTORNEY-GENERAL

The point *in limine* taken by Mr *Chatikobo* raises the question: what immunity from civil suit, if any, attaches to the office of the Attorney-General in the exercise of his constitutional functions?

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Mr *de Bourbon* in effect submitted that this question has to be looked at from two different angles: **first, what immunity, if any, does he have from law suits for compensation by virtue of s 13(5) of the Constitution and, secondly, what immunity, if any, does he have from common law suits.**

The Plaintiff claims compensation under s 13(5), which provides:

"(5) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person or from any person or authority on whose behalf or in the course of whose employment that other person was acting."

She complains on two grounds:

- (i) that her rights under s 13(1) and (2)(e) of the Constitution have been infringed; and
- (ii) that her rights under s 13(4)(b) have been infringed.

The section provides:

"13. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the cases specified in subsection (2) ...

(2) The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorized by law ...

(e) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;

(4)(b) Any person who is arrested or detained upon reasonable suspicion of his having committed, or being about to commit, a criminal offence ...and who is not released, shall be **brought without undue delay before a court;** and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence **is not tried within a reasonable time**, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial" (my emphasis).

The proviso to subs 13(5) reads:

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"(a) any judicial officer acting in his judicial capacity reasonably and in good faith; or

(b) any other public officer, or person assisting such public officer, acting reasonably and in good faith and without culpable ignorance or negligence;

may be protected by law from liability for such compensation" (my emphasis).

The language of the proviso is very clear and leaves no doubt that the immunity afforded to any judicial officer acting in his judicial capacity is a qualified immunity: it is qualified to the extent that he acts reasonably and without malice (in good faith). Secondly, the immunity afforded any other public officer is qualified to the extent that he acts reasonably and in good faith, **"and without culpable ignorance or negligence"**. Whether or not the Attorney-General in exercising his constitutional functions is acting in a judicial capacity or a non-judicial capacity does not make any difference save as to the extent of his qualified immunity as afforded by under s 13, and that question need not be decided for the present purposes.

Three cases from other jurisdictions were referred to by Mr *de Bourbon*. They all deal with the vexed question as to the immunity of prosecutors, Attorneys-General and Directors of Public Prosecutions in their prosecutorial functions. The cases are *Riches v Director of Public Prosecutions* [1973] 2 All ER 935, *Imbler v Pachtman* (1976) 96 S Ct 984; (1976) 47 Ld 2d 128 and *Nelles v The Queen in Right of Ontario* [1985] 51 QR 2nd Series 513; (1985) 21 DLR (4th) 103. *Imbler v Pachtman* was a decision in which, on *certiorari*, the United States Supreme Court affirmed the decision of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court of the Central District of California.

In both Canada and the United States of America the Attorney General's prosecutorial responsibilities have been described as quasi-judicial. See the *Nelles* case above, at pp 522H & 523B, where THORSON JA discusses the question and concludes:

"There are a number of cases that have come before our Courts which have characterised them as 'quasi-judicial'. See, for example, the *Owsley* case, *supra* and the decision of this Court in *R v Logiacco* (1984) 11 CCC. (3d) 374 at p 379, and authorities cited therein. The responsibilities of public prosecutors have been characterised in the same way in a number of constitutional cases that have come before appellate courts,

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in the United States. The description 'quasi-judicial', however, is as far as our courts have been prepared to go, and, in the context of this case, as far as I too would wish to go."

Mr *Chatikobo* submitted, on behalf of the second defendant that "the independence conferred on the Attorney-General would be a mere sham if the Attorney-General were to operate under fear of being sued for incorrect decisions" and that "a necessary corollary to the completeness of his independence is immunity from civil liability". The Constitution, the supreme law of Zimbabwe, provides for qualified immunity and that should be the final word on the subject.

It seems to me that this submission cannot be sustained; certainly not in regard to compensation suits under s 13 of the Constitution. It will be noted that in the United States, the Supreme Court held in the case of *Imbler v Pachtman* (1976) 47 L Ed 2d 128 that:

"A prosecutor, acting within the scope of his duties in initiating and prosecuting a case has the same absolute immunity from liability for damages under 42 USCS § 1983, for alleged violations of another's constitutional rights that a prosecutor enjoys at common law, notwithstanding that such immunity leaves the genuinely wronged defendant without civil redress against any prosecutor whose malicious or dishonest action deprives him of liberty; there is no exception to such prosecutorial immunity even where the person asserting violation of his civil rights has successfully petitioned for habeas corpus relief" (see headnotes 10a, 10b, at pp 130-1 of the report of

that case).

However, the position which, with respect, I think accords with the provisions of our Constitution was stated in that case, in the minority judgment by WHITE J with BRENNAN J and MARSHALL J concurring, when he said at p 145:

"Most seriously, I disagree with any implication that *absolute* immunity for prosecutors extends to suits based on claims of unconstitutional suppression of evidence because I believe such a rule would threaten to *injure* the judicial process and to interfere with Congress' purpose in enacting 42 USCS § 1938 [42 USCS § 1983] without any support in statutory language or history."

He went on to say, at p 150 -

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"Thus, even if this Court had accepted the proposition, which it has not, *Scheuer v Rhodes* 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2 & 474 (1974), that Congress incorporated in 42 USCS § 1983 [42 USCS § 1983] all immunities existing at common law, it would not follow that prosecutors are absolutely immune from suit for all unconstitutional acts committed in the course of their jobs. Secondly, it is by no means true that such blanket immunity is necessary or even helpful in protecting the judicial process. It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed this was precisely the proposition upon which § 1983 was enacted. Absent special circumstances, such as those discussed in Part II, *supra*, with respect to actions attacking the decision to prosecute or the bringing of evidence or argument to the court, one would expect that the judicial process would be protected - and indeed its integrity enhanced - by denial of immunity to prosecutors who engage in unconstitutional conduct."

The background facts of this case are conveniently summarised by THORSON JA at pp 532-535 in *Nelles v The Queen in Right of Ontario supra* where one also finds quotations summarising the reasoning and the rationale for an unqualified prosecutorial immunity from civil suit for malicious prosecution at common law as held by the United States Supreme Court. *Nelles'* case is one in which the Ontario Court of Appeal went all the way in support of the American position in regard to the Attorney-General's immunity at common law; it did not decide the question of the infringement of the Canadian Charter of Rights and Freedoms, and concluded at p 540d-g:

"On the basis of the conclusions which this Court reached on the hearing of the appeal concerning the submissions based on the Charter it is not necessary to address in these reasons the question whether a remedy in the form of damages might be available to the appellant under s 24(1) of the Charter as a result guaranteed by the Charter. The conclusion here reached does not stand for the proposition that if the Attorney-General or a Crown Attorney, by conduct which would have exposed him to liability for malicious prosecution at the suit of another but for his common law immunity, also infringes or denies a right of that person guaranteed by the Charter, no remedy is available under s 24(1) to that person. Whether, however, the appropriate remedy in such circumstances would be an award of damages having the effect of displacing, to the extent of the award, the Attorney-General's immunity at common

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law is a question that may be left to another day".

It should be noted that the American position conferring absolute immunity in respect of claims under the Civil Rights Act of 1871 was, as THORSON JA says at p 533 b in *Nelles* case *supra*, **"predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it"** (see the quotation from *Imbler's* case at pp 533-534)" (my emphasis)

COMMON LAW SUITS

Adopting that approach I would say, that apart from the guidance that can be drawn from the clear language of s 13 of our Constitution, historically our judges and other officials acting in a judicial or quasi-judicial capacity have always enjoyed qualified immunity from common law suits and it seems that the framers of the Constitution had that in mind when drafting s 13 of the Constitution; in other words, it seems to me that the Constitution has adopted and recognised the changed position under the common law.

The common law position was stated by DE VILLIERS JA in *Matthews & Ors v Young* 1922 AD 492. This was a case where the plaintiff had, in the Court below, been awarded damages on the view that the members of his trade union council who had expelled him were liable for damages arising from such expulsion unless they had authority to expel him. The plaintiff had disobeyed Union rules and there was an arrangement between his union and his employers that a person could only be employed by the Council (Johannesburg Municipal Council) as long as he was a member of a trade union. The defence was that, at the time when the plaintiff was expelled from the union, resulting in the loss of his job, there was a duty cast on the union's council "to consider the conduct of the plaintiff and whether he had worked or acted contrary to the interests of the Society, and that in pursuance of this duty the defendant considered the plaintiff's conduct and framed the resolution expelling him and notified his employers accordingly, in the *bona fide* exercise of their discretion and without malice towards the plaintiff" (p 505). On appeal, after discussing the law and the cases relied upon, DE VILLIERS JA disagreed with *Brennan v United Hatters of North America* (1906) 9 LRA (NS) 254, where an association put a member on trial without following its own procedures regarding due notice and submission of certain charges, and it was held, on the member suing for damages, that the vigilance committee of the association "acted without jurisdiction - *coram non jndice* - unless the plaintiff by his own conduct consented that they should proceed". The learned ACTING JUDGE OF APPEAL remarked at pp 506-7:

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"I must point out, with great respect to so eminent a judge, that there is no onus upon a defendant until the plaintiff has proved that a legal right of his has been infringed. Under the *lex Aquilia* there is only an action for *damnum injuria datum* - for pecuniary loss inflicted through (a legal) injury, and the defendant is not called upon to answer the plaintiff's case before the plaintiff has proved both the pecuniary loss and that it directly results from what is, in the eye of the law, an *injuria* ...

Now it may be readily confessed the defendants had no jurisdiction under the circumstances to take the action they did, **but to ignore the fact that they purported to act as the properly constituted tribunal under the rules of the association is to disregard a material fact in the case for the defendants which can hardly be**

considered irrelevant. A judge who purports to try a case in which he has no jurisdiction would not on that account be liable" (emphasis added).

Then at p 508 he said:

"In my opinion, where, under the rules of an association, there is a duty imposed upon a body of persons under certain circumstances to consider the conduct of a member and in their discretion to take appropriate action, such persons are not liable **so long as they, in good faith, act or purport to act under the rules of the association in the interests of the association but through *imperitia* err in following the rules or in their proper application"** (emphasis added).

And referring to *Partridge v General Council of Medical Education* (1890) 25 QB 90 he said:

"The remarks which in that case were made by LORD ESHER MR: 'I think the defendants were intending, in what they did, to do what they were entitled to do' - exactly describe the position of the defendants in the present case."

Lastly, at p 509 the learned Judge stated:

"In my opinion, therefore, in considering plaintiff's conduct and in taking the resolution they took, the council purported to act under the rules of the society, **and in so doing they were performing functions analogous to those performed by a judge, they were acting in a quasi-judicial capacity** and are, therefore, under our law (*Groenewegen de Legibus Abrogatus* 1 4 5 1; Voet 5.1.58 *in fine*), as also, I understand,

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under the English law, not liable for any damage provided they acted *bona fide* and in the honest discharge of their duties. When once it is established that the defendants were acting in such a capacity under the rules of the society, to which the plaintiff as a member must be taken to have given his full assent, the *onus* would be upon him to prove that, in taking the resolution and in the further steps **they took, they did so not in pursuance of the duty devolving upon them as such council, but were actuated by some indirect or improper motive"** (my emphasis).

With reference to English Law in the above quotation, it is interesting to note the remark by STEPHENSON LJ in *Riches v Director of Public Prosecutions* at p 941 where he expressed the opinion:

"I do not wish to be taken as saying that there may never be a case where a prosecution has been initiated and pursued by the Director of Public Prosecutions in which it would be impossible for an acquitted defendant to succeed in an action for malicious prosecution, or as saying that the existence of the Attorney-General's fiat where required conclusively negates the existence of malice and conclusively proves that there was reasonable and probable cause for the prosecution."

That case was in fact an action for damages for malicious prosecution brought against the Director of Public Prosecutions by a defendant who had been acquitted in a prosecution instituted by the Director. At first instance, the plaintiff had been convicted, fined and ordered to pay a large amount of costs, but his conviction was quashed by the Court of Criminal Appeal. In considering the allegation of malice DAVIES LJ remarked at p 937:

"It is very difficult, I think, to construe that as an allegation of malice against the then Director of Public Prosecutions; but, for myself, this being a litigant in person, were the only relevant point the absence of a proper plea of malice on the part of the defendant, I do not think that I would feel justified in putting an end to this action."

There is no reference in *Riches'* case *supra* to any absolute immunity from civil suits of the

Director of Public Prosecutions in England. In a further passage in his judgment, DAVIES LJ in fact refers to a passage in an unreported case (*Wenlock v Shimwell*, heard on 27 April 1966 in the Court of Appeal (Civil Division)), where RUSSELL LJ, dealing with the question of reasonable and probable cause, said:

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"I may perhaps add this, that I cannot see how an allegation of prosecution without reasonable and probable cause and with malice can really stand any chance of success when you find that the view that the Director of Public Prosecutions presumably had of the evidence seems to have been shared by the committing magistrate, by the judge who allowed the matter to go to the jury and by the 12 jurymen."

On the above indications, the remarks of DE VILLIERS JA in *Matthews* case *supra* seems to be quite a justified and correct statement of the English law on the subject.

The next case was *Penrice v Dickinson* 1945 AD 6. This was an application for condonation of a delay in serving notice of an appeal. The applicant's action, in the Natal Provincial Division before HATHORN JP was unsuccessful. It was a claim for damages against a magistrate who had erroneously made two orders detaining the plaintiff, under s 28(3) of the Mental Disorders Act 38 of 1916. The Court was specially requested to refuse the application on the ground that the appeal had no reasonable prospects of success.

In discussing the test of liability of a magistrate under the circumstance where he exercised judicial functions TINDALL JA said (at pp 14-16):

"The first question to determine is one of law, namely, the test of the liability of a magistrate for acts done in the exercise of functions such as those performed by the defendant on 17 and 31 March 1941. It is clear, in my opinion, that in making the orders complained of, the defendant acted in a judicial capacity. The Roman Dutch writers who deal with the question of the liability of a Judge who gives a wrong judgment through want of knowledge express their views in commenting on the Roman Law stated in *Institutes* (4-5-pr). Groenewegen *de Legibus Abrogatis*, in commenting on that passage, states that 'by the customs of this age a Judge is not liable who gives a bad judgment through want of legal skill (*per imperitiam*) ...but (it is) otherwise if fraud and deceit have been present' See also the commentary of *Vinnius* on the same passage. *Voet* (5.1.58 *in fine*) mentions *imprudencia* as well as *imperitia*, remarking: '*eo quod ex sola imperitia aut imprudencia eum non teneri tralatitium est; sed demum ex dolo, qui difficilis plerumque probationis est*'. See also van Leeuwen *Roman-Dutch Law* 4.33.10. This test of the liability of an officer performing judicial functions was accepted by this Court in *Matthew & Others v Young* 1922 AD 492 at 509."

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In discussing the protection provided by the Mental Disorders Act 38 of 1916 he continued at pp 15-16:

"If s 76(1) defined the limits of the defendant's immunity, the plaintiff could succeed if he discharged the burden of proving either that the defendant acted without good faith or without reasonable care; proof by the plaintiff of the absence of either of those requisites would be sufficient. But, in my opinion, s 76(1) does not define such limits; for subs (5) of the section enacts that nothing in the section shall be construed as depriving any person of any defence which he would have independently of the section. **It follows, therefore, that the defendant was entitled to rely on the defence open to him under the common law, namely, that he was performing**

judicial functions and could not be held liable unless the plaintiff proved that he had acted without good faith. The test, therefore, which we must apply is whether the plaintiff proved that the defendant acted in bad faith in proceedings on 17 and 31 March 1941. This is a question of fact ..." (my emphasis).

On the basis of these considerations and the cases to which reference has been made above I am constrained to hold that both the Attorney-General and the Director of Public Prosecutions in this matter enjoy only qualified immunity in our law from common law suits.

In the result:

- (1) the first defendant's plea in abatement succeeds;
- (2) the first part of the point *in limine* taken by Mr *Chatikobo* fails;
- (3) there will be no order as to costs.

Coghlan, Welsh & Guest, plaintiff's legal practitioners

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

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RUZANE v PARADZAI & ANOR 1989 (1) ZLR 118 (HC)

Court **High Court, Harare**

Mtambanengwe J

Civil application

24-28 October 1988, 15 February 1989

Flynote

Customary law - chieftainship - succession thereto - Shona custom.

Headnote

In Ndebele custom, a chief is selected by a system of primogeniture in which, upon his death, the office is passed to his eldest son. In Shona custom, however, there is a system of collateral succession, according to which the personal name and office of chief is passed to the late chief's next youngest brother or half-brother, until the succession has been held by each brother in turn. Thereafter the eldest grandson succeeds to the name and position of his grandfather, the determining factor being the order of birth among collateral grandsons. There are tribal variations to this theme and the system is not always complete.

A man cannot succeed to his elder brother's own name and position, but may, after his brother's death, succeed to the name of their common father or forefather. In old and established chieftainships, the succession may involve the candidacy of numerous clansmen between whom agnatic relations may be very remote. The relative age of the candidates is, in principle,

the determining factor, but other extra-legal considerations, such as infirmity on the part of the rightful heir, may play a part in the selection of the next chief.

Chiefs are appointed by the President in terms of s 3 of the Chiefs and Headmen Act 1982. In so doing the President must give due consideration to the customary principles of succession, if any, applicable to the community over which the chief is to preside. Under the pre-Independence administrations, Chiefs were appointed by the Administrator, Governor or President. Usually, but not always, the person holding

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traditional title to the chieftainship was appointed; but sometimes, as where the tribe could not agree on the succession, the Government made the decision or arranged for a form of election. There was also administrative interference where the Government reorganised the chieftainships because, for instance, a particular tribe was no longer suitable as an administrative unit and was amalgamated with another tribe. Despite these interventions, the old order did not completely disappear and modern disputes about chieftainship are symptomatic of the re-assertion of the old traditions.

Case cited:

Muwuungani v Minister of Native Affairs 1957 R & N 298; 1957 (2) SA 544 (FSC).

S Chihambakwe for the plaintiff

R Mufuka for the first defendant

F Musakana for the second defendant

Judgment

Mtambanengwe J: The dispute between the plaintiff and the defendant in this matter essentially is a dispute between two houses of common origin, as to who is entitled to be the next Chief. The clan is an off shoot of the Rozwi people from Matonjeni, who settled in the Wedza Area on land formerly under the suzerainty of Chief Swoswo. The two real protagonists, each in a representative capacity belong to two houses, the Mukamba house and the Musinganete house, in common tracing their origin to a common ancestor Sarijo.

The second defendant is made a party to these proceedings as the Minister to whom the Act governing the appointment of Chiefs is assigned and who advises the President as to whom he should appoint chief in any particular area in terms of s 3(1) and (2) of the Chiefs and Headmen Act No. 29 of 1982 ("the Act") which provides:

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

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

The Act was passed in terms of s 111 of the Constitution of Zimbabwe set out in the Schedule

to the Zimbabwe Constitution Order 1979 (SI 1979/1600), which reads:

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"(1) There shall be Chiefs to preside over the tribespeople in Zimbabwe, who shall, subject to the provisions of subsection (2), be appointed by the President in accordance with an Act of Parliament.

(2) An Act of Parliament shall provide that in appointing a Chief the President shall give due consideration to the customary principles of succession of the tribespeople over which the Chief will preside and may provide for the appointment of deputy Chiefs and acting Chiefs."

The dispute involved in this matter is not an isolated event. Several such disputes have arisen in other areas, particularly since independence. The general position regarding chieftainship in this country before independence is reflected in what TREDGOLD CJ said in *Muwuungani v Minister of Native Affairs* 1957 R&N 298 (FSC) at 301-2; 1957(2) SA 544 at 547.

"By 1927 the old native tribal system had long since disappeared, except in so far as it had been recognised and adopted in Government appointed chieftainships. From a very early stage the power of appointment had been vested in the Administrator. In 1910 a statute was passed, which was, in general effect, much the same as the present Act, and which obviously contemplated a situation in which all chiefs would be Government appointed and the whole country organised into tribes by administrative order (Southern Rhodesia Native Regulations Proclamation, 1910). It may safely be assumed that, when the present Act was passed, the Legislature thought only in terms of 'chiefs' and 'tribes' as contemplated by the existing law, and not of chiefs and tribes that were part of a superseded regime.

Moreover, a chaotic position would arise if, every time a chief died, **the existing tribal organisation, which had been set up under the law**, and which might have endured over a long period of years, was swept aside in favour of the old order that had obtained before ever the law was brought into force" (my emphasis).

In that case the learned CHIEF JUSTICE was considering a situation where, by administrative order, three different tribal entities had been brought under one Chief (as one tribe) and when that Chief died the one-out-of three tribal entity was divided into two tribes with the appointment of two successor Chiefs selected from two of the original three tribal elements that had been amalgamated into one.

The old order or the superseded regime that was referred to in *Muwuungani's*

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case *supra* is described in the various books written about the tribes of Southern Rhodesia at that time and all the writers or researchers on the subject agree as to the system of succession to chieftainship among the Shonas. Thus, Harold Child *The History and Extent of Recognition of Tribal Law in Rhodesia* at p 6 says:

"Succession to chieftainship also shows a difference, being in most instances collateral. Younger brothers succeed to elder brothers until the succession has been held by each in turn, when it reverts to the son of the first chief and then to the sons of the collateral lines. There are tribal variations, and the system is not always complete."

Similarly JF Holleman *Shona customary Law* at p 21 says:

"Succession to chieftainship is governed by the common principles of collateral succession prevailing in central Mashonaland. According to these principles the eldest son, regardless of the position or rank of his mother, succeeds to the **personal** name and position of his father. When he dies his next youngest brother or half-brother succeeds to the father's name, until the generation of sons of the father is exhausted and the eldest grandson succeeds to the name and position of his grandfather, the determining factor again being the order of birth amongst collateral grandsons."

And B Goldin and M Gelfand *African Law and Custom in Rhodesia* at p 46 say:

"Whilst among the Ndebele, the chief (*induna*) is selected by a system of primogeniture in which, upon his death, the office is passed on to his eldest son, a more complicated one is adopted by the more numerous Shona-speaking people. Their chiefs are chosen by a collateral system in which the position is passed from the head of one of the 'special families' to that of another. Each of these families is known as an '*imbahuru*' or 'royal family' and on the death of a chief (*ishe, mambo*) his successor is selected from the representatives of two, three or even four 'royal' families in the clan. Thus when a chief dies his office passes on to the representative of the next family until each has had its turn, when the cycle is repeated."

C Bullock *The Mashona* says at p 280:

"With very few exceptions primogeniture did not govern succession. The

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chieftaincy theoretically descended from the elder to the younger brothers of a family, until all had held it."

(See also his diagrammatical representation of the system).

And finally, Dr Claire Palley *The Constitutional History and Law of Southern Rhodesia 1885-1965*, writes at p 476:

"In other cases where the tribe (reference is here to the Mashona, who have a complicated system of collateral succession) have been unable to agree on a successor, the Government have made the decisions and in the last ten years have on twelve occasions arranged for some form of election ..."

The last of the above quotations testifies to the fact that, while the pre-independence governments tried to modify the system of succession to chieftainship among the Shonas and by administrative orders appointed chiefs, the old order was so entrenched that it did not disappear. No mere lip service was paid to it: it was recognised and adopted, save where the tribe was unable to agree. What is more important still is the fact that TREDGOLD CJ was at that time giving effect to the administrative intention of the Act, the Native Affairs Act [Chapter 72 of 1938] whose intention he perceived in the paragraph preceeding the one referred to above at p 547 where he states:

"But if s 4 is read as a whole, I am satisfied that it was intended that the Governor should upon occasion, exercise two simultaneous functions, the creation of a tribe and the appointment of a chief to such a tribe. He may find a tribe that is suitable as an administrative unit, in which case he has only to appoint a chief to such a tribe; or he may have to combine various elements to make a new tribe before he appoints its chief. The unlimited powers of division and amalgamation make this clear and I am confident that when, in the section, the Legislature spoke of tribes it meant tribes created in terms of the section, or of the laws that had preceded it."

It is now necessary to quote in full Dr Claire Palley's summation of the position regarding chieftainship in Southern Rhodesia from conquest to independence as the question inevitably arises what system, in present day Zimbabwe, we are talking of when considering chieftainship and the appointment thereto among the Shonas:

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"THE CHIEFS

The Chiefs are Government officials, appointed in terms of section 4 and 17 of the African Affairs Act by the Governor. They hold office during pleasure, and contingent upon good behaviour and general fitness. Although Chiefs are envisaged as hereditary holders of the office, it is only official recognition that carries with it the title of Chief. In practice the Governor frequently appoints the person holding traditional title to the chieftainship, but this is not always done. In other cases where the tribe (reference is here to the Mashona, who have a complicated system of collateral succession) have been unable to agree on a successor, the Government have made the decisions and in the last ten years have on twelve occasions arranged for some form of election. Furthermore, not all traditional chieftainships are recognised as from time to time Government has carried out a general reorganisation of chieftainships reducing the numbers of recognised Chiefs. Thus, in 1951, eighty-nine out of approximately 323 chieftainships were abolished. Chieftainships were 'amalgamated'; thus different ethnic tribes were placed under one Chief. The fact that the 'Government Chief' may not be the 'real Chief' may lead to difficulties and the Africans in the area may still take their disputes to be settled by the person whom they regard as the proper incumbent of the chieftainship. In fact in recent litigation counsel for the Government argued that the African tribes in Rhodesia today are in no way identifiable with the tribes which existed prior to the conquest of Rhodesia in 1893 but are essentially administrative units created by administrative action under the African Affairs Act'. Indeed Davies J held that 'the tribes of Rhodesia no longer consist of ethnic groups but of administrative units created by action under the (African Affairs) Act. Furthermore, the learned judge considered that in present-day circumstances it was impossible in law for Shona customary law to operate to confer a corporate personality on a tribe so that it was capable of acquiring rights or obligations.

Chiefs are charged with duties of tax collection, prevention of crime in their tribal areas, and oversight of the general good conduct of Africans under their charge. Chiefs rank as constables within their tribal areas. They also possess civil jurisdiction and are *ex officio* members of the African Councils in their areas. Chiefs have, however, gradually been converted into minor administrative officers of Government, supporting the authority of the District Commissioner in rural areas. More recently, they have been used for political purposes to bolster the Government claim to independence when they were brought by Government to a

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meeting of 196 Chiefs and 426 Headmen and invited to state their views on the question of independence for Southern Rhodesia."

The above and TREDGOLD CJ's comments in *Muwuungani's* case *supra* correctly, I think, represent the way things were, generally speaking, during the pre-independence period. However, despite these administrative interventions, it is not true to say the old order completely disappeared or was successfully completely done away with. At least among the Shonas the old pre-colonial system was too deep-rooted to disappear altogether and I think the disputes surfacing these days are symptomatic of the re-assertion of those old traditions that the previous administrations tried to suppress. It is my view that the present dispute may be seen in that light.

One of the cardinal practices under the old system among the Shonas was collateral succession, not only as regards to chieftainship, but also, as an example of its general acceptance, as regards succession on a family or clan level.

Before I deal with the evidence in the present case, it is necessary to put the matter in its proper historical perspective.

At pp 21-22 of Holleman's *Shona Customary Law* it is stated:

"A man cannot, for instance, succeed to his elder brother's own name and position, but he may after his brother's death, succeed to the name of their common father or forefather. Especially in the case of an old and established chieftainship its succession may involve the candidacies of numerous clansmen between whom agnatic relations may be very remote. As it is the relative age on a certain generation level which is, in principle, the determining factor, it is often difficult to know who is the eldest and therefore most eligible amongst the candidates. It is the task of tribal elders, mostly belonging to the ruling clan, and of other important kinsmen, to determine which candidate has the best rights to become chief. In the event of serious rivalry recourse may be had to a *svikiro* (spirit medium) of an important ancestor to ascertain the views and wishes of the ancestral spirits. There is no doubt that other than legal considerations may sometimes influence the succession. A common excuse for passing over a rightful heir is some serious physical disability, especially blindness. Other heirs have been passed over on account of their temporary absence from the tribal territory. From at least one it is reported that he refused to accept the chieftainship because he considered

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himself too poor to fulfil his duties properly. And previous insubordination by a minor house has led in more than one case to the permanent exclusion from the chieftainship of such a house and its descendants."

Footnote 4 to the first paragraph at p 21 is significant in relation to this case:

"This may cause friction in tribes which represent an affiliation of remnants of an old lineage section, the political unity of which has broken down. When the Chieftainship is re-established on the bases of one of these houses, the other houses, of which some may be incorporated in the new political unit cannot participate in the succession to the new chieftainship. The fact that there may still be questions of succession to the name and (now purely geneological) position of the founder of the old unity in which these other houses share, has sometimes resulted in a conflict between geneological seniority and political superiority. Examples of such conflicts are fairly common, for instance amongst the Hera of Southern Sabi and the Rozwi of the Wedza Reserve."

In its barest form the dispute in this matter, put in a historical context, is, according to the plaintiff, that the Rozani Chieftainship only started with Nyenye Chief Rozani 1 of the Makamba Clan. According to him, it was he who approached Chief Swoswe and pleaded for the favour to set up the Rozwi Chieftainship in the Wedza area. The Musunganeti clan or family had nothing to do with it and for four reigns, spanning from 1922 to 1984, only those of his clan succeeded to the Chieftainship till the intervention of the authorities in 1984, when Paradzai of the Musunganeti family was imposed as Chief and after him, his son, the present defendant, was made acting Chief. The Musunganetsi were made sadunhus, ie headman, and had no right to succession to the Rozane Chieftainship. He denies that there was any Rozawi Chieftainship in the area before 1922.

The defendant, on the other hand, claims that the Rozwi Chieftainship in the Wedza area was established a long time back when the two clans had come into the area of Chief Swoswe, who had previously married a daughter of the Rozwis of this group that came from Matonjeni

deriving from their ancestor Sarijo. The name by which the Chieftainship was known was Mbava. According to him, it was only through the intervention of the administration in 1922 when Nyenye succeeded Furaunye, who was Mbava 7, that the name was changed to Rozani, and thereby excluded the Musinganeti family.

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Thus the main dispute is whether the Musinganeti claim is entitled to succeed to the Rozwi Chieftainship in the Wedza area. As Mr *Chihambakwe* for the plaintiff put it, if the answer is in the negative, then that is the end of the matter but if the answer is in the affirmative, then the second enquiry is which customary principles are applicable in the choosing of the chief in this Rozwi Chieftainship. He stated the issue correctly except that the first inquiry is really whether the Musinganeti family is entitled to succession to the Rozwi rather than the Rozane Chieftainship.

To answer the question another question must be answered first. The question is: is it true or false that, historically, there was a Rozwi Chieftainship established in the Wedza area before Nyenye Ruvote, Chief Rozani 1, in 1922? A subsidiary question is: when Nyenye Ruvote was installed as Chief, what was the view taken by the opposing family? It should be pointed out, at the outset, that the evidence led from both camps was, on the main question, respectively reprobative and approbative, that is, the plaintiff says there was no such Chieftainship while the defendant says there was.

Charles Bullock, a Native Commissioner and Examiner in Native customs and Administration in Southern Rhodesia, did, it seems to me carry out extension researches in the period prior to and over 1922. His second publication on the Shonas was published in 1927 after many years of study during which he obviously had contacts with a large number of people across the country. Talking about the VaRozwi at p 39 of his book *The Shona* he says in a footnote:

"Mbava, a Rozwi chief, informed Mrs Lloyd of Rusape that Zimbabwe was built by his ancestor Chief Togwa",

and at p289, discussing succession to Chieftainship, he writes:

"...and long ago, Mbava, a Chief of the Warozwi, told me, that when a new Chief was appointed, he was taken to a pool by a doctor, and there dived and caught a crocodile" (my emphasis added in both passages).

As regards the subsidiary question I posed above, JF Holleman, a Beit Research Fellow, writing in 1952, says at p 21 of his book *Shona Customary Law*:

"A man cannot, for instance, succeed to his elder brother's own name and position, but he may after his brother's death, succeed to the name of their common father or forefather."

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and in a footnote to this states -

"4. This may cause friction in tribes which represent an affiliation of remnants of an old lineage section, the

political unity of which has broken down. when the Chieftainship is re-established on the basis of one of these houses, the other houses, of which some may be incorporated in the new political unity, cannot participate in the succession to the **new Chieftainship**. The fact that there may still be the question of succession to the name and (now purely geneological) position of the founder of the old unity in which these other houses share, has sometimes resulted in a conflict between geneological seniority and political superiority. Examples of such conflicts are fairly common for instance amongst the Hera of Southern Sabi **and the Rozwi of the Wedza Reserve.**" (my emphasis).

I have repeated this quotation because, in this context, it illustrates what was said in evidence, that when Changu Ruwote, a brother of Nyenye Ruwote, succeeded to what was then now known as Rozane Chieftainship, two "headmen" refused to give "*chiwuchiro*", a token of recognition and acceptance of the new Chief, and that these were of the Musunganete family. It must, I think also be quoted in the context of what TREDGOLD CJ said in *Muwuungani v Minister of Native Affairs supra* about Chieftainship and tribes as conceived in the new colonial administrative order and Dr Clair Palley's comments extensively quoted *supra*. The attempted ordered shape of things is even more dramatically illustrated (if somewhat confused) in a letter written by the Assistant Native Commissioner, Wedza in 1943 at the very point of the intended departure from the old to the so-called new order of things and talking of these people, the Rozwi Tribe of Wedza. I quote it in full (Exhibit 5):

"The Native Commissioner,
Marandellas

September 12th 1943

Late Chief Ruote @ Rozani:
Appointment of a Successor;
Barozwi Tribe : Wedza

I beg to report that I attended a meeting of the Barozwi section of this sub-district on Wednesday 8th Sept. 1943, for the purpose of selecting a successor to the late Nyenye Chief Rozani who died in November 1942. 2/11/42.

I return the file of papers relative to the late Chief's appointment in 1927

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and matters prior to this. I attach also a genealogical tree, compiled from data left by my predecessor (Mr J V Kerr). In this tree the present claimants are underlined in red ink.

The views of the tribe will be expressed first; followed by my opinion of each respective claimant; my opinions are influenced by the fact that this is not an age-old dynasty. The new chief will be the third to succeed; prior to this the tribe, a migrant section of the Barozwi, had only a headman who paid allegiance to the then Soswe chief of his time.

There are some five hundred tax-paying members of the tribe; and of these some three hundred are away at work. The meeting comprised some 180 adult males and 100 women (who of course were not allowed to vote); and can be said to be fully representative of the resident members of the Reserve.

The meeting was orderly and vehement bitterness absent. It was explained that the Government was anxious to hear from the people themselves, as to whether they could agree amongst themselves on the selection of a chief. After considerable discussion, the names of three claimants were put forward; their respective claims discussed and finally the matter put to the vote, with the following results: -

(1) Gonesu & Sibindwani

103 votes

- | | | |
|-----|---|----------|
| (2) | Muchada (3858) Emp. SA (Canvas Co Salisbury) | 69 votes |
| (3) | Chigweshe (Exempt unit, too old to attend, represented by his sons Chaka and Paradza) | 10 votes |

182 out of 500 Tax paying adults

As Gonesu polled the greatest number of votes I then sounded the "Muchada" section as to their willingness to accept Gonesu if he was chosen by the Government. Changu (eldest son of the late chief) replied for this section in the following words "We will accept the man chosen by the Government; but, if Gonesu is chosen he cannot take on the hereditary name of Rozani. Only claimant Muchada is entitled to this".

The meeting then closed.

I now present my opinions on the respective claimants:

- (1) Gonesu Sibindwani
This man, who polled the greatest number of votes is and has been an influential headman. His age is about 65 to 70. He is in full

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possession of his faculties and is able bodied. He has acted as a Councillor in the Court of the late chief Rozani for some years; and appears to carry considerable respect.

- (2) Muchada
This man is about 30 years of age, and has been away at work in Salisbury for some years. He has had no education; but is young enough to receive benefit from the Chief's training courses in Dombashawa.
- (3) Chigweshe
This man is of great age, and is the same man passed over in 1927 (see minute of the NC Marandellas dated 29.11.27). It is obvious that his sons, Chaka and Paradza, who represent his claim, hope to be the real power in the land. The lack of support shown is a clear indication of the feeling of the tribe.

In conclusion, I must confess a feeling of disappointment that the name of Changu (eldest son of the late Chief Ruote Nyenye Rozani) was not advanced. This man has acted in an unpaid capacity for the past ten months and has shown marked ability (I did not feel it my place to suggest him as I was presiding over the meeting). Further, Ruote Nyene Rozani's appointment in 1927 is a precedent for the passing of the Chieftaincy from father to son (following Zansi Amandebele custom) and I feel it a great loss from the administrative point of view, that all further succession cannot continue from father to son. In most Mashona custom a man cannot be chief unless his father at some time held the chieftaincy. Examination of the family tree shows that only Changu and claimant No 3 Chigweshe have those qualifications. Where the future chief is known, it is possible to give him prior to his accession, education and administrative instruction. The main qualification for a chief in the mind of the average Mashona native, is age, with the result that the real chief takes no part in his official duties. The actual work being done by a deputy (son or nephew).

(Signed) Asst Native Commissioner"

It will be seen from this letter that Furaunye, the son of Makamba and the father of Nyenye Ruwote, is taken as the first Chief in this area and it is significant, I think, that Changu, the son of Nyenye, did not contest the succession; and that Gonesu Sibindwani, the son of

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of Makambe, contested and polled the highest number of votes from a gathering of both families. It is also significant, highly significant, that the Native Commissioner's disappointment expressed in the last paragraph, and what is there suggested, is what was subsequently implemented - a clear attempt, it would seem, to introduce the Ndebele system against the expressed views of the people concerned; and also significant, I think are the reported comments of Changu:

"We will accept the man chosen by the Government; but, if Gonesu is chosen he cannot take on the hereditary name of Rozani. Only claimant Muchade (a son of Manyengwa, brother of Furaunye) is entitled to this" (my insertion in brackets).

The evidence is that Rozani was the real name of Mukamba, Mukamba being a nickname.

The above considerations point conclusively, in my view, to the fact that prior to Nyenye Ruvote Rozani there existed in Wedza a Rozani Chieftainship under the style of Mabava and that the change to Rozani was as a result of authoritative intervention by the then administration with the half hearted acquiescence of the one family, which acquiescence over the years and under the same administration that introduced the departure from tradition had hardened into a belief in an exclusive right that flies in the face of known historical facts. In my view, therefore, the first enquiry is answered in the affirmative.

I should add, in concluding this part of the enquiry, that I have been mindful of Mr *Chihambakwe's* criticism of discrepancies in the defence evidence. There were also discrepancies in the evidence of the plaintiff. I did not have to rely on that evidence alone. I have resorted to other evidence which was placed before me in the form of the works of the writers to which counsel in this matter drew my attention. It should be remembered that oral history is notorious for its susceptibility to different interpretation and it is being passed down in different versions told by many people. Such discrepancies as there might have been are easily explained by this well known fallibility of human memory. The picture, however, is clear from the evidence and such written references as I have been supplied with corroborates the main thrust of the evidence. For the defence, the witness Gonese I think summed it up convincingly, when under close cross-examination he was asked why if Gonese of Nyenye's generation did not throw away the *nyembe* (medal) he was given to signify he was headman if he was tricked. He replied to the

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effect: "You know that time there were Europeans you could not argue with them". "So you had to wait till a black government so you could argue?" he was asked, to which he replied: "Yes, we are in good terms now we can discuss our customs with them." "And for a period of 60 years waiting for a black government to discuss with?" - "We were fighting till there was a black

government; we were still fighting with them."

The rift between the two houses, to the extent that they virtually boycotted each other, seems to have centred round the change of name from Mbava to Rozani and, it seems to me, can only be healed by a reversion to Mbaya. The Musinganetes will have nothing to do with it, while the Makambas, judging by Changu's comment to the assistant Native Commission in 1943 (see Exhibit 5), take it exclusively as their own it being the name of their forefather, Makamba. I am further fortified in coming to this conclusion by plaintiff and plaintiff's witnesses stance of pleading ignorance of some of the major events in their history prior to Nyenye Ruote. It was apparent to me that the professed ignorance was in effect a reluctance to admit what might otherwise not accord with their stance.

I come now to deal with the traditional system of succession. In this there is much common ground. The evidence from the plaintiff shows that even when the Chieftainship was confined to the Makamba family despite the appearance of lineal descent, (the collateral system of succession was practised. The family tree (Exhibit 1) produced by the plaintiff shows that, after Nyenye, the chieftainship went to his son Changu. The plaintiff explained that, after Nyenye, it should have gone to Magumiso but by then he was dead, Mapurusa declined because of poor health, Muchada offered it to Changu, Nyenye's son. The first three were Nyenye's brothers who were older than him and could not be passed. But from Exhibit 5 we know Muchada contested succession to Nyenye. We also know after Nyenye's death, at a meeting of the whole Roziwi clan, Gonesu Sibindwani of the Musinganete clan was voted for by the majority, though Changu was later appointed in accordance with the Native Commissioner's wishes. This is at odds with plaintiff's claim that the Musinganetes had no right to the Chieftainship and also confirms the claim by the Musinganetes that they were fighting for the right to chieftainship as early as that, but their claims were brushed aside by the authorities.

The evidence of the plaintiff and Muchada, the man who declined the chieftainship in favour of Changu, his nephew, shows that where age took precedence over the usual collateral succession, it was at the option of the

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eligible candidate and this does not seem to establish a tradition that age automatically took precedence.

According to my understanding house-to-house succession is the very essence of the collateral principle of succession. So that when one group says succession was collateral and the other says it was collateral and house-to-house, they are in effect talking of the same systems of principles. Naturally the eldest member of the house that had the turn to assume the chieftainship would be the obvious and inevitable choice.

In conclusion I must repeat that I took note of the valid criticism of the defence evidence which Mr *Chihambakwe* dwelt upon at length in his submissions. I have also referred to the unsatisfactory features of the plaintiff's evidence. One piece of evidence that Mr *Chihambakwe* referred to as supporting plaintiff's case was the letter handed in from the bar. It was handed in

after Mr *Chihambakwe*, who had a day before been shown it by the defence, made use of it. I ruled that it be produced as defence counsel had drawn attention to other passages in the letter to which Mr *Chihambakwe* had not made reference. This is a case where formalism can very easily lead to injustice and I am convinced that a formal approach to the evidence, such as it is, would result in the truth being buried in formal stances by the parties instead of being unravelled. As it turned out the said letter, Exhibit 5, was a sword that cuts both ways, as has already been demonstrated above.

The prayers by the plaintiff are for a declaration nullifying the appointment of defendant as acting Chief Rozani, an interdict restraining second defendant from appointing defendant or any other person other than the plaintiff as Chief Rozani and an order compelling the second defendant to appoint plaintiff as acting Chief Rozani and Chief Rozani respectively, and costs of suit.

On the above considerations these prayers must fail. On the basis that this matter was brought up not for personal reasons but as a matter of public interest affecting the whole Rozwi people in the Wedza Area there will be no order as to costs in favour of or against either party. See *Muwuungani's case supra*.

Chirunda, Chihambakwe & Partners, plaintiff's legal practitioners

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S v TAKAVARASHA 1989 (1) ZLR 133 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Korsah JA

Criminal appeal

16 February 1989

Flynote

Criminal law - Drugs and Allied Substances Control Act [Chapter 320] - s 33(a) - carrying on business of pharmaceutical chemist on unlicensed premises - necessary for accused to be registered as pharmaceutical chemist.

Criminal law - Medical, Dental and Allied Professions Act [Chapter 224] - s 53(1)(a) - practise as, or perform acts specially pertaining to, practice of a medical practitioner - accused a registered medical assistant - extent to which such a person may perform such acts.

Headnote

The appellant was a medical assistant, registered under the Medical, Dental and Allied Professions Act [Chapter 224]. In that capacity she operated a clinic where she used to treat common colds and other minor ailments. She was charged with practising as, or performing acts specially pertaining to the practice of a medical practitioner, in contravention of s 53(1)(a) of the Act, in that she had "treated" persons named in the charge. It was also alleged that she

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had contravened s 33(a) of the Drugs and Allied Substances Control Act [*Chapter 320*], in that, not being a medical practitioner, she had carried on the business of selling or dispensing drugs on unlicensed premises.

Held, allowing the appeal against conviction on the second count, that the section prohibited the practice of the business of a pharmaceutical chemist on unlicensed premises. To carry on such a business, one must be registered as a pharmaceutical chemist, which the appellant was not. She could not, therefore, commit the offence alleged.

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Held, further, that a person who is not a medical practitioner can be convicted of contravening s 53(1)(a) of the Medical, Dental and Allied Professions Act if he performs a single act which "specially pertains" to the practice of a medical practitioner, whether that act be diagnosis, advice or treatment.

Held, further, that a person who is a registered member of a medical calling, other than a medical practitioner, may, to the extent that it is necessary to do so in order to perform the functions of his calling, diagnose, treat and advise. Thus, the appellant could diagnose and treat common ailments that do not require the use of controlled drugs which have to be prescribed by a medical practitioner. For a conviction against her to be sustained, it was necessary for the State to show that she had performed acts reserved for a medical practitioner, by treating people who required to be treated by a medical practitioner and whose treatment required the use of drugs that could only be prescribed by a medical practitioner. It was not enough merely to show that she had treated patients, because treating patients is one of the functions of a medical assistant.

Cases cited:

S v Tatsvarei S-19-85 (unreported)

S v Cuddington 1974 (1) RLR 251 (AD); 1974 (3) SA 371 (RA)

S v Sibanda (1) 1978 RLR 182; 1978 (3) SA 217 (R).

E Chatikobo for the appellant

Mrs S C Mavangira for the respondent

Judgment

Dumbutshena CJ: The appellant was charged in the magistrates court Harare with two counts of contravening s 53(1)(a) of the Medical, Dental and Allied Professions Act [*Chapter 224*] and s 33(2) of the Drugs and Allied Substances Control Act [*Chapter 320*] as amended by s 14(a) of Act No. 20 of 1978. It was alleged in the first count that she wrongfully and unlawfully and for gain did an act specially pertaining to the practice of a medical practitioner, in that between 3 and 30th March 1988 she treated certain persons named in the charge. In the second count it was alleged that she did wrongfully and unlawfully and for gain, not being a medical practitioner

carry on the business of selling or dispensing drugs on premises that were not licensed and which were situated within the Siyamakuya Supermarket at the Zengeza 4 Shopping Centre.

I want to dispose of the appeal against conviction and sentence relating to count 2, because counsel were agreed that the appellant should not have been

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charged under s 33(a) of the Drugs and Allied Substances Control Act as amended.

Section 33(a) reads:

"Subject to the provisions of any regulations, no -

- (a) person shall practice as, or carry on the business of a pharmaceutical chemist or manufacture any drug on;
- (b) ...

any premises unless those premises are licensed in terms of this Part for the particular purposes referred to in paragraph (a) ..."

The particular purposes referred to in para (a) of s 33 are practising or carrying on the business of a pharmaceutical chemist and the business of manufacturing any drugs. To carry on this type of business one must be registered as a pharmaceutical chemist under the Medical, Dental and Allied Professions Act. The appellant was not a registered pharmaceutical chemist. She could not therefore carry on the business of a pharmaceutical chemist or the business of manufacturing drugs. She was not a pharmaceutical chemist.

That the appellant was wrongly charged with contravening s 33(a) of [Chapter 320] becomes clear when one reads the elements of the offence put to the appellant by the learned magistrate. She was asked:

"Now *vis-à-vis* the second count, do you agree that between the period January 1988 to 30 March, you sold or you dispensed drugs on unlicensed premises at Zengeza 4 shopping centre? - Yes.

And you knew very well that these premises were not licensed as they should be according to the Medical and Allied Professions Act? - I knew it and we were in the process of doing it.

Who was in the process of doing it? - Dr Chiwara.

Did you have a lawful right to operate on unlicensed premises? No, my Worship." -

The magistrate must have believed that the appellant was charged with a contravention of s 53(1)(a) of [Chapter 224]. That this was so becomes clear from examining the questions that were put to the appellant when the court was ascertaining whether she understood the facts and elements of the offence. Since the State did not support the conviction the appeal on count 2 had to succeed.

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Mr *Chatikobo* applied to amend the grounds of appeal and to argue the appeal against conviction on count 1 on the following additional ground:

"The learned Magistrate failed to comply with the provisions of s 255(2)(b) and s 255(3) of the Criminal Procedure and Evidence Act [*Chapter 59*] in that she did not properly put the essential elements of the offence to the appellant. She erred in not entering a plea of not guilty when faced with the answers given by the appellant to her questions."

Since the State did not oppose the application we allowed the amendment. I do not intend to decide the appeal against conviction for contravening s 53(1)(a) of the Medical, Dental and Allied Professions Act on the question of the manner in which the court proceeded after the appellant had pleaded guilty. I am not sure that justice would be seen to be done were I to set aside the conviction on the sole ground that the procedure followed by the magistrate was irregular. It is true there were some irregularities but they were not sufficient to vitiate the proceedings. The appellant understood the facts and the essential elements of the offence that were put to her. She then proceeded to give the reason why she was operating her clinic without a medical practitioner's supervision. She showed that she appreciated the nature of the offence with which she was charged and to which she pleaded guilty. See *S v Tatsvarei* S-19-85. Although this Court allowed the appellant to amend the Notice of Appeal by the addition of a new ground relating to the matters referred to above, I believe what is important in this appeal is the nature of the charge in count one. The particulars of the charge of contravening s 53(1)(a) are as follows:

"... the accused not being registered as a medical practitioner did wrongfully and unlawfully for gain, practise or carry out business as a medical practitioner whether or not purporting to be registered or did perform or undertake to perform any act specially pertaining to the practice of a medical practitioner that is to say: the accused did treat or purport to treat medically, the persons mentioned hereunder; Jonathan Mwamuka, Phillip Makuni, Percy Mahona, Patricia Gwara, Phillip Iliyaza and other persons therebeing."

The appellant is a medical assistant. As such she does treat patients. She has statutory exemption from liability under s 53 of the Act because she is a member of a medical calling. She is exempted from liability in terms of ss 23(2) and 58 and the Third Schedule. I can do no better than cite the remarks of BEADLE CJ in *S v Cuddington* 1974 (1) RLR 251 at 266D-F; 1974 (3) SA 371 at 377H-378A:

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"By specially recognising what I have called the 'registered medical callings', the legislature has recognised that persons who practise certain medical callings which are properly registered, defined and controlled under the Act may perform the functions of their callings without infringing the Act, and to the extent that it is necessary for them to diagnose, treat and advise in the exercise of the functions of their callings. Such form of diagnosis, treatment and advice are not acts 'specially pertaining', but *non constat*, that acts of diagnosis, treatment and advice performed by others who are not registered are not such acts. Put another way, the diagnosis, treatment and advice given by those in the registered medical callings may be explained as being statutory exceptions to the general rule."

See also *S v Sibanda* (1) 1978 RLR 182 (GD) at 188H-199A; 1978 (3) SA 217 at 219-220.

The appellant was qualified to treat patients in terms of the Act. She had a licence to run a private clinic. In this regard she could, without a medical practitioner's supervision, treat common ailments that do not require the use of controlled drugs which are prescribed by a medical practitioner after diagnosing the sickness the patient suffers from. Why was she not allowed to diagnose her patients? The answer is because she was not trained and qualified to do so. Diagnosis is defined by CLAASSEN in the Dictionary of Legal Words and Phrases Volume 1 as follows:

"'Diagnosis means applying scientific knowledge to the ascertainment of what the disease is from which the patient is suffering'. Words of MILLIN J approved in *S v Cuddington* 1974 (3) SA 371 (RA); *S v Patel* 1973 (2) SA 208 (NC) 213."

I would like to distinguish the instant case from two previous decisions. In *S v Cuddington supra* BEADLE CJ considered the law in depth. The passage from *S v Cuddington* cited above is very relevant to the instant case because it defines in a clear and precise manner those professions which are exempted from liability should they contravene s 52(1)(a) of the Act. *S v Cuddington* concerned a naturopath who used to diagnose his patients by a process known as irisdiagnosis. CLAASSEN defines irisdiagnosis in the *Dictionary of Legal Words and Phrases*, Volume 2 as:

"...the art of the observation and diagnosis of disease from the iris - the coloured circular part of the eye. The act of irisdiagnosis performed by

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a naturopath is an act specially pertaining to the practice of a medical practitioner' so as to support a conviction for contravening s 52(1)(a) of the Medical, Dental and Allied Professions Act of 1971 (R). See *S v Cuddington* 1974 (3) SA 371 (RA). This act must of course be done for gain."

The case against the appellant in *S v Cuddington* was not that he performed the acts of a naturopath but that he performed the acts of an irisdiagnostician. He was convicted and his appeal was dismissed because he was not registered as a medical practitioner under the Act. The SALR headnote in *S v Cuddington* sums up aptly what performing an act "specially pertaining" to the practice of a medical practitioner means. It reads:

"Unless some good reason exists for coming to a different conclusion, when a person not registered as a medical practitioner, for gain, sees a patient and submits him to an examination for the purpose of diagnosing his ailment so that he may treat or advise him as to its cure, or alleviation, he performs an act 'specially pertaining' to the practice of a medical practitioner in contravention of s 52(1)(a) of the Medical, Dental and Allied Professions Act 1971 (R).

The act of irisdiagnosis as performed by naturopath is, therefore, 'an act specially pertaining to the practice of a medical practitioner' so as to support a conviction for contravening that sub-section."

The appellant in this case belongs to a profession exempt under the Act. She is not charged with performing for gain a diagnosis "specially pertaining" to the practice of a medical practitioner. It is not clear from the charge what it was she did that offended against the provisions of the Act.

The distinction between the instant case and *S v Sibanda (1) supra* is clearer than in *S v Cuddington supra*. Sibanda was employed by a medical practitioner. He was an unqualified

person. *S v Sibanda (1)* makes it clear that a person who is not a medical practitioner can be convicted if he performs a single act which "specially pertains" to the practice of a medical practitioner, whether that act be a diagnosis or advice or treatment. GUBBAY J (as he then was) put this point beyond doubt at 187A-H. The learned judge remarked:

"There is judicial opinion to the effect that by substituting the words 'any act' for 'such acts' the Legislature intended to prohibit any single act

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which 'specially pertained', whether it be diagnosis or advice or treatment. The following passages from the judgment of DE BEER J in *R v Winberg* 1941 OPD 137 at p 150 and 152 are pertinent:

'The test laid down in *R v Greene (supra)* - if in prescribing treatment is included as was suggested by BRISTOWE J in *R v Smith* 1917 TPD 206 at 210 - is the test which the Legislature had in mind at the passing of the Act. But, whereas in the case of *Greene* proof of all these functions was required, under the present Act the prohibition became more stringent and an offence was created where for gain a person diagnosed, advised or treated a patient for any ailment.

...

Under the latter (the Transvaal Ordinance) it will be remembered *R v Greene* laid down that all three functions must be present, whereas under the new law it is sufficient to show that an accused performed any one of these functions.'

In *R v Steenkamp* 1942 OPD 126 at 9 133, De Beer J reaffirmed that '...those cases which following *R v Greene* ... have laid down that in order to support a conviction there must be evidence that the accused did attempt to or profess to diagnose, advise and treat the patient are no longer applicable as the present Acts makes it an offence for an accused to perform any one of those functions for gain.'

Recently, VERMOOTEN AJ (as he then was) in *S v Posel* 1977 (4) SA 476 (N) at p 493D-E, remarked

'The acts which are generally recognised as falling within the phrase "performs any act specially pertaining to the calling of a medical practitioner" are diagnosing an ailment and/or advising the patient and/or treating or prescribing for the complaints.'

I think the clear implication of these words is that any one of the three types of function will suffice. See also *R v Myeki* 1941 EDL 124 p 127. The only apposite decision of this country which I have been able to find is *R v Meda supra*, where at p 39 BLAKEWAY J (in whose judgment HUDSON CJ and TREDGOLD J concurred), said:

'These functions need not all be present in every case. In my opinion if an unauthorised person carries out any of these functions for gain he is committing an offence.'

This *dictum*, although *obiter*, is of much persuasive force and I respectfully agree with it."

So do I

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DUMBUTSHENA CJ

Sibanda administered an injection to one of his employer's patients without diagnosing the ailment and without advising the patient. He treated the patient and charged him 75c and credited the money to his employer who was a medical practitioner. He was correctly convicted

of contravening s 53(1)(a) of the Act. The facts in *S v Sibanda* (1) are different from the facts in the present case. Sibanda was not qualified. The appellant is a medical assistant. She is a qualified person whose calling enjoys an exemption in terms of the Act. She did treat people for gain. That was her business. She, however, had to be supervised by a medical practitioner in certain aspects of her work but not in all. It is here that the State failed, both in the particulars to the charge and in the Statement of Agreed Facts, to identify what she did in her treating of the persons mentioned in the indictment which offended against the provisions of s 53(1)(a).

It is common cause that she had a licence which authorised her to operate a clinic for gain. She had the permission of the Harare Local Authority to operate such a clinic. She told the court she applied to the Drug Control Council for permission to have drugs in her clinic. The Drug Control Council told her to find a doctor who would supervise her work. In order to keep controlled drugs in her clinic for dispensing to her patients the Drug Control Council advised her to apply for a licence. Controlled drugs cannot be used without a medical practitioner's prescription given after examining the patient.

It was never in issue that the appellant was operating a clinic in which she performed acts specially pertaining to the practice of a medical practitioner. It was common cause that she operated the clinic for gain. Her sole purpose in operating the clinic was to make profit in order to support her large family. She cannot be convicted if she performs that which she is permitted by law to do. She is in terms of the provisions of ss 23(2) and 58 and the Third Schedule exempted liability under s 53 of the Act. For the appellant to fall within the ambit of s 53(1)(a) she has to perform in her clinic those acts which are reserved for a registered medical practitioner or doctor. She cannot diagnose diseases whose diagnosis is only performed by a medical practitioner. She cannot prescribe controlled drugs. It is clear from the particulars of the offence that she was not charged with doing acts reserved for a medical practitioner. There was nothing stopping her from dressing the wound of an injured patient. She could treat common colds, flu and other ailments which do not require a medical practitioner's diagnosis.

She is required to refer to a doctor patients whose ailments need the doctor's

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DUMBUTSHENA CJ

diagnosis and advice or those whose ailments can only be cured by the use of a controlled drug prescribed by a doctor. But once the doctor has prescribed the drug and specified the mode of treatment, the appellant would treat the patient.

It is common cause that Dr Chiwara, who used to supervise her practice, was no longer visiting the clinic. However, as pointed out above, for the appellant to fall within the ambit of s 53(1)(a) the State must show that the appellant treated people who required to be examined by the doctor and whose treatment required the use of drugs prescribed by a medical practitioner. It is not sufficient to allege that "she did treat or purport to treat medically, the persons mentioned hereunder: Jonathan Mwamuka, Phillip Makuni, Percy Mahona, Patricia Gwara, Phillip Iliyaza and other persons therebeing". There must be evidence of the type of treatment she gave without the medical practitioner first examining them, advising and prescribing the required drugs. In the absence of such evidence and in the circumstances of this case, a conviction

would be improper. In the course of her duties as a medical assistant she performs functions which people not exempted in terms of the act are not permitted to perform.

One of those functions is treating patients. She was in fact lawfully operating a clinic for gain. It therefore made no sense to charge her with treating or purporting to treat medically certain persons named in the indictment.

There is no need to deal with the appeal against sentence although it appears to me that a sentence of six months' imprisonment on each count was rather severe. If the court felt it desirable to impose terms of imprisonment, it would have been proper to make the sentence run concurrently.

It was for these reason that we allowed the appeal at the end of the hearing and set aside the convictions and sentences.

McNally JA: I agree.

Korsah JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

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ROYAL MUTUAL INSURANCE CO (PVT) LTD v MUBAIWA 1989 (1) ZLR 142 (HC)

Court **High Court, Bulawayo**

Blackie J

Exception to plea

17 February 1989

Flynote

Contract - insurance - motor insurance - notice of accident - whether must be given by or on behalf of insured - notice to be given "immediately" - meaning of - breach of condition precedent to liability of insurer - insurer entitled to repudiate liability, even if breach causes no prejudice.

Headnote

The defendant was insured by the plaintiff under a motor vehicle insurance policy. The policy provided that notice had to be given in writing to the plaintiff "immediately upon the occurrence of an accident" and that the observance of the conditions of the policy was a condition precedent to the liability of the plaintiff to make any payments under the policy.

On 21 December 1984 an accident occurred involving the defendant's motor vehicle and another vehicle. As a result of the accident a man in the other vehicle was killed. On 7 January 1985 the man's widow gave notice of the accident to the plaintiff. In so doing she was not acting on behalf of the defendant. The plaintiff paid her the sums due under the policy and

sought to recover them from the defendant. It alleged that the defendant had failed to give the requisite notice and that it was therefore entitled to repudiate liability. In his plea, the defendant claimed that the notice was proper notice and had been given "immediately"; but even if it was not proper notice, the plaintiff was not prejudiced thereby. The plaintiff excepted to the plea as disclosing no lawful defence. It said that the notice had to be given by or on behalf of the defendant and in any case had not been given immediately.

Held, that nowhere in the policy was it stated that notice had to be given by

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BLACKIE J

or on behalf of the insured. The fact of the notice to the insurer and not its source was the vital ingredient. In any event, the wording of the policy was sufficiently vague or ambiguous to bring into effect the *contra proferentem* rule.

Held, further, that in this context "immediately" meant "as soon as possible in the circumstances". Notice given after a period of 18 days, even taking into account the Christmas and New Year holidays, could not be regarded as "immediate".

Held, further, that since the conditions of the contract were made material terms of the contract, the plaintiff was entitled to repudiate liability. Prejudice was irrelevant.

Cases cited:

South British Insurance Co Ltd v Patel & Co 1959 (2) R & N 90 (SR); 1959 (4) SA 500 (SR)

Kali v Incorporated General Insurances Ltd 1976 (2) SA 179 (D)

Hean v General Accident, Fire & Life Corporation Ltd 1931 NPD 215

Smith & Smith NO v Hulley & South British Insurance Co Ltd 1961 R & N 259 (SR)

Collen v AA Mutual Insurance Association Ltd 1954 (3) SA 625 (E)

Norris v Legal & General Assurance Society Ltd & Anor 1962 (4) SA 743 (C)

Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (A)

D M Campbell for the plaintiff

R Moyo-Majwabu for the defendant

Judgment

Blackie J: This is an application in which plaintiff, by way of exception, seeks to set aside the defendant's plea on the grounds that it does not disclose a defence.

The plaintiff insured the defendant under a motor vehicle insurance policy issued in terms of Part III of the Road Traffic Act No. 48 of 1976 (the Act). The conditions of the policy included

the following:

- "1. Notice shall be given in writing to [the plaintiff] immediately upon the occurrence of any accident; ...
6. The due observance and fulfilment of the terms and conditions of this policy, insofar as they refer to anything to be done or complied with by the insured, shall be conditions precedent to any liability of

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BLACKIE J

the [plaintiff] to make any payments under this policy...

8. In the event of the [plaintiff] being required to make any payments under this policy in respect of liability to any person which but for the provisions of the Road Traffic Act 1976 of Zimbabwe or any amendments thereof, it would not have been required to make, any sum so paid shall be recoverable by the [plaintiff] from that person."

On 21 December 1984, an accident occurred involving the defendant's motor vehicle and a Mr McKay. Mr McKay was killed. It is common cause that the first and only notice of the accident given to the plaintiff was in a letter written by Mrs McKay and delivered to the plaintiff's offices on 7 January 1985. It is also common cause that Mrs McKay was not acting on the defendant's behalf when she wrote and delivered her letter to the plaintiff.

The plaintiff has paid \$15 000 to Mrs McKay. In this action it seeks to recover that \$15 000 from the defendant relying upon clauses 1, 6 and 8 of the policy. It alleges that the defendant was in breach of condition 1 of the policy in that he failed to give the notice required by the policy immediately upon the occurrence of the accident; that in terms of condition 6 of the policy it was therefore entitled to repudiate liability and cancel the policy; that it was obliged to make payment to Mrs McKay by reason of the provisions of the Road Traffic Act; and that, in terms of condition 8 of the policy, it is entitled to recover the \$15 000 from the defendant.

In the plea, as amended and as supplemented by further particulars, defendant sets out four defences to plaintiff's action. These are:

- (a) that he is not in breach of the policy: the notice given to the plaintiff by Mrs McKay on 7 January 1985 constituted proper notice, in terms of Condition 1 of the policy, given "immediately after the occurrence of the accident."
- (b) that even if the notice relied on by defendant does not constitute proper notice in terms of the policy, the plaintiff has not been prejudiced by the absence of such notice.
- (c) that "in terms of the statutory policy of insurance in question the parties contemplated that the liability of plaintiff would arise when defendant was involved in an accident for which, but for the said policy he would be liable to third parties. In the circumstances the alleged failure to report (which is denied) was an event which occurred after the liability of plaintiff to indemnify defendant had attached."

BLACKIE J

- (d) that, even if inadequate notice had been given to plaintiff, "plaintiff by its conduct subsequent to the receipt of the notice precluded itself from relying on any defect in the notice as a ground for repudiating its obligation to indemnify defendant in terms of the contract."

The plaintiff has excepted to the defendant's plea on the basis that it does not disclose any lawful ground of defence.

The plaintiff's exception to the defendant's first ground of defence is that in terms of the policy of insurance the notice given to the plaintiff must be notice given by or on behalf of the defendant and that in any event, the notice given by Mrs McKay was not notice given "immediately after the occurrence of the accident."

Condition 1 of the policy says that "notice shall be given in writing to [the plaintiff]". In *South British Insurance Co Lt v Patel & Co* 1959 (2) R&N 90; 1959(4) SA 500 (SR) YOUNG J had to consider an identical phrase in a similar condition in a motor vehicle policy. He analysed certain authorities and came to the conclusion (at p504) that notice, to be sufficient, must be or purport to be by or on behalf of the insured. YOUNG J's analysis of the authorities and the conclusion he reached have been criticised in *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 186E-H. With respect, I agree with that criticism and disagree with the conclusion arrived at by YOUNG J. Nowhere in condition 1 or in any other part of the policy is it expressly stated that notice must be given by or on behalf of the insured. There is no reason why, if the plaintiff intended notice to it to be given by or on behalf of the insured, it could not have said so. It would have been a simple matter to include the necessary words.

It is submitted for the plaintiff that, on a proper construction of the policy as a whole and from the purpose for which this condition was inserted into the policy, it must be implied that the notice should have been given by or on behalf of the defendant.

I cannot agree with that submission. Firstly, the policy as a whole is against such a construction. Other conditions in the policy refer expressly to the insured where action has been taken by him (see condition 2) or there is a duty to be undertaken by him (see condition 3). Yet in condition 1 there is no mention of the insured. Secondly, while notice is important to the insurer in order to be able to protect its interests and, *prima facie*, one would expect the insured to give that notice because his interests are also at stake, nonetheless

BLACKIE J

it is the fact of the notice and not the source of the notice which is the vital ingredient. It is not suggested that plaintiff was not or would not have been able to protect its interests because the notice came from Mrs McKay and not from the defendant.

Even if I am wrong in the interpretation which I have placed on condition 1 of this policy, then it

seems to me that the wording of that condition is sufficiently vague or ambiguous to bring into effect the *contra proferentem* rule. That rule requires me to interpret the condition against the plaintiff.

The plaintiff's second ground of exception to this defence is that the plea does not disclose that the notice was given "immediately upon the occurrence of the accident." In *Hean v General Accident, Fire and Life Corporation Ltd* 1931 NPD 215 the word "immediately" was said to mean "reasonably immediate having regard to the circumstances of the cause." In *Smith & Smith NO v Hulley & South British Insurance Co Ltd* 1961 R&N 259 (SR), the word was said to mean "as soon as possible in the circumstances." I accept those definitions as being, for practical purposes, identical, and as being applicable to this case. See also *Collen v AA Mutual Insurance Association Ltd* 1954 (3) SA 62 (E) at 629-630.

The defendant admits that the accident occurred on 21 December 1984 and that notice was given to plaintiff on 7 January 1985. That is a period of 18 days - nearly three weeks. However, the plea goes on to say that the notice was not given before 7 January 1985 "because of the intervening Christmas holiday between that date and the date of the accident". That is the only reason given for the delay.

It is obvious that notice given after a delay of 18 days, unless there are some special circumstances excusing the delay, cannot be described as "immediate" even under the extended meaning given to that word in the cases quoted above. In this case, the special circumstance excusing that delay is said to be the Christmas holiday. Accepting that excuse and making full allowance for both the Christmas and New Year holidays, there remain at least six clear working days during which notice of the accident could have been given to plaintiff. To describe notice having been given after that delay as "immediate" is to do violence to the proper meaning of that word.

I accordingly hold the plaintiff's exception to defendant's first ground of defence is allowed on the basis that notice of the accident was not given "immediately upon the occurrence of the accident".

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BLACKIE J

The plaintiff's exception to defendant's second ground of defence is that if there is a breach of any of the conditions of the policy, then the plaintiff is entitled to repudiate liability and the question of prejudice to it is irrelevant. Condition 6 of the policy provides that the conditions of the policy are "conditions precedent to any liability of [the plaintiff]". The effect of this clause are that the conditions are made material terms of the contract. See *Gordon & Getz SA Law of Insurance* 3 ed pp 190 *et seq* and p286; *Norris v Legal and General Assurance Society Ltd & Anor* 1962 (4) SA 743 (C); *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 638 and 639.

In these circumstances, if the defendant is in breach of such a term, the plaintiff is entitled to repudiate liability. Prejudice is irrelevant. The exception to this ground of defence has been rightly taken.

The plaintiff's exception to defendant's third ground of defence is quite simply that, if it is entitled to repudiate liability under the policy because of a breach by defendant of the material terms of that policy, then it does not matter in law that the liability to indemnity arose at the time of the accident. That is clearly correct and the exception to this ground of defence is allowed.

The plaintiff's exception to the fourth ground of defence is that none of the essential elements to support a plea of estoppel are contained within the plea. That is clearly correct. See Hoffmann and Zeffertt *SA Law of Evidence* 3 ed at 273-7; *SA Law of Insurance (supra)* at 159-197.

The exception to this ground of defence is allowed.

In the result paras 2, 3 and 4 of the defendant's plea are struck out. The defendant is ordered to pay the plaintiff's costs.

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

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

1989 (1) ZLR p148

S v MANZINDE 1989 (1) ZLR 148 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Criminal appeal

21 February 1989

Flynote

Appeal - postponement of - application for - candid and comprehensible explanation for postponement required.

Legal practitioner - filing affidavit from client in which serious aspersion cast on fellow practitioner without first checking truth of allegation - impropriety of.

Headnote

A request for the postponement of an appeal (whether civil or criminal) which has been set down for hearing is a request for the indulgence of the court. The appellant's legal practitioner must ensure that in support of such a request an affidavit is submitted in which the appellant gives a candid and comprehensible explanation for the postponement. A legal practitioner should not associate himself with serious allegations cast by the appellant against a fellow practitioner (such as one that the other practitioner had been dilatory in prosecuting the appeal) without first checking with the other practitioner to confirm the truth of the allegation.

Case cited:

Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (SC).

W Chinamora for the appellant

A O Agyemang for the respondent

Judgment

McNally JA: we refused an application for the postponement of this criminal appeal and dismissed the appeal for want of prosecution when it came before us on 21 February 1989.

1989 (1) ZLR p149

McNALLY JA

The following are our reasons for taking such severe action.

The appellant was convicted of car theft on 30 March 1987, the theft having taken place in August 1984. He noted an appeal and apparently instructed his legal practitioners to proceed with the appeal. Meanwhile he was granted bail, the matter was set down for hearing on 21 February 1989.

On 6 February 1989 his legal practitioners renounced their agency, leaving him unrepresented. Unrepresented persons cannot prosecute their criminal appeals without leave of the Court, which had not been sought. Therefore, on the face of it, the appeal lapsed.

On 15 February 1989 an urgent letter was addressed by Mr *Chinamora* of Brian Mparadzi & Co, to the Registrar of this court. It advised that that firm had now been instructed to act for the appellant. However, since a copy of the record had not been uplifted and heads of argument had not been prepared it would not be possible to proceed on the set down date. A postponement would have to be sought. The Attorney-General's representative did not object.

Mr *Chinamora* was advised through the Registrar that the court would require argument on the question of postponement and was not *prima facie* disposed to grant it.

On 17 February 1989 an affidavit by the appellant was lodged. In this affidavit he averred that he had instructed his former legal representative to appeal and had paid them a considerable sum of money. He continued:

"4. I trusted that my legal practitioner would do everything necessary to prosecute my appeal.

5. I was however surprised when on the 13th February 1989 I received the letter annexed hereto marked 'A'."

No letter was in fact annexed. At the hearing Mr *Chinamora* was unable to produce either the original or a copy of the letter. So we do not know who wrote it, what date it was written on, or what it said. We are left to infer that it was an advise of renunciation of agency from the appellant's previous legal representatives.

This kind of statement in an affidavit is simply not good enough. To start with, it casts an aspersion of a very serious nature on a fellow legal practitio-

McNALLY JA

ner. No lawyer should associate himself with such a statement by his client without first checking with the other lawyer to confirm the truth of the allegation. Had Mr *Chinamora* checked with the appellant's previous legal representative he would have learnt that the allegation against them was unfounded. This Court has on record copies of letters written to the appellant by his previous representatives dated 18 November 1988 and 16 January 1989. Even if these were the only contacts between the noting of the appeal and the renunciation of agency, they give the lie to the claim by the appellant that he was "surprised" when agency was renounced.

I have spoken before (*Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (SC)) of the duty of legal practitioners in putting affidavits before the court. That was a civil case. This is a criminal case. The duty is the same. In *Songore's* case *supra* I said at p 212:

"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."

The request for a postponement is a request for the indulgence of the court. It is in the interests of the justice generally that there should not be a long delay between conviction and punishment. Attention is drawn to the provisions of Rule 4 of SI 405/1979 dealing with criminal appeals from the Magistrates Court. The rule says:

"The prosecution and finalisation of all appeals in terms of these rules, especially any appeal, other than an appeal by the Attorney-General in terms of section 69 of Chapter 18, relating to a case in which the convicted person has received an unsuspended prison sentence, shall be treated by all persons concerned as a matter of urgency."

The action and statements of the appellant in this matter have failed to convince us that this application is not simply a device to postpone the evil day or to buy time. I may say also that I have read the record and am satisfied that, had the matter come before me in terms of s 10 of the Supreme Court of Zimbabwe Act, for a certificate to enable the appellant to prosecute an appeal in person, I would have declined to issue a certificate.

It was in these circumstances that we refused to grant a postponement to the appellant and dismissed his appeal for want of prosecution.

McNALLY JA

Manyarara JA: I agree.

Korsah JA: I agree.

Brian Mparadzi & Co, appellant's legal practitioners

ARCHES (PVT) LTD v GUTHRIE HOLDINGS (PVT) LTD 1989 (1) ZLR 152 (HC)

Editor's Note:(1)

Court **High Court, Harare**

Adam J

Application for leave to execute judgment pending appeal

16 & 22 February 1989

Flynote

Appeal - execution of judgment pending - criteria.

Headnote

The execution of the judgment of a court is automatically suspended when an appeal is noted, unless the court, on special application, gives leave for the judgment to be executed.

In determining whether to grant such leave, the court should determine what is just and equitable in all the circumstances and would normally have regard, *inter alia*, to the following factors:

- (a) the potentiality of irreparable harm or prejudice being sustained by the appellant if leave is granted;
- (b) conversely, the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute is not granted;
- (c) the prospects of success on appeal, including the question whether the appeal is frivolous or vexatious or noted, not with the *bona fide* intention of reversing the judgment appealed against, but for some ulterior motive eg to gain time;
- (d) where there is the possibility of irreparable harm to both parties, the balance of hardship or convenience.

The overall *onus* is on the party seeking execution to satisfy the court that he is entitled to the relief sought. However, where the judgment is sounded in money and the appellant could be safeguarded by an order for security *de restituendo*, the risk of irreparable harm to the appellant would *prima facie* be obviated. This would go a long way towards establishing the applicant's claim for relief, but should not be regarded as displacing the

1989 (1) ZLR p153

ADAM J

ultimate discretion the court enjoys in deciding whether or not to grant leave.

Cases cited:

Reid & Anor v Godart & Anor 1938 AD 511

Geffen v Strand Motors (Pvt) Ltd 1962 R & N 259; 1962 (3) SA 62 (SR)

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)

Dabengwa & Anor v Minister of Home Affairs 1982 (1) ZLR 223 (HC)

Jeremy Prince (Pvt) Ltd v Owen & Anor HH-14-86 (not reported)

van T'Hoff v van T'Hoff & Ors (2) 1988 (1) ZLR 335 (HC)

Wood NO v Edwards & Anor 1966 RLR 336 (GD)

Fox & Carney v Carthew-Gabriel 1977 (1) RLR 152 (AD); 1977 (4) SA 970 (R)

Leask v French & Ors 1949 (4) SA 887 (C)

J Sayce for the applicant

A P de Bourbon SC for the respondent

Judgment

Adam J: The applicant was granted an order on 7 December 1988 by SANDURA JP evicting the respondent from certain shop premises known as 101 Manica Road in Harare on 31 December 1988. On 15 December 1988 the respondent filed a notice of appeal to the Supreme Court.

By its notice of motion filed on 26 January 1989 the applicant asks leave of this court to execute the order of SANDURA JP on 7 December 1988. In its founding affidavit the applicant mentions that the pending appeal is unlikely to take place until the latter part of this year and the consequent delay will cause irreparable harm and prejudice to the applicant, in that the contractor hired by the applicant will not be able to commence work of repairs to the premises and so the applicant will be obliged to pay the contractor a contractual penalty of \$200 a day. Also, the applicant had borrowed \$180 000 to finance the cost of the proposed repairs and is obliged to pay interest at the rate of 16% *per annum*. The applicant indicates that it has no other source of income and is operating at a loss. The applicant further mentions that if the respondent is made to vacate the premises forthwith it will not suffer irreparable harm or prejudice, as the applicant gave notice to the respondent on 14 July 1988 to vacate the premises, so the respondent had over 5 months to secure alternative premises. The applicant maintains that

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ADAM J

prospects for success on appeal are sound and that it would appear that the appeal has been noted by the respondent for the purposes of delay, since it must have known that the appeal would not be heard for many months, particularly as the respondent's contention is that it is

entitled to six months' notice, which will expire on 31 January 1989. Even if there is potentially irreparable harm to the respondent, which the applicant denies, the harm liable to be suffered by the applicant is of a greater degree and the balance of convenience is in favour of the applicant.

In its opposing affidavit, the respondent states that irreparable harm or prejudice will be caused to it because it (or its subsidiaries) do not own or lease other property which it might occupy pending the appeal, since the other properties occupied by itself or its subsidiary are used as repair workshops for home appliances or for the manufacture and repair of paraffin refrigerators and freezers and the lease for these premises do not permit retailing of domestic appliances, further, these premises are not large enough and are not suited for retailing of domestic appliances and furniture. The respondent states that it is unable to lease other premises at short notice and for short duration between eviction and the outcome of the appeal. It says that if it were evicted it would disrupt its business to an extent which cannot be quantified; to mitigate loss it would be necessary to place "blanket" advertisements in the media at a cost of about \$25 000 and to pay for moving, which would cost about \$1 000. The respondent did not believe that there would be irreparable harm or prejudice to the applicant if the respondent remained in the premises pending appeal.

In its answering affidavit the applicant denies that the respondent will suffer irreparable harm and reiterates that the respondent had since July 1988 to seek alternative premises and appears to have done nothing in this regard.

I have read the reasons for judgment given by SANDURA JP in the original proceedings. I have also carefully considered the submissions made on behalf of the parties by their respective counsel.

Under our common law the execution of the order granted by SANDURA JP was automatically suspended upon the noting of the appeal: *Reid & Anor v Godart & Anor* 1938 AD 511 at 513. This meant that, pending the appeal, the order could not be carried out except with the leave of this court and in order to obtain such leave special application had to be made by the applicant: *Geffen v Strand Motors (Pvt) Ltd* 1962 R&N 259 (SR) at 260; 1962 (3) SA 62 (SR).

1989 (1) ZLR p155

ADAM J

It is clear that the principles which must be applied to this court in determining the matter are those stated by CORBETT JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545:

"In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:

- (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute was refused;
- (3) the prospects of success on appeal, including more particularly the question of whether the appeal is

frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, eg, to gain time or harass the other party; and

- (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

I should indicate that this court has applied the foregoing principles in *Dabengwa & Anor v Minister of Home Affairs* 1982 (1) ZLR 223 at 225 (HC), *Jeremy Prince (Pvt) Ltd v Owen & Anor* HH-14-86; *Van t' Hoff v Van t' Hoff & Ors* (2) 1988 (1) ZLR 335.

It was argued on behalf of the respondent that the facts in this matter cannot be distinguished from those of *Wood NO v Edwards & Anor* 1966 RLR 336 (GD) and that the only factor to be considered is whether the appeal had been noted with the *bona fide* intention of testing the correctness of the judgment or whether it was noted merely as a delaying tactic. Also, it is not appropriate in such matters to decide the prospects of success.

In *Wood NO v Edwards & Anor supra* the applicant, who was the first respondent's trustee in insolvency, had obtained an order of ejectment of the respondent and his wife, so that he could dispose of the property and give vacant possession to the purchaser. The respondents had noted an appeal. LEWIS J observed at 340:

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ADAM J

"The learned judge ...suggested that the matter might be treated on the same basis as an application for leave to appeal. The court should ask itself: has the applicant any reasonable prospect of success? That may well be the position where no question of irreparable loss arises by allowing execution, where for instance, the judgment sounds in money ...Then, the question of whether or not execution should be afforded would depend on whether or not there are any reasonable prospects of success on appeal. But, in a case where the whole object of the appeal would be completely defeated if execution were to proceed, then it seems to me that this court has no right to deal with the matter on the basis whether or not there is a reasonable prospect of success on appeal.

The position is this: that the appellant has an absolute right to appeal, and to test the correctness of the judgment appealed from in the Appellate Division, and if, by ordering execution, the whole object of the appeal would be stultified, then this court, would, in effect, be usurping the functions of the appeal court if it ordered execution merely on the basis that it thought, in its opinion, that the prospects of success on appeal were slight. It seems clear, from the authorities, that it is only where the court is satisfied that the appeal is not brought genuinely with the *bona fide* intention of testing the correctness of the judgment of the court below, but is only brought as a delaying tactic and as the means of staving off the evil day, that the lower court may order execution to proceed in such circumstances."

I note that LEWIS J did not mind a court granting execution and usurping the functions of the appeal court where no question of irreparable loss arises and where the judgment sounded in money and the appellant could be safeguarded by an order for security *de restituendo*. However, this court has a wide general discretion in such matters and when exercising such discretion it must determine what is just and equitable in all the circumstances. With the greatest of respect to LEWIS J, since his judgment is merely persuasive and not binding upon me, while it is true, as he states, that the appellant has an absolute right to appeal and to test the correctness of the decision appealed from (although this applies to every appeal that is noted including an appeal from a judgment sounding in money), in my view, the correct approach in a matter of such a nature is that approved by this court in the past as outlined by

CORBETT J in *South Cape Corporation (Pty) Ltd v Engineering Services (Pty) Ltd supra*. It follows that this court would normally have regard to the potentially of irreparable harm or prejudice to the respective parties, as well as the question of prospects of success on appeal, including whether the

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appeal was frivolous or vexatious or *mala fide* and also where the balance of hardship or convenience rests if there was potential harm or prejudice to both parties.

As far as *onus* is concerned, I approach this on the basis as described by CORBETT JA in *South Cape Corporation* at 547-549:

"The use, without proper definition of the term *onus* in this context has, I believe, been a source of some confusion ...the word *onus* has often been used to denote, *inter alia*, two distinct concepts, (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents *onus* in its true and original sense ...In this sense the *onus* can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ...This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or other ...Applying these concepts to an application for leave to execute a judgment pending an appeal, the *onus* proper (or overall *onus*) rests ...upon the applicant. This is so, in my view, irrespective of whether the judgment in question is one sounding in money only or is one granting other forms of relief. Where the judgment is for money only, then, in an appropriate case, the inference may be drawn, *prima facie*, that the furnishing of security *de restituendo* would protect the appellant against irreparable harm or prejudice. This would go a long way towards establishing, *prima facie*, the applicant's claim for relief, and, in the absence of any rebutting evidence from the other party (the appellant) might be conclusive ...It is only in this sense, in my view, that an '*onus*' can be said to rest on the other party. This not being an *onus* proper but merely a burden of adducing evidence to rebut a *prima facie* case, the other party would not be obliged to establish a case on a preponderance of probability; and, if upon consideration of all the evidence the court were left in doubt as to whether irreparable harm would be suffered or not, then the applicant, upon whom the true *onus* rested, would fail on this issue. Moreover, even if the appellant succeeded on this issue, the court would still retain its discretion to decide whether in all the circumstances (including factors other than irreparable harm to the other party) leave to execute should be granted or not. Nor would failure on this issue be conclusive: the Court

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might, after considering, for instance, the balance of hardship (or convenience), nevertheless decide in the exercise of its discretion that leave to execute be granted.

It is therefore, in this sense that the word *onus* (or other words conveying that concept), as used in the 'general rule' relating to leave to execute money judgments, should be understood. Furthermore, the general rule should not be regarded as displacing the wide ultimate discretion which the court enjoys in deciding whether or not to grant leave."

One other matter of relevance, approved by SMITH J in this court in *Fox & Carney v Carthew Gabriel* 1977 (4) SA 970 at 971, is the observation of SEARLE J in *Leask v French & Ors* 1949 (4) SA 887 (C) at 893:

"In every case of an order of court *ad factum praestandum* there must be a serious risk of prejudice to one or other party in the event of an appeal. If execution is authorised and the appeal succeeds it is seldom, if ever, possible to restore the full *status quo ante*, whereas on the other hand if execution is stayed and the appeal ultimately fails the successful party, through the delay, generally suffers a loss for which he cannot be compensated. In the circumstances the court can only reduce to a minimum the possibilities of prejudice by granting or refusing the application in accordance with demands of the preponderance of equities."

It was argued on behalf of the applicant that its prospects of success on appeal are sound, that it will suffer irreparable harm or prejudice and that the balance of convenience favours the applicant. On the other hand the respondent's counsel submits, relying on *Wood NO v Edwards & Anor supra*, that it is not appropriate to decide the prospects of success in this application; that the respondent cannot get alternative accommodation before the hearing of the appeal and its business would be disrupted; that the equities favour the respondent since the applicant has not attempted to have the appeal heard as a matter of urgency; that to require the respondent to vacate the premises to await the outcome of the appeal is quite unjust; and that whilst there would appear to be an element of inconvenience and expense to the applicant, this can be met with a claim for damages for holding over which the respondent would be able to pay.

As the authorities indicate, I have a wide general discretion to grant or refuse leave. In exercising this discretion I have decided what is just and equitable

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in all the circumstances. It is on that basis that this application has to be determined. I am satisfied that the potentiality of irreparable harm or prejudice being suffered by the applicant, if leave to execute is refused, is greater than the potentiality of irreparable harm or prejudice being sustained by the respondent. The respondent's prospects of success on appeal are minimal, as appears from the reasons for judgment of SANDURA JP. The balance of convenience favours the applicant. The applicant has, in my view, discharged the overall onus of establishing that this is a proper case for this court to exercise its discretion in granting leave to execute and for this court to determine the conditions upon which the right to execute will be exercised.

Accordingly, it is ordered:

1. That the respondent vacate the premises known as 101 Manica Road in Harare on 22 March 1989 and give the applicant vacant possession of the aforesaid property pending the outcome of an appeal lodged by the respondent in respect of Case No HC 4441/88, being a judgment of this Honourable Court of 7 December 1988;
2. That failing compliance with this Order, the Deputy Sheriff, Harare, be and is hereby authorised to evict the respondent from the aforesaid property and to seize from the respondent and deliver to the applicant all keys affording access to and in the aforesaid property;
3. That the applicant furnish security to the satisfaction of the Registrar;
4. That in the event of an appeal being noted against this Order, notwithstanding such noting

of appeal, this Order be and is hereby declared operative and in effect and shall not be suspended;

5. That the costs will be costs in the cause.

Honey & Blanckenberg, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

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DONALD v DONALD 1989 (1) ZLR 160 (SC)

Court Supreme Court, Harare

McNally JA, Manyarara JA & Korsah JA

Civil appeal

26 January & 28 February 1989

Flynote

Succession - wills - alterations thereto made before promulgation of Wills Act 1987 - law applicable - formalities required - deletions - whether constitute absolute or conditional revocation of deleted provision.

Headnote

The provisions of the Wills Act No. 13 of 1987, which came into effect on 1 January 1988, apply only to wills executed after that date. Wills and alterations thereto executed before that date are governed by the old law. Under the old law, alterations which introduced new matter into a will could be treated as part of the will only if the alteration was made with the formalities required for the execution of a will, as set out in s 2 of the Wills and Attesting Witnesses Act [Chapter 306]. Deletions, on the other hand, were valid without further formality if made *animo revocandi*.

Revocations could be absolute or conditional. If they were absolute, any deleted bequests would stand revoked. However, if they were conditional on the validity of the amendments, then, if the amendments fell away, so did the deletions, and the bequests stood. The question of whether the revocation was absolute or conditional was a question of fact to be determined according to the circumstances of each case. The application of this principle may also arise where a will is destroyed as part of the act of making a new will which is not in fact made or is ineffectually made.

Where a bequest fails because of deletions and invalid additions, the property concerned falls into residue and accrues to the residuary heir.

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Judgment of EBRAHIM J in *Donald v Master of the High Court & Anor* 1988 (1) ZLR 276 reversed in part.

Cases cited:

Mirvish & Ors v The Master & Ors 1945 AD 674

Gow v The Master 1936 CPD 296

Senekal v Meyer NO & Ors 1975 (3) SA 372 (T)

Marais v The Master & Ors 1984 (4) SA 288 (D)

Davis v Steel & Eriksen NO 1949 (3) SA 177 (W)

Re Jones (deceased) [1976] 1 All ER 593 (CA)

Hutchinson v Brooks NO & Ors 1936 SR 81.

M J Gillespie for the appellant

M R D Stonier for the respondent

Judgment

McNally & Korsah JJA: Both parties appeal from the decision of the High Court, Harare, declaring certain deletions in a will valid and the alteration by way of additions therein ineffectual, and concluding therefrom that -

"The net result is that in the majority of instances the attempt to redistribute the testator's legacies have failed and the property concerned must be distributed according to the rules of intestate succession".

The name of testator was Charles Russell Donald. His will was executed on 15 June 1979. Thereafter, certain additions and cancellations were effected by him thereto which substantially altered his testamentary dispositions. He died on 31 March 1986, before the promulgations of the Wills Act (No. 13 of 1987), s 9 of which governs alterations to wills and their validity.

The trial court rightly held that as the provisions of the Wills Act apply only to wills executed after 1 January 1988, it is to the old law that one must turn to find a basis for the validation of alterations in a will made after execution, prior to that date 1 January 1988.

By s 2 of the Wills and Attesting Witnesses Act [Chapter 306]:

"No will or other testamentary writing, which will or other testamentary writing **if made in the Colony of the Cape of Good Hope** before the 1st January 1844, would in order to be valid have required to be witnessed by seven or some other number of competent witnesses, shall be valid

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unless it is executed in the manner hereinafter mentioned: that is to say, it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, and each signature shall be

made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time, and such witnesses shall attest and subscribe the will in the presence of the person executing the same, and where the instrument is written upon more leaves than one the party executing the same and also the witnesses shall sign their names upon at least one side of every leaf upon which the instrument is written" (our emphasis).

Inferentially, therefore, the law that applies to the validity or otherwise of alterations in a testamentary instrument executed before 1 January 1988 is the law which governed such matters in the Colony of the Cape of Good Hope before 1 January 1844. Of greater significance is the provision by s 89 of the Constitution that the common law of Zimbabwe "shall be the law in force in the Colony of the Cape of Good Hope on 10th June 1891, as modified by subsequent legislation having in Zimbabwe the force of law".

Counsel for the parties were in agreement that the law applicable to alterations made subsequent to execution of a will by the testator on 10 June 1891 in the Colony of the Cape of Good Hope was as stated by Corbett, Hahlo, Hofmeyer and Kahn *The Law of Succession in South Africa* p 59 under the heading: "Alterations made subsequent to execution". It reads:

"Deletions made in a will after execution constitute partial revocation. Provided they are made *animo revocandi* the alterations are, under the common law, valid without any further formality. An unintentional deletion is not effective even if the words so deleted have become illegible and extrinsic evidence is admissible to prove the words in question. In regard to alterations made after execution which introduce new matter into the will, **the new matter can be treated as part of the will only if the alteration was made with the formalities required for the execution of a will**" (our emphasis).

Although the will contained a reservatory clause reserving to the testator the right to make such alterations in or additions to his will from time to time, the clause provided that alterations and additions be "duly witnessed according to law". The alterations and additions to the will, being signed by the testator and one witness only, were, therefore, not duly formalised in accordance with law, as provided by s 2 of the Wills and Attesting Witnesses Act [Chapter

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306], and were not saved by the reservatory clause. See *Mirvish & Ors v The Master & Ors* 1945 AD 674 at 687-8.

Proceedings in the court below were prompted by the Master of the High Court accepting the will with additions and cancellations rejected. The Master's view, clearly, was not in consonance with the common law of the Colony of the Cape of Good Hope, that where part of a will is destroyed by cancellations, it is not the entire testament that is destroyed but only the part deleted that is invalidated; provided there exists on the part of the testator the intention to revoke. See *Gow v The Master* 1936 CPD 296 at 298. Such destruction of part of a will by deletion does not have to be made with the formalities required for the execution of a will. As stated in *The Law of Succession in South Africa supra*, provided deletions made in a will after execution are made with the necessary *animus revocandi*, they constitute partial revocation and are valid under the common law without any further formality. Thus the deletions in the testator's will did not require attestation by two witnesses to validate them as the law relating to revocation, partial or otherwise, was the common law. See *Senekal v Meyer NO & Ors* 1975 (3) SA 372 (T)

at 365; *Marais v The Master & Ors* 1984 (4) SA 288 (D) at 291 E-F, 2931-294B.

The learned judge *a quo* correctly found, insofar as the additions were concerned, that the signature of the testator and only one witness was invalid execution. In consequence, effect could not be given to the new bequests introduced by the new words written into the original will.

When it came to a consideration of the validity of the deletions, the learned judge simply (albeit correctly) concluded that they were valid because the necessary intention to revoke (*animus revocandi*) had been established. It does not appear, however, that his attention was directed to the next important question which arises: was the intention to revoke absolute or conditional? Compare s 15 of the Wills Act No. 13 of 1987.

It is proposed in this judgment to use the term "conditional revocation" instead of the more traditional and more cumbersome "dependant relative revocation". Apart from the fact that "conditional revocation" is the phrase used in s 15 of the new Wills Act, the use of the other phrase has been criticised in *Davis v Steel & Eriksen* NO 1949 (3) SA 177 (W) at 188 by MILLIN J and by ROSKILL LJ in *Re Jones (deceased)* [1976] 1 All ER 593 (CA) at 601h. See also *Hutchinson v Brooks NO & Ors* 1936 SR 81 at 84 *et seq.*

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The importance of this second question is fundamental. If the revocations were absolute, then the bequests deleted stand revoked. But if the revocations were conditional on the validity of the amendments, then, if the amendments fall away, so do the deletions. The revocations fail and the bequests stand.

The matter is stated in *The Law of Succession in South Africa supra* at pp 96-97 as follows:

"Revocation may be conditional and if the revocation was subject to a condition which is not fulfilled, the revocation fails.

The question whether or not the revocation was unconditional or was dependent upon the fulfilment of some condition is a question of fact which must be determined according to the particular circumstances of each case. The enquiry is always one of intention, namely, whether or not the testator intended the will or disposition in question to be revoked whatever happens, or only conditionally...

The application of the principle of conditional revocation may arise not only where a will is destroyed as part of the act of making a new will which is not in fact made or is ineffectually made, but also where a provision in a will is obliterated and a different provision is substituted but the substitution is invalid because it was executed without the necessary formalities."

Halsbury's Laws of England 4 ed Vol 50 makes much the same points in para 298 and then goes on to say:

"The question (of conditional revocation) may also arise in the case of obliteration of the amount of a legacy and the substitution, without proper formalities, of a different amount, or obliteration and substitution, in a similar manner, of a different donee or other person, or of a different event upon which the gift is to take effect.

However, if a complete legacy has been obliterated and a new gift has been substituted which does not take effect (for example, for want of execution) the doctrine (of conditional revocation) does not apply and probate will be

granted of the will with the parts obliterated blank.

On the other hand where some words in a legacy, as opposed to the whole legacy, have been obliterated and other words have been substituted for them it may be possible to infer that the testator had no intention of

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revoking the original words unless the substituted words were effective in which case the doctrine (of conditional revocation) applies and evidence outside the will itself will be admissible to show what the original words were."

In the light of these broad principles it is necessary to consider the facts of the present case.

When the testator executed his will on 15 June 1979 his family was made up as follows:

1. He had a wife, Frances Anne Donald, the present respondent;
2. He had three children, David William Russell Donald, Wendy Donald and Fiona Donald;
3. He had no grandchildren;
4. He had a godson, Mark Hodges.

The will made his wife (subject to a condition now irrelevant) his residuary heir, and left legacies separately to his children Wendy and David and jointly to those same two children, plus a small legacy to his godson. There was also a provision that the children of Wendy and David, if any, should succeed them *per stirpes*. If one or the other died without issue, his or her share would go to the other, or the other's children, again *per stirpes*.

When, some time before his death on 31 March 1986, the testator sought to amend his will, his family position had changed significantly:

1. His children David and Wendy had died;
2. David's two children, Sarah and David (Jnr) had been born.

It is clear therefore that, at the time when he decided to amend his will, the three legacies (one to Wendy, one to David and one jointly to Wendy and David) would have accrued in equal shares to Sarah and David (Jnr), provided they survived him. That must have been apparent to him. It is equally apparent that he did not want that to happen. He set about making amendments which were clear and logical save for the fatal omission of the signature of a second witness. The broad effect of these amendments was as follows:

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1. The legacies under Clauses 3 and 4, reduced by the omission of his motor car and \$400, and altered by changing the name of one of the companies whose shares were bequeathed, which would otherwise have gone to Sarah and David (Jnr) jointly, were now left to David (Jnr) alone. Effectively, therefore, the alteration purported to disinherit Sarah

and increase his wife's inheritance.

2. The legacy under Clause 5, with certain descriptive words altered, presumably to accord with the factual state of affairs at the time, was switched so that the legatee was no longer David (Jnr) jointly but his wife, Frances, the residual heir.

Before proceeding to consider the testator's intention, it is perhaps useful to recall a passage in the judgment of BUCKLEY LJ in *Re Jones (deceased) supra* at 601c-d:

"... the fact that the testator destroyed his will and had at the same time the intention of making a new one, is not, in my judgment, something which necessarily leads to the conclusion that the revocation was intended to be conditional on the making of a new will..."

It is simplest first to dispose of the problem in relation to Clause 3. That clause originally read as follows:

"I give and bequeath unto my son David William Russell Donald and my daughter Wendy Anne Russell Donald jointly all such funds and investments held and administered for me and on my behalf by Messrs Wright Brown & Strong (Mr Strong) solicitors of Carlisle, England and originating from an inheritance received by me from my late mother, Mary Elinor Donald..." (The rest of the clause is immaterial).

The amendments were as follows:

1. The words "son David William Russell Donald and my daughter Wendy Anne Russell jointly" were crossed out (though clearly visible) and the words "wife Frances" inserted in their place;
2. The words "Messrs Wright Brown & Strong (Mr Strong) solicitors of Carlisle, England" were crossed out (though clearly visible) and the words "the Cumberland Building Soc. of Carlisle, England" inserted in their place.

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The second amendment is purely an amendment of description and identification and is of no significance. But clearly, because of the want of formality of a second signature, the insertion of the words "wife Frances" amounts to an invalid bequest.

Is the deletion to be regarded as conditional on the validity of the insertion? Clearly, here it is not, and for a very simple reason. The insertion or addition was unnecessary and superfluous. Frances, the intended legatee, is in any event the residuary heir. The insertion of her name was unnecessary. The same result could have been achieved by deleting the whole clause. The legacy would have fallen into residue and accrued to Frances.

It is quite clear therefore that in deleting the names of his two children the testator intended absolutely that this legacy should not go to his grandchildren at all. Or, to put it another way, he intended to cancel the legacy. There can be no doubt therefore that the revocation in this clause was intended to be an absolute revocation.

The position in relation to Clause 3 and 4 is more complex. The alteration had the effect of

combining the two clauses into one. The learned judge a quo was, with respect, wrong when he said "since the testator has not specified a substitute beneficiary, bequest 4(c) must also fail". In fact if one looks at the two Clauses 3 and 4 together, it is clear that 4(c) was intended to become 3(c). So David (Jnr) was to be the substitute beneficiary. The alteration moreover had two different effects. One was effectively to cut out his granddaughter Sarah. The other was to remove certain items from the legacy, so that David (Jnr) would receive something less than twice what he was originally intended to receive.

The two clauses in their original form read as follows:

"3. I give and bequeath unto my daughter Wendy Anne Russell Donald:

- (a) All my shareholdings in Messina Transvaal Development Company Limited, Rothmans of Pall Mall (Rhodesia) Limited and Wankie Colliery Co. Limited;
- (b) A sum of Four Hundred (\$400,00) Rhodesian dollars in cash;

4. I give and bequeath unto my son David William Russell Donald:

- (a) Any motor car or motor cars owned by me at the time of my death;

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- (b) A sum of Four Hundred (\$400,00) Rhodesian dollars in cash;
- (c) Such funds as are presently held in an account in my name in the books of Grindlays Bank Limited, London and representing the proceeds of an endowment policy of mine which matured together with the interest which has accumulated thereon and any further interest which accumulates thereon up to the time of my death."

The clause, as it read after the deletions and additions, was to the following effect:

"3. I give and bequeath to my grandson David Lewis Donald:

- (a) All my shareholdings in Dunlop Ltd Zimbabwe, Rothmans of Pall Mall Limited and Wankie Colliery Co. Limited;
- (b) A sum of Four Hundred (\$400,00) Zimbabwe dollars in cash;
- (c) Such funds as are presently held in an account in my name in the books of Grindlays Bank Limited, London, and representing the proceeds of an endowment policy of mine which matured together with the interest which has accumulated thereon and any further interest which accumulates thereon up to the time of my death."

When one considers the extent of the alterations one has to look beyond the actual words, because the actual words suggest that David (Snr) and Wendy are being disinherited in favour of David (Jnr). However, as earlier explained, David (Snr) and Wendy had already died when these alterations were made. In the light of Clause 9, David (Jnr) and Sarah, the grandchildren, were to step into their shoes and had already done so. So the real effect of the alteration was

to exclude Sarah from the legacy and to leave both portions to David (Jnr), less the motor car and \$400.

It is perhaps relevant to mention two further alterations at this stage since they have a bearing on Clauses 3 and 4 though they appear elsewhere. The deletion of the reference to the "motor car or motor cars" was accompanied by the addition of substantially the same words to Clause 7, in which the testator appointed his wife Frances as his residuary heir. Secondly, Clause 9, which provided for the grandchildren to step into the shoes of the legatees if the latter died, was deleted. That was clearly a deletion which was consequential upon the other deletions and alterations.

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Logic demands that Clauses 3 and 4 be looked at as a unit. Difficulty arises when one turns to assess the intent of the testator in relation to the deletions. Some indications go one way and some another. Thus it may be said with confidence that the deletion of the legacy of the "motor car or motor cars" was intended as an absolute revocation of that bequest. No alternative beneficiary was named, so it seems clear that it was intended simply to cancel the bequest. Indeed the intention that it should be revoked and fall into residue is strengthened by the fact that the testator sought (again unnecessarily) to write in the reference to his motor vehicles in Clause 7, where he appointed Frances as his residuary legatee.

The same can be said about the crossing out of the bequest of \$400. It is simply a revocation. No attempt is made to write in an alternative beneficiary. Thus there is no other beneficiary of whom it could be said "he only revoked the bequest on condition that it went to the alternative beneficiary". The revocation of these two bequests may therefore safely be regarded as valid and absolute.

On the other hand, the deletion of the names of David and Wendy seems clearly to have been conditional upon the effectiveness of the bequest to the grandson, David (Jnr). To allow this bequest to fall into residue would not be appropriate. The testator was clearly intending to vary his bequest as between his grandchildren. To put it another way, he clearly did not intend to disinherit David (Jnr), who would have received half the bequest under the original arrangement and the whole of the (smaller) bequest under the amended arrangement.

Because of the form of the will it must be said also that the revocation of Clause 9 (providing for the grandchildren to succeed on the deaths of Wendy and David (Snr)) was a conditional revocation. It was deleted only because it became superfluous once the reference to the deceased children Wendy and David (Snr) had been deleted.

There is one other alteration to Clause 3 which requires comment. In listing the shares he left to Wendy the testator included all his shareholdings in Messina Transvaal Development Company Limited (MTD). When he altered his will invalidly he deleted this reference and substituted a reference to Dunlop Ltd Zimbabwe (Dunlop). Possibly this was because he had disposed of his shares in MTD and acquired the Dunlop shares in their place. Certainly the former shares are not mentioned in any of the Distribution Accounts. The latter are valued at a

mere \$205.

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The learned judge concluded that "the name of the company was not a material consideration and therefore the alteration would not have constituted new execution". He therefore allowed the alteration to stand.

However, in the absence of any evidence at all on the point (except that apparently at the testator's death he did not own shares in MTD and he did own shares in Dunlop) it does not seem possible to conclude that there was no new execution. On the face of it different shares were substituted. The new bequest of the Dunlop shares was invalid. The revocation of the bequest of the Dunlop shares was invalid. The revocation of the bequest of the MTD shares was absolute, because he no longer owned them.

The effect of our ruling on the interpretation of Clauses 3, 4 and 9 of the Will is that the items originally enumerated in Clauses 3 and 4, less the Dunlop shares, the one sum of \$400, and the motor vehicle, all of which fall into residue, will go to the two grandchildren, Sarah and David (Jnr) in equal shares.

Certain minor alterations of a descriptive nature may be allowed to stand because they are of no testamentary consequence and would have been interpreted as amended in any event. This reasoning applies to changes like "Mutare" for "Umtali", "Zimbabwe" for "Rhodesia" and "Zimbabwean" for "Rhodesian", as well as to the change of address in Clause 6.

Finally, it must be said that the learned judge was not correct in ruling that where any bequest failed as a result of the deletions and invalid additions, "the property concerned must be distributed according to the rules of intestate succession". In fact such property falls into residue and must accrue to the residuary heir. See Corbett et al *op cit* pp 4 and 567.

All parties were agreed that the costs of this appeal be paid from the estate.

In the result the appeal succeeds in part. The order of the court *a quo* is set aside and the following order is substituted:

1. Clause 3 of the will of the late Major Charles Russell Donald is to be interpreted as if it read as follows;

"I give and bequeath unto my daughter Wendy Anne Russell Donald:

- (a) All my shareholdings in Rothmans of Pall Mall Limited and Wankie Colliery Co. Limited;

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(b) A sum of Four Hundred (\$400,00) Zimbabwe dollars in cash."

2. Clause 4 of the said will is to be interpreted as if it read as follows:

"I give and bequeath unto my son David William Russell Donald:

Such funds as are presently held in an account in my name in the books of Grindlays Bank Limited, London and representing the proceeds of an endowment policy of mine which matured together with the interest which has accumulated thereon and any further interest which accumulates thereon up to the time of my death."

3. Clause 5 of the said will is to be interpreted as having failed, the bequest therein falling into residue.

4. Clause 6 of the said will stands.

5. Clause 7 of the said will stands without the inclusion of the superfluous words added in ink.

6. Clause 9 of the said will stands in its original form, as if not deleted.

7. The costs of the application are to be borne by the estate of the testator.

The costs of the appeal are also to be paid out of the estate of the testator.

Manyarara JA : I agree.

Winterton, Holmes & Hill, appellants legal practitioners

Atherstone & Cook, respondent's legal practitioners

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STUMBLES & ROWE v MATTINSON; MATTINSON v STEPHENS & ORS 1989 (1) ZLR 172 (HC)

Court High Court, Harare

Greenland J

Application to set aside order of Court

2 & 15 March 1989

Flynote

Practice and procedure - order of court - whether may be set aside by court which granted order - third party affected by original order - locus standi of - High Court Rules 1971 - Order 6 Rule 44 - procedural nature of.

Headnote

Mr Mattinson, the respondent in the first matter and the applicant in the second, had sought an

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order granting leave to proceed against the respondents in the second matter by notice of motion. Such leave was necessary because the respondents were *peregrini*. The judge who heard the matter (in chambers) granted the leave to proceed and also granted leave to serve the notice of motion by making service on Stumbles and Rowe, a firm of legal practitioners. This method of making service was chosen because Stumbles and Rowe were the legal practitioners for the respondents.

Stumbles and Rowe sought to have the order set aside in its entirety on the grounds that Mr Mattinson had no right to it and no basis for seeking it. They also alleged that the whole procedure before the judge granting the order was irregular, because the order was granted in their absence and without their knowledge. Further, they said, their relationship with the respondents expressly excluded authority to accept service or conduct litigation.

Held, that while normally a court does not have jurisdiction to tamper or interfere with its own judgments because, in relation thereto, it is *functus officio*, it does have such jurisdiction over orders made in interlocutory

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and procedural matters, the order in question being such a matter.

Held, further, that in terms of that jurisdiction the court has power to set aside such orders on good and sufficient grounds, including the fact that the basis for the order has been destroyed or shown to be non-existent. In this case, although *prima facie* Stumbles and Rowe were agents for the respondents and service on them was proper, they had shown that the basis for this *prima facie* view was wrong.

Held, further, that although Stumbles and Rowe were not parties to the proposed litigation, they had a sufficiently direct and substantial interest in the matter to provide them with *locus standi* to approach the court and have the situation regularised.

Cases cited:

Firestone South Africa (Pty)Ltd v Genticuro AG 1977 (4) SA 298 (A)

Sayprint Textiles & Anor v Girdlestone 1983 (2) ZLR 322 (HC); 1984 (2) SA 572 (ZH)

Ex p Barclays Bank 1936 AD 481

Ex p Mercer 1969 (1) RLR 117 (GD); 1969 (2) SA 207 (R)

Voicevale Ltd v Freightlink (Malawi) Ltd 1987 (2) ZLR 22 (SC)

Bell v Bell 1908 TS 887

Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)

Glens Removals & Storage Ltd v Schonken & Ors 1973 (1) RLR 205 (GD); 1973 (3) SA 227 (R)

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

United Watch & Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor 1972 (4) SA 409 (C)

D W Aitken & Co v Honey & Blanckenberg 1986 (1) ZLR 231 (SC)

M J Gillespie for Stumbles & Rowe and the respondents in the second matter

A P de Bourbon SC for Mr Mattinson

Judgment

Greenland J: At the request of the legal practitioners acting for Mr Michael Stuart Mattinson (hereinafter referred to as the applicant), the above matters stand to be considered together as they are interrelated and resolution of the second matter is entirely dependent on resolution of the first.

In the first matter the applicants (hereinafter referred to as Stumbles and Rowe) seek to have an order granted by a judge of this court in chambers set aside. The position is that the applicant proceeded in terms of Order 6 Rule 44 of the High Court (General Division) Rules, 1971 to apply for an order granting leave to sue Edwin Barry Stephens, Siebe PLC, James North

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(Africa) (Pty) Ltd and Rocsi (Pty) Ltd Leave was required because all these persons are *peregrini*. Also required was an order prescribing the manner and mode of service. The learned Judge granted an order in the following terms:

"IT IS ORDERED:

That the applicant be and is hereby granted leave to proceed by way of notice of motion against 1st, 2nd, 3rd and 4th respondents.

That leave be and is hereby granted to serve the notice of motion on the 1st, 2nd, 3rd and 4th respondents by making service on Messrs Stumbles & Rowe, legal practitioners, Harare."

Stumbles and Rowe now seek to have this order set aside in its entirety. Simply put, they aver that applicant had no right to the order, no basis for applying for it and misled the learned Judge into granting it. Analysis reveals that the real complaint is that the procedure before the learned Judge was irregular from start to finish.

The first aspect to be resolved is whether or not this court has jurisdiction to set aside the order in question. Normally a court does not have jurisdiction to tamper or interfere with its own judgments because, in relation thereto, it is *functus*. To quote from *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977(4) SA 298 (AD) at 306 F:

"The general principle, now well established in our law, is that, once a court has duly pronounce a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio* : its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased. See *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176,

186-7 and 192; *Estate Garlick v Commissioner of Inland Revenue* 1934 AD 499 at 502."

That court then went on to point out that there are exceptions to this general rule and that judicial thinking was that the exceptions listed were not to be considered exhaustive. I quote from p 308B:

"Apparently this Court in *Ex p Barclays Bank* 1936 AD 481, considered that the list was not exhaustive and that a court retained a general discretionary power to alter its judgment or order, at any rate in regard to costs. For on p 485 STRATFORD JA said:

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'That the alteration of its order is matter for the exercise of the Court's discretion seems to have been the view of SOLOMON JA: "The matter is not one of principle or of substantive law, but purely one of procedure, and we are entitled to regulate the procedure of our own Courts" (*West Rand Estates Ltd v New Zealand Insurance Co Ltd supra* at p 185). Indeed this discretion was exercised in (*Estate Garlick's case supra* so as to adapt the general rule to modern exigencies."

This approach, which Mr *Gillespie* has urged this court to adopt, is persuasive because the order in question in the present case was indeed purely procedural. Also, and this is important, the matter was *interlocutory*. Simply put, the applicant was seeking, in terms of prescribed procedure, an interlocutory order for the purpose of facilitating the successful prosecution of his proposed action. That this was so is apparent from a reading of the application itself and more particularly from the very nature of O 6 R 44 of the High Court (General Division) Rules 1971 which reads:

"44. (1) Save as is provided in rule 45 or in any Act relating to the service of process on a reciprocal basis in any territory, no process or document whereby proceedings are instituted shall be served outside Zimbabwe without the leave of the court or a judge to proceed by way of edictal citation.

(2) The leave of the court shall be required in all proceedings in which it is necessary for the defendant either to be in the jurisdiction or to have property within the jurisdiction before the court can assume jurisdiction, and the leave of a judge in all other proceedings.

(3) Application for leave of the court shall be made by petition and of a judge by means of an entry in the chamber book accompanied by a statement, setting out concisely in both cases -

- (a) the facts upon which the cause of action is based;
- (b) the grounds upon which the court has jurisdiction to entertain the claim
- (c) the manner of service which the court or judge is asked to authorize, and if personal service cannot be effected the last-known whereabouts of the person to be served and the inquiries made to ascertain his present whereabouts.

(4) On such application the court or judge may make such order as to the manner of service as to it or him seems proper and necessary, and shall further order the time within which notice of intention to defend or any other step is to be taken by the person to be served.

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(5) In all cases in which publication is directed, it shall not be necessary to publish the document or documents *in extenso* but the publication of a short form thereof to be approved and signed by the registrar shall be deemed to be sufficient compliance with the direction of the court or judge.

(6) Any process or document in such case shall be served in such a manner and subject to such conditions as the court or judge in each particular case directs."

There is no authoritative statement or ruling in our law as to whether or not this court can actually set aside its own order in an interlocutory matter. There is authority in relation to this court's power to amend or alter such an order in circumscribed circumstances. See *Sayprint Textiles & Anor v Girdlestone* 1983 (2) ZLR 322 (HC) at 325; 1984 (2) SA 572 (ZH) at p 574G:

"While no one seems to have ever described the outer limits of a Court's power to vary one of its interlocutory orders, such decisions as were referred to by counsel all seemed to approach the matter on the basis that such a power is at best a circumscribed one. Mr *de Bourbon*, in arguing that the variation here sought was well beyond the Court's powers to vary one of its own orders, pointed to Rule 449 of the High Court Rules as indicative of such limits. But I think that that Rule contemplates final orders and reflects the common law attitude to judgments of that nature. The problem here involves an interlocutory order, and the Roman-Dutch law has always apparently recognized a distinction between the two-see *Bell v Bell* 1908 TS 887.

In *Bell's* case - which seems to be the bench mark decision taken for guidance in later years - variation of an interlocutory order was allowed where the object of the original interlocutory order would be achieved by making such change. In *Meyer v Meyer* 1948 (1)SA 484 (T) an interlocutory order in the form of a temporary interdict was varied by the discharge of that interdict where altered circumstances since it was ordered made it no longer necessary. That was also the reason in the English Court of Appeal decision in *Attorney-General v Birmingham, Tame, and Rea District Drainage Board* [1912] AC 788 that is referred to in *Meyer's* case.

In *Sandell & Ors v Jacobs & Anor* 1970 (4) SA 630 (SWA) proceedings had been instituted by the applicants on notice of motion for certain relief *pendente lite*. Interlocutory orders had been obtained on that basis for not only a temporary interdict but also for the oral examination of the two

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respondents. On the return day of the rule *nisi*, HOEXTER J (as he then was) was asked by the respondents' counsel to discharge the order for oral examination of the respondents and to vary the interlocutory order accordingly. The learned Judge did so, albeit with considerable diffidence. He seems to have done so for the reason that the proceedings were by notice of motion and only for relief *pendente lite*. Such proceedings were not designed for extensive oral examination and cross-examination, nor did that particular case lend itself readily to such a course. The affidavits themselves had by the time of the return day reached voluminous proportions and the congested state of the Court's roll precluded the luxury of another trial within the existing proceedings. But the learned Judge varied the order without discussion or consideration of the basis upon, or the extent to which, a Court's power rests or extends to vary one of its own orders.

In *Bell's* case *supra*, which seems to contain such guidance as there is, INNES CJ said at 894:

'Courts will not lightly vary their own orders, even though they may be of an interlocutory character. And the cases in which such orders will be altered in the absence of fresh facts cannot be numerous.'

There were such fresh facts in *Bell's* case and in *Meyer's* case. There were not in *Sandell's* case. But in all three the common denominator seems to be that the variation touched on an incidental question, usually - but not invariably - of procedure, the variation of which would have no effect on the final judgment. As the CHIEF JUSTICE put it in *Bell's* case:

'The time fixed by the Court for doing something in connection with the matter, having in itself no direct

bearing on the ultimate order, has *per incuriam* been allowed to lapse."

In that case SQUIRES J found it unnecessary to decide whether or not this court had the power to actually set aside its own judgment in an interlocutory matter as a factual case to support such rescission had not been made out. Can this court therefore do so in the present matter? The Rules, *supra*, provide no express power to do so except that Rule 449 provides for the rectification of formal and technical defects. Compare the South African rules which contain express provisions in this respect. See Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at p 468 *et seq.*

To my mind this court has the power to set aside the order in question. My reasons are as follows:

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- (a) It has already been accepted on the authorities cited above that although the instances when a court can do so are necessarily circumscribed the recognised exceptions are not exhaustive. In principle therefore the court has the power.
- (b) This is particularly so where the matter is interlocutory; *per* SQUIRES J *supra*. It is also so where the matter is procedural; *per* STRATFORD JA in *Ex p Barclays Bank supra*. I support the propositions that the court is entitled to regulate its own rules. It is trite that the rules are intended to expedite procedure and relief. To insist that the court is bound by a procedural order which it knows is fatally defective is to insist on the court conducting a sham trial. It is illogical, senseless, unjust and unreasonable to say to a litigant, "We will proceed with this expensive and protracted exercise which is a trial and you can start all over again when the Supreme Court rightly sets the proceedings aside because of this fatal procedural defect."
- (c) To approach the matter on this basis supports rather than subverts the principle of the finality of judgments, a consideration properly in the mind of the court in *Firestone supra*. I quote from p 308H:

"However, I need not pursue and express any final view on this inquiry; the correctness or otherwise of the approach in the *Barclays Bank* and *Pogrand* cases was not debated before us; that aspect can be left for future consideration, since, for the immediate purpose in hand, it suffices merely for me to assume without deciding in *Firestone's* favour that a court does retain a general discretion to correct, alter or supplement its judgment or order in appropriate cases other than those listed above. But, I should add, the assumed discretionary power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded - *interest reipublicae ut sit finis litium*."

When a court proceeds to trial its purpose is to provide final resolution of the issues not to conduct an academic exercise.

- (d) Also a court cannot be functus in a matter until it has finally resolved the substantive issue between the parties. That much is clear from the dictum at p 306 F of the report on *Firestone supra*, quoted above.

Analagous are all the situations in a civil trial where a court makes rulings and orders

on admissibility of evidence, points *in limine*, *onus*, who is to start, evidence on commission, etc, etc. It is at liberty to amend or reverse

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such rulings and is not *functus* in relation thereto until it hands down its judgment on the merits.

- (e) The order in question must be distinguished from what is regarded as a final judgment. The latter takes on the character of *res judicata* the essence of which is that the issue, *having been fairly* contested by the *parties*, is finally resolved. As stated by Spencer-Bower and Turner *Res Judicata* 2 ed at p 40:

"Of course no consent judgment or order has the slightest operation or effect, whether by way of estoppel or otherwise, against any third person, or against any of the parties who is not shown to have consented. Where a party, though cited in the proceedings and served, has not appeared at the hearing, and has taken no part therein, he will not be estopped by a judgment given by consent of the other parties, when the issue has not been really litigated."

In the present case it is common cause that the order was secured *ex parte*. It is clear also that our courts do not regard an order granting leave to sue by way of edictal citation as a final order but as having the quality of a rule the validity of which is open to challenge on a return date. Hence BEADLE CJ states in *Ex p Mercer* 1969 (1) RLR 117 at 119; 1969 (2) SA 207(R):

"I therefore propose to follow the course I adopted in *Ex p Coote & Ors* 1962 R&N 423, and issue the following order: Leave is given to the applicant to sue the respondent by edictal citation on the claim set out in the petition. The **citation is returnable one month after service**" (my emphasis).

Also see *Voicevale Ltd v Freightlink (Malawi) Ltd* 1987 (2) ZLR 22 (SC) where the citation itself was treated as a rule nisi susceptible to discharge or confirmation. In this case the court *a quo* was not faulted for having discharged a citation being a final order and not susceptible to reversal but on the basis that, on the merits, such leave was in order and the citation should have been confirmed.

That such an order cannot be regarded as final is demonstrated also by the fact that it is susceptible to amendment by myself in order to reflect its essential nature, purpose, intent or scope. See *Bell v Bell* 1908 TS 887 cited by SQUIRES J *supra*.

- (f) Lastly I hold that this court has an inherent power at common law to set aside an order granted in the absence of a party effected thereby. To my

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mind that is the effect of the decision in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A), the headnote of which reads:

"In terms of the common law, the Court has power to rescind a judgment obtained on default of appearance

provided sufficient cause therefore has been shown."

I accept the approach and reasoning employed in this case which has already been followed with approval within this jurisdiction. This precedent is extremely persuasive because if a court has the common law power to set aside a default judgment *a fortiori* that power must extend to those situations where a party is not in default but is affected by an order made in his absence and without his knowledge.

For all the above reasons therefore I hold that this court has jurisdiction to interfere with the order in question and set it aside on good and sufficient grounds.

The question which now arises is whether or not such good and sufficient grounds exist. I do not agree with Stumbles and Rowe that the proceedings were totally irregular. I agree with Mr *de Bourbon* that the proceedings were regular and that the learned Judge properly granted the order. This however does not end the matter because, in my determination, he did so on a *prima facie* view of the relevant facts.

It is important to realize that in such a matter the judge makes no final determination of any of the relevant facts. This is self evident but if authority be needed see *Glens Removals and Storage Ltd v Schonken & Ors* 1973 (1) RLR 205 (GD); 1973 (3) SA 227 (R), where Beck J (as he then was) makes the obvious point at 209 B of the Rhodesian report:

"It cannot be assumed that all the respondents will admit the correctness of the facts relied on by the petitioner, and each respondent is entitled to be untrammelled in his defence..."

See also *Voicevale supra*, when the facts were contested and resolved on the return day. In any event to approach the matter otherwise would be in keen breach of the *audio laterad partem* rule which needs no elaboration and is part of our law.

In the result therefore I accept that the learned judge granted the order on the basis that applicant had made out a *prima facie* case. That this is necessarily

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so in many interlocutory matters was recognised by none other than LORD DENNING MR in *Fellowes v Fisher* [1975] 2 All ER 829 (CA) at 836-8, quoted by McNALLY JA in *Voicevale supra*, at p 14.

An important fact that the learned Judge accepted on this basis was that Stumbles and Rowe had a mandate to accept service on behalf of the respondents. In his "STATEMENT IN TERMS OF ORDER 6, RULE 44(3)", presented to the learned Judge, the applicant said:

- "3. An Order is sought authorising service of the Notice of Motion, annexure 'C', on the First, Second, Third and Fourth Respondents, by service on *Stumbles & Rowe*, Legal Practitioners, Harare, for the following reasons:
- 3.1 It is clear from the letters from Stumbles & Rowe to the Applicant and the Applicant's Legal Practitioners, appearing at pages 84 and 87-88 of annexure 'C', and also from the fact that on the instructions of Siebe plc, Messrs Stumbles & Rowe have applied to the Labour Relations Officer in Harare for termination of the applicant's contract of employment with James North (Zimbabwe) (Pvt) Ltd, that **Messrs Stumbles &**

Rowe have a mandate in this matter from the Second, Third and Fourth Respondents and also from the First Respondent in his capacity as the Chief Executive Officer of the Second Respondent" (my emphasis).

The applicant went on to disclose that Stumbles and Rowe however had no power of attorney to accept service.

I agree with Mr *de Bourbon* that on this information it is safe to accept that the learned Judge correctly formed the view that, despite the absence of a power of attorney, Stumbles and Rowe were common law agents for respondents. However I am of the further view that correctly stated the position is that the learned judge properly held that *prima facie* Stumbles and Rowe were common law agents and therefore *prima facie* authorised to accept service.

The present position is essentially different. Stumbles and Rowe have satisfied me that their relationship with the respondents **expressly excluded authority to accept service and conduct litigation**. The *prima facie* view hitherto held by this court and the basis for the order has been effectively destroyed. I hold therefore that good and sufficient grounds have been demonstrated for setting aside the order. Put differently, this court would

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simply not have granted the order had it been informed or been satisfied that there was no basis for doing so. This basis is an essential requirement of Rule 44 *supra*.

The last issue is whether or not the Order can be set aside at the instance of Stumbles and Rowe who are not parties to the proposed litigation. The answer is in the affirmative if it can be said that they have a sufficiently direct and substantial interest in the matter. Such interest provides them with *locus standi*. See *United Watch and Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 410 (C) at 415 B Compare *DW Aidmen and Co v Honey and Blanckenberg* 1986 (1) ZLR.

In my view they have such an interest. As officers of this court they have an obligation to ensure that its orders are carried out. In terms of their duty to their clients they are obliged to protect their clients from a possible default judgment (now actually applied for in the second matter). They are in an extremely invidious position. If they deliberately frustrate the order by refusing to accept service they risk being held in contempt of court. At the same time they have no authority to accept service. Quite obviously they have *locus standi* to approach this court and have the whole situation regularised.

In the result therefore I hold:

- (a) that this Court has jurisdiction over its own orders made in interlocutory and procedural matters;
- (b) that an order made in terms of Order 6 Rule 44 of the High Court (General Division) Rules 1971 is such a matter;
- (c) that in terms of that jurisdiction this court has the power to set aside the order on good

and sufficient grounds;

- (d) that such grounds include the fact that the basis for the order has been destroyed or shown to be non existent;
- (e) that the above rulings apply with particular force where such order is obtained in the absence of a party effected thereby with a sufficiently direct and substantial interest in the matter;
- (f) that Stumbles and Rowe are such a party and are therefore entitled to have the order set aside.

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It is ordered therefore that the order granted by this court in Case HC 552/89 giving Michael Stuart Mattinson leave to sue *peregrini* respondents and giving leave to serve the process on Stumbles and Rowe be and is hereby set aside. Costs of these proceedings are to be borne by the respondent, Michael Stuart Mattinson.

In the second matter the position is that the applicant, Michael Stuart Mattinson, applies for default judgment against the first four respondents. As it is implicit in my judgment that service on these respondents could not be effected by serving on Stumbles and Rowe, such service is invalid. In any event the facts show that Stumbles and Rowe declined to accept service as they had no authority to do so.

The application for default judgment must fail for lack of valid service and it is dismissed. It should be noted that there was no prayer for any relief against the first respondent in this matter.

Stumbles & Rowe, applicant's legal practitioners in the first matter and respondents' in the second matter

Atherstone & Cook, Mr Mattinson's legal practitioners in both matters

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GUTHRIE HOLDINGS (PVT) LTD v ARCHES (PVT) LTD 1989 (1) ZLR 184 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil appeal

16 March 1989

Flynote

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Contract - of lease - notice terminating contract - time within which notice must be received - eviction of tenant
- "good and sufficient grounds for" - dominant purpose not to let to persons other than current tenant - court
required to exercise value judgment.

Headnote

The appellant company was tenant of commercial premises owned by the respondent. In July 1985 the parties entered into an agreement of lease, the period of the lease to run from 1 August 1985 to 31 July 1988. Thereafter, the lease was to run as a two-monthly tenancy, terminable by either party giving two calendar months' notice to the other. On 14 July 1988 the respondent gave notice requiring the appellant to vacate the premises by 30 September 1988. The respondent's founding affidavit stated that it intended to carry out major repairs and alterations to the premises; thereafter it intended to lease part of the premises to third parties and itself occupy the rest.

The appellant contended that there was no valid notice given, because the notice was given during the currency of the original lease and there was no provision in that lease entitling the respondent to give notice during it. It also contended that because the respondent intended to lease the premises to other parties, the appellant was protected by s 22(2) of the Commercial Premises (Rent) Regulations 1983 (SI 676/1983) from being evicted.

Held, that it was an abrogation of common sense to argue that the notice of termination was invalid simply because the appellant was given more notice than it was entitled to. Where a period of notice is prescribed in

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a contract, this means that notice of at least the stipulated period must be given. It does not mean that only notice of exactly that period is permissible.

Held, further, that although the Regulations prohibited the ejectment of a lessee just because the lessor wishes to lease the premises to some other person, this was not the case here. The respondent wanted the premises in order to effect much needed repairs and renovations, and this was its dominant purpose. In deciding whether "good and sufficient grounds" for ejectment had been shown (as required by the Regulations), the court has to make a value judgment.

Cases cited:

Rustenburg Town Council v Minister of Labour & Ors 1942 TPD 220

Weinerlein v Goch Buildings Ltd 1925 AD 282;

Moffat Outfitters (Pvt) Ltd v Hoosein & Ors 1986 (2) ZLR 148 (SC).

A P de Bourbon SC for the appellant

J B Colegrave for the respondent

Judgment

Dumbutshena CJ: After hearing argument we dismissed the appeal with costs. By consent of the parties the appellant was ordered to vacate the premises on or before 31 March 1989. We indicated that our reasons would follow. These then are our reasons.

The respondent owned a building on Stand 576, known as No. 101, Manica Road in Harare. The property was constructed in stages, starting from 1926 onwards.

The respondent and the appellant entered into an agreement of lease on 17 July 1985. In terms of Clause 1 of the agreement the period of the lease was to run from 1 August 1985 to 31 July 1988. At the end of that period the lease was to continue in force as a two monthly tenancy, terminable by either party giving two calendar months' notice in writing. Either party could also, not less than two months before the expiry of the lease, notify the other in writing that the two monthly lease would not be established at the end of the period of the lease.

The respondent, through its legal practitioners, by letter dated 14 July 1988 gave notice to the appellant, requiring it to vacate its shop premises by 30 September 1988. It was indicated in the letter that the respondent intended to alter the premises, at the end of which the premises would be occupied by

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the respondent. The appellant refused to vacate the premises.

Mr *de Bourbon*, who appeared for the appellant, contended that there was no valid notice given because the giving of notice did not arise until 1 August 1988. In his written heads of argument Mr *de Bourbon* submitted that there was no provision in the lease entitling the respondent to give notice during the currency of the lease because the operative words in Clause 1(a) of the lease are: "At the conclusion of the above period...". He argued that notice would have to be given before noon on 1 August 1988, not earlier, in order to secure the eviction of the appellant on 30 September 1988. Mr *de Bourbon* contended that any notice given before the right to give notice arose cannot be valid because a right that does not exist cannot be exercised. In terms of this argument the right to give notice would have accrued on 1 August 1988.

The *Judge President* in the court *a quo* rejected this argument.

It seems to me that the giving of notice before 1 August 1988, that is a notice that will be effective as from 1 August 1988, has much to commend it.

A reading of Clause 1(a) of the lease does not support Mr *de Bourbon's* contention. Clause 1(a) reads as follows:

"At the conclusion of the abovementioned period the lease shall continue and remain in full force and effect as a two monthly tenancy terminable by either party on giving the other party two calendar months' notice in writing unless either party, or the Lessor's duly appointed agent, shall, not less than two calendar months before the expiry of this lease, have notified the other in writing that the said two monthly tenancy shall not be established, PROVIDED THAT no notice of termination of this lease or of the said two monthly tenancy shall be of any force and effect whatsoever unless such notice is RECEIVED in writing by the lessor's agents or the lessee as the case

may be by 12 noon on the first day of the month prior to that in respect of which such notice is to apply, or in the event of the first day of the month being a public holiday by close of business on the last business day preceding such public holiday, PROVIDED FURTHER that the lessee shall vacate by 12 noon on the first day of the month following that in which such notice applies."

The interpretation given by Mr *de Bourbon* to the operative words "At the conclusion of the above ...period ..." does not accord with common sense because that adverbial clause prefixes two likely events: The first event

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arises if nothing happens before the end of the period between 1 August 1985 and 31 July 1988. In that event the lease will continue in full force and effect as a two monthly tenancy, terminable by either party giving the other party two calendar months' notice in writing. The second event comes up when one of the parties notifies the other, not less than two calendar months before the expiry of the lease, that there shall be no two monthly lease at the end of the agreement. That, in my opinion, is the significance of the phrase: "At the conclusion of the above ...period ..." contained in Clause 1(a).

It does not seem to matter whether the letter containing the notice, as in this case, is written two weeks before the day the notice begins to run. What is important is that the notice arrives or reaches the lessor or the lessee by noon on 1 August 1988.

In the instant case, long before noon on 1 August 1988, the lessee had in its hands the written notice. It was informed that that notice would begin to run from 1 August 1988 to 30 September 1988. It was given the required two calendar months' notice in writing. The letter was clear enough to bring the message to the attention of the appellant that it was being given the required two calendar months' notice in writing.

My understanding of the words:

"... unless such notice is RECEIVED in writing by the lessor's agents or the lessee ... by 12 noon on the first day of the month prior to that in respect of which such notice is to apply ..."

is that such notice can be received anytime before and by noon on the first day of the month in respect of which notice is given. Notice received before noon of that day cannot be rendered of no force and effect. But the lessor or the lessee would invalidate such notice were it to be received after 12 noon on the first day of the month in respect of which notice is first given. I, therefore, agree with Mr *Colegrave's* written submission that:

"...it is an abrogation of common sense to argue that the notice itself is invalid, simply because, for the benefit of appellant, respondent gave it more warning than appellant was entitled to."

The learned JUDGE PRESIDENT was correct when he held that the notice to vacate contained in the letter of 14 July 1988 ran from 1 August 1988 to 30 September 1988 and was thus valid. Support for this view is found in what

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was said by MURRAY J (as he then was) in *Rustenburg Town Council v Minister of Labour & Ors* 1942 TPD 220. In that case the third respondent was an employee of the Council. His conditions of employment entitled him to terminate such employment upon one month's notice. He, however, lodged his resignation letter on 19 December 1941, to operate as a termination notice from the end of January 1942. The learned judge said at 223:

"... such writing was merely in effect an intimation to give on or before 1st January 1942, the requisite one month's notice, effective as from 31 st idem."

The learned judge went on to say at 224:

"Where provision exists to terminate a contract by notice of prescribed length, this means notice of at least such length, not necessarily only of exactly the prescribed length. If the party giving notice may do so even a fortnight before the period of notice commences, this does not detract from the finality of such notice ..."

What MURRAY J said above lends weight to the conclusion reached by the learned JUDGE PRESIDENT and to the correctness of the view this court holds on this particular point. See also Kerr *The Law of Sale and Lease* at p 313.

Mr *de Bourbon* next attacked the judgment of the learned JUDGE PRESIDENT because he failed to realise that Clause 28 of the agreement did not reflect the intention of the parties. Clause 28 reads as follows:

"Notwithstanding anything hereto aforementioned, should the Lessor sell this property during the term of this lease, then the Lessee shall accept a six (6) month period of notice terminating this lease."

Mr *de Bourbon* argued that the appellant was concerned to protect itself against change of ownership, whether that be registered ownership by virtue of the sale of the property or the effective ownership by virtue of the sale of shares. The appellant based its contention on the fact that the respondent wanted to sell its shares to a third party, hence its desire to rectify Clause 28 of the lease so that the lessor gives to the lessee six months' notice to terminate the lease. It was agreed on behalf of the appellant that Clause 28 did not reveal the true intentions of the parties to the lease because it incorrectly reflects the agreement of the parties concerning the period of notice which the respondent would be entitled to give in the event of the

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respondent selling its shares to a third party. It was the appellant's intention to rectify Clause 28 by substituting it with the following:

"Notwithstanding any of the terms of this lease, if the premises are sold to a third party or if the shares of the lessor are sold to a third party, the lessor shall be entitled to give to the lessee six months' notice to terminate this lease."

The respondent, for its part, did not agree that there was a common error which justifies the rectification of Clause 28. In support of its contention it relies on what was said on this point in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 287-288. There DE VILLIERS JA said:

"In the court below the argument advanced in support of the exceptions was that the courts in South Africa have adopted and applied the English doctrine of law as to rectification of written documents, and that it has been laid down by JAMES VC in *Mackenzie v Coulson* (1869) 8 Eq C at 375, that: 'It is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument.'" That this view was adopted by the Witwatersrand Local Division in *Bushby v Guardian Assurance Co* 1915 WLD at 71 and by this court in the appeal (1916 AD at 492); and that as s 30 makes the prior verbal agreement null and void there is no concluded contract antecedent to the written agreement which can be invoked or rectified. This argument is disposed of by the consideration that, in order to enable the court of law to reform the writing so as to conform to the terms of an agreement in most cases antecedently arrived at by the parties, there is no necessity that the antecedent agreement should be a binding contract between the parties enforceable by action. To satisfy the rule in *Mackenzie's* case it is sufficient if the parties have arrived at a *consensus ad idem* in shape of an agreement, the terms of which they, either of their own accord or to comply with the requirements of the law, subsequently embody in a formal instrument. It seems self-evident that, upon satisfactory proof of the terms of the agreement the instrument should, in the language of Story in his *Equity Jurisprudence* 13 ed vol 1 s 152, be made to conform to the precise intention of the parties. As far back as 1749 LORD HARDWICKE laid down the following: 'No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties, on proper proof that should be rectified': *Henkle v Royal Assurance Co* (1749) 1 Ves 314)."

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The instant case does not satisfy the above rule. The appellant has applied to the High Court for the rectification in Clause 28 in case no HC 4737/88. It was Mr *de Bourbon's* submission that the learned JUDGE PRESIDENT failed to appreciate what the appellant was arguing with regard to the issue of rectification. In my view the learned JUDGE PRESIDENT applied his mind to appellant's argument and came to the conclusion that even if Clause 28 was amended as desired by the appellant it would not afford the appellant the right to receive 6 months' notice. Correctly interpreted, Clause 28 permits the respondent to terminate the lease on 6 months' notice during the currency of the lease, that is during the fixed period of the lease. The phrase "during the term of this lease" in Clause 28 means that the 6 months' notice only applies before the expiry date of the lease, that is before 31 July 1999. Mr *de Bourbon's* submission must therefore fail.

The appellant's next ground of attack was based on the fact that the respondent's intention in evicting the appellant was to lease part of the premises to other parties. It cannot for this reason evict a statutory tenant. Mr *de Bourbon* contended that in terms of s 22(2) of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) a court cannot order the eviction of a statutory tenant if the purpose for the eviction is to enable the lessor to lease the premises to some other person.

This contention has already been considered, but for what it is worth I shall set down the provisions of s 22(2) of the Regulations, which reads as follows:

"(2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee -

- (a) continues to pay the rent due, within seven days of due date; and

(b) performs the other conditions of the lease;

unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that

(i) the lessee has declined to agree to an increase in the rent; or

(ii) the lessor wishes to lease the premises to some other person."

In this case the respondent does not rely on any breaches of the agreement. It appears that rents were paid timeously. It has never been alleged that the appellant has failed to perform other conditions of the lease. The respondent

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did not seek to rely on an implied breach occasioned by the appellant's refusal to vacate the premises. A statutory tenant who fails to meet these conditions forfeits the protection afforded him by s 22(2) of the Regulations. See *Moffat Outfitters (Pvt) Ltd v Hoosein & Ors* 1986 (2) ZLR 148.

The respondent's principal purpose is to effect repairs to premises that badly need repairs. It is true that the respondent did state in its founding affidavit that it intended to let shops 2, 4 and 5 to outsiders and let other parts of the building to associated companies. But this can only come about after the dominant purpose, the repair and renovation of the building, has been accomplished. That this is the dominant purpose is clearly expressed in para 21 of its founding affidavit, which says:

"When the renovations and repairs of the buildings are completed it is the applicant's intention to let shops 2, 4 and 5 which more fully appear from the plan 'Annexure B5' to outsiders, and to let various other parts of the building to associated companies. The aim of the applicant, and its holding company is to provide for those associated companies, security of accommodation in commodious premises at an economical and stable rent."

The appellant does not believe that effecting repairs is the dominant purpose. Mr *de Bourbon* argued that the respondent was admittedly effecting repairs but the overriding purpose was to lease the premises to third parties.

It is common cause that the sixty-year old premises needed extensive repair and renovations, the extent of which are amply illustrated below. In giving notice it was stated:

"The shareholders of Arches (Private) Limited intend to alter the premises and themselves occupy the premises once alterations are completed."

The appellant contends that was an afterthought conveniently put up because the respondent realised that the first-stated intention - the renting of part of the premises to third parties - was not good enough.

It is, however, fair to say the respondent has two intentions. The first in time and importance is to effect repairs to a building that was built more than sixty years ago. Those repairs are necessary. The second and subsequent intention is to use part of the premises itself and let

part to third parties.

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The repairs are necessary. That is made clear by a letter written to the appellant's legal practitioners by the respondent's legal practitioners. Part of the letter reads:

"According to our understanding, as soon as the property is vacated by your client and the other tenant, the whole interior of the building is to be remodelled. Our client intends to use the remodelled interior for its own purpose. Once the work has been completed, our client will then be in a position to decide whether our client needs to use the whole interior of the building, but if not, it may then let some part of it, but a decision will only be made when the work has been completed."

In para 4.2 of its replying affidavit the respondent denies

"... that the prime purpose of the planned alterations is to lease the premises to some other person or persons at a higher rent. As appears from founding Affidavit, the prime purpose is to carry out much-needed repairs and renovation and thereafter provide the Applicant's associated companies with security of tenure in commodious premises at an economic rent and in proximity to each other."

What is more compelling in the acceptance of the respondent's case is the age of the building. The appellant does not say there is no need for repairs. The respondent wants to remodel and modernise the building. It wants to strengthen the roof trusses. Its technical advisors advised it to do so. The respondent entered into contracts with workmen who were to begin building on 3 October 1988.

On 29 September 1988 the respondent advised the appellant by letter that bricks, plaster board for new ceilings, steel door frames and locks, timber brandering, cement and paint had been purchased and an order placed for the shop fronts. I think the repairs to be carried out, judging from the materials purchased, is substantial. The work consists of refurbishing the entire roof, levelling the floors and replacing the screed on all floors, removing and replacing the electrical wiring, removing and replacing the piping and plumbing fittings, demolishing and replacing the internal divisions within the building, and removing and replacing the ceiling. The cost of materials was estimated at \$63 820. Already materials worth \$45 110 have been purchased. It can be seen that the renovations and repairs to be effected are very extensive.

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It is clear from the papers and from the facts recited above that the respondent's primary purpose is to effect renovations and repairs.

I do not agree with Mr *de Bourbon*'s contention that one of the purposes of the Regulations is to prevent landlords evicting statutory tenants in order to lease to third parties and that this intent applies whether or not there is a plan by the landlord to renovate the premises. It is true that s 22(2)(b)(ii) prohibits the ejectment of a lessee just because "the lessor wishes to lease the premises to some other person." But that is not the case here.

In this case that is not even the dominant purpose. The respondent wants the appellant to vacate the premises in order to effect much needed repairs and make some renovations. The works to be carried out by contractors are not small when one considers the cost of materials, estimated at \$63 820, of which materials valued at \$45 110 have already been purchased.

In these circumstances the respondent is entitled in terms of the provisions of s 22(2) of the Regulations to give notice to the appellant to vacate the premises. It has shown good and sufficient grounds for requiring the court to issue an order of eviction.

In *Moffat Outfitters (Pvt) Ltd v Hoosein & Ors supra*, GUBBAY JA considered the phrase "good and sufficient grounds". This is what he had to say at p 7 of the cyclostyled judgment, and I agree with him:

"It is hardly possible and, in my opinion, certainly undesirable, to attempt any definition of the words 'good and sufficient grounds' which appear in the latter part of s 22(2) of the Regulations. Whether a lessor succeeds in overcoming the burden they create depends on the particular circumstances of each case, viewed against the real purpose behind the Regulations. That purpose, as expressed by the learned judge, is 'to prevent unscrupulous landlords from taking advantage of the shortage of commercial premises by increasing their tenants' rents unjustifiably'. The court is enjoined to exercise a value judgment, which if arrived at without caprice or bias or the application of a wrong principle, will not be lightly interfered with on appeal."

The learned JUDGE PRESIDENT applied his mind to all the issues put before him and came to the conclusion that the respondent had shown good and sufficient grounds for the eviction of the appellant. He considered the repairs and renovations the respondent intends to carry out on the premises and

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satisfied himself of the need to effect repairs. In the exercise of his discretion he granted the order of eviction, which this court has justifiably confirmed.

Gubbay JA: I agree.

Korsah JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

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S v BEAHAN (1) 1989 (1) ZLR 195 (HC)

Court High Court, Harare

Mtambanengwe J

Criminal trial

23 January & 17 March 1989

Flynote

Criminal procedure - jurisdiction - plea to - offender brought within court's territorial jurisdiction illegally - whether court has jurisdiction - whether court may nevertheless refuse to exercise jurisdiction.

Headnote

The accused, a citizen of the United Kingdom and a resident of South Africa, entered Zimbabwe at the Kazungula border post using a passport in a false name. He was the leader of a group of men whose objective was to effect the release from lawful custody in Zimbabwe of another group of men who were awaiting trial on allegations of sabotage and acts of terrorism. The accused, who was accompanied by another man, fled when being questioned by Zimbabwean officials and swam to Botswana across the Zambezi River. The rest of the accused's group, who were already in Zimbabwe when he attempted to enter, were thwarted by the Zimbabwean authorities when they tried to effect the release of the alleged saboteurs.

The day after he had fled back into Botswana, the accused was arrested by members of the Botswana Defence Force. He was detained by the Botswana Police for four days, then taken by them to Zimbabwe, where he was handed over to members of the Zimbabwe Republic Police, who formally arrested him. He was not required to present himself to an immigration officer. There was no extradition treaty in force between the two countries, and no request for his extradition had been made to the Botswana Government.

The accused was arraigned before the High Court on a charge under the Law and Order (Maintenance) Act [Chapter 65], but pleaded to the jurisdiction

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of the court, on the ground that his removal from Botswana was unlawful.

Held, that where a court of competent jurisdiction has before it a person who was properly arrested and committed for trial, it must proceed to try him, no matter what went before. The circumstances in which he was arrested in Botswana were no concern of the court's. Even if he had been captured outside the jurisdiction in violation of public international law, this would not impair the court's jurisdiction. If there was anything irregular or illegal in the mode in which the accused was brought within the jurisdiction, his remedy is against the wrongdoer.

Held, further, that although the court has jurisdiction, it may, nevertheless, as a mark of its disapproval of the abuse of process, decline to exercise jurisdiction in respect of a person irregularly or illegally brought before it.

Held, further, that balancing the interests of the public against those of the accused, and taking into account the fact of the accused's illegal departure from Zimbabwe and re-entry to Botswana, the court's discretion should not be exercised in the accused's favour.

Cases cited:

Ex p Scott (1829) 9 B & C 446; 109 ER 166
R v Nelson & Brand (1867) Lord Cockburn's Charge, 59;
Sinclair v HM Advocate (1890) 17 R (JC) 38;
R v Plymouth Magistrates' Court & Ors ex p Driver [1985] 2 All ER 681 (QB);
R v OC Depot Battalion RASC Colchester ex p Elliott [1949] 1 All ER 373 (KB);
S v Brewster (1835) 7 Vt 118;
US v Rauscher (1886) 119 US 407; 30 L ed 425;
Ker v Illinois (1886) 119 US 436; 30 L ed 421
Ex p Ebrahim in re S v Maseko & Ors 1988 (1) SA 991 (T)
R v Bow Street Magistrates ex p Mackeson (1981) 75 Cr App R 24
R v Hartley [1978] 2 NZLR 199
US v Sobell (1957) 244 F 2d 520
R v Guildford Magistrates' Court ex p Healy [1983] 1 WLR 108
Mackeson v Minister of Information, Immigration & Tourism & Anor 1979 RLR 481 (GD)
Y Omerjee and A O Agyemang for the State
A P de Bourbon SC for the defence

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MTAMBANENGWE J

Judgment

Mtambanengwe J: The accused is charged with the offence of contravening s 50(1) of The Law and Order (Maintenance) Act [*Chapter 65*]. It is alleged that, acting in concert with others and with intent to endanger the maintenance of law and order in Zimbabwe, he committed or attempted to commit an act of terrorism or sabotage by conspiring to forcibly effect the release from the lawful custody of the Zimbabwe Prison Service of certain prisoners, namely Kevin John Woods, Michael Smith, Phillip Conjwayo, Barry Bawden and Rory Burt Maguire who were lawfully detained on charges relating to the security of the State and to remove them from Zimbabwe. It is also alleged that in pursuance of the plan he entered Zimbabwe on 27 June 1988 at the Kazungula Border Post and in execution of the said plan acted in a manner that was likely to cause serious bodily injury to or endanger the safety of any person within Zimbabwe; and that he did cause serious bodily injury to one Doubt Chinhamo, a person residing within Zimbabwe.

When, on 23 January 1989, the charge was put, he replied: "I do not believe the Court has the

jurisdiction to try me". The plea to the jurisdiction was, Mr *deBourbon* for the accused, stated, in accordance with a notice to that effect filed on 19 December 1988.

Mr *Omerjee* for the State then referred the Court to ss 168 and 169 of the Criminal Procedure and Evidence Act [*Chapter 59*] which read:

"168. Upon a plea to the jurisdiction of the Court, the Court shall proceed to satisfy itself in such manner and upon such evidence as it thinks fit, whether it has jurisdiction or not.

169. If the accused pleads any plea or pleas other than the plea of guilty, or a plea to the jurisdiction of the court, he is, by such plea without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by the court."

The issue that arises, as Mr *Omerjee* submitted, is whether in the circumstances of this case this Court has jurisdiction to try the accused on the substantive charge. The Court therefore proceeds to consider the issue.

The circumstances of this case are largely contained in a statement of agreed facts put in as Exhibit 1, and the evidence of Superintendent Bernard Jambawa, a member of the Criminal Investigation Department of the ZRP stationed at the CID Offices Bulawayo, and that of the accused.

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Exhibit 1 reads as follows:

"The following facts are agreed for the purposes only of the special plea as to jurisdiction to be dealt with on Monday the 23rd January 1989.

1. At the main trial of the matter, the State will make, *inter alia*, the following allegations against the Accused:
 - 1.1 The accused entered Zimbabwe at Kazungula on a false British passport bearing the name of Henry Coleman and containing a photograph of the accused at about 6.00 pm on the 27th June 1988.
 - 1.2 The accused was the leader of a group of armed terrorists (*sic*) whose objective was to forcibly effect the release from lawful custody of South African agents awaiting trial on allegations of sabotage, terrorism and acts of bombings carried out at the behest of the South African Government.
 - 1.3 When the accused so entered Zimbabwe, he was in the company of one Jim Maguire. The two men drove to the Zimbabwe side of the Kazungula border in a motor vehicle.
 - 1.4 Jim Maguire was a member of the group of terrorists. Concealed in the vehicle in which the men drove to Zimbabwe were ground to air communication radios necessary for the prosecution of the operation to release the abovementioned agents.
 - 1.5 The accused and Maguire on being questioned by the Zimbabwean Police and Immigration officials absconded and swam their way across the Zambezi River into Botswana.
 - 1.6 The other members of the group referred to in paragraph 1.2 above, who were within Zimbabwe by the 28th June 1988, attempted by force to effect the release of the above-mentioned agents, but were thwarted by the Zimbabwe security agencies.

2. The accused was, at the time of his arrest, a resident of the Republic of South Africa, and a citizen of the United Kingdom.
3. The accused was arrested on the 28th June 1988 at a roadblock within Botswana by members of the Botswana Defence Force. The State will allege at the trial that the accused was at the time still in the company of Jim Maguire, and will allege that Maguire absconded when the pair were challenged.
4. Following his arrest by members of the Botswana Defence Force, the accused was handed to the custody of the member-in-charge of

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the main police station in Gaborone later on the 28th June 1988.

5. The accused remained in the custody of members of the Botswana Police Force in Botswana from the 28th June 1988 until the 2nd July 1988.
6. On the 2nd July 1988 the accused was taken by members of the Botswana Police Force from Botswana into Zimbabwe and was handed to members of the Zimbabwe Republic Police at Plumtree. The Zimbabwe Republic Police detained the accused.
7. When the accused was brought into Zimbabwe from Botswana by the Botswana Police Force, the accused was not required to present himself to an immigration officer.
8. There does not exist any extradition treaty between Zimbabwe and Botswana.
9. No request for the extradition of the accused from Botswana to Zimbabwe was made to the Government of Botswana by the Government of Zimbabwe.
10. The accused alleges:
 - 10.1 that no documents purporting to show his deportation from Botswana to Zimbabwe were given to him at any stage;
 - 10.2 that the Botswana Police Force were aware that the accused was wanted by the Zimbabwe Republic Police and agreed to hand the accused to the Zimbabwe Police;
 - 10.3 that with effect from the 29th June 1988, a member of the Zimbabwe Republic Police, or the Zimbabwe Central Intelligence Organisation, was present in Botswana when the Accused was being questioned."

Before dealing with the evidence of Superintendent Jambawu let me refer to the accused's case. It is summarised in a notice of special plea filed on 19 December 1988, which reads:

"NOTICE is hereby given in terms of s 162 of the Criminal Procedure and Evidence Act [*Chapter 59*] that at the trial of the above matter the accused will plead in terms of s 163(1)(f) of that Act that this Honourable Court has no jurisdiction to try him for the offence alleged against him. The grounds upon which the accused will base his special plea is that he was unlawfully removed from Botswana by members of the Police Force of Botswana and handed to members of the Zimbabwe Republic Police at Plumtree. The removal of the accused from Botswana was not a deportation in terms of the law of Botswana, but amounted to an extradition from Botswana without any procedures in respect thereof

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being followed. The accused's country of origin was South Africa, and his country of citizenship is the United Kingdom. In terms of s 168 of the Act, the Accused requests this Honourable Court to satisfy itself whether it has jurisdiction or not in the present matter."

[The learned Judge considered Superintendent Jambawu's and the accused's evidence and continued:]

Accordingly we find that the onus upon the accused of proving the allegations, that

- (1) that Zimbabwe Police were involved in his interrogation in Botswana or present thereat; and
- (2) that he was not formally arrested on Zimbabwean soil;

has not been discharged on a balance of probabilities.

I take therefore the circumstances on which the court has to decide whether it has jurisdiction or not in this matter as these:

- (1) what is admitted by the State as alleged in the Statement of Agreed Facts, Exhibit 1, that is, briefly, that the accused was taken into custody by the Botswana Police who communicated with the Zimbabwe Police and later brought him into Zimbabwe without deportation or extradition formalities; and
- (2) that the accused was formally arrested on Zimbabwean soil at Plumtree and subsequently formally charged to appear before this court.

WHETHER THE COURT HAS JURISDICTION

The State in its written submissions has placed before the court a great number of authorities on the matter, from various jurisdictions including American and English cases not to mention South African and other jurisdictions. The principle applied or referred to in most of these decisions on the question was first established in *Ex p Susannah Scott* (1829) 9 B&C 446; 109 ER 166. That case involved an application for her release by way of *habeas corpus*. The applicant was charged in England with the misdemeanour of perjury. In execution of a warrant of arrest specifically addressed to him an English police officer apprehended the applicant in Belgium. The British Ambassador refused her application for him to intervene. She was brought to England where an order for her committal was made pending trial.

LORD CHIEF JUSTICE TENTERDEN, in dismissing the application, said:

"I consider the present question to be the same as if the party were now

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brought into Court under the warrant granted for her apprehension ...The question, therefore, is this, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them. If the act complained of were done against

the law of a foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it ... For these reasons, I am of opinion that the rule must be discharged."

In his summing up to the jury in the case of *R v Nelson & Brand* (1867) Lord Cockburn's Charge, 59, COCKBURN CJ said:

"... Suppose a man to commit a crime in this country, say murder, and that before he can be apprehended he escapes into some country with which we have not got an extradition treaty, so that we could not get him delivered up to us by the authorities, and suppose that an English police officer were to pursue the malefactor, and finding him in some place where he could easily reach the sea, got him on board a ship and brought him before a magistrate, the magistrate could not refuse to commit him. If he were brought here for trial, it would not be a plea to the jurisdiction of the Court that he had escaped from justice, and that by some illegal means he had been brought back. It would be said, 'Nay, you are here; you are charged with having committed a crime, and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; settle that with him.'"

In 1890 the point arose in Scotland in *Sinclair v HM Advocate* (1890) 17 R (JC) 38. The decision of the High Court of Justiciary consisting of LORD JUSTICE-CLERK MACDONALD, LORD ADAM and LORD M'CLAREN is conveniently referred to by STEPHEN BROWN LJ in his judgment in *R v Plymouth Magistrates' Court Ex p Driver* [1985] 2 All ER 681 (QB) at pp 692 g - 694 h. I quote from these pages. The headnote reads:

"The Sheriff-substitute of Lanarkshire, on the petition of the procurator-fiscal, granted warrant to apprehend a person charged with breach of trust and embezzlement, and authority to a Glasgow sheriff-officer to receive him into custody from the Government of Spain. The accused was brought before the Sheriff-substitute on this warrant, and committed to prison to await his trial. He brought a bill of suspension and liberation

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in which he alleged that he had been arrested and imprisoned in Portugal by the Portuguese authorities without a warrant; that he had been put by them on board an English ship in the Tagus, and there had been taken into custody by a Glasgow detective-officer without production of a warrant; that during the voyage to London the vessel had been in the port of Vigo, in Spain, for several hours; that the complainer had demanded to be allowed to land there but had been prevented by the officer; that on arriving in London he was not taken before a magistrate, nor was the warrant endorsed, ut he was brought direct to Scotland, and there committed to prison, and that no warrant whatever was produced or exhibited to him. *Held*, that these allegations did not set forth any facts to affect the validity of the commitment by the Sheriff-substitute, which proceeded upon a proper warrant."

The facts on which Sinclair based his case were:

"Sinclair presented a bill of suspension and liberation, praying for suspension of the warrants under which he was apprehended and detained in prison, and for liberation. He averred that he had been living at Barcelona, in Spain, since February 1887, and had been carrying on business there; that in the month of January 1890 he had taken a furnished lodging near Lisbon in Portugal; that he was there arrested by the Portuguese authorities, and taken to the prefecture or police-office, where William Warnock, a detective from Glasgow, identified him, and undertook to pay for his keep. He was then, without any charge being made against him, or any inquiry instituted, or warrant produced, locked up in the police-office for some days, and thereafter detained in prison twenty-seven days. He was then taken by two Portuguese officers to the docks and thence in a boat to the English ship 'Malaga', of London, then in the roads at the mouth of the Tagus, and in Portuguese waters, and put on board thereof. William Warnock accompanied the complainer and the officers, and assumed the custody of the complainer on board. Immediately thereafter the vessel sailed, viz, about 3 February 1890. No warrant was then produced, nor did such exist. There is no Extradition Treaty between the United Kingdom and Portugal. The 'Malaga', on its voyage to London, went into the port of Vigo in Spain, and anchored in Vigo Bay, in Spanish waters, for nearly ten hours.

The Complainer demanded to be allowed to land, but was refused by Warnock. The vessel sailed from Vigo to London, where it arrived on 10 February 1890, and the complainer was at once taken in custody of Warnock straight from the docks to Euston Station, and thence, after waiting an hour, by train

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to Glasgow. The complainer was not taken in London before any magistrate or official, nor was any warrant procured or produced there to justify the complainer being kept in custody, and he was brought to Glasgow and lodged in the prison there without any warrant whatever being produced or exhibited. The petitions on which the warrants of commitment were afterwards granted only contain warrants to search for and apprehend and bring the complainer up for examination, but the said warrants only run in Scotland, and are not endorsed or vised in any way by any authority out of Scotland, and there was thus no authority for William Warnock taking or detaining the complainer in custody and lodging him in prison in Glasgow, nor is there any authority in the warrant of commitment for detaining him in prison. William Warnock acted throughout upon orders received from the respondents, but without any judicial or other warrant or authority whatever. The officials who apprehended him, and those who subsequently set him on board the said vessel, had no authority, judicial or other warrant to do so, and of this William Warnock was at that time well aware."

Their Lordships' judgments were as follows:

THE LORD JUSTICE-CLERK said (at 40-41):

"There are three stages of procedure in this case - first, there are the proceedings abroad where the complainer was arrested; second, there are the proceedings on the journey to this country; and third, the proceedings here. As regards the proceedings abroad and where the complainer was arrested, they may or may not have been regular, formal, and in accordance with the laws of Portugal and Spain, but we know nothing about them. **What we do know is that two friendly powers agreed to give assistance to this country so as to bring to justice a person properly charged by the authorities in this country with a crime. If the Government of Portugal or of Spain has done anything illegal or irregular in arresting and delivering over the complainer his remedy is to proceed against these Governments.** That is not a matter for our consideration at all, and we cannot be the judges of the regularity of such proceedings. In point of fact the complainer was put on board a British vessel which was at that time in the roads at the mouth of the Tagus, and given into the custody of a person who held a warrant to receive him, and who did so receive him. **This warrant was perfectly regular, as also his commitment to stand his trial on a charge of embezzlement.** If there was any irregularity in the granting or execution

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of these warrants the person committing such irregularity would be liable in an action of damages if any damage was caused. But that cannot affect the proceedings of a public authority here. The public authority here did nothing wrong. The warrants given to the officer to detain the prisoner were quite formal, and it is not said that he did anything wrong. It is said that the Government of Portugal did something wrong, and that the authorities in this country are not to be entitled to obtain any advantage from this alleged wrongdoing. As I have said, we cannot be the judges of the wrongdoing of the Government of Portugal. What we have here is that a person has been delivered to a properly authorised officer of his country, and is now to be tried on a charge of embezzlement in this country. He is therefore properly before the Court of a competent jurisdiction on a proper warrant. I do not think we can go behind this. There has been no improper dealing with the complainer by the authorities in this country, or by their officer, to induce him to put himself in the position of being arrested, as was the case in two of the cases cited. They were civil cases in which the procedure was at the instance of a private party for his own private ends, and the Court very properly held that a person could not take advantage of his own wrongdoing. But that is not the case here."

The LORD JUSTICE-CLERK then proceeded to deal with submissions made about the process adopted on arrival in England.

A submission was made on behalf of Sinclair that there was an irregularity in that part of the journey which should lead the court to quash the whole proceedings. The LORD JUSTICE-CLERK said that he did not think so and went on (at p 42):

"No irregularity, then, involving suspension can be said to have taken place on his arrival in London and on his journey here. **But even if the proceedings here were irregular I am of opinion that where a Court of competent jurisdiction has a prisoner before it upon a competent complaint they must proceed to try him, no matter what happened before, even although he may have been harshly treated by a foreign Government, and irregularly dealt with by a subordinate officer**" (my emphasis).

In his judgment LORD ADAM said (at 42-43):

"If there was anything irregular and illegal in the mode in which the suspended was brought here, he will have his remedy against the wrongdoer."

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LORD M'CLAREN in the course of his judgment said (at p 43):

"With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. **Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have** neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody" (my emphasis).

He continued (at 44):

"... I am of opinion with your Lordships that, when a fugitive is brought before a magistrate in Scotland on a proper warrant, the magistrate has jurisdiction, and is bound to exercise it without any consideration of the means which have been used to bring him from the foreign country into the jurisdiction. In a case of substantial infringement of right this Court will always give redress, but the public interest in the punishment of **crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the prisoner's apprehension and detention**" (my emphasis).

In *R v OC Depot Battalion RASC Colchester ex p Elliott* [1949] 1 All ER 373 (KB) at 377-378, the judgment of LORD M'CLAREN in *Sinclair v HM Advocate* was approved by LORD GODDARD CJ as being:

"a perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in lawful custody in this country, of the circumstances in which he may have been brought here. The circumstances in which the applicant may have been arrested in Belgium are no concern of the court."

The case concerned an application for *habeas corpus* by a British soldier who had deserted his unit in 1946. He was arrested in Belgium in 1948 by two British military officers, accompanied by two Belgium police officers, was transferred by the British military authorities to England and

was there held

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in custody pending trial for desertion. It was pleaded on his behalf that the British authorities in Belgium had no power to arrest the applicant and that he was arrested contrary to Belgian law. LORD GODDARD, in dismissing the application said (at p 376) before concluding as cited above:

"The point with regard to the arrest in Belgium is entirely false. If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: 'I was arrested contrary to the laws of the State of A or the State of B where I was actually arrested'. He is in custody before the court which has jurisdiction to try him. What is it suggested that the court can do? The court cannot dismiss the charge at once without its being heard. He is charged with an offence against English law, the law applicable to the case."

In the United States of America the first judgment that speaks of a (possible) violation of the sovereignty of another State and lays down an express ruling on the matter is the American decision in *S v Brewster* (1835) 7 Vt 118 given by the Supreme Court of the State of Vermont. The respondent, a foreign citizen, who was found guilty of theft by one of the courts of that State, pleaded before the Supreme Court that he was forcibly and against his will removed from Canada, the country of his domicile, by citizens of Vermont and brought into the State to stand trial, and that in these circumstances the Court had no jurisdiction to try him. These contentions were rejected by the Supreme Court on the following grounds:

"The respondent, although a foreigner, is, if guilty, equally subject to our jurisdiction with our own citizens. His escape into Canada did not purge the offence, nor oust our jurisdiction. Being retaken and brought in fact within our jurisdiction, it is not for us to inquire by what means, or in what precise manner, he may have been brought within the reach of justice. It becomes then immaterial, whether the prisoner was brought out of Canada with the assent of the authorities of that country or not. If there were anything improper in the transaction, it was not that the prisoner was entitled to protection on his own account. The illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complains, it is a matter which concerns the political relations of the two countries, and in that aspect, is a subject not within the constitutional powers of this court. Whether the authorities of Canada would have surrendered the prisoner, upon due application, is a question

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of national comity, resting in discretion. The power to do so will not be questioned. If they have the power to surrender him, they may permit him to be taken. If they waive the invasion of their sovereignty, it is not for the respondent to object, in as much as for this offence, he is, by the law of nations, amenable to our laws."

The case of *S v Brewster supra* was followed by two decisions in the United States Supreme Court in 1886: *US v Rauscher* (1886) 119 US 407; 30 L ed 425 and *Ker v Illinois* (1886) 119 US 436; 30 L ed 421. *Rauscher's* case deals with the speciality principle which does not concern us here. But *Ker v Illinois* dealt with a fugitive offender. The applicant in that case pleaded that he was kidnapped by an agent of the United States Government in a sovereign country (Peru), was forcibly brought to the State of Illinois, was tried for theft and found guilty of embezzlement. The Supreme Court of Illinois rejected his plea to the jurisdiction of the Court that convicted him and

the United States Supreme Court refused to interfere with the decision and said (at p 424):

"The question of how far his forcible seizure in another country, and transfer by violence, force or fraud to this country, could be made available to resist trial in the state court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court. Among the authorities which support the proposition are the following: *Ex p Scott* (1829) 9 Barn & C 446; ... *State v Brewster* (1835) 7 Vt 118 ..."

In *Ex p Ebrahim in re S v Maseko & Ors* 1988 (1) SA 991 (T) at 1004 DANIELS J, after considering South African, American and English decisions and several writers on international law (see their conclusions to the same effect at pp 999I-1002A of the judgment) sums up the effect as follows:

"I am satisfied upon the authorities referred to that even if the applicant therefore was captured in violation of public international law, such seizure by the South African State or by an agent of the State acting with its knowledge and connivance in Swaziland, would not impair this Court's jurisdiction. This view appears to me to be in accordance with

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the internationally accepted approach and one which has been consistently applied and followed in South African Courts."

To emphasize the point, the learned Judge continued:

"Whether I am correct or incorrect in my assessment of the facts and at the best for the applicant, as far as the facts are concerned, the Court would be entitled and remains endowed with necessary jurisdiction to try the applicant for the crimes allegedly committed."

And in similar vein LORD LANE CJ in *R v Bow Street Magistrates ex p Mackeson* (1981) 75 Cr App R 24 (QB) at p 32 discussed the New Zealand case of *R v Hartley* [1978] 2 NZLR 199 and commented as follows:

"The judgment of the Court was delivered by WOODHOUSE J So far as the appellant's appeal was concerned, WOODHOUSE J dealt with the allegation of wrongful actions by the police under two heads: first the issue of jurisdiction. It had been submitted that in the circumstances of the arrest and bringing back to New Zealand from Melbourne of this man, the court had no jurisdiction to try Bennett on the charge against him. That submission was rejected, and in rejecting it the learned Judge at p 215 cited a passage of LORD GODDARD CJ in *Officer Commanding Elliot* [1949] 1 All ER 373, 376 as follows '**if a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country "I was arrested contrary to the laws of the State A or the State B where I was actually arrested"**' He is in custody before the Court which has jurisdiction to try him.

The learned judge WOODHOUSE J went on to say at p 215:

'As to the bare question of jurisdiction, we think, that the observations of LORD GODDARD and of LORD M'CLAREN must be accepted as applicable to this country. **It is the presence within the territorial boundaries that is the answer to the initial question of jurisdiction.** In the present case, although Bennett was brought here unlawfully, he was eventually lawfully arrested within the country and then by

due process of law he was brought before the Court. The Court was accordingly in a position to exercise jurisdiction in respect of him."

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Ex p *Mackeson supra* was a case in which the court concluded that a British citizen who was wanted for allegation of fraud in Britain and had gone to Zimbabwe-Rhodesia had in fact been brought back as a result of the Metropolitan police persuading the authorities in Zimbabwe-Rhodesia to deport him for no reason other than he was wanted in Britain for trial.

Mackeson was handed over at Gatwick Airport to the Metropolitan Police by the Zimbabwe-Rhodesia Police who waited with him in handcuffs till the Metropolitan Police arrived to arrest him. LORD LANE in that case concluded his reference to *Hartley's case supra* by stating:

"That applies precisely here and indeed no one in this court has argued to the contrary. Whatever the reason for applicant being at Gatwick Airport on the tarmac, whether his arrival there had been obtained by fraud or illegal means, he was there. He was subject to arrest by the police force of this country. **Consequently the mere fact that his arrival there may have been procured by illegality did not in any way oust the jurisdiction of the Court. That aspect of the matter is simple**" (my emphasis).

The facts in *Hartley's case supra* will be given later in this judgment. On these authorities, if, in the present case, I was merely to answer the plea by the accused as appears in his notice of special plea and whether in the circumstances there alleged the court has jurisdiction to try him, I would say yes and this would be the end of the matter. This stands to say that I am satisfied that the court has jurisdiction (in the present matter) to try the accused, (and that all authorities I have been referred to support this conclusion) as I have tried to demonstrate above.

Mr *de Bourbon* raises no serious contention against the conclusions derived from the cases referred to above and many others reference to which would be merely tedious repetition. Indeed Mr *de Bourbon* submits, and this, as I understand it, is the burden of his argument; briefly paraphrased, he says: *prima facie* the court does not inquire into how the accused came before it, but if the issue is raised, then the court must look into it and has a discretion to refuse to try him to prevent abuses of process by the executive authorities. As I understand this submission, and indeed as some of the authorities to which I have been referred say explicitly or seem to say by implication, the position can be stated simply in the following terms: that while the court has jurisdiction to try a person properly brought before it regardless of the means used to secure his presence before the court, nevertheless the court can

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decline to exercise that jurisdiction in respect of a person irregularly or illegally brought before it and it can decline to exercise jurisdiction as a mark of its disapproval of the abuse of process.

I accept that approach, and it seems to me that support of the approach can be found not only

in those cases that state so explicitly, such as *Ex p Hartley supra*, *Ex p Healey* [1983] 1 WLR 108 and *Ex p Mackeson supra*, but even in those cases that seem to conclude by not recognizing the existence of this discretion.

In *R v Plymouth Magistrates' Court & Ors ex p Driver supra*, STEPHEN BROWN LJ sitting with STUART-SMITH J and OTTON J in the Queens Bench Division held (and I cite the decision as summarised on the first page of the judgment (p 681):

"Once a person was in lawful custody within the jurisdiction the court had no power to refuse to try that person for the offence in question and no power to inquire into the circumstances in which he had been brought into the jurisdiction since that was solely a matter for the State which had surrendered him. Accordingly, the circumstances of the applicant's departure from Turkey were irrelevant and his application would be dismissed (see p 691 e, p 697 hj and p 698 cfg post)."

According to the headnote the facts in that case were that the British police wished to interview the applicant in connection with a murder in Plymouth, but he had left the United Kingdom and had travelled to Turkey. There was no extradition treaty between Turkey and the United Kingdom but the British police informed the Turkish authorities that, if it was within their power, the deportation of the applicant to the United Kingdom would help the British police with their enquiries. The applicant was held in custody by the Turkish authorities for four days, but was then told that he was to be released as the British police were no longer interested in him. He was told he had to leave Turkey and was placed on a direct flight to London. There were no extradition proceedings. On his arrival in London the applicant was arrested and charged with murder. The applicant applied for an order of *certiorari* to quash the charge of murder against him and an order of prohibition to prevent the hearing of the committal proceedings on the ground, *inter alia*, that the circumstances of the applicant's return to England were unlawful in that his presence within the jurisdiction had been obtained by means of deportation in circumstances which amounted to a disguised extradition.

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In holding as he did, with the concurrence of the other two judges, his Lordship followed *Ex p Scott*, *Ker v Illinois*, *Sinclair v HM Advocate*, *R v O/C Depot Battalion RASC, Colchester ex p Elliott* and *US v Sobell* (1957) 244 F 2d 520, and differed "from the view of this court as expressed in *Mackeson's* case" (and also *Ex p Healey supra*, which followed *Mackeson's* case, and *Ex p Hartley*, the New Zealand case),

"in so far as it held that the court did have such a discretion by reason of its inherent jurisdiction" (pp697J-698a).

However, as regards this question of discretion, it is interesting to note what STEPHEN BROWN LJ says at p 694-695a-e of that case. His Lordship stated:

"In *R v OC Depot Battalion, Colchester ex p Elliott* [1949] 1 All ER 373 at 377-378 LORD GODDARD CJ specifically approved the judgment of LORD M'CLAREN in *Sinclair v HM Advocate* as being -

'a perfectly clear and unambiguous statement of the law administered in Scotland. It shows that the law of both countries is exactly the same on this point and that we have no power to go into the question, once a prisoner is in *lawful custody in this country*, of the circumstances in which he may have been brought here. The circumstances in which the applicant may have been arrested in Belgium are no concern of this

court."

After giving the facts at 695 b, the learned LORD JUSTICE continued:

"In the New Zealand case of *R v Hartley* [1978] 2 NZLR 199 the New Zealand Court of Appeal appears to have considered that *Ex p Elliott* was only authority for the proposition that a court had jurisdiction to try a prisoner who was found within its territory. As has been seen, the judgment in *R v Hartley* divided the consideration of the problem into, first 'jurisdiction' and second 'discretion'. It would appear, however, that LORD GODDARD CJ **clearly did have in mind the question of 'discretion'**. There were other points in the case of *Ex p Elliott*, including an allegation of unreasonable delay. The importance of the judgment of the Divisional Court in *Ex p Elliott* is that it adopted without qualification the decision in the Scottish case *Sinclair v HM Advocate* as representing the law of this country. LORD GODDARD CJ also referred in the course of his judgment to *Ex p Scott* which had been decided in England in 1829. The decision in *R v Hartley* did not appear to take into account the fact that the case of *Ex p Scott* **did involve consideration of**

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an allegation of abuse of process. It may be that in *R v Hartley* the Court misunderstood LORD GODDARD CJ, because he went on to consider the question of an allegation of delay in that case, **in respect of which there was a clear discretion** in the court due to its inherent jurisdiction" (my emphasis supplied).

I may be misunderstanding the learned LORD JUSTICE, but, with due respect to his Lordship, I find it difficult to see in this a rejection of the existence of the discretion as discussed in *Hartley's* case and those cases that followed it. On the contrary, it seems the existence of such a discretion is clearly implied.

In the passage following soon thereafter the LORD JUSTICE discussed the American case *Ker v Illinois* (1866) 119 US 436. He quotes at p 696 a passage in MILLER J's judgment (p 440 of that judgment) which reads:

"We do not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the provisions of this clause in the Constitution, but, for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged **in a regular indictment**. He may be arrested for a very heinous offence by persons without any warrant, or **without any previous complaint, and brought before a proper officer, and this** may be in some sense held to be 'without due process of law'. **But it would hardly be claimed, that after the case had been investigated and the defendant held by proper authorities to answer for the crime, he could plead that he was first arrested 'without due process of law'**. So here, when found within the jurisdiction of the State of Illinois and liable to answer for a crime against the laws of that State, **unless there was some positive provision of the Constitution or of the laws of this country violated in bringing him into court**, it is not easy to see how he can say that he is here 'without due process of law', within the meaning of the constitutional provision."

The Constitutional provision relied on in that case provided -

"No state ...shall deprive any person of life, liberty or property without due process of law."

In referring to *Sinclair's* case WOODHOUSE J in *Hartley's* case at p 215-50-216-5 stated:

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"It is worth observing that in the *Sinclair* case the LORD JUSTICE-CLERK (LORD MACDONALD) first said that the court could not be the judges of the wrong doing of the Government of Portugal and that Sinclair was, 'properly before the Court of a competent jurisdiction on a proper warrant'. But then he added:

'I do not think we can go behind this. There has been no improper dealing with the complainer by the authorities in this country or by their officer...'(*ibid* 4).

It may be implicit in those last remarks that if there had been evidence of improper dealings by the authorities in Scotland then the Court might well have taken some appropriate action... However, as the complaint had centred merely upon the actions of the Government of Portugal no domestic issue of the sort referred to by LORD MACDONALD required attention."

In *Hartley's* case *supra* the passage I have already referred to dealing with the issue of "discretion" continues as follows:

"But if the Courts are faced, as in this case, by a deliberate decision of one of the executive arms of Government to promote in a direct way the very illegality that has had a person returned to this country, then the question does arise as to what might be done. That sort of consideration caused LORD GODDARD CJ in the *Depot Battalion* case to add a rhetorical question to the passage to which we have referred. He asked 'What is it suggested that the court can do?'. And his answer was that **'The court cannot dismiss the charge at once without its being heard'**. As we understand it, LORD GODDARD was not dealing in that passage with the inherent jurisdiction of the Court to prevent abuse of its own process. As to the extent of that inherent jurisdiction, reference may be made to *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401 and in particular the speech of LORD DEVLIN and also to *Taylor v Attorney-General* [1975] 2 NZLR 675. In addition in New Zealand there is the wide statutory discretion conferred by s 347 of the Crimes Act 1961 which enables a Judge to direct that no indictment shall be presented or that other appropriate steps may be taken for proceedings to be terminated after an indictment has been presented or at any stage of any trial. **Of course powers such as these should be exercised by a Judge with proper circumspection but they are nevertheless available 'to prevent anything which savours of abuse of process'**: *Connelly v Director of Public Prosecutions* [1964] 2 All ER 40, 406, *per* LORD REID.

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In the same case LORD DEVLIN referred to the constitutional importance which attaches to the power of the Courts to control the successive prosecution of charges, despite the safeguards generally provided by the propriety surrounding decisions taken by the Crown in that regard. And he said:

'Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused' (*ibid*, 1354; 442).

On the following page he said plainly that in the sort of situation he was then discussing 'the only way in which the court could act ... would be by refusing to allow the indictment to go to trial'. We think that sort of consideration arises directly in the present case" (my emphasis).

It seems to me that in most of the cases considered above, where the question of discretion was specifically discussed, the facts were such that there was nothing to show that the authorities had breached or contravened municipal laws in bringing the applicant or accused before the Court. In *Hartley's* case it was found that the New Zealand police had by a deliberate

decision committed an illegality that had Bennett returned to that country.

The facts in that case according to the headnote were as follows:

"Members of a motor cycle gang made a retaliatory raid on a house believed to be occupied by members of a rival gang. Those making the raid armed themselves with metal tools, bars and wooden staves, and two firearms were carried. Several of the occupants of the house were assaulted and required minor medical attention. One young man was killed by a shotgun fired by Hartley. After the shot had been fired the gang members dispersed, and one of the men (Bennett) went to Australia. Hartley was charged with murder and 11 others (including Bennett whom the police had brought back from Australia) were charged under s 66(2) of the Crimes Act 1961 with being parties to the offence. Hartley and 8 of those charged were convicted of manslaughter [culpable homicide] ...

Bennett appealed on two grounds: first, that the Court had no jurisdiction to try him because he had been illegally brought back to New Zealand.

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The police had not obtained a warrant for Bennett's extradition and had merely asked the Melbourne Police by telephone to put Bennett on the next plane to New Zealand; a request which they had complied with."

There was a deliberate violation of an existing extradition treaty between the two countries.

In *Mackeson's* case the court accepted the facts as found in GUBBAY J's judgment*(2) with the additional facts that by the time Mackeson was returned to Britain legality had returned to Zimbabwe and no application was made to extradite him.

I am therefore satisfied on the authorities referred to both by the State and by the Defence that the court has jurisdiction to try the accused.

I am also of the opinion, on a proper examination of the authorities, that the court, in matters of this nature, does have a discretion to refuse to exercise jurisdiction. In this connection I accept, with respect, that the more enlightened view is that where the authorities within the jurisdiction or outside have resorted to some illegal conduct in bringing the person before the court the court may, too, use the words of LORD M'CLAREN in *Sinclair's* case,

"I am of opinion with your Lordships that, when a fugitive is brought before a magistrate in Scotland on a proper warrant, the magistrate has jurisdiction, and is bound to exercise it without any consideration of the means which have been used to bring him from the foreign country into the jurisdiction. **In a case of substantial infringement of right this Court will always give redress, but the public interest in the punishment of crime is not to be prejudiced by irregularities on the part of inferior officers of the law in relation to the prisoner's apprehension and detention"**

and that in exercising that discretion the court has to balance the interest of the State against those of the individual.

To the point, in the instant case, that there is no extradition treaty between Zimbabwe and Botswana, and that in terms of the Extradition Act No. 6 of 1982 Zimbabwe has not designated Botswana as a specified country to allow offenders to be passed across the borders, the answer, I think, is to be found

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in the words of GRIFFITHS LJ in *R v Guildford Magistrate's Court Ex p Healy* [1983] 1 WLR 108 at p 113E-F where the learned Lord Justice says:

"if a criminal wanted in this country is being deported by the United States' authorities of their own motion and for their own purposes, there is no reason whatever why the authorities in the United States should not report to the authorities in this country that they are deporting him and inform this country of the aircraft upon which he will be arriving so that he can be arrested as soon as he arrives here and brought to justice in this country. It is in the interest of the law abiding community that there should be international co-operation to bring wanted criminals to justice: there is no reason whatever to assume because that is done that there is a collusive agreement between the two countries to use the deportation process as a short cut to extradition."

LORD M'CLAREN put the position even more emphatically at p 43 of *Sinclair's* case where he stated:

"With regard to the competency of the proceedings in Portugal, I think this is a matter with which we have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the State who surrenders him. Each country has its own ideas and its own rules in such matters. Generally it is done under treaty arrangements, **but if a state refused to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on those conditions and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody**" (my emphasis).

The rest of his Lordship's statement in that case has already been quoted above.

In the present case the point must not be lost sight of that the accused had entered Zimbabwe and left the country **illegally** and he was merely returned here. To the complaint, therefore, that he was not brought back through immigration, the answer should be very simple: the accused is merely taking advantage of his illegal actions both in respect of his departure from this country and his entry into Botswana, and it is difficult to see what rights of his have been infringed by anybody in these circumstances - whether by the Zimbabwe authorities in receiving him on his being returned here after he had left the country illegally, or by the Botswana Police in handing him back after he entered that country illegally.

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It seems to me that it would be taking to absurd lengths the concept of personal liberty to insist that a man in these circumstances acquires a right to remain free or to complain if apprehended, as the accused here was, after his own flagrant violation of the immigration laws of both countries, and to insist that he should benefit from such acts and escape being brought to justice.

Therefore, accepting that in a proper case the court does have a discretion to refuse to exercise jurisdiction, I find that the facts of this case are not such, with respect, as would lead me to refuse the exercise of the jurisdiction that the court has to try the accused for the offence with which he is now charged. Even assuming that the accused's version of events was the correct one, balancing the interests of the public against those of the accused, such as they

are, I would exercise the discretion in favour of the State and rule that the accused must stand his trial.

It follows that the plea to the jurisdiction fails.

Coghlan, Welsh & Guest, defendant's legal practitioners

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S v MAZORODZE 1989 (1) ZLR 218 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Korsah JA

Criminal appeal

17 March 1989

Flynote

Criminal law - Road Traffic Act 1976 - s 46(1) - "drunken driving" - nature of evidence required - s 67(2) - refusal to submit to breath analysis - need for accused to have been required to do so - polite request insufficient - "reasonable excuse" for failing to submit to analysis - on whom onus lies - constitutionality of section.

Headnote

While it is not impossible to obtain a conviction for contravening s 46(1) of the Road Traffic Act (drunken driving) without medical or scientific evidence, the other evidence must be very clear and convincing. The fact that an accident was caused, or even that it was caused by negligence, does not necessarily justify the conclusion that any liquor the driver had drunk had impaired his faculties to the required degree.

Before a driver who is suspected of driving while intoxicated can be convicted of contravening s 67(2) of the Road Traffic Act 1976, a police officer must have required him to submit to a breath analysis and the driver must, without reasonable cause, have failed or refused to comply with the requirement. A polite request by the police officer is not enough; words must be used which clearly impart to the driver that the policeman is entitled to make the demand. It would be advisable, though there is no legal requirement to do so, for the police officer to warn the driver that a failure or refusal to comply will, in the absence of a reasonable excuse, amount to an offence.

What constitutes a reasonable excuse is for the court to decide as a matter of fact, and in this context must amount to a physical or mental inability to provide a specimen of breath. Being too drunk to do so is obviously no

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excuse. Once there is a cogent foundation for the existence of such an excuse, the prosecution must eliminate the defence. The risk of self-incrimination inherent in s 67(1) of the Act is not forbidden by s 18(8) of the Constitution.

Cases cited:

R v Mackay 1955 (3) SA 129 (SR)

S v Mhetoa 1968 (2) SA 773 (O)

S v Zikali S-221-81 (not reported)

R v Spicer 1945 AD 433

S v Moyo (2) 1978 RLR 469 (GD)

S v Chitengu 1979 RLR 228 (GD)

S v Barketts Transport (Edms) Bpk en 'n Ander 1988 (1) SA 157 (A)

R v Chapman [1969] 2 All ER 321 (CA)

R v Clarke [1969] 2 All ER 1008 (CA)

R v Nicholls [1972] 2 All ER 186 (CA)

Poli v Minister of Finance & Economic Development & Anor 1987 (2) ZLR 302 (SC)

E Chatikobo for the appellant

M T Boylan for the respondent

Judgment

Gubbay JA: The appellant was convicted in the magistrate's court on two charges framed under the Road Traffic Act 1976. The first was a contravention of s 46(1), in that he had driven a motor vehicle on a public road while under the influence of alcohol to such an extent as to be incapable of having proper control of it; and the second, a contravention of s 67(2), in that when required by Inspector Chaweta of the Zimbabwe Republic Police to submit a breath analysis he had, without reasonable excuse, refused to do so. The sentence imposed on each count was a fine of \$250 or, in default of payment, two months' imprisonment with labour, and in addition a prohibition from driving all classes of motor vehicle for a period of six months. The appeal to this court is only against the propriety of the convictions.

Little need be said of the first count. Although it was established that in negotiating a left-hand turn into a minor road the appellant had allowed his motor vehicle to encroach onto the incorrect side of the road, thereby colliding with an oncoming vehicle, it was conceded, properly in my view, by Mr *Boylan*, who appeared for the respondent, that the evidence led on the appellant's condition was inadequate for the trial court to draw an inference of drunkenness to the extent of

his being incapable of having proper control

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of his vehicle. No medical or scientific evidence was available to the State. While it is not impossible to obtain a conviction without such support, the other evidence must be very clear and convincing. See *R v Mackay* 1955 (3) SA 129 (SR) at 130A; *S v Mhetoa* 1968 (2) SA 773 (O) at 774H-775A; *S v Zikali* S-221-81.

In the circumstances of this case the evidence adduced lacked the necessary persuasive quality. All that was revealed by the observations of the police officers was that the appellant's breath smelt of liquor, his face was flushed, his speech somewhat loud and his manner aggressive. As against these features, he spoke coherently was steady on his feet and his gait was sure.

Nor does the fact that a collision occurred, or that it was caused by negligence, justify the conclusion that the liquor the appellant admittedly consumed had impaired his faculties to the required degree. See *R v Spicer* 1945 AD 433 at 441. There was no suggestion of his having driven in an erratic manner; and the explanation that he had taken the corner wide so as to avoid a number of stationary vehicles which partially obstructed the left-hand side of the road, was not discounted.

It is perhaps to be regretted that the appellant was not charged in the alternative, as is customary, with negligent driving in contravention of s 43(1)(a) of the Act. The established facts accorded more, in my view, with the commission of that offence than with the one charged. But it is unnecessary to debate the point, for it was not contended that it was appropriate to amend the charge in terms of s 191(1) of the Criminal Procedure and Evidence Act [Chapter 59] and substitute a conviction of negligent driving or even of driving without due care and attention. In any event, I doubt whether it would have been competent to do so. See *S v Moyo* 1978 RLR 469 (GD); *S v Chitengu* 1979 RLR 228 (GD); *S v Barketts Transport (Edms) Bpk en 'n Ander* 1988 (1) SA 157 (AD) at 161E-I.

The facts concerning the second count are that the appellant was conveyed by Constable Munyanyi from the scene of the accident to the Harare Central Police Station. There he was taken before Insp Chaweta, who was informed that he had been involved in an accident while driving a motor vehicle and appeared to be drunk. Insp Chaweta proceeded to make independent observations of the appellant, all of which he recorded on the official "Observations: Intoxicated Persons" form. Upon completing that task, and having formed the opinion that the appellant was moderately drunk, he then prepared the breath analysis machine and, in his own words, "asked the

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accused to blow into it." The appellant responded that he "did not want to do so." Insp Chaweta did not question the refusal. He made not the slightest attempt to persuade the appellant to

change his mind, for it was his understanding that it was not proper practice to compel a suspect driver to blow into the breath analysis machine.

Cst Munyanyi also testified to the appellant's refusal. His recollection was that he heard Insp Chaweta advise the appellant "what it would mean if he did not blow into the machine." Even if it be assumed from this rather vague piece of evidence that the appellant was informed of the criminal sanction attached to a refusal, I do not consider, in the absence of any finding thereon by the trial court, that this court is in a position to resolve the conflict adversely to the appellant. Insp Chaweta was, after all, the person who dealt directly with the appellant. He made it plain that he had accepted the refusal to undertake the test without demur. He did not claim to have mentioned the consequences of such a refusal.

The narrow point, therefore, is simply whether on Insp Chaweta's evidence, the appellant's refusal to take a breath test amounted to a breach of 67(2), as read with s 67(1)(b)(i) of the Act.

In order to secure a conviction under the aforementioned provisions, the prosecution has to clear a number of hurdles. they are these:

- (i) The police officer concerned must have been of or above the rank of section officer.
- (ii) He must have had **reasonable cause to believe** that the conduct of the person concerned fell within the ambit of para (a) or (b) or (c) of s 67(1).
- (iii) He must have **required** that person to submit to a breath analysis.
- (v) The person must, **without reasonable excuse**, have failed or refused to comply with the requirement.

Unquestionably the essential elements (i), (ii) and (iv) of the offence were fulfilled. The police officer who dealt with the appellant held the rank of Inspector. He had been informed, at the time the appellant was placed in his custody, that he had been involved in a collision while driving a motor vehicle on a public road. And the personal observations he made of the appellant - that there was a smell of liquor on his breath, that

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his face was flushed, that his eyes were watery and his speech was loud - were cumulatively and objectively of enough weight to give him reasonable cause to believe that the appellant had consumed liquor to such an extent as to be incapable of exercising proper control over his motor vehicle. The appellant refused to provide a specimen of breath, and neither to Insp Chaweta nor at his trial did he proffer any excuse for such refusal.

It is as well to indicate that what is "reasonable excuse" is for the court to decide as a matter of fact. Related to s 67(2) of the act it must, I think, have to amount to a physical or mental inability to provide a specimen of breath. Perhaps the fact that the suspect driver suffered from a critical lung complaint, from an inoperable hernia, or from chronic asthma would serve. Once there is cogent foundation for the existence of such an excuse, it will be for the prosecution to eliminate

the defence, for the usual words "the proof thereof lies on him" are absent from the provision. (Compare s 37(1) of the Law and Order (Maintenance) Act [*Chapter 65*]. Being too drunk to take the test is obviously no excuse. See *R v Chapman* [1969] 2 All ER 321 (CA) at 324A-B.

Relying on the apposite *dictum* of GEOFFREY LANE J (as he then was) in *R v Clarke* [1969] 2 All ER 1008 (CA) at 1010A-B, Mr *Chatikobo* correctly submitted that the word "require", in the context of s 67(1) of the Act, connotes that there is a legal duty to submit to a breath analysis. But words must be used by the police officer which clearly impart to the suspect driver that as of right he is being asked to provide a specimen of breath. They must convey that the police officer, at his option, is entitled to make the demand. This is especially so since the suspect driver's understanding may be impaired by drink.

That this is what the law-giver intended is borne out by an examination of a number of other provisions in Part VIII of the Act in which the word "required" is used. In particular s 59(1), 60(1), 62(1), 63(1)(a) and (b), 65(1) and (2), and 66(1), similarly to s 67(2), render non-compliance with the requirement an offence. Criminal liability would hardly have been made to attach if the word "require" means no more than a request which the person to whom it is addressed may, without any justification, freely decline.

There is no set form of words which the police officer must use to inform the suspect driver that he is requiring him to take a breath test under the section. The words "I intend to give you a breath test" or "I am going to get you to blow into the breathalyzer" would, in my opinion, suffice. However, in order to

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avoid any misconception on the part of the suspect driver that he is being given a choice, I deem it advisable, even though there is no statutory requirement to do so, that he be warned that a failure or refusal to comply will, in the absence of reasonable excuse, amount to an offence. Needless to add, the fact that "his brain has not absorbed the sound of the words spoken or has not processed them into full understanding (will) not prevent that which would otherwise be a requirement from being a requirement": *per* MEGAW LJ in *R v Nicholls* [1972] 2 All ER 186 (CA) at 188g.

Insp Chaweta's evidence discloses that he did no more than to politely **request** the appellant to submit to a breath analysis. He did not formulate his request in such a manner as to make the appellant fully understand that he was compelled to do as instructed, subject, of course, to the existence of a reasonable excuse. And when the appellant indicated that he was not prepared to blow into the machine, Insp Chaweta left it at that. He neither queried why the appellant was refusing, nor did he inform him that he had a right to insist upon compliance. In short, he failed to **require** the appellant to submit to a breath analysis.

I have some sympathy with Insp Chaweta who, in an effort to get the appellant to provide a specimen of breath, was obviously at pains to treat him with a maximum of courtesy. that, however, is of far less importance than the vital right of the suspect to know whether he is obliged to comply or whether he has an unfettered right to refuse.

Finally, it should be noted that the risk of self-incrimination inherent in s 67(1) of the Act is not forbidden by s 18(8) of the Constitution of Zimbabwe. See *Poli v Minister of Finance & Economic Development & Anor* 1987 (2) ZLR 302 (SC) at 310D-E. It was for these reasons that at the conclusion of argument the appeal was allowed and the convictions on both accounts set aside.

Dumbutshena CJ: I agree.

Korsah JA: I agree.

George Seirlis & Associates, appellant's legal practitioners

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UNION CARBIDE MANAGEMENT SERVICES (PVT) LTD & ANOR v CLUFF MINERAL EXPLORATION (ZIMBABWE) LTD & ORS 1989 (1) ZLR 224 (HC)

Court **High Court, Harare**

Greenland J

Application for review of administrative proceedings

2 & 22 March 1989

Flynote

Administrative law - review of proceedings of administrative authority - failure by authority to observe peremptory provisions of legislation - effect of.

Mines and Minerals Act [Chapter 165] - s 89 - Mining Affairs Board failing to comply with provisions of when granting exclusive prospecting order - effect of.

Practice and procedure - review - late initiation of proceedings - extension of time on "good cause shown" - meaning of.

Headnote

An exclusive prospecting order was granted by the Mining Affairs Board (the second respondent) and issued by the Minister of Mines (the third respondent) in favour of the first respondent. The applicants had objected in writing when notified by the Board of the first respondent's application, but despite the peremptory provisions of s 89 of the Mines and Minerals Act [Chapter 165], they were not permitted to present evidence or arguments in regard to the grant or refusal of the order. The order was issued on 2 September 1987, but motion proceedings to bring the order under review were not commenced until 8 February 1988. Order 33 Rule 259 of the High Court Rules provides that such proceedings be instituted within eight weeks of the termination of the proceedings complained of, although the court may "for good cause shown" extend the time. No reasons were adduced to show that the applicants' dilatoriness was excusable and the respondents argued that

the applicants were barred because they were out of time.

Held, that the proceedings before the Board were irregular and the Court had the power to intervene. The provisions of s 89 of the Mines and Minerals Act were peremptory in terms and those terms were entirely breached. It could therefore be said that the Board's proceedings were a nullity and could be voided at the instance of an aggrieved or prejudiced party.

Held, further, that the words "good cause shown" in Rule 259 are of wide meaning. The word shown did not impose a particular onus on an applicant to make formal application and lead evidence on the issue of condonation. All that was required was that good cause be revealed or demonstrated. The court, in review proceedings, had an unfettered discretion in this regard, the only limitation being that the discretion be exercised judicially. This situation was different from that of appeals, where the Rules of the Supreme Court prescribed the mode and content of an application for condonation and where the court was required to be satisfied on such aspects as the reasons for the late noting of an appeal.

Held, further, that the legislature, in s 96 of the Mines and Minerals Act, had provided a clear indication of the time within which an order could be challenged. This section provides that twelve months after an order has been published, it is no longer competent for any person to allege that the Act had not been complied with prior to the making of the order.

Held, further, that as the applicants' case was unarguable and as the legislature contemplated that exclusive prospecting orders could be challenged for a period of up to twelve months, this was a proper case to condone the lateness of the application.

Cases cited:

Mafuya & Ors v City Council of Mutare 1983 (2) ZLR 226 (HC); 1984 (2) SA 124 (ZH)

S v Jussab 1970 (1) RLR 181 (AD); 1970 (3) SA 727 (RA)

Cone Textiles Football Club v Zimbabwe Football Association & Ors S-131-87 (not reported)

de Kuszaba-Dabrowski et uxor v Steel NO 1966 RLR 60 (AD); 1966 (2) SA 277 (RA)

R v Hlupo 1969 (2) RLR 344 (AD)

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

S v Franco & Ors 1974 (2) RLR 39 (AD); 1974 (4) SA 496 (RA)

Estate Geekie v Union Government & Anor 1948 (2) SA 494 (N)

Union Government & Fisher v West 1918 AD 556

Bhengu v Registering Officer for Bloemfontein Native Location 1935 OPD 108

GREENLAND J

Attorney-General, Eastern Cape v Blom & Ors 1988 (4) SA 645 (A)

Schierhout v Minister of Justice 1926 AD 99

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

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

Traube & Ors v Administrator, Transvaal & Ors 1989 (1) SA 397 (W)

A P de Bourbon SC for the applicants

J Sayce for the respondents

Judgment

Greenland J: For the sake of clarity the two applicants will be referred to as "the applicants", the first respondent will be referred to as "the respondent", the second respondent will be referred to as "the Board" and the third respondent will be referred to as "the Minister".

The applicants seek a declaration that an exclusive prospecting order granted by the Board and issued in favour of the respondent by the Minister on 2 September 1988 is invalid and of no force and effect.

In effect this court is requested to review the Board's decision to grant the prospecting order. This court has power to do so in terms of s 26 of the High Court of Zimbabwe Act No. 29 of 1981 and has the power, in terms of s 28 thereof, to "set aside or correct the proceedings or decision ... of all ... administrative authorities within Zimbabwe" if it finds, in terms of s 27 thereof, "gross irregularity in the proceedings or the decision".

The applicants complain that such gross irregularity was occasioned by the Board's failure to permit the applicants their right to present evidence and arguments "in regard to the grant or refusal" of the exclusive prospecting order, as required in peremptory terms by s 89 of the Mines and Minerals Act [Chapter 165]. The evidence presented does support this complaint. *Prima facie* therefore the proceedings before the Board were irregular and in terms of the High Court Act, *supra*, this court has the power to intervene.

Mr Sayce, acting for the respondent, submits that the applicants are barred from bringing the decision of the Board on review because they are out of time in terms of Order 33 Rule 259 of the High Court (General Division) Rules 1971. On the facts the application is clearly out of time. The decision of the Minister was issued on 2 September 1987. This application was sued out, on notice of motion, on 8 February 1988, some five months and six days thereafter. Order 33 Rule 259 of the High Court Rules *supra* reads:

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"Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or

proceeding in which the irregularity or illegality complained of is alleged to have occurred: Provided that the court may for good cause shown extend the time."

Apart from a verbal request by Mr *de Bourbon*, appearing for the applicants, that this court condone the fact, the applicants have made no attempt to show or demonstrate "good cause" for this court extending the time prescribed in Rule 259 *supra*. Not surprisingly therefore Mr Sayce submits that, in the absence of an application for condonation, this court will not exercise its jurisdiction to review the complaint. See *Mafuya & Ors v Mutare City Council* 1983 (2) ZLR 226 (HC) at 231; 1984 (2) SA 124 (ZH) at 128C-H. In that case DUMBUTSHENA JP (as he then was) was able to find good cause in facts revealed in the papers and because condonation was not opposed.

That is not the position here. There are no facts revealed which pertain to the question at hand. Unlike the learned Judge in *Mafuya supra* I am unable to discern any facts which reveal that the applicants' dilatoriness in bringing the review is excusable. No facts, factors, circumstances or reasons have been pointed to as justifying this court exercising its discretion and condoning the lateness of the application.

Does this mean that good cause has not been shown? The words "good cause shown" are of wide meaning. This has been previously recognised in *S v Jussab* 1970 (1) RLR 181 (AD) BEADLE CJ had this to say at p 183C:

"This particular section has already come before the court in decided cases. In *R v Montgomery* AD 153/69 (not reported), QUENET JP stated:

'In the context of s 382(3) of the Criminal Procedure and Evidence Act [*Chapter 31*], the word 'good', in my view, means 'sufficient' or 'satisfactory'. Having said that, I would draw attention to the remarks of Sir James Rose-Innes, in *Cohen Brothers v Samuels* 1906 TS 221, at p 224. The learned judge considered it 'hardly possible, and certainly undesirable' for the court to attempt to define 'a good cause' - that was something the court had to decide in the light of the circumstances of each case.'"

Also I do not think the words, in particular the word "shown", imposes a particular onus on an applicant to make formal application and lead evidence on the issue of condonation. I think that all that is required is that good cause

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GREENLAND J

be revealed or demonstrated. The situation must be distinguished from those various situations where the Supreme Court is required to extend periods eg for the noting of an appeal or for the prosecution of an appeal. In these instances the Rules of the Supreme Court RGN 380/1964 prescribe the mode and content of an application for condonation. The court is required to be satisfied on various aspects such as the reason for the late noting of appeal. See *Cone Textiles Football Club v Zimbabwe Football Association & Ors* S-131-87; *de Kuszaba-Dabrowski v Steel* 1966 RLR 60 (AD); 1966 (2) SA 277 (RA); *R v Hlupo* 1969 (2) RLR 344 (AD); *R v Humanikwa* 1968 (2) RLR 42 (AD) and *S v Franco* 1974 (4) SA 496 (RA); 1974 (2) RLR 39 (AD).

In my view the proviso to Rule 259 *supra* confers an unfettered discretion on this Court, the only limitation being the trite one that this discretion be exercised judicially.

The position in this matter is that the applicants' case for relief is, to my mind, unarguable on the merits. I am also influenced by the indication from the legislature revealed in s 96 of the Mines and Minerals Act. This section reads:

"After a period of twelve months has elapsed since the date of publication of an order in the *Gazette*, it shall not be competent for any person to allege that any of the provisions of this Act were not complied with prior to the making of the order."

This indicates clearly the period in which the legislature envisaged that the present order could be challenged. Whilst not conferring a right on the applicants to proceed out of time, in breach of the High Court Rules, *supra*, the section is a clear pointer to what period the legislature considers acceptable.

As already said, on the merits, the applicants' case is unarguable. Part V of the Mines and Minerals Act, *supra*, sets out *in extenso* the procedure to be followed for the granting of exclusive prospecting orders. Very simply, the applicant in such a case is required to make formal application in writing to the Board, who in turn must give notice to the public of that fact and thereafter adjudicate on the merits of such application only after fully complying with what has come to be known as the rules of natural justice. Section 89 reads:

"The Board shall, at a place and on a day fixed by it and notified to the applicant and to any person who has lodged written objection with the Board to the grant of the application, hear such evidence and arguments

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GREENLAND J

as those persons may wish to lay before it in regard to the grant or refusal of the application or any part thereof."

It is a fact that the applicants had objected in writing in response to written notification by the Board of the fact of the application by the respondent. They objected within the time stipulated in the notification. I am not impressed by the fact that the date stipulated for objection in the notification ante-ceded the date published in the *Government Gazette*. It seems to me that the Board must be taken to have deliberately fixed two dates, one for the general public, published in the *Gazette*, and one for the applicants stipulated in a written notice, for its own convenience. That it can regulate its affairs for its own convenience cannot be in doubt provided that such regulation is not unlawful and does not prejudice rights conferred by the Act.

It is also a fact that the applicants were simply not afforded an opportunity to be heard in objection as required by s 89, *supra*. The provisions of that section are couched in peremptory terms. As those terms were breached in their entirety the proceedings were entirely irregular and the applicants are entitled to relief. Because the whole spirit of Part V of the Act, *supra*, is to require adherence to the principles of natural justice and s 89 is couched in peremptory terms, which terms were entirely breached, it can be said that the Board acted *ultra vires* the Act and the proceedings were a nullity, as envisaged by precedents such as *Estate Geckie v Union Government* 1948 (2) SA 494 (N) at 502; *Union Government and Fisher v West* 1918 AD 556. Consequently an order made pursuant to such proceedings is unenforceable for want of validity: *Bhengu v Registering Officer for Bloemfontein Native Location* 1935 POD 108 at 112. Put differently it is not so much that the *audi alteram partem* rule, as envisaged by cases such as *Attorney-General Eastern Cape v Blom & Ors* 1988 (4) SA 645 (A) at 660F-662I, has not been

complied with, it is that *the statute itself has not been complied with*. Distinguish also *Mafuya supra*, which is really concerned with a common law duty to act fairly. That failure to comply with the provisions of a governing statute law render an administrative act a nullity is not in doubt. See *Schierhout v Minister of Justice* 1926 AD 99 at 109; *Rogers v Durban Corporation* 1950 (1) SA 65 (D); *Stoop v Lichtenburg Town Council* 1952 (2) SA 72 (T). It is more correct to say that such act can be voided at the instance of an aggrieved or prejudiced party. Compare *Traube & Ors v Administrator, Transvaal & Ors* 1989 (1) SA 397.

On this basis alone there can be no room for the view that only part of the order be declared invalid, a submission advanced in the alternative by Mr Sayce.

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GREENLAND J

As the Board's proceedings were irregular the resultant recommendation to the Minister and subsequent order are invalid *in toto*.

In the result therefore I hold that, as the applicants' case is unarguable and because the legislature contemplated that exclusive prospecting orders can be challenged for up to a period of twelve months it is proper to condone the lateness of the application.

As regards costs I agree with Mr *de Bourbon* that the costs were occasioned by respondent opposing the application. It must pay the price.

There will be an order in terms of the draft.

Atherstone & Cook, applicant's legal practitioners

Coghlan, Welsh & Guest, first respondent's legal practitioners

Director Civil Division of Attorney General's Office, second and third respondents' legal practitioner

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S v CHARI 1989 (1) ZLR 231 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Manyarara JA

Criminal appeal

6 & 22 March 1989

Flynote

Appeal - notice of - magistrate's duty to reply to. Criminal procedure - inconsistent previous statement -

procedure to be adopted.

Headnote

A magistrate has a duty to assist an appeal court by commenting on allegations made in the notice of appeal about misdirections on his part. It is not enough to make the routine reply "I have no comment".

The object of having a witness declared hostile is not to have the witness dismissed and excused further attendance, but to allow the prosecutor to cross-examine him. The court cannot simply declare the witness hostile on production of an apparently conflicting previous statement. The witness must be asked whether he made the statement, whether he can explain the differences, and what the truth of the matter really is. Thereafter a decision may be made. The witness's explanation for the apparent conflict may turn out to be acceptable, or it may be appropriate to impeach the witness, as provided for in s 293 of the Criminal Procedure and Evidence Act [*Chapter 59*].

Cases cited:

S v Muhlaba & Ors 1973 (1) RLR 178 (GD); 1973 (3) SA 141 (R)

R v Twetison 1964 RLR 147 (GD)

R v Loofer 1952 (3) SA 798 (C)

S v Makandigona 1981 ZLR 408 (AD); 1981 (4) SA 439 (ZA)

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

S v Chikafa S-162-88 (unreported)

1989 (1) ZLR p232

McNALLY JA

G S Wernberg for the appellant

M T Boylan for the respondent

Judgment

McNally JA: In this appeal the State conceded that there had been a gross irregularity at the trial. We agreed with that concession, and with the consequential concession that the conviction and sentence on Count 1 be set aside. Accordingly at the hearing we allowed the appeal and set aside the conviction and sentence. We announced that we would give our reasons later, and these are they. We are also required to impose a sentence on Count 2 to replace the global sentence imposed by the magistrate.

The appellant was charged with culpable homicide, alternatively negligent driving in contravention of s 43(1)(a) of the Road Traffic Act No. 48 of 1976. In addition he was charged with driving without a licence in contravention of s 6(1)(a) of the same Act. He pleaded not guilty

to the first and alternative charges and guilty to the second. He was found guilty on the second count and no more need therefore be said about it, save in regard to sentence. I will revert to that matter at a later stage.

The first State witness gave evidence to the effect the he and his friend, the deceased, were going to pray in the Harare Mosque at about 4.30 pm on 4 June 1986. While his friend was walking across the road to the Mosque the appellant reversed his emergency taxi at about 40 kilometres per hour and knocked the deceased down. The deceased died later in hospital from injuries resulting from the accident. There were some unsatisfactory features about this evidence, which was given about eighteen months after the event. In the light of what happened later in the trial it is unnecessary to say more.

The court held an inspection *in loco* and then the second State witness was called. This witness said the vehicle was reversing at moderate speed while the deceased was still on the pavement. It then hit the deceased when he was in the middle of the road.

At this point in the witness's evidence the prosecutor applied to have the witness declared hostile. The magistrate properly asked why. The prosecutor then said that his evidence was in conflict with his sworn statement, and produced it as an exhibit. Without further ado the magistrate declared the witness hostile and excused the witness. Apparently this meant the witness was excused from further attendance.

The court then adjourned for two months until 12 February 1988. After

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McNALLY JA

leading certain technical medical evidence, the prosecutor called a witness who said he was the brother of the "excused" witness. This man asserted that his brother was mentally unstable and that at that stage he could not be found.

The court then, after hearing the defence case, proceeded to find the appellant guilty of negligent driving but not of culpable homicide. Logically this verdict is incomprehensible. If the appellant was guilty of negligent driving, it must follow in the circumstances that he was guilty of culpable homicide. He was sentenced to four months' imprisonment with labour on both counts taken together.

The gross procedural irregularity arose from the magistrate's handling of the application to treat the witness as hostile. The object of such an application is not to have the witness dismissed, but to allow the prosecutor to cross-examine him. See generally Hoffmann & Zeffertt *SA Law of Evidence* 3 ed at 351-2. The magistrate cannot simply declare the witness hostile on production of an apparently conflicting previous statement. The witness must be asked whether he can explain the differences, and what the truth of the matter really is. This procedure is outlined in *S v Muhlaba & Ors* 1973 (1) RLR 178 (GD); 1973 (3) SA 141 (R). See also *R v Twetison* 1964 RLR 147 (GD); *R v Loofer* 1952 (3) SA 798 (C) at 804 *et seq*; *S v Makandigona* 1981 ZLR 408 (AD) at 411; 1981 (4) SA 439 at 441 (ZA); and Reid Rowland & Others *Prosecutors Handbook* 2 ed at p 82. Thereafter a decision may be made. The witness's explanation of the apparent conflict may turn out to be entirely acceptable, or it may be appropriate to impeach the witness

as provided for in s 293 of the Criminal Procedure and Evidence Act. All this will depend in the answers to the questions which, in this case, were never put. What happened in effect was that a witness who showed some signs of giving evidence favourable to the appellant was summarily dismissed without the State laying a proper foundation for his impeachment and without an opportunity for the defence to cross-examine.

It seemed to us, and to Mr *Boylan* who appeared for the State and properly made the concession, that the appellant had been seriously prejudiced by this irregularity. We did not consider that the State could be saved by that provision in the Supreme Court of Zimbabwe Act which permits us to overlook an irregularity where no substantial injustice has in fact resulted. (See s 11(2) of the Act and Hoffmann *op cit* pp 378-9; and compare *S v Ngara* 1987 (1) ZLR 91 (SC) at 99D-E.)

Finally it must be said that this is yet another example of a case crying out for

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McNALLY JA

a response by the magistrate to the notice of appeal. He had a duty to assist the appeal court by commenting on the allegation about his misdirection. He failed in that duty. He should not have said, routinely, "I have no comment". Compare *S v Chikafa* S-162-88, not reported; and see Order V, Rule 2(1)(b) of the Magistrates Court (Criminal) Rules 1966 (RGN 871 of 1966).

In the result the conviction and sentence on the count involving negligent driving had to be set aside. It must be said, incidentally, that the sentence was one more appropriate to a bad case of culpable homicide than to the offence of negligent driving.

It remains only to deal with matter of the sentence on Count 2. The Parties' legal representatives suggested that a fine of \$150 would in the circumstances be appropriate. We agree.

Accordingly the order of the court is as follows:

1. The conviction and sentence on Count 1 are set aside.
2. The conviction on Count 2 is confirmed, and the appellant is sentenced to a fine of \$150 or, in default of payment, one month's imprisonment with labour.

Dumbutshena CJ: I agree

Manyarara JA: I agree

Coghlan, Welsh & Guest, appellant's legal practitioners

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S v PONDER 1989 (1) ZLR 235 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

McNally JA, Manyarara JA & Korsah JA

Criminal appeal

28 March 1989

Flynote

Criminal procedure (sentence) - indecent assault - 18 - year - old youth fondling private parts of young girls he was playing with - subsequently assaulted by girls' father - appropriate sentence - foreign resident - whether suspended sentence appropriate.

Evidence - sexual cases - nature of corroboration required - witness a child - whether evidence should be corroborated.

Headnote

The appellant, a youth of 18, was a resident of South Africa holidaying in Zimbabwe with his family. It was alleged that he had briefly fondled the private parts of two young girls, who were aged seven and nine respectively, while playing with them in a swimming pool. He denied the allegations, claiming that if he had touched them, it was accidentally while picking the children up to throw them into the water. However, both children, who got out of the pool separately, reported to their parents that the appellant had touched them as alleged. The children's father was enraged at these reports and assaulted the appellant.

The appellant was convicted of indecent assault and sentenced to eight months' imprisonment with labour, none of which was suspended. He appealed against both conviction and sentence. It was argued that the magistrate erred in holding that the children's evidence was corroborative of each other.

Held, that it was not incumbent on the trial court to find that there was corroborative evidence of the complainants' evidence before returning a verdict of guilty. There is no requirement in our law that a child's

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KORSAH JA

evidence must be corroborated. Where supportive evidence is sought, it is usually in such matters as the behaviour of the victim soon after the incident; that there was an immediate report; and the culprit's behaviour after the incident. The list is not exhaustive.

Held, further, that the court does not normally seek corroboration for the evidence of one victim from the evidence of another victim who has suffered similar treatment at the hands of the same culprit, though the experiences of two victims at the hands of the same culprit may lend support as corroborative evidence to dispel a defence of accident. In the present case, that defence was negated and the magistrate rightly believed the complainants.

Held, further, that the sentence imposed was manifestly excessive. The appellant was only 18 and a first offender. Although there are dicta to the effect that there is no point in suspending any portion of a sentence imposed on a foreigner, the policy of the courts in this country is that, as much as is reasonably possible, young offenders should be protected from falling under the influence of hardened criminals by keeping them out of prison. This applies to all young offenders, regardless of their nationality and whether they are visitors. Although the offences were serious, there was no violence and the complainants suffered no physical or psychological traumas. The severe chastisement meted out by the children's father also should be taken into account.

Held, further, that a wholly suspended sentence of one month's imprisonment was appropriate.

Cases cited:

R v W 1949 (3) SA 772 (A)

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

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

DPP v Kilbourne [1973] 1 All ER 440 (HL)

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

S v Pienaar 1973 (1) RLR 112 (AD); reported *sub nom* *S v P* 1973 (2) SA 737 (RA)

S v Drummond 1978 RLR 422 (AD); 1979 (1) SA 565 (RA)

S v Markham & Anor S-185-88 (not reported)

S v Avari S-4-86 (not reported)

S v Kanyamula 1983 (2) ZLR 222 (SC); 1984 (2) SA 121 (ZS)

S v Gwarada 1981 ZLR 17 (AD); 1981 (2) SA 531 (ZA).

A P de Bourbon SC for the appellant

M Jones for the respondent

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KORSAH JA

Judgment

Korsah JA: This matter came before us for hearing on a certificate of urgency. After hearing counsel for both sides, we dismissed the appeal against conviction but upheld the appeal against sentence. We set aside the sentence imposed by the trial court and in its place substituted the following:

"A sentence of one month's imprisonment with labour, the whole of which is suspended for three years on

condition that within that period the appellant is not convicted of any offence of which indecency is an element."

We reserved our reasons for altering the sentence. Those reasons now follow.

The appellant is eighteen years of age and is a citizen of the Republic of South Africa. He had recently completed his secondary education and entertained plans of training as a pilot in the Republic of South Africa. In December 1988 he, in the company of his parents, came to Zimbabwe for their holidays.

On 29 December 1988 he was arraigned before the Magistrate's Court, Nyanga, on two counts charging with indecent assault. He pleaded not guilty to the charges and professed a total absence of intention to commit the offences alleged. In spite of his protestations of innocence and the defence put up by his counsel, he was convicted of the alleged offences and sentenced to a term of eight months' imprisonment with labour without the option of a fine. Although the appellant was a youthful first offender no portion of the period of imprisonment was suspended. He noted appeals against both conviction and sentence, and an application for bail pending appeal was turned down by the trial court. On 4 January 1989 the appellant's application to the High Court received more favourable consideration and he was duly released on bail under stringent conditions.

The complainants, whom I shall refer to as "P" and "L" are female juveniles aged seven and nine years respectively. They were on their holidays with their parents and grandmother at Troutbeck, Nyanga. At about 4.30 pm on 25 December 1988, while their parents were indulging in a game of croquet, they sought permission to go and swim in the pool within the complex. P and L, being very young children, swam in their pants. There were only two other children in the pool. While P and L were swimming in the deep end, the complainant arrived and dived into the pool. He swam to P and L and asked them if they wished to jump-by this it was understood that he would pick them up and throw them into the water. The complainants agreed.

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KORSAH JA

P was the first of the complainants who was lifted by the appellant and thrown into the water. After that L took her turn at "jumping". Immediately after she had experienced the jump she got out of the pool. Her mother, who had gone to the pool to check on the children, saw the elder of her two daughters, ie L, climbing out of the pool. She observed the back of the appellant, as he stood in the middle of the pool, and saw him reach out and gently pull her younger daughter towards him in a playful manner. By then L had put her clothes on and run onto the lawn. She overheard the appellant ask P: "Where is your mummy?". P turned round and looked towards where she stood and replied "There she is". The appellant then threw P for the second time into the air and into the water, and P swam to the edge of the pool and got out.

The above facts are, more or less, common cause, in that the appellant admits giving the complainants "a jump" while they were swimming in the pool. What now follows is disputed by the appellant.

As soon as L had got out of the pool, after her experience of "a jump", she put on her clothes and went to her grandmother to ask her to button her dress up for her, and reported to her that

the appellant had put his fingers into her pants and fiddled with her private parts. She also reported her experience of what the appellant had done to her father when the father went to where L stood with her grandmother. The father, quite properly, was greatly incensed by the report.

Upon getting out of the water P, too, made a similar report to her mother of what the appellant had done to her and related the incident, on her mother's instructions, to the father.

From the record, it is clear that the father was by this time beside himself with anger. He went to the appellant's room and assaulted him and damaged property worth \$500. While not condoning his subsequent behaviour towards the appellant, such behaviour may be explicable on the basis of a complete loss of control upon hearing the advantage the appellant had taken of the pure innocence of children of such young and tender ages.

It was suggested to both complainants under cross-examination that the appellant did not deliberately put his fingers into their pants to fiddle with their private parts and that if his fingers found their way into their pants then it was accidental and not by design. But both complainants were adamant that the appellant did so on purpose because he lifted one side of their pants and put his fingers through the side.

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KORSAH JA

The learned trial magistrate, mindful of the cautionary rule, found the testimonies of the complainants credible. In my respectful view, any other finding by the trial court would have been incomprehensible. My reasons for so holding shall be made evident later in this judgment.

It was contended before us that the magistrate fell into error when he held that L's testimony was completely corroborative of that of P and that because of the disparity in the evidence of these very youthful complainants in the chronological sequence of events their testimonies were not corroborative of each other.

In the first place, the trial court rightly believed the testimonies of the complainants, and applied its mind to the dangers inherent in founding a conviction upon such testimony without corroboration. It was not incumbent upon the court to find that there was corroborative evidence of the testimonies of the complainants before returning a verdict of guilty. As was stated by WATERMEYER CJ in *R v W* 1949 (3) SA 772 (A) at 781:

"... it is permissible for a court to convict in these sexual cases even where there is no corroboration of the complainant and even where the accused has given evidence and has not been proved to be a lying witness. But that is only the position where the court is fully appreciative of the risks involved and where the merits of the complainant and the demerits of the accused as witnesses are beyond question."

The above *dictum* in no way displaces the normal burden on the prosecution to prove the guilt of the appellant beyond reasonable doubt, but I cite it in support of the view that where there is other evidence, albeit circumstantial, which in some way supports the complainant's case, such evidence cannot be ignored.

Much more to the point, there appears to be no rigid requirement in our law that a child's

evidence must be corroborated-see the exposition of the law on this issue by McNALLY JA in *S v Santos* S-138-85 (unreported) at pp 7 and 8. See also *R v W supra*.

In the second place, with all due respect to counsel, having regard to the furtiveness associated with offences of a sexual nature, the court does not normally seek corroboration for the evidence of one victim from the evidence of another victim who has suffered similar treatment at the hands of the same culprit. Supportive evidence is sought, usually in such matters as: the

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KORSAH JA

behaviour of the victim soon after the incident; that there was an immediate report of the incident; and the behaviour of the culprit after the incident. this, by no means, is an exhaustive list of the matters to which a court may look for support of the testimony of a witness whom the court has otherwise found credible - *S v Mupfudza* 1982 (1) ZLR 271 (SC).

But the experiences of two victims at the hands of the same culprit may lend support as corroborative evidence to dispel a defence that the similarity was explicable on the basis of accident. In this wise, it is well to remember the words of LORD SIMON in *DPP v Kilbourne* [1973] 1 All ER 440 (HL) at 463b that:

"... there is no essential difference between, on the one hand, corroboration and, on the other, 'supporting evidence' or 'evidence which helps to determine the truth of the matter'. Each is evidence which makes other evidence more probable. Once it is accepted that direct evidence on one count is relevant to another by way of circumstantial evidence, it follows that it is available as corroboration if corroboration is required. Whether it operates as such depends on what weight the jury attaches to it, and what inferences the jury draws as to whether the offences demonstrate an underlying unity."

P's testimony of what transpired was that:

"He put his hand in my wee and fiddled with it a little bit and gave me a jump. He then asked my sister if she wanted to jump. She said yes and he did the same to her. He came to me a second time and asked me if I wanted to jump and I said no. He said come on. He held with his hand on my side and he put his finger on my wee for about ten seconds and gave me a jump. He asked me where my mother was and I said: 'Out there'. Where she was having lunch.

Q. Who got out of the water first between you and your sister?

A. My sister - she went out of the water, got dressed and went to granny" (the rest was hearsay evidence).

L's testimony, although it cannot be said to be corroborative of P's experience, differed fractionally in the chronology of events. She said when the appellant was in the water:

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KORSAH JA

"He asked: 'Do you want to jump' and I said yes and said to P 'Yes go first' and she said 'No you go first'.

...

He bounced me twice and my sister went next and he did the same thing."

So that, while the evidence of P gives the impression that she was the first to be bounced or given a jump, that of L implies that she, L, was the first to be bounced or given a jump by the appellant.

I do not consider this divergence in the chronological order of events to be one of great import, especially as the appellant admitted in his evidence-in-chief that:

"I was holding them with my hand on the side chest and buttocks and I would throw them up. My hand might have slipped."

Under cross-examination, when the appellant was asked why it was that his hand ended up at their vaginas, he replied:

"Water is very slippery. Their pants were wet and loose.

Q. Would you comment, L said your finger (was) on her vagina for 5-10 seconds, how come it was accidental?

A. Not in the vagina because my hand was down there.

Q. If it was accidental how come you did it twice to P?

A. I lifted her twice and my hand slipped twice."

It was clear from the foregoing that any discrepancies in the evidence of the complainants regarding the chronological order of events are of no consequence and that the appellant's defence is really one of accidentally touching the vagina of each of the complainants.

The fact that the complainants did not speak to each other in the pool after their experiences at the hands of the appellant, but made immediate reports of similar treatment suffered at the hands of the appellant, each to a different person, and the spontaneity of the father's anger against the appellant soon after the reports reached him, dispel any possibility of collaboration either between the complainants themselves, young as they were, on the one hand, and the grandmother and mother on the other.

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KORSAH JA

Had the appellant's hand slipped only once, the defence of accident might have been plausible, but in these circumstances, for his hand to slip onto the vagina of each of the complainants so often as he gave them "a jump" "it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence."

Although the trial court's judgment did not analyse the appellant's testimony critically before rejecting his defence, for the reasons above given no amount of scrutiny would, in my view, have rendered his defence probable. The regularity with which his fingers entered the pants of these young complainants and rested on their vaginas on each occasion that he purported to give them "a jump" belies the genuineness of his defence of accident.

With regard to sentence, we were of the persuasion that it was so excessive in the

circumstances as to merit interference by this court.

The appellant was only eighteen years of age. He had hitherto not fallen foul of the law. The offence, though of a serious nature, was not coupled with any degree of violence. Although the complainants registered their dislike of what the appellant did to them they frankly admitted that it had not put them in fear of the appellant. The appellant had completed his secondary education with prospects of a further training in aeronautics. His presence in Zimbabwe was due to his having taken his holidays with the rest of the family. Obviously he hails from a close-knit family and there is nothing to gainsay that he has a good family background. It struck us that this was a youthful first offender, deserving of an opportunity to reform and prove himself to be of value to his community.

Mr *de Bourbon* rightly submitted that the cases relied upon by the trial court in assessing sentence in the instant case exhibited features which are absent from the present. In *S v C* 1965 (3) SA 105 (N) a thirty-seven-year-old man was convicted of indecent assault on a young boy after threatening him with a weapon which was later found to be a toy. He was sentenced to five months' imprisonment with labour. Having regard to the maturity of the accused in *S v C supra* and the use of a weapon to achieve his purpose, the sentence of eight months' imprisonment with labour imposed in the instant appeal upon a youth of eighteen years who had employed no threat or violence appeared to us to be inordinate. And in *S v Pienaar* 1973 (1) RLR 112 (reported *sub nom*, *S v P* 1973 (2) SA 737, to which the trial court adverted in assessing sentence, the appellant had a previous conviction for indecent assault for which he had been sentenced in the magistrate's court to a fine of \$40 or four

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KORSAH JA

months' imprisonment with labour. In addition four months' imprisonment with labour was suspended on conditions. He was subsequently thereto convicted of criminal injuria and sentenced to six months' imprisonment with labour. Having regard to his previous conviction, the sentence of six months' imprisonment with labour was upheld on appeal. As Mr *de Bourbon* rightly pointed out, although mentioning it, the trial court appears to have ignored the fact that the previous conviction in the matter had been for indecent assault where a fine had been imposed.

The trial court, because of the tender ages of the complainants, rightly considered the offences to be particularly serious, but in the assessment of punishment failed to take into account the severe chastisement already meted out to the appellant by the father of the complainants. In deciding upon the sentence to impose, if regard is had to the retributive aspect of punishment then a court must take cognisance of any punishment unlawfully inflicted upon an accused person by members of the public. See *S v Drummond* 1978 RLR 422 (AD); 1979 (1) SA 565 (RA), applied in *S v Markham & Anor* S-185-88. And sight must also not be lost of the fact that the appellant served a week of the sentence imposed before he was mercifully released on bail.

Finally, the trial court was of the view that with regard to the sentence of eight months' imprisonment with labour imposed it would be pointless to suspend any portion of it because the appellant is a foreigner. There are respectable *dicta* in support of the above view expressed by

the magistrate to be found in *S v Avari* S-4-86 (unreported) where McNALLY JA said:

"... the point must be made that this court in [*S v Kanyamula* 1983 (2) ZLR 222; 1984 (2) SA 121] was not necessarily saying that three years' imprisonment was an appropriate sentence. It was saying that in a case involving a non-resident and a foreign national there is not much point in imposing a sentence suspended on condition of future good behaviour."

In *Kanyamula's* case *supra*, this court was of the view that the sentence of five years' imprisonment with labour of which two years' imprisonment with labour was suspended was, having regard to all the circumstances of the case, not so severe as to merit interference by the court, but the court was of the view that since it was not in a position to monitor the future good behaviour of the appellant the suspended portion of the sentence was superfluous. *Kanyamula* was a citizen of Malawi, a country with whose judicial system the courts of Zimbabwe have not much in common. Likewise in *Avari's* case

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KORSAH JA

supra, the appellant hailed from Bombay in India, and the same difficulties as in the *Kanyamula* case *supra*, with regard to a suspended portion of his sentence arose. But in each case this court found no reason to disturb the sentence imposed it only dealt with the superfluity of a suspended sentence.

It seems to me that the instant case raises issues which did not fall for consideration in the above-cited cases, where both offenders were mature men, one with a previous conviction and the other trafficking in drugs on an international scale. To begin with, the appellant herein is a juvenile first offender. The policy of the courts in this country is that, as much as is reasonably possible, such young offenders should be protected from falling under the influence of hardened criminals by keeping them out of jail. See *S v Gwarada* 1981 ZLR 17 (AD); 1981 (2) SA 531 (ZA). This policy is universal and must of necessity apply to all young offenders regardless of their nationality and whether they are visitors to this country, but always bearing in mind the heinousness of the offence of which they are found guilty. Secondly, the complainants, it would appear from their own testimonies, had suffered no physical or psychological traumas—they professed no fear of the appellant. Thirdly, the father had exacted his pound of flesh. Given these circumstances, it seemed to us manifestly unfair to subject the appellant to a custodial sentence of any duration.

We were also of the opinion that there is sufficient reciprocity between the normal law enforcement agencies of this country and the appellant's country of origin to make a suspended prison sentence a real threat to any such future conduct by him.

McNally JA: I agree.

Manyarara JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

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S v BISSET 1989 (1) ZLR 245 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, McNally JA & Manyarara JA

Criminal appeal

30 March 1989

Flynote

Criminal law - perjury - intent - extent to which constructive intent sufficient - negligence not enough - materiality of false statement - relevance of.

Headnote

The appellant, a legal practitioner, was convicted of perjury. He had, during the course of the trial of one of his clients, given evidence in respect of the warned and cautioned statement made by his client. Possibly misled by the way the prosecutor framed his questions in cross-examination, he had stated that he had not been present when his client was warned and cautioned. Although it was common cause that he was not present when the statement itself was recorded from his client, in fact he had been present when his client was warned and cautioned. The magistrate found a constructive intent to lie.

Held, that perjury cannot be committed by mistake; actual or legal intent is required. The concept of legal as contrasted to actual intent is well established in Roman-Dutch law, although it is not an easy concept to apply to perjury; there is always the possibility that what one says is false. The statement must be one which the accused knows to be false or does not believe to be true; negligence is not enough.

Held, further, that when, as here, one is reasoning by inference, an important consideration is whether there might be any sinister reason for the accused to lie. If an untruth is uttered on a matter of deep significance or unforgettable materiality, it may well be inferred that it was uttered deliberately (ie with actual intent) or recklessly (ie with legal intent). The inference tends in the other direction if the statement is made on a

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DUMBUTSHENA CJ, McNALLY JA & MANYARARA JA

matter of no significance.

Held, further, that there was no basis for finding, as the magistrate had, that the appellant's persistence in adhering to his story was anything more than a lapse of memory.

Quaere, whether the statement was material to the issue.

Cases cited:

S v Sigwahla 1967 (4) SA 566 (A)

R v Malianga 1962 (3) SA 940 (SR)

D M Campbell for the appellant

M T Boylan for the respondent

Judgment

Dumbutshena CJ, McNally JA & Manyarara JA: The appellant was convicted of perjury by the Regional Magistrate, Bulawayo, and sentenced to a fine of \$200 or, in default of payment, ten days' imprisonment with labour. At the hearing we allowed the appeal and set aside the conviction and sentence. What follows are our reasons for that decision.

A charge of this nature, particularly when it involves a legal practitioner, is a most serious matter. In this case the facts are almost all common cause. It is not disputed that the appellant gave evidence on oath in a trial involving a client of his, and made a statement during the course of that evidence which was factually incorrect. He said he was not present on a certain occasion when he was present. In fact there was a video tape showing beyond all question that he was there.

We consider it necessary to set out the factual situation in some detail. We begin with the fact that the appellant was legally representing a number of persons who had been detained in connection with security matters. He had been particularly busy, working long hours and interviewing his clients in detention.

On 1 February 1988 the appellant interviewed one of his clients, Maguire, between 12.45 pm and 2.45 pm at the Matabeleland North Provincial Headquarters of the Zimbabwe Republic Police, Stops Camp, Bulawayo. During this interview he says he formed the view that Maguire was confused, because it seemed to give him inordinate difficulty to relate the relevant facts in the proper chronological order. However, he managed eventually to reduce to writing the gist of what Maguire had told him. He gave this manuscript document to Maguire. The intention was that Maguire would

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DUMBUTSHENA CJ, McNALLY JA & MANYARARA JA

then go and make a warned and cautioned statement to the police, using this document as a guide or précis. All this was done with the knowledge and co-operation of the police. Maguire was preparing, on the appellant's advice, to "make a clean breast of things".

At the end of this lengthy interview appellant then handed Maguire over to the police so that they could record a statement from him. His positive evidence was that he (the appellant) then left. But in fact he did not leave at once. The video recording makes it quite clear that he remained while the preamble was put to Maguire and only left after that. He was not there while the statement was being recorded, but he was there while the preamble was put to Maguire. In fact it appears that Maguire read the preamble out loud. He then commenced to make his

statement, the recording of which was completed at about 5 pm.

The business of the preamble took, we are told, perhaps five to ten minutes. And it must be borne in mind that there has never been any denial that Maguire made the statement freely and voluntarily and without undue influence being brought to bear on him. The appellant confirmed that Maguire was in his sound and sober senses. There was no question of his being *non compos mentis*. If there had been, he would have objected to the taking of the statement. He formed the view that Maguire was confused about the facts, but he did not think that confusion was temporary. A delay would not have improved the situation. For that reason he did not object to the recording of a statement that afternoon.

How then did the appellant's presence or absence during those few minutes become an issue? What happened was that Maguire, having pleaded guilty, gave evidence in mitigation of sentence. In the course of that evidence he said he had not reported the activities of certain South African agents because one of them was a member of the Central Intelligence Organisation ("the CIO") and he did not want to get into trouble by making allegations he could not substantiate. Friendship, he said, was part of the reason but "not totally the only reason".

It was then put to him that he had put the matter rather differently in the statement of agreed facts where it was recorded: "The accused did not report this fact to the authorities because he did not wish to incriminate his friends". Maguire then explained this discrepancy by saying that his mind at the time "wasn't totally clear". It was to support this allegation that the appellant was called to give evidence as to Maguire's state of mind during the two hours he

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DUMBUTSHENA CJ, McNALLY JA & MANYARARA JA

was taking a statement from him on 1 February 1988.

The State considered that it was of some importance that Maguire had spoken of these agents as his friends, and the prosecutor was not disposed to accept his allegation that he had meant to say "friend" in the singular because only one of them was his friend. Thus the issue of whether or not Maguire was "confused" assumed some significance.

Consequently, when the appellant came to give evidence, it no doubt seemed important to the prosecutor to show that his evidence about Maguire's confusion was unreliable.

In his evidence-in-chief the appellant told how he had interviewed Maguire and he said:

"I am now able to be accurate about this because I made a note of what exactly happened from 12.15, quarter to one, during that afternoon until about a quarter to three, and I understand that immediately after my interview with him he commenced to make the statement exhibit 2 after having been warned and cautioned and so forth."

He was the cross-examined at some length. It appears from the record that the cross-examiner misinterpreted something he had said concerning the dates of Maguire's wife's detention. As a result there ensued a period during which the prosecutor and the appellant were at cross-purposes. The appellant became irritated. The prosecutor became hostile.

Then came the fateful question:

"Did I understand you correctly also to say that you were not present when the accused was being warned and cautioned in respect of this case? Are you absolutely certain about that, Mr Bisset?"

(Note that no clear distinction is made between the warning and cautioning on the one hand and the actual recording of the statement on the other). The answer was:

"I am in no doubt about that whatsoever Your Worship. What happened is that after I had finished speaking to the accused, I indicated to members of the CID, I do not remember their names, I think one of them has been Detective Inspector Ncube but my memory is not clear as far as that goes;

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DUMBUTSHENA CJ, McNALLY JA & MANYARARA JA

I think also that Mr Mbanga, Chief Superintendent Mbanga as he then was, was present.

I said to them that I had gone through and confirmed with the accused that he had not been subject to any undue pressure to make a statement. I had discussed with the accused what he was going to say and that I did not require to be present while the statement was being made. I was therefore not present when that statement was made and I left before anything further happened."

The prosecutor did not at once follow this up. He might have said: "I know you were not present when the statement was made. That is common cause. But my question was whether you were present when the preamble was put to the accused?" In fact, however, the prosecutor sheered away from the point temporarily and only reverted to it later:

"Mr Bisset, dealing again with this question of your departure from the scene prior to the recording of the warned and cautioned statement, you adhere to that evidence?

Yes."

Note how the prosecutor, clearly unintentionally, has directed the witness's mind to the wrong point. There was no "question" about his departure from the scene prior to the recording of the statement. The witness had correctly said that he had left the scene prior to the recording.

The next questions were correctly phrased:

"Mr Bisset, if I were to suggest to you that there is evidence available and the State is in a position to call such evidence readily that at the formal commencement of the warn and caution administered to your client, you and one Mr Finch were actually present in the room when the warning and cautioning was administered?

Certainly not.

Are you certain of that, Mr Bisset - and I urge you to be careful in this regard?

It is possible Mr Finch was there, certainly I was not.

And if I suggest to you that at the relevant time you were actually smoking a cigarette and offered one to the accused prior to your

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departure, what would you say, Mr Bisset?

I do not remember things like that.

Are you saying you do not remember because it did not happen or it happened but that you cannot now recall? Which is the position, Mr Bisset?

I have already said I cannot remember. I will say it again. I will say it again as many more times as I am asked."

The exchange grew sharper and then the appellant was told that there was evidence to contradict what he had said. He then said:

"Well, the question originally put to me was did I light a cigarette at the beginning of the formal proceedings when the accused was warned and cautioned. My answer to that is and remains that I was not present when the accused was warned and cautioned nor was I present when he made the statement which is now exhibit 2. I should add that some of the confusion in this matter probably arises from the fact that the Provincial Headquarters on the day that we speak of and for the rest of the week when such people as Kevin Woods were being interviewed and making statements and so forth was more rather like a movie set than a police headquarters. There were video cameras. There were I think tape recorders. When I arrived at quarter to one. or perhaps it was earlier than that I am not sure, but when I arrived on the 1st of February there was at least one video camera of which use was made taking presumably a tape of me walking into the building, perhaps conferring with Mr Maguire, perhaps indeed offering him a cigarette as counsel suggests. That is all there is in it.

Afterwards, after I had finished interviewing Mr Maguire, I am afraid I do not remember exactly what happened but I think he was taken to another room.

I may well have been, a tape may well have been taken of me coming out of the building with Mr Maguire, **but I certainly was not present when the statement was made.**"

The words emphasised show how the witness's mind was still labouring under the misapprehension earlier induced by the prosecutor, that the real and substantive allegation against him was that he had been present while the statement was being recorded.

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There can be no doubt, however, that the appellant states categorically that he was not present when the accused was warned and cautioned, when in fact he was.

Now, perjury cannot be committed by mistake. Hunt SA *Criminal Law & Procedure* Vol II 2 ed p 120 says:

"X must have the intention (actual or legal) to give false evidence. This means that he must at the least actually foresee the possibility that his evidence may be false. If, despite such foresight, he gives the evidence without qualification, he acts recklessly and has *mens rea*."

This passage was relied upon by the magistrate in convicting the appellant. He accepted that there was no actual intention to lie. He found that the appellant was "assertive and positive in his evidence in a subjectively reckless manner". He found that the appellant had a legal or constructive intent to lie.

While it is true that in Roman-Dutch law the concept of legal as contrasted to actual intent is

well established, it is not an easy concept to apply to the crime of perjury.

There is always a possibility that what we say is false, as is evidenced by the common use of the expression: "How amazing. I could have sworn that..". How does one determine whether in any particular case X harboured secret doubts about the correctness of what he asserted, unless of course there is evidence of previous conflicting statements by him?

It is perhaps easier to apply English law formula as expressed in Smith & Hogan *Criminal Law* 6 ed p 748:

"The statement must be one which D 'knows to be false or does not believe to be true'. That is, either intention or recklessness will suffice. Negligence of course is not enough." But again the court would have to be satisfied that D did not believe his assertion to be true.

Memory plays strange tricks on us all, and anyone familiar with the courts will have had many opportunities to note how it is possible for witnesses to be quite sure that something did not happen when it did or vice versa. Now

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does one judge in such a case that a witness must have foreseen the possibility that his memory might be wrong? As *Hunt* says later in the paragraph to which reference has already been made:

"If X makes a statement thoughtlessly it may not be possible to say that he believes it to be true, far less than he knows it to be true. Yet he may not foresee the possibility of falsity either; his conduct may be merely negligent."

The appellant in this case was essentially giving evidence about his client's state of mind as it emerged during the course of the two hour interview. He correctly said that he was not present during the subsequent two-and-a-quarter hour period when his client made a statement. He wrongly said he was not present during the few minutes prior to the statement, when the formality of warning and cautioning was gone through.

At no time was it suggested that anything out of the ordinary happened during these few minutes. It is not difficult therefore to understand why they should not have imprinted themselves on the appellant's memory.

Nor can one think of any sinister reason why the appellant should have lied on the subject. Suppose he had said: "Yes I think I was there while he was warned and cautioned, but left before he began making his statement". What difference would that have made? What advantage could the appellant corruptly have gained for his client by falsely denying that he was present during these uneventful few minutes? The answer must be that it would have made no difference, and that no advantage was to be gained by lying.

This consideration must be a powerful one when, as here, one is reasoning by inference. If an untruth is uttered on a matter of deep significance or unforgettable materiality, it may well be inferred that it was uttered deliberately (ie with actual intent) or in a proper case recklessly (ie with legal intent). But if it is uttered on a matter of no significance or of merely theoretical

materiality, the inference tends in the other direction.

Mr *Campbell*, who appeared for the appellant, aptly cited in this context the words of HOLMES JA in *S v Sigwahla* 1967 (4) SA 566 (A) at 570E:

"Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn."

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It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did so."

The magistrate seems to have been confirmed in his view that there was recklessness amounting to legal intention by the appellant's obstinacy in the face of advice that his movements were on video tape. The record, however, does not sustain such a view. The appellant, when told there was a video recording of his presence when Detective Inspector Ndhlovu was administering a warning and cautioning to his client, said:

"I am reasonably certain that that is not correct, yes."

He readily agreed to watch the video tape, and, when asked if that would change his mind, answered with some justification:

"How can I answer that question? If somebody shows the video tape then perhaps I can be cross-examined on it further. I have not seen it. I do not know what it shows."

It is noteworthy that when the question of showing the video tape as evidence arose the prosecutor said:

"Your Worship ...There was no suggestion - and I want that to be placed on record quite clearly here despite Mr Bisset's assertion - that Mr Bisset is being untruthful. We have made it categorically clear we are talking of faulty memory. There is no suggestion express or implied about untruthfulness."

Obviously that attitude was not sustained when it was decided at a higher level to charge the appellant with perjury.

In convicting the appellant on the basis of legal intention the magistrate was saying in effect that he was satisfied beyond a reasonable doubt that the appellant was not merely suffering from a lapse of memory, but that he knew that what he was saying might be untrue but nonetheless recklessly persisted in say it.

In our view this was a fundamental misdirection. There was no basis for thinking, let alone finding beyond a reasonable doubt, that there was anything more than a memory lapse. Insofar as he persisted when told of the video

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tape, this is not recklessness. It may be stubbornness; it may be over-weening self confidence.

But a man must be entitled to say in effect: "I am quite satisfied in my own mind that what I am saying is correct. You say you have a video tape to prove the contrary? Very well, let's see it, and then you can cross-examine me again".

To find as he did, the magistrate must have been satisfied that the appellant entertained doubts about what he said, but suppressed those doubts. We can see no basis for such a finding. Self-doubt does not suggest itself as a characteristic of the appellant. It seems to us that the most obvious interpretation of the whole unfortunate affair is that the appellant suffered a lapse of memory in regard to a minor and unimportant event and was not prepared to concede that he might be wrong. That may be a character blemish, but it is not a crime.

Having decided the matter on that basis, we find it unnecessary to decide the other question raised in the appeal, namely that of materiality. In South African law the requirement of materiality has been abolished by statute (Hunt *supra* at 114), but in Zimbabwe lack of materiality may be established as a defence, though it need not be alleged; see *R v Malianga* 1962 (3) SA 940 (SR), and the proviso to s 137 of the Criminal Procedure and Evidence Act [Chapter 59].

Materiality, however, has been defined very widely - see the examples given in Hunt, *supra*, at 114 - and we prefer to make no ruling on the facts of the present case. It is enough to say that if the false statement was material to the issue of sentence its materiality was minimal.

In the circumstances we allowed the appeal and set aside the conviction and sentence.

Scanlen & Holderness, appellant's legal practitioners

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LOGAN v MORRIS & ORS 1989 (1) ZLR 255 (HC)

Court High Court, Harare

Mtambanengwe J

Application on notice of motion

10 March & 5 April 1989

Flynote

Succession - Administration of Estates Act [Chapter 301] - s 117 - power of Master to authorise sale of asset of deceased estate otherwise than by public auction - nature of Master's discretion - when his decision may be set aside by court.

Headnote

The applicant had, before the final liquidation account of a deceased estate had been confirmed by the Master, entered into an agreement with the executor of the estate, under which the executor would sell him certain immovable property which formed part of the estate and of

which the applicant was the tenant. The agreement was made subject to the consent of the Master. That consent was sought after the account had been confirmed, but was refused because the third respondent, the beneficiary under the will of the property, who had previously agreed to the sale, told the Master that he had changed his mind and no longer wished to sell the property. The reason for this change of mind was a dispute about the purchase price.

The applicant sought a review of the Master's decision, which had been made under s 117 of the Administration of Estates Act [Chapter 301]. That section empowers the Master, if he is of the opinion that it would be to the advantage of persons interested in the estate to sell any of the property otherwise than by public auction, to grant the necessary authority to the executor so to act. It was argued on behalf of the applicant that the Master's discretion under the section is a judicial one, and could be overruled because the Master had not applied his mind to the facts. The beneficiary argued that the Master's decision is a purely administrative

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one, which can only be interfered with if he had showed *mala fides* or had failed to apply his mind to the matter.

Held, that although there were South African authorities to the effect that the Master's discretion is a judicial one, they should not be followed, because the South African legislation specifically makes every order or decision of the Master subject to appeal or review. The Zimbabwean legislation does not, and the judicial authorities dealing with similar legislation made it clear that the court on review could only interfere with the Master's decision if that decision was so grossly unreasonable as to indicate that the Master acted *mala fide* or from improper motives or that he did not apply his mind to the matter.

Held, further, that there was no suggestion of *mala fides* or any improper motive and the facts showed clearly that the Master had applied his mind to the relevant factors.

Cases cited:

Buxmann's Executors v The Master 1932 CPD 241

Coetzer en 'n Ander v de Kock NO en Andere 1976 (1) SA 351 (O)

de Hart NO v Klopper & Botha NO & Ors 1969 (2) SA 91 (T)

Kambasha Bros & Enterprises (Pvt) Ltd & Anor v Thompson NO & Anor 1970 (2) RLR 97 (GD); 1971(1) SA 155 (R);

Hartley NO v The Master 1921 AD 403

African Commercial & Distributive Workers' Union v Schoeman NO & Anor 1951 (4) SA 266 (T)

Lipschitz v Watrus NO 1980 (1) SA 662 (T).

D Middlemost for the applicant

YA *Mukadam* for the third respondent

Judgment

Mtambanengwe J: This is an application on notice of motion, in which the remedy sought is that it be ordered -

"That the second respondent [the Master] give authority to the first respondent to sell to [the] applicant certain immovable property, being Stand 1858, Stand 1859 and Stand 1860 Salisbury Township Lands for a purchase price of \$208 151,00"

and that costs of suit be paid by the first respondent.

Initially the third respondent was not cited on the papers but by consent, on the application of the applicant, he was joined accordingly.

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The facts of this matter are as follows.

The third respondent is the sole beneficiary in respect of the stands in question ("the property") by virtue of a bequest under the will of the late Elsa May Ravenscroft. The first respondent, as executor dative of the estate of the late Elsa May Ravenscroft, framed and lodged a first and final liquidation and distribution account on 6 May 1988, which properly lay for inspection in terms of s 53(10) of the Administration of Estates Act [*Chapter 301*] ("the Act") and was subsequently confirmed by the Master on 18 November 1988, no objections thereto having been noted. That account dealt with the property as not having been sold. Prior to this, in July 1988, a relative of the third respondent had, with his consent, requested the executor (the first respondent) to sell the property by private treaty. On 2 August 1988, an agreement was reached by the executor in respect of the sale of the property by the executor ("the first agreement"). The executor sought permission from the Master, but on being approached by the applicant, who is tenant of the said property and who had come to know of the agreement and claimed a right of first refusal, the executor wrote to the Master, informing him of this development. The sale agreement was not proceeded with. Subsequently, on 21 October 1988, the executor drew up another agreement to sell the property to the applicant ("the agreement"). This was signed by the executor as seller and ratified by a Mr Slater on behalf of the third respondent by virtue of a general power of attorney given to him by the third respondent. The agreement was made subject to ratification by the third respondent and "to the consent of the Master of the High Court". Apparently that consent was sought only on 28 November 1988, that is, ten days after confirmation by the Master of the first liquidation and distribution account, and the Master, by letter dated 9 December 1988, advised the executor that he was not going to consent to the sale "as the beneficiary [the third respondent] has refused in writing to [consent to] this sale". This refers to the third respondent's letter dated 30 November 1988, which reads:

"With reference to previous correspondence: I shall be very grateful if you will arrange a meeting between yourself, Mr Morris (of Morris Beale and Collins) [the first respondent] and myself to finalise the matter of my estate. I also want to place on record that I do not want to sell my property at 200-204 Rhodes Avenue, Harare."

The third respondent says in his affidavit that after the agreement had been signed he discovered certain facts which caused him to change his mind. The affidavit goes on to allege collusion between the applicant and the offeror in

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the first agreement, and certain misrepresentations to himself by the applicant, and to a Mrs Jill Anderson who, it is common cause, was a close adviser of the third respondent, which actions led to the property being sold for \$215 151,00 (less \$6 850,00, being agent's commission), instead of the \$250 000,00 which had been offered initially by the intended purchaser in the first agreement. He further alleges that the applicant, in terms of the agreement, would take transfer in the name of a nominee company controlled by the offeror in the first agreement and he, the applicant, would thus earn a commission of \$41 848,00. He related all this to the Master, hence the Master's refusal to consent to the sale of the property.

It is fair to note that these allegations are strenuously denied by the applicant and that the first respondent filed an affidavit on the request of the applicant's legal practitioners, in which he refers to certain factors which, in his opinion, make "such allegations overwhelmingly improbable". The applicant admits writing to Mrs Anderson a letter which, it is claimed, related to the said misrepresentations. Unfortunately Mrs Anderson lost her copy and the applicant has not produced his. I draw no conclusions on this because both counsel in this matter agree that should the court come to the view that the Master should not have withheld his consent without first resolving the dispute about the purchase price, then the dispute cannot be resolved on the papers and the matter should be sent to trial.

In essence, however, this application seeks a review of the Master's decision and asks the court to compel the Master to change that decision. I therefore take the view that the determination of this matter depends on whether in the circumstances the court has the power to interfere with the Master's decision. That in turn depends on the nature of the discretion exercised by the Master. The Master acted in terms of s 117 of the Act, and both counsel agree that when he so acts he exercises a discretion.

Mr *Middlemost*, for the applicant, submitted that the Master's discretion in terms of s 117 of the Act is a judicial one. In support of that contention he relied on a passage at p 129 of Meyerowitz *The Law and Practice of Administration of Estates* 4 ed and cited the cases of *Buxmann's Executors v The Master* 1932 CPD 241 and *Coetzer en 'n Ander v de Kock NO en Andere* 1976 (1) SA 351 (O). He relied on another passage at p 129 of Meyerowitz *op cit* and *Buxmann's Executors v The Master supra* for the contention that if an objection is lodged eg by an heir, the Master should not refuse to exercise his authority because of that fact alone, but should consider the merits of the objection. Following on these authorities, the thrust of his

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argument was that the Master has not exercised a judicial discretion as he has not applied his mind to the facts, that there is no substance in the third respondent's allegations that the

applicant "engineered the transaction to earn a substantial commission", and that the Master's decision was not correctly arrived at as the Master did not verify the allegations.

Mr *Mukadam*, for the third respondent, submitted that the Master's discretion in terms of s 117 of the Act is a purely administrative and not a quasi-judicial one and can only be interfered with if *mala fides* on the part of the Master or failure of the Master to apply his mind has been alleged by the applicant. He argued, in the alternative, that even if the Master's discretion is quasi-judicial the Master was justified in declining to give his consent to the sale in view of the conspiracy to induce the third respondent to ratify the sale at a much lower purchase price and/or in view of the prior confirmation by the Master of the first and final liquidation distribution account of the estate. He relied on a number of authorities in support of the main proposition that the discretion exercised by the Master is an administrative one. These will be referred to in due course.

The two cases cited by Mr *Middlemost* for the proposition that the Master's discretion is a judicial one are based on the South African Act. Mr *Mukadam* has correctly pointed out that our Act is not identical and that these decisions cannot be cited as authority in our law for the same proposition; they are clearly distinguishable. They are based on a s 95 of the South African Act 66 of 1965 (or s 107 of the old South African Act 24 of 1913). As CENTLIVRES CJ clearly states at p 246 in *Buxmann's Executors' case supra*:

"In my opinion the provisions of s 107 of the Act are sufficiently wide to confer on this Court the power to reverse the decision of the Master. That section provides, *inter alia*, that every order or decision of the Master under this Act shall be subject to appeal or review by the Court at the instance of any person aggrieved thereby and thereupon the Court may confirm, set aside or vary the order or decision."

And in *Coetzer's case supra* STEYN J at p 359 states:

"The Administration of Estates Act is the source of the Master's authority and ss 35(10) and 95 of the Act provide that his decisions are reviewable by the Court."

Our Act does not have a section similar to s 95 (or 107) of the South African equivalents; and clearly Meyerowitz *op cit* bases the statements on p 129

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(relied on by Mr *Middlemost*) on *Buxmann's Executors' case supra* and STEYN J at p 359 in *Coetzer's case supra* specifically refers to both that passage and *Buxmann's case supra*.

Section 117 of our Act reads as follows:

"If after due inquiry, the Master is of the opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise than by public auction he may, if the will of the deceased contains no provision to the contrary, grant the necessary authority to the executor so to act" (my emphasis).

Mr *Mukadam's* first contention is that the words "if ... the Master is of [the] opinion" clearly show that the legislature intended to confer a purely administrative discretion not a quasi-judicial one. He cited first the case de *Hart NO v Klopper & Botha NO & Ors* 1969 (2) SA 91 (T), where at p

96 TROLLIP J stated:

"It is clear that the Master's decision under s 23(11) is reviewable by the Court under s 157, as amended by s 44 of Act 99 of 1965 (see *Jooste v Laubscher* 1926 WLD 99 at 100-1). It is convenient here to examine the extent of the power to review. Mr *Eloff*, for the first respondents, contended that the Master's decision under s 23(11) was administrative and discretionary, and that there being no allegation of *mala fides* or irregularity, the only question on review was whether, on the facts as laid before the Master at the time, he had in fact exercised his discretion and not whether he had exercised it correctly. Cases such as *Hartley NO v The Master & Anor* 1921 AD 403 and *Schenker v The Master & Anor* 1936 AD 146 were relied upon in support of that contention. In each of these cases the particular provisions of the Administration of Estates Act 24 of 1913 endowed the Master with an administrative discretion in the matter. That is not the position under s 23(11). According to that subsection, the Master, before granting the certificate 'that the property therein is so claimable', must be satisfied on the facts made known to or ascertainable by him that the two elements (1) and (2) canvassed above are present. **There are no words in the subsection, such as for example, 'in his opinion' or 'if he deems fit' committing that decision to his subjective view of the facts or the granting or refusing of the certificate to his discretion.** It is a judicial, not an administrative, decision. That distinguishes *Hartley's* and *Schenker's* cases *supra*" (my emphasis).

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The next case cited by Mr *Mukadam* in support of his contention is *Kambasha Brothers & Enterprises (Pvt) Ltd & Anor v Thompson NO & Anor* 1970 (2) RLR 97; 1971 (1) SA 155 (R), where at p 156 Beck J (as he then was) stated thus:

"For the applicants, Mr *Thompson* submitted that, if the Legislature had intended the Chairman's jurisdiction under s 138(1) to depend on his own opinion of the existence of extreme urgency or other exceptional circumstances, it would **have expressly inserted into the section prefatory words, such as: 'Where, in the opinion of the chairman'. No doubt, the inclusion of such words would have made the Legislature's intention clear, but the absence of such an express indication is not, by itself, conclusive**" (my emphasis).

Though his Lordship went on to discuss other pointers to the Legislature's intention, what is significant is the remark that the inclusion of prefatory words make the Legislature's intention clear. That is the position here. Those words in our Act, to use TROLLIP J's language in *de Hart NO v Kloppe* *supra*, commit the Master's decision to his subjective view of the facts or the granting or refusing of his authority to his discretion, an administrative discretion. And as BECK J said in *Kambasha's* case *supra*:

"Once he has exercised this discretion and formed his opinion, a Court on review cannot find absence of jurisdiction merely because the Chairman's opinion is not one at which the Court would itself have arrived; its powers of interference are limited to those grounds on which review jurisdiction is exercisable which are referred to in *Clan Transport Co (Pvt) Ltd v Swift Transport Services (Pvt) Ltd & Ors* 1956 (3) SA 480 (FSC) at pp 488-490."

That is, that the court will only interfere with the Master's decision if it is so grossly unreasonable that it indicates that the Master acted *mala fide* or from improper motives or that he did not apply his mind to the matter.

In the present case, while no allegations of acting *mala fide* or from improper motives are made, it was contended for the applicant that the Master did not apply his mind to the facts. The facts before the Master were that the first and final liquidation and distribution account of the deceased's estate had been lodged and had been approved by him without any objections. The

property in question was, in that account, indicated as not sold; there were no debts still to be paid. The third respondent was entitled to claim transfer of the property into his name from the executor and the executor was to all intents

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and purposes *functus officio*. The request for the Master's authority to sell the property by private treaty came after all this and the third respondent, as the only person interested, approached him, stating that he no longer wanted to sell his property because, according to him, there had been collusion between an offeror and the applicant to reduce the offer from \$250 000 to \$208 157 and the applicant himself approached the Master. The Master's report and the letters he wrote to first respondent on the subject clearly shows that he applied his mind to these factors. He says that in his opinion:

"I construed the letter dated 30 November 1988 from Mr Hawkins as amounting to a repudiation by himself of what G Slater had consented to on his behalf and this explains why I wrote to the first respondent in the terms stated in Annexure E to the applicant's founding affidavit."

The third respondent gives in his affidavit (pp 19-21 of the papers) detailed particulars of the allegations he makes of the collusion between the applicant and the person who first offered to buy the property, as he says, at \$250 000, and says he related all this to the Master.

Apart from those already mentioned above, there are also the following authorities in support of the proposition that the Master's discretion is an administrative decision with which the court cannot interfere, and that conclusion derives from the use in the relevant empowering statute or particular sections thereof of words or phrases such as: "The Master, if it appears to him ...", as appears in s 51 of the South African Administration of Estates Act 1913. In that connection, in *Hartley NO v The Master* 1921 AD 403 INNES CJ stated:

"For the matter is left to his entire discretion. The test is what he thinks with regard to prejudice, not what we think. We have no power to compel him to change his mind in respect of a question which he has duly considered."

A similar phrase is "whenever the Minister is of the opinion ..." as appeared in reg 2 of the War Measures Act 145 of 1942. The court held in *African Commercial & Distributive Workers' Union v Schoeman NO & Anor* 1951 (4) SA 266:

"The question is not whether objectively a dispute as defined in the Regulations has arisen, but whether or not in the opinion of the Minister such a dispute has arisen. Unless it is shown that the Minister has not fairly and *bona fide* considered the question or has not observed the

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principles of natural justice or has come to a conclusion that is so grossly unreasonable that no reasonable man could have come to such a conclusion, the Court is not entitled to interfere and to substitute its opinion for that of the Minister."

In *Lipschitz v Watrus NO* 1980 (1) SA 662 (T) MYBURG J reviewed the provisions of the South African Administration of Estates Act, the Insolvency Act and the Companies Act, relating to the

powers of the Master to appoint executors, provisional as well as final liquidators, where the words "if in the opinion of the Master" or "he is of the opinion" are used, and concluded at p 671 by stating:

"As to any such provisional appointment the Master has an unfettered and sole administrative discretion and it is within his enacted powers to give directions to his staff about such appointments."

He cited the judgment of INNES CJ in *Hartley NO v The Master supra* at p 671H-672 (partly cited above) and, at p 672A-B, a passage of MAASDORP JA's judgment in the same case which reads as follows:

"I have said that the discretion of the Master is full and absolute and cannot be interfered with by this Court. But supposing this Court is of opinion that the Master is wrong, which I do not suggest, should the Court - for his future guidance - point out where it thinks he erred? I do not think that the Court is called upon to do so, and by laying down any legal proposition for the future guidance of the Master it would indirectly interfere with his absolute discretion. And even if the mode of instructing the Master were proper, it would in my opinion be utterly futile, considering the infinite variety of circumstances under which applications of this sort come before the Master."

The above review of the authorities makes it unnecessary to consider Mr *Mukadam's* alternative submission as these authorities make it abundantly clear and satisfy me that there is no basis in the present case for interfering with the Master's decision. Whether in the circumstances of this case the applicant has other remedies against the third respondent, that he has to decide for himself and I need not express any views on it.

Accordingly the application is dismissed with costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Gollop & Blank, third respondent's legal practitioners

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NDHLOVU v REGIONAL MAGISTRATE, EASTERN DIVISION & ANOR 1989 (1) ZLR 264 (HC)

Court **High Court, Harare**

Adam J

Application for review of criminal proceedings

30 March & 5 April 1989

Flynote

Criminal procedure - review - of uncompleted proceedings - power to be exercised only in exceptional circumstances.

Headnote

The applicant had been convicted of fraud before the respondent but before sentence was

passed applied to the High Court for the conviction to be set aside and the matter to be referred to the respondent for the hearing of further evidence. The witness whom the applicant sought to have heard had been out of Zimbabwe for some, but not all, of the period during which the trial took place. The trial had begun on 3 January and judgment was delivered on 28 February; the witness had left on the 13 January and returned on the 25 February. The applicant had not sought any postponement of the trial to see whether the situation regarding the witness might change. The magistrate, having seen an affidavit from the witness, averred that the witness's evidence would not have affected his verdict.

Held, that the High Court's statutory powers of review under s 29 of the High Court of Zimbabwe Act 1981 can be exercised at any stage of criminal proceedings before an inferior court. The court in any case has an inherent power of review. However, in uncompleted cases this power should be sparingly exercised only in those rare cases where otherwise grave injustice might result or justice might not be obtained. Where a trial magistrate performs his functions in a proper and regular manner the High Court will not interfere. It is desirable that the actual merits of cases be speedily disposed of and that any decisions which are wrong in law

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be corrected in the ordinary way, by way of appeal.

Held, further, that in this case the regional magistrate had observed the normal formalities in a criminal trial and the conviction was not erroneous. It could not be said that grave injustice had been done to the applicant. No illegalities had been committed by the magistrate. The applicant had the normal review and appeal rights open to him. The case had no peculiar, exceptional or cogent features which brought it within the ambit of an exception to the general rule.

Held, further, that since the evidence of the witness was not such as to alter the verdict given, there were no grounds for remitting the matter for the hearing of further evidence.

Cases cited:

Rascher v Minister of Justice 1930 TPD 810

Ginsberg v Additional Magistrate of Capetown 1933 CPD 357

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

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

S v Sibanda 1978 RLR 182 (GD); 1978 (3) SA 217 (R)

S v Hutchings 1970 (1) RLR 176 (GD); 1970 (3) SA 453 (R)

S v Sibanda HB-139-88 (not reported)

S v Moyo 1978 RLR 316 (GD); 1978 (4) SA 538 (R)

Benatar v Regional Magistrate, Eastern Division & Anor HH-376-85 (not reported)

Bonadei v Magistrate of Otjiwarongo & Anor 1985 (3) SA 92 (SWA)

Levy v Benatar 1987 (4) SA 693 (ZS)

Ismail & Ors v Additional Magistrate, Wynberg & Anor 1963 (1) SA 1 (A)

S v Sithole 1979 RLR 412 (GD); 1980 (1) SA 356 (ZR)

D P Carter for the applicant

A Chikumira for the respondents

Judgment

Adam J: The applicant by notice of motion seeks an order that the conviction of the applicant by the Regional Magistrate for the Eastern Division on 28 February 1989 for fraud be set aside and the matter be remitted to the same Regional Magistrate for the hearing of further evidence from Senator Kantibhai Patel. The High Court of Zimbabwe Rules 1971, under Order 31, provides for review proceedings. Rule 258 permits the hearing of a matter less than twenty-four clear days after date of service if the respondent agrees in writing to a shorter period or the court orders a shorter period. The

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Regional Magistrate has indicated in his affidavit that he agrees to the matter being heard within a shorter period and there is a consent for the matter to be set down for a hearing on 30 March 1989 signed by the legal practitioner for the applicant and by the legal practitioner for the State.

I should point out that the record of proceedings discloses that the applicant was convicted on 28 February 1989. On that date he was remanded to 8 March 1989 for sentence, at which time the matter was further remanded to 22 March 1989 to permit the applicant to make an application for a review. Again on 22 March 1989 there was a further remand until 7 April 1989. On 22 March 1989 the prosecution objected to a further remand on the basis that up to that period no application had been made to the High Court, that also the applicant should be sentenced and that if the applicant wanted to lodge an appeal he could do so and the appeal court could decide on the issue of hearing further evidence from Senator Patel.

In the supporting affidavit to the notice of motion the applicant's legal practitioner states that the trial commenced on 3 January 1989 and on 28 February 1989 the applicant was convicted. He indicated that in the course of the defence case it was intended to interview Senator Patel with a view to calling him as a witness, but enquiries revealed before the trial commenced, that Senator Patel was out of the country. Senator Patel's son had been called as a witness for the defence and had said that Senator Patel was in India and that the date of his return to Zimbabwe was not known and could not be established at that time. The affidavit also states that, soon after addresses had been delivered in regard to sentence, Senator Patel had

returned to Zimbabwe. By 1 March 1989 a statement had been taken from Senator Patel. Further, the applicant's legal practitioner avers that the evidence of Senator Patel would be highly relevant to the issue of guilt and from his evidence the Regional Magistrate may well take a different view of the guilt of the applicant. It was accepted by the Regional Magistrate that failure to call Senator Patel during the trial was in no way the fault of the defence or an error of judgment.

In his affidavit, attached to the notice of motion, Senator Patel says that during August/September 1981 a group of musicians from India were brought to Harare and they stayed with him. This group of Indian musicians went to the ZBC for a recording session; payment received from the ZBC by these musicians was donated to the Hindu Temple. There was an approach from the Ministry of Information's Production Services and he spoke to the applicant, whom he knew. He and the group of Indian musicians went to the

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Production Services and were received by the applicant and taken to the studio. The applicant left at that stage and the musicians were filmed (a full session, about three-quarters of a day). Senator Patel also appeared in the film but he did not see the completed film from Production Services. He says that at that time there was talk, initiated by some of the people at Production Services, that the group of Indian musicians should receive some payment and that was clearly the intention at that time. Any payment received by these musicians would have been treated as a donation to the Hindu Temple. He had never had occasion to go to Production Services before nor did he go again afterwards. Within a week or so after this these musicians left Zimbabwe. During the session he prepared a memorandum for Production Services giving the background on the musicians, on the instruments and on the music itself. He had done likewise for the ZBC. He never submitted a claim or received payment. He states that he was in the Soviet Union until 3 January 1989, returned to Harare and left for India on 13 January 1989 returning on 25 February 1989. He indicates that he was asked to make this sworn statement on 1 March 1989.

In his affidavit, the Regional Magistrate denies that the evidence of Senator Patel would be highly relevant to the issue of guilt and that in light of that evidence he may well take a different view of the Applicant's guilt. He admits that he accepted that the failure to call Senator Patel was not in any way the fault of the defence or an error of judgment but, he states, the applicant chose not to seek a postponement of any kind in order to see whether the situation regarding Senator Patel might change or become clear. He indicates that on reflection this could arguably be said to be an error of judgment.

He also deals with the law applicable to review. With regard to the statutory grounds under s 27 of the High Court of Zimbabwe Act 1981 (those of bias, gross irregularity or absence of jurisdiction) and the provisions of s 29(3) of the same Act (which provides that no conviction may be set aside on review as a result of any irregularity or defect in proceedings, unless there has been a substantial miscarriage of justice), he asserts these are not applicable in the present case, since there has not been any irregularity or defect in the proceedings before him

nor has any substantial miscarriage of justice occurred in these proceedings.

He agrees that he did mention in his ruling that Senator Patel's evidence could have an important bearing on the case but at that time he had not seen Senator Patel's affidavit nor had he been advised as to what Senator Patel would say

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during the trial. His ruling was delivered *ex tempore* and he did not pay meticulous attention to the wording of it, as he intended to decide the application on a different point, that is, that even assuming Senator Patel's evidence to be conclusive, there was no legal way of getting that evidence before him prior to sentence, as the applicant was trying to do by asking the Regional Magistrate to set aside the conviction.

With regard to Senator Patel's affidavit, the Regional Magistrate says that that evidence was likely to contradict rather than support the applicant and if Senator Patel were to give evidence along the lines of his affidavit, this would have no bearing on the verdict given.

It will be useful for purposes of this decision for me to summarise the law that is applicable. The power of a superior court to review the proceedings of an inferior court covers various stages in a criminal proceeding before an inferior court, that is, prior to conviction, after conviction but before sentence, and after sentence has been passed by an inferior court.

Part IV of the High Court of Zimbabwe Act 1981 enumerates the High Court's statutory powers of review. Section 26 provides that, subject to the provisions of the Act and any other law, the High Court has review powers over all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities. Section 27(1) provides that subject to the provisions of that Act and any law, the grounds of review are absence of jurisdiction, bias and gross irregularity in the proceedings or decision. Section 27(2) provides that nothing in that particular section shall affect the provisions of any other law relating to review of inferior courts, tribunals or authorities. Section 29(1)(b) provides that for purposes of reviewing any criminal proceedings the High Court may hear any evidence in connection with the proceedings. Section 29(2) states that if on review of any criminal proceedings the High Court considers that the proceedings are not in accordance with real and substantial justice it has the power to do various things, including the power to alter and quash the conviction or to set aside or correct the proceedings or "generally give such judgment or make such order as the inferior court or tribunal ought in terms of any law have given, imposed or made on any matter which was before it in the proceedings in question." Section 29(3) specifically provides that no conviction or sentence shall be quashed or set aside in terms of s 29 by reason of any irregularity or defect on the record of proceedings unless the High Court considers that a substantial miscarriage of justice has actually occurred. Section 29(4) states that, subject to the rules of court, the powers under section 29(1) and (2) may

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be exercised whenever it comes to the notice of the High Court that any criminal proceedings are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court or have not been submitted to the High Court for review.

It is clear from the foregoing that the statutory powers of review under the High Court of Zimbabwe Act, 1981 can be exercised at any stage of criminal proceedings before an inferior court.

Further, the authorities indicate that this court has an inherent power of review. In *Rascher v Minister of Justice* 1930 TPD 810 at 820 KRAUSE J said:

"... a wrong decision of a magistrate in circumstances which would seriously prejudice the rights of a litigant would justify the Court at any time during the course of the proceedings in interfering by way of review ...

The above principles were laid down in a civil case, and they would apply with greater force where the proceedings are of a criminal nature and a miscarriage of justice might result in the circumstances from a wrong decision of the magistrate or where the rights of an accused person are seriously affected thereby."

In *Ginsberg v Additional Magistrate of Cape Town* 1933 CPD 357 at 360 GARDINER JP observed:

"Now, as a rule, the Court's power of review is exercised, only after termination of the criminal case, but I am not prepared to say that the Court would not exercise that power ... before a termination of a case, if there were gross irregularity in the proceedings."

In *Wahlhaus v Additional Magistrate, Johannesburg & Anor* 1959 (3) SA 113 (A) at 119-120 OGILVIE THOMPSON JA (as he then was) said:

"It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief - by way of review, interdict or *mandamus* - against the decision of a magistrate's court given before conviction ...

This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The

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learned authors of *Gardiner and Lansdown* (6 ed Vol 1 p 750) state:

'While a superior court having jurisdiction on review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained ...In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.'

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts. I would merely add two observations. The first is that, while the attitude of the Attorney-General is obviously a material element, his consent does not relieve the Superior Court from the necessity of deciding whether or not the particular case is an appropriate one for intervention. Secondly, the prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's

decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not *per se* necessarily justify the Supreme Court in granting relief before conviction."

In *Ellis v Visser & Anor* 1956 (2) SA 117 (W) at 120-122 MURRAY J (as he then was) considered *Ginsberg v Additional Magistrate of Cape Town supra* and observed that the learned JUDGE-PRESIDENT in that case dealt with a case in which the trial magistrate tried the accused in his absence in circumstances where such trial was not permitted. The learned JUDGE-PRESIDENT said this was one of the exceptional and unusual cases where the trial magistrate had acted with gross irregularity and had not discharged the functions entrusted to him. GARDINER JP's view was that where a trial magistrate performs his functions in a proper and regular manner the Superior Court would not interfere. Referring to *Rascher v Minister of Justice supra*, MURRAY J indicated that as far as what KRAUSE J had said was concerned, if that meant that any wrong decision by a trial magistrate on a point of law was given in the course of a criminal trial was subject to immediate interference by the superior Court he would hold that he did not agree with that. MURRAY J went on to state at 123-124:

"Even assuming that I have the discretion to interfere in exceptional cases

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I see no reason whatsoever for using that discretion in the applicant's favour, and see considerable reason against exercising my discretion in the applicant's favour ...

The grounds counsel asked me to consider were really this: That the title to prosecute is a *sine qua non* and the applicant would be subject to hardship if the case was allowed to proceed further, and that there would be repetition of matters which would cause him to be involved in publicity of an extremely undesirable character from his point of view. It was also pointed out that he would be put to costs and that he was not certain that he would be able to recover from the prosecutor if acquitted. It was also pointed out that the case would be a protracted one and that there would be claims on the applicant's time as a result of this.

I cannot see that, in regard to these matters, the applicant is in any worse position or suffers any greater hardship than any person who is prosecuted and eventually acquitted.

...There are a number of objections which may be taken apart from embarrassment in a case against an accused person; there are special pleas ...

and there are matters of exception or objections to the plea and the indictment presented. All of these matters can be decided and are decided by the magistrate. If the applicant's contention in this case is correct, then in every one of these cases where a decision is taken by a magistrate there would be just as much reason as in the present case for the accused person to claim that this matter must be decided *in limine* without awaiting the results of the merits of the case. The result would, I think, create chaos - one envisages a succession of appeals .. whereas it is desirable that the actual merits should be speedily disposed of; and any decisions which are wrong in law should be corrected in the ordinary way by way of appeal, as there can be no miscarriage of justice, no abuse of process of the Court if the ordinary procedure is followed."

I turn now to the submissions made by Mr *Carter* for the applicant that by virtue of s 26 of the High Court of Zimbabwe Act 1981, this court has power of review to quash a conviction before the resumption of the proceedings for sentencing and that s 29(4) enables this court to intervene at any stage of the proceedings of an inferior court to correct injustice which is brought to its notice. But the power of this court under s 26 is specifically made subject to the provisions of that Act and, as already mentioned, s 27 provides the grounds of review are an

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in the proceedings or the decision. None of the foregoing grounds are alleged by the applicant as the basis for this Court's review.

On the other hand s 29(2) and (4) provides that when any criminal proceedings are not in accordance with real and substantial justice this court may alter or quash the conviction or set aside the proceedings. However, s 29(3) states that no conviction shall be quashed or set aside by reason of any irregularity or defect in the record of proceedings unless substantial miscarriage of justice has actually occurred.

The applicant's contention is that the provisions of s 29(2) and (4) allow an injustice to be corrected. Reliance was placed on *S v Sibanda* 1978 RLR 182 at 185; 1978 (3) SA 217(R), *S v Hutchings* 1970 (1) RLR 176 and *S v Sibanda* HB-139-88. However, in *S v Sibanda* 1978 RLR 182, reference was made by GUBBAY J (as he then was) to *S v Hutchings supra*. He observed at p 185:

"The unusual course adopted by the magistrate is permissible ... In *S v Hutchings* 1970 (1) RLR 176 (GD); 1970 (3) SA 453 (R), GREENFIELD J held that this power may be invoked to quash an erroneous conviction before the resumption by the magistrate of the proceedings for sentencing the accused."

In *S v Sibanda* HB-139-88 the accused had pleaded guilty to theft and sentenced to 15 months' imprisonment with labour (of which 3 months was conditionally suspended for 5 years). The proceedings had been confirmed by a judge of the High Court. The accused brought review proceedings to set aside the trial proceedings. In his petition, he said that he should have pleaded not guilty but did not do so because of the wrong advice given by the police, to the effect that he should plead guilty as he would get a fine and keep his job as a security guard. This was done in the presence of his aunt who also swore a supporting affidavit. At the hearing of the review matter the State conceded that the investigating officer unduly influenced the accused, a simple minded person who had never been in court before. MUCHECHETERE J observed:

"While I agree that there must be finality to proceedings I however consider that this court has power to intervene at any stage of the proceedings of any inferior court to correct an injustice which is brought to its notice - see s 29(4) of the High Court of Zimbabwe Act 1981 ...

In my view the above includes the present case where the proceedings

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were reviewed before there was notice of some injustice in the proceedings. It would of course be otherwise if the judge who reviewed the case earlier has notice of the injustice.

In this case ... the investigating officers unduly influenced the accused ... to proffer a plea he would not otherwise have. There was therefore real and substantial injustice in the proceedings ...

The conviction is therefore quashed and the sentence is set aside. The matter is remitted to the Magistrates Court for trial *de novo*."

The foregoing may be in keeping with what this Court has done in the past. In *S v Moyo* 1978 RLR 316 at 322; 1978 (4) SA 538 (R) at 542 GUBBAY J (as he then was) observed:

"Mr Reid-Rowland rightly conceded that in a proper case a Judge's certificate of confirmation may be withdrawn by himself or, where he is not available, by another Judge. See *R v Hughes* 197 O(1) SA 156 (R); *S v Maseko* 1971 (4) SA 475 (T). He cited as "proper cases" instances of where it is subsequently found that there has been an irregularity in the proceedings, or a mistake, or where facts are discovered which, if known, would have resulted in the original certificate being withheld. There is a respectable accumulation of authority in support of this proposition. See, for example, *R v Madlelana* 1936 EDL 140 at 141; *R v Coetzee* 1950 (1) SA 101 (C) at 104-105; *R v Dube* 1967 RLR 101 at 103A. He contended, however, that regard must be had to the maxim *interest reipublicae ut sit finis litium* and referred to *S v Franco & Anor* 1974 (4) SA 496 (RA) at 497H ...

Unlike the appeal procedure, which requires a convicted person to note and prosecute his appeal within certain prescribed periods, there is no time limit placed on the power of review.

...

The criterion is always whether the proceedings are in accordance with real and substantial justice. If a certificate of confirmation was issued, justice nonetheless demands that it be recalled. In the words of HOLMES J, as he then was, in *R v Pirison* 1959 (1) SA 102 (N) at 102G-H:

'...the Judge has flexible powers to ensure that the proceedings are in accordance with justice.'

While it is in the interests of justice that litigation should come to finality, that principle, in proceedings of this nature, must be weighed against the gravity of the punishment to which the individual was unjustly sub-

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jected. Each case must be considered on its own merits and a value judgment reached."

On the above basis the foregoing case and *S v Sibanda* HB-139-88 can be distinguished from the present case since the trial proceedings there had been terminated. Also, as mentioned above, each case must be considered on its own merits.

In *S v Hutchings supra* this court interfered prior to sentencing for the purpose of quashing an erroneous conviction brought to its attention by the trial magistrate. While in *S v Sibanda* HB-139-88 this court, after the proceedings had, as far as conviction and sentence were concerned, been confirmed, decided to set aside the proceedings on the basis of an irregularity that had occurred in a guilty plea having been recorded as a result of undue influence.

I should point out that a clear distinction can be made between the instant case and the above authorities relied upon by the applicant. The Regional Magistrate has observed the normal formalities in a criminal proceeding for the conviction entered by him and it is not an erroneous conviction. Further, there has not been any irregularity in the criminal proceedings before him.

Reliance was also placed by the applicant on *Benatar v Regional Magistrate, Eastern Division & Anor* HH-376-85, where in a private prosecution Benatar sought review of the decision of the Regional Magistrate who had dismissed the pleas by Benatar that Levy had no title to prosecute Benatar on any of the charges. EBRAHIM J, after reviewing the various authorities including

Walhaus v Additional Magistrate Johannesburg supra and *Bonadei v Magistrate of Otjiwarongo & Anor* 1985 (3) SA 92 (SWA), concluded that this court had the power to interfere in appropriate cases in the decision of an inferior court where a gross irregularity has occurred in that decision prior to the conclusion of those proceedings. He held that it would be unjust to have the criminal trial proceed before the Regional Magistrate since an incorrect dismissal of a plea amounted to a gross irregularity. He found that Levy was not entitled to bring any of the charges against Benatar. On appeal (*Levy v Benatar* 1987 (4) SA 693 (ZS)) GUBBAY JA had his to say at 696:

"Somewhat surprisingly, it was not sought to persuade the learned presiding Judge, EBRAHIM J, that, as the criminal proceedings before the regional magistrate had not terminated and as the essence of the complaint was not that a gross irregularity had been committed but rather that

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the regional magistrate had simply erred in dismissing the special pleas, the normal and proper course was for the respondent to await the result of the trial on the merits and if a conviction ensued, to appeal to the Supreme Court. See, for instance, *Ellis v Visser & Anor* 1956 (2) SA 117 (W) at 119F-120A; *Walhaus & Ors v Additional Magistrate, Johannesburg & Anor* 1959 (3) SA 113 (A) at 119D-120A; *Bonadei v Magistrate of Otjiwarongo & Anor* 1985 (3) SA 92 (SWA) at 98B-C). It would seem that counsel representing both parties were *ad idem* in requesting the learned Judge to review the decision of the regional magistrate. Nonetheless EBRAHIM J properly gave careful thought to whether he ought to do so, for he appreciated that in the context of unconcluded criminal proceedings the inherent power of review is to be sparingly exercised."

In *Bonadei v Magistrate of Otjiwarongo & Anor supra*, BERKER JP said at 97-98:

"Mr *Seligson*, in short, submitted that the present case was one which clearly fell within the ambit of the exceptions in which this Court would interfere in the pending proceedings inasmuch as the proceedings themselves were a nullity and that the applicant would be gravely prejudiced if this Court would not at this stage intervene.

From the arguments advanced and the authorities quoted it is clear that normally speaking the Court will not interfere, either by way of appeal or review, in unconcluded proceedings in an inferior court, but that it nevertheless has the power, which it has in a number of cases exercised, to interfere where 'grave injustice might otherwise result or where justice might not by other means be obtained' ...Whether or not a particular case falls within the relatively rare cases depends on the circumstances of each case, and the Courts have consistently refused to lay down in general the exception to the general rule."

It was submitted on behalf of the applicant that this is one of those cases where grave injustice would result if the conviction were not set aside and the matter remitted for the hearing of evidence from Senator Patel. It was argued that should the applicant be sentenced now he would be prejudiced in light of the provisions of ss 42 and 70 of the Constitution of Zimbabwe. Under s 42 of the Constitution, a member of the House of Assembly or the Senate who is convicted in Zimbabwe of a criminal offence and is sentenced to a term of imprisonment of 6 months or more shall cease forthwith to exercise his functions and to be entitled to any remuneration, but if an appeal is made and

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as a consequence of its disposal favourable to such a member he will not have to vacate his seat but will be entitled to resume his functions and receive remuneration for the period during which he ceased to exercise his function. As for s 70, that provides that if a Minister or a Deputy Minister is required to cease to exercise for any period his functions as a member of the House of Assembly or the Senate he will not during that period exercise any of his functions as a Minister or Deputy Minister. It follows that on being sentenced (and as his legal practitioner has advised the applicant will lodge an appeal), although he will cease to exercise his functions as a member of the House of Assembly should the sentence be a 6 month (or longer) term of imprisonment there would not be any financial prejudice to the applicant if his appeal was successful or the sentence were altered to less than 6 months' imprisonment.

It was the submission on behalf of the State that it has not been shown that there has been an injustice which would permit this court to interfere. Mr *Chikumira* argued that it could not be said that this was one of those rare cases justifying this court's intervention before sentence.

On the authorities it is clear that a superior court will not ordinarily interfere by way of review before the conclusion of the proceedings in the inferior court, but this court in the exercise of its inherent jurisdiction will, in rare cases in uninterminated proceedings before an inferior court, intervene where "grave injustice might otherwise result or where justice might not by other means be obtained."

In this case, up to the stage of conviction it cannot be said that grave injustice has been done to the applicant in the proceedings before the Regional Magistrate. No illegalities have been committed by him. Further, it is open to the applicant to seek review proceedings after the termination of the proceedings. There is also a right of appeal, which he intends to exercise and which empowers the Supreme Court to remit the matter for new evidence: *Ismail & Ors v Additional Magistrate, Wynberg & Anor* 1963 (1) SA 1 (A) at 6.

I hold that this case is not one of those "rare cases" where this court would be entitled in the exercise of its inherent jurisdiction to interfere before the applicant is sentenced. It has no peculiar, exceptional or cogent features and, in my view, cannot be brought within the ambit of an exception to the general rule that is ordinarily applicable. To grant the relief sought by the applicant in these circumstances and at this stage of the proceedings would create a most undesirable precedent and have the effect of interrupting the continuity

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in the proceedings in the court below.

In his affidavit, the Regional Magistrate correctly states that superior courts have repeatedly emphasized that powers of review over uninterminated proceedings before inferior courts should be exercised exceedingly sparingly and that, as far as he was concerned, there was no possibility of grave injustice in the present case. Also, he was of the opinion that the applicant could get the same access to relief after he had been sentenced. In light of this it is most difficult to comprehend why he should have granted a further adjournment over the strenuous objections of the State. It could be maintained that he has in some measure contributed to the

interruption in the continuity of the proceedings before him, which this court has on a number of occasions warned against, holding that this should not be permitted to happen as it is most prejudicial to the proper and due administration of justice, which prohibits a piece-meal resolution of issues tried in the courts.

On the assumption that I may have arrived at a wrong conclusion that this case does not constitute a rare case for this court's intervention, it is incumbent upon this court to determine whether there are grounds for a remittal for the hearing of further evidence. In *S v Sithole* 1979 RLR 412 at 419; 1980 (1) SA 356 (ZR) at 363, WADDINGTON J observed:

"The conditions which must obtain before a reviewing court will order the re-opening of a trial ...are well known. These were summarized by HOLMES JA in the case of *S v de Jager* 1965 (2) SA 612 (AD) at 613 as follows:

- '(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
- (b) There should be a *prima facie* likelihood of the truth of the evidence.
- (c) The evidence should be materially relevant to the outcome of the trial."

I should point out that HOLMES JA went on to state at 613E-F that:

"Non-fulfilment of any one of these requirements would ordinarily be fatal to the application, but every case must be decided on its particular merits."

[The learned Judge examined the affidavit of Senator Patel.]

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I am satisfied that the evidence that is intended to be secured from Senator Patel is not such as would alter the verdict given by the Regional Magistrate.

Accordingly, I refuse to review the matter in the manner sought by the applicant and the Regional Magistrate is directed to proceed to sentence the applicant. The application is dismissed with costs.

Kantor & Immerman, applicant's legal practitioners

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S v MUPAH 1989 (1) ZLR 279 (SC)

Court Supreme Court, Bulawayo

Dumbutshena CJ & Korsah JA

Criminal appeal

2 August 1988 & 6 April 1989

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Flynote

Evidence - similar fact evidence - when may be proved in order to convict.

Headnote

Evidence of a previous offence is admissible to rebut a defence of accident or innocent intent and to show a systematic course of conduct by the accused. This is so whether or not the accused has been convicted of that offence. There must not only be similarity between the previous acts and those in issue, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. The discreditable acts of the accused must share with the discreditable conduct in issue features of such an unusual nature and striking similarity that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence.

Where the accused has been acquitted in one case, it would be wrong, in order to obtain a conviction in a later case, to seek to show that the accused was guilty in the first case. This does not mean that evidence relating to the first case may not be called to show what the accused's intent was in the second; it means that it is impermissible, in the second case, to rely on the accused's guilt in the first if he has been acquitted in the first case.

Cases cited:

R v Sebeso & Ors 1943 AD 196

Makin v Attorney-General for New South Wales [1894] AC 57

R v Pharenque 1927 AD 57

R v Smith [1914-15] All ER Rep 262 (CCA); (1915) 11 Cr App R 229

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DPP v Kilbourne [1973] 1 All ER 440 (HL)

R v Mackie (1973) 57 Cr App R 453

Boardman v DPP [1974] 3 All ER 887 (HL)

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

Harris v DPP [1952] 1 All ER 1044 (HL); [1952] AC 694

G (an infant) v Coltart [1967] 1 All ER 271 (QB)

R v Difford 1937 AD 370

N Lang for the appellant

K Esat for the respondent

Judgment

Korsah JA: Four counts charging the theft of four motor vehicles were preferred against the appellant. The fourth count also charged him, in the alternative, with the use of a vehicle without consent. The appellant was acquitted on the first and third counts, and convicted on the second and the alternative to the main charge in count four. On the second count he was sentenced to serve a term of three-and-a-half years' imprisonment with labour, and on the alternative to count four he was sentenced to undergo six weeks' imprisonment with labour. The conviction and sentence in respect of the second count alone are the subject of this appeal.

At all times relevant to the charges preferred against the appellant, he was a detective constable in the Zimbabwe Republic Police attached to the Car Theft Section in Bulawayo. The vehicles, the subject matter of all four counts were in the custody of the Car Theft Section, Bulawayo. Custody of each one of the vehicles in the first three counts was given up by the Car Theft Section as a result of a release of each vehicle by the appellant to someone other than the owner. The complaint of the appellant is that the learned trial magistrate erred in fact and in law by relying on facts adduced in evidence in support of counts on which the appellant had been acquitted as establishing similar fact evidence, or evidence of a system, in order to support the conviction of the appellant on the second count. This attack stems from the following statement which appears at page four of the judgment.

"I propose therefore to deal with the evidence of each count but we must remember that if criminal conduct shows a system then it is not improper for the court to look at the common features in all counts when considering the evidence overall. If authority is wanted for this you can look at *R v Sebeso & Ors* 1943 AD 196."

Mr *Lang* for the appellant submitted that the *Sebeso* case is distinguishable

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from the instant appeal because the trial court in that case relied on evidence of similar facts which had been proved in order to convict the accused persons of certain offences to ground their conviction on a similar offence; whereas in the present appeal similar facts which did not support the conviction of the appellant on similar charges were relied upon to found a conviction on the second count.

The circumstances under which evidence of acts relied upon to establish the guilt of an accused person in one case may be introduced upon his trial on a similar charge have always presented great difficulty. It is perfectly clear that evidence of a previous offence is admissible to rebut a defence of accident or a defence of innocent intent. What, to Mr *Lang* was unclear was whether evidence of acts by an accused person which had not resulted in a conviction may be receivable as evidence of similar facts for the purpose of grounding a conviction. There is authority of persuasive force that such evidence is receivable and may be used to ground a conviction.

In *Makin v Attorney-General for New South Wales* [1894] AC 57 Makin and his wife were tried

for the murder of a baby which, it was alleged, they had informally adopted upon a small payment made to them by the infant's mother. The sum paid was inadequate for support of the child beyond a limited period. Apart from other damaging evidence adduced, the prosecution adduced evidence of other mothers who had similarly given up their babies to the couple for adoption upon payment of meagre amounts to the accused. Evidence that thirteen bodies of infants had been found on three different sets of premises occupied at different times by the accused was held to be relevant to rebut any possible defence of accidental death, and to show a systematic course of conduct by the accused.

LORD HERSCHELL, who delivered the opinion of the House, said at p 65 of the report:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime

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charged in the indictment were designed or accidental, or to rebut a defence which otherwise would be open to the accused."

Makin had not been convicted of the murder of the other thirteen infants before evidence of the circumstances of their deaths were received to show systematic conduct on the part of the accused. The reasoning in *Makin's case* *supra* was adopted by INNES CJ in *R v Pharenque* 1927 AD 57 at 59-60.

In *R v Smith* [1914-15] All ER Rep 262 (the "brides in the bath" case) there was no direct evidence that the accused had killed his wife by holding her under water in the bath, as alleged by the prosecution. There was, however, the undoubted fact that Mrs Smith had drowned in her bath on her honeymoon. Indisputable "similar fact" evidence that two other brides of Mr Smith had been drowned in their baths on their honeymoons was tendered to buttress the prosecution's allegation that Mr Smith was guilty of the offence charged. This evidence, the truth of which was not open to challenge, provided very strong circumstantial evidence that the accused had committed murder. This evidence of similar circumstances was held to be admissible to exclude coincidence where there was no other evidence either of the fact of killing or the intent. Smith had not been convicted of the murders of his two former brides, nor probably could he have been convicted of such other murders, but the similarities in the circumstances in which each of the wives came to her untimely end had, to borrow the language of LORD SIMON in *DPP v Kilbourne* [1973] 1 All ER 440 at 463g, "such an underlying unity between the offences as to make coincidence an affront to common sense."

Under the heading: "Theory of evidencing Design or System", Wigmore on *Evidence* expounds on the kind of evidence now under consideration at s 304 of his work thus:

"when the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's Design or Plan to do it. This in turn may be evidenced by conduct of sundry sorts, as well as by direct assertions of the design. But where the conduct offered consists merely in the doing of other similar acts, it is obvious that

something more is required than that mere similarity, which suffices for evidencing intent. The object here is not merely to negative an innocent intent at the time of the act charged but to prove a pre-existing design, system plan, or scheme, directed forward to the doing of that act. In the former case (of intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a

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definite prior design or system which included the doing of the act charged as a part of its consummation. In the former case, the result is to give a complexion to a conceded act, and end with that; in the present case, the result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed.

The added element, then, must be, not merely a similarity in the results, but **such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations**" (emphasis mine).

Nowhere in this exposition of the law is there a suggestion that similar fact evidence which is relied upon to prove the *modus operandi* must have been accepted and relied upon to convict the accused of a similar offence. Indeed, such evidence invariably takes the form of acts done by the accused on occasions other than those relating to the offence charged. And as *R v Mackie* (1973) 57 Cr App R 453 illustrates, it is evidence of the acts themselves which is relevant, and not the evidence of any conviction which may have resulted from those acts.

In *Mackie's* case *supra* the appellant was convicted of the manslaughter of a boy aged three to whom he stood *in loco parentis*. The prosecution had tendered evidence of past excessive chastisement of the boy by the appellant, in order to explain the child's fear of the appellant, which was relevant to explain the circumstances in which the boy fell downstairs while attempting to escape from being ill treated by the appellant. Although the appellant had not suffered convictions upon the allegations of those prior excessive chastisements, it was held -

"... that evidence of previous injuries to the"

boy for which the appellant was responsible, was receivable to prove the boy's state of mind and not the disposition of the accused. This evidence of similar facts was an important link in the chain of evidence leading to the conviction of the appellant, and the Court of Appeal refused to disturb the verdict because of its acceptance.

As the learned author of *Cross on Evidence* 6 ed puts it at p 312 of his work:

"In more analytical and less descriptive terms the evidence tending to show other discreditable acts, and through them the disposition of the accused to commit the discreditable act in issue, was admissible to

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corroborate circumstantial evidence both of the commission of the *actus reus* of the crime and the *mens rea* required for it."

But for such evidence to be receivable and acted upon by a court of law those discreditable acts of the accused must share with the discreditable conduct in issue features of such an unusual

nature and striking similarity that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence. See the comments of LORD SIMON in *DPP v Kilbourne supra* at 463 approved by LORD HAILSHAM in *Boardman v DPP* [1974] 3 All ER 887 at (HL) 905c and applied by GUBBAY JA in *S v Ngara* 1987 (1) ZLR 91 (SC).

I think the following words of LORD SIMON in *DPP v Kilbourne*, *supra*, at 463b clearly explain the legal position:

"... there is no essential difference between, on the one hand, corroboration and, on the other, 'supporting evidence' or 'evidence which helps to determine the truth of the matter'. Each is evidence which makes other evidence more probable. Once it is accepted that direct evidence on one count is relevant to another by way of circumstantial evidence, it follows that it is available as corroboration, if corroboration is required. Whether it operates as such depends on what weight the jury attaches to it and what inferences the jury draws as to whether the offences demonstrate an underlying unity."

What then was the evidence upon which the appellant in the instant case was convicted?

It was common cause that at the time the four motor vehicles, the subject matter of the four counts preferred against the appellant, were released from the possession of the Bulawayo Car theft Section as a result of a release by the appellant to someone other than the owner.

Count 1 was in respect of a Ford Anglia motor vehicle which was entered in the Car Theft Exhibit Book as Ex 61/82 and as relating to entry No. 9/82 in the Bulawayo Central Criminal Record. It was received by the Car Theft Section on 6 May 1982. The name of the suspect was left blank as no one had been apprehended for the theft of the vehicle. Column 6 in the Car Theft Exhibit Book noted that enquiries were being made into theft of the vehicle. Column 7 gave the description of the vehicle as: Ford Anglia, registration 244-234N. Column 8 listed the owner of the vehicle as Joan Ramode

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Corvalho of 19 Harding, North End, Bulawayo. Columns 9 and 10 were blank and Column 11 indicated that references to the vehicle had been carried forward to Ex 5/83. Ex/ 5/83 contains the same information as above given except that in column 9, which provides for the signature of the complainant when collecting his property, and which was left blank in Ex 61/82, now appears the name J Voster, 4 Myrtle Road, Rowena. Column 1 indicates that the date of disposal was 29 July 1983. And column 11 had the signature of the appellant and his force number as the person responsible for the release.

The documentary evidence from Ex 5/83 in respect of Count 2 was that on 18 May 1983 Detective Constable Moyo entered a white sedan Peugeot 404 in the Exhibit Book. Column 8 listed the owner of the vehicle as John Gasson of 3 Percy Avenue, Hillside. In column 9, appears a signature purporting to be that of John Gasson with the inscription "see Quicks' invoice 5266 dated 22/8/83", which implied that Quicks' had towed the vehicle away. The disposal of this vehicle by the appellant on 22 August 1983 was attested to by the appellant's signature in column 11.

Count 3 involved a light green Peugeot 404 station wagon which was entered by Detective

Sergeant Nkosana onto Ex 59/84. The registration number was 16-511W. The owner indicated in the record book was one Fanny Ticharambana of Block 84/2544, Mpopoma. this vehicle was also disposed of by the appellant, but the person to whom the vehicle was released did not sign his name under column 9 to indicate that he had received the vehicle.

Investigations mounted on these three vehicles released by the appellant revealed that Joan Voster to whom the vehicle in Count 1 had allegedly been released was not known by anyone at the address furnished and did not reside at that address. With regard to the Peugeot 404 sedan in count 2 which was allegedly towed away by Quicks on 22 August 1983 as witnessed by an invoice No. 5266 of even date, Quicks' had no record of towing this vehicle away, because they did not keep records of that nature. Quicks', however, issued a copy of invoice No. 5266 on 20 February 1985 to cover the towage from Stops Camp to Modern Motors to the appellant.

As a result of information received, the investigating officer travelled to Masvingo, where he recovered the Ford Anglia mentioned in Count 1 from S and Y Garage and left it with the CID in Masvingo. The vehicle had been sold to a Sergeant Svatwa of the ZRP.

The investigating officer also proceeded to No. 20 Elliot Road in Masvingo

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where he recovered the Peugeot 404 sedan mentioned in Count 2 from one John Ngara.

With regard to the Peugeot station wagon, the subject of count 3, the investigating officer found out that the vehicle had been handed over to Dawn Motors Sales after it was disposed of by the appellant. the appellant wrote a note signed by him to Dawn Motor Sales (Ex 3) indicating that this vehicle had been cleared.

During investigations in Masvingo the investigating officer proceeded to the appellant's farm which the appellant had visited whilst driving a Datsun Pulsar the subject matter of a car theft case (Ex 26/85) and the property described in count 4. This vehicle ought to have been entered in the books of Car Theft Section on 3 January 1985, but was entered on 15 January 1985 after the appellant had returned with it from Masvingo.

Returning to the Ford Anglia (count 1), the documentary evidence discloses that that car was in the hands of the police on 6 May 1982, and the owner was indicated as Joan Ramode Corvalho. Without a change of the ownership of the vehicle being recorded, the vehicle was released by the appellant to J Voster on 29 July 1983. Yet according to the Vehicle Register Voster had possession of the vehicle on 10 February 1982 before Corvalho had possession. On 31 October 1982 the identity of the owner of the vehicle was left blank, but on 24 November 1983 the Ford Anglia was registered in the name of Levison Mupah - the appellant herein. On 30 April 1984 the same vehicle was registered in the name of Lameck Collen Svatwa, ZRP Zimuto Masvingo.

With regard to the Peugeot 404, the subject matter of count 2, the vehicle, at the time it came into the hands of the police on 3 June 1986, was registered in the name of John Gasson of Percy Avenue, Hillside, Bulawayo. On 22 August 1983 the vehicle was allegedly towed away by

Quicks on the authority of John Gasson. On 12 January 1984 it was registered in the name of Langton Mukwidzah of 29 Baxter Road, Khumalo, Bulawayo. There is no indication as to how the vehicle came into the hands of Mukwidzah. And it was finally registered in the name of Mischeck Ngara, 20 Elliot Street, Masvingo.

The Peugeot 404 station wagon, in count 3, was, from the records, recovered from Fanny Ticharambana. Checks from CVR records revealed that the registration number on that vehicle was assigned to a yellow Pulsar saloon

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registered in the name of Echo Car Hire on 4 March 1982.

There are, of course, certain features which appear to be common to all the counts preferred against the appellant.

1. The appellant released all three vehicles from the custody of the Car Theft Section.
2. The appellant hails from Masvingo.
3. All three vehicles in the first three counts were recovered in Masvingo.
4. The appellant visited Masvingo in the fourth vehicle.

But there are also obvious dissimilarities in the evidence in support of each count.

- (a) Voster, to whom the vehicle in count 1 was released did not exist.
- (b) John Gasson, to whom the vehicle in Count 2 was released, could not be found, but a signature purporting to be that of Gasson was given for the release of the vehicle.
- (c) Fanny Ticharambana from whom the Peugeot 404 station wagon was recovered did not sign his/her name, but the appellant gave a clearance note to Dawns Motors.
- (d) The appellant rode in the fourth car to his farm in the Masvingo area and returned in it.

It seems to me that underlying unity from which a court may infer that the release of the vehicle in count 2 was not accidental, but designed, did not exist in the evidence in support of the other counts. No doubt, the fact that all the vehicles were released by the appellant and were retrieved in Masvingo from where he hails heaps grave suspicion on the appellant but as VISCOUNT SIMON cautions us in *Harris v DPP* [1952] 1 All ER 1044 at 1048F:

"... evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt. This is the ground, as it seems to me, on which the Judicial Committee of the Privy Council allowed the appeal in *Noor Mohamed's* case [1949] 1 All ER 370. The Board there took the view that the evidence as to the previous death of the accused's wife was not relevant to prove the charge against him of murdering another woman, and, if it was not relevant, it was at the same time highly prejudicial."

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In *Harris v DPP supra*, the appellant, a member of the City of Bradford police force, was tried on an indictment containing eight counts charging him with office-breaking and larceny on a series of dates from May to July 1951, by breaking into and entering the premises of a company of fruit and vegetable merchants situated in an enclosed market and stealing various sums of money. In every case the money stolen was only part of the amount which the thief might have taken. In every case the same means of access was used, and in every case the theft occurred in a period during part of which the appellant was on duty in uniform in the course of patrolling the market, and, apparently, at an hour when most of the gates were closed to the general public. On the first seven of these occasions, there was no further evidence to associate the appellant specifically with the thefts. On the eighth occasion, however, the appellant was on solitary duty in the market. He was found by two detective officers just outside the premises when they rushed to the spot upon hearing the ring of a bell actuated by the thief's weight when he stepped on the floor of the shop. On this occasion, marked money, which had been placed in the till, had been abstracted but it was not found on the appellant when he was arrested. It had been concealed in a coal-bin not far away from where he was first seen. The two detective officers were well known to the accused, but he claimed that he did not recognise them. By the time the detectives reached the premises, the appellant had disappeared from view and a little later came running up to join them. The time which elapsed between their first sight of him and his return was just sufficient to enable him to have reached the coal bin and returned to them (the above facts are taken from the judgment of VISCOUNT SIMON).

The appellant was acquitted on the first seven counts, but convicted on the eighth count. The main contention on appeal was that evidence on the first seven counts, when the appellant was not shown to be near the premises when the thefts occurred could not be advanced by the prosecution or considered by the jury as part of the material to prove the charge under the eighth count.

The learned trial judge treated the evidence cumulatively, and it was not clear whether the jury had been influenced by the evidence on the first seven counts to return a verdict of guilty on the eighth count. The majority of their Lordships felt it would be unsafe to sustain the conviction in such circumstances, and as it could not be determined that no substantial miscarriage of justice had occurred, allowed the appeal.

In *G (an infant) v Coltart* [1967] 1 All ER 271 the appellant was convicted on two offences of larceny. The appellant was employed as a domestic

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servant by Mr and Mrs Tod at the relevant time. She was informed by the Tods that their guest, a Mrs Doig, who was Mrs Tod's aunt, would be returning to South Africa the following day. On the day of Mrs Doig's departure, the appellant's room was searched and a considerable amount of jewellery belonging to Mr and Mrs Tod and Mrs Doig was discovered. The appellant admitted taking all the jewellery, but said she had always intended to return the goods to their respective

owners.

She was charged on two summonses: one in respect of Mrs Doig's goods; and the second with regard to the goods of Mr and Mrs Tod. As Mrs Doig was in South Africa at the time of the appellant's trial, the prosecution took the view that her absence made it impossible to pursue the summons in respect of her goods; although the appellant had admitted taking them and the only issue for determination was her intention in taking the said goods. The prosecution therefore, consented to the summons in respect of Mrs Doig's goods being dealt with first and the appellant being acquitted.

In the Tod case the prosecution, in order to prove the appellant's intention permanently to deprive the Tods of their property, sought to rely on the first fact that even though Mrs Tod had told the appellant that Mrs Doig was leaving for South Africa the following day the appellant had not returned Mrs Doig's jewellery to her. This was tantamount to saying that the appellant was guilty of the offence of which she had just been acquitted.

The trial magistrates held that they were satisfied that the appellant had no intention of returning Mrs Doig's jewellery and so were equally satisfied that she had no intention of returning the Tod jewellery. SALMON LJ and LORD PARKER CJ said at 274H on the report:

"There is very little authority on this point. I think, however, on general principles that it would be quite wrong to allow the prosecution, in order to obtain a conviction in case B, to seek to show that the Accused was guilty in case A, after the accused had been acquitted in case A. I have no doubt, that, even although the accused is acquitted in case A, evidence called against the accused in case A could be relevant in case B, for example to show what his intent was in case B. It can never be permissible, however, in case B to rely on the guilt of the accused in case A if he has been acquitted in case A. In the present instance, unless the appellant was guilty of stealing Mrs Doig's goods, the evidence about her taking Mrs Doig's goods and being told that Mrs Doig was leaving on September 24, 1965, would have been quite irrelevant. The only

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relevance of the evidence tendered by the prosecution was to show that she was in fact guilty of that offence; and I am satisfied that this is what they cannot do."

In the present appeal, that portion of the learned trial magistrate's judgment reciting that -

"... if criminal conduct shows a system then it is not improper for the court to look at the common features in all counts when considering the evidence over all..."

indicates that the trial court considered the evidence on all four counts cumulatively, and it is unclear to what extent he had been influenced by the evidence on the other counts to arrive at the conclusion he did in respect of count 2. Beyond the common features that I have already indicated, there was nothing in the evidence in support of the other charges which implicate the appellant in any material particular with the offence in count 2.

It was contended that, even disregarding the similar fact evidence, there was sufficient evidence adduced in support of the conviction on count 2.

The evidence placed before the court was that John Gasson was recorded in the Exhibit book by DC Moyo on 18 May 1983, as the owner of the vehicle, the subject matter of count 2. On 22

August 1983, the vehicle was released by the appellant with the notation that it had been towed away by Quicks. The notation bore a signature purporting to be that of John Gasson.

John Gasson was not called as a witness for the prosecution to disprove the implied assertion that the vehicle was released to him by the appellant. But Quicks, two years after the incident, issued the appellant with a receipt purporting to be a copy of a receipt for payment of towage, which receipt Quicks, in fact, did not have.

On 12 January 1984, the vehicle was registered in the name of one Langton Mukwidzah. Thereafter, the appellant visited his uncle Mischeck Ngara at his home in Masvingo and left the vehicle at his uncle's house for two weeks on the allegation that he had no petrol for the vehicle, but later indicated an interest in selling the vehicle. A deal was concluded whereby the appellant's uncle paid \$2 730 leaving an outstanding balance of \$70. It was after this deal that the appellant delivered to his uncle a registration book which gave out that Langton Mukwidzah was the owner of the vehicle.

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An agreement of sale of the vehicle, Ex 7, was placed before the trial court in support of the appellant's assertion that he acted as a middleman between Langton Mukwidzah as the seller and his uncle Mischeck Ngara as the buyer. Mischeck Ngara told the court that Langton Mukwidzah's signature was already on the document when he was asked to sign the agreement. But prior to the agreement being taken to Mischeck Ngara, the vehicle had been at his house for two weeks, and he had agreed to purchase it when the appellant in a telephone conversation informed him that the owner of the vehicle was desirous of selling the vehicle because he was unemployed. It was during that telephone conversation that the terms of the sale were agreed upon. Therefore, nothing turns on the fact that the appellant arrived at his uncle's house with an agreement already signed by the seller together with the registration book for the vehicle. Yet the trial court appeared to have envisaged something sinister in the manner in which the agreement was concluded without a meeting of the principal parties.

The learned trial magistrate in his "Reply to the Notice of Appeal" stated that:

"When enquiries were made about this vehicle DSO KANJAKWA made enquiries to locate the given address of this LANGTON MUKWIDZAH to find there was no such address and even at a similar address such person was unknown."

It is to be noted that Joan Voster, whose name appeared in the Exhibit Book as the owner of the vehicle in count 1, likewise could not be traced at the address furnished in the Exhibit Book or at any other likely address. Of Joan Voster, the Vosters of Bulawayo had no knowledge, but all that the learned trial magistrate made of this was:

"The court cannot however find on the evidence that Voster did not exist. Certainly her name appears as the owner before you started in Car Theft Section. There is a great deal of suspicion surrounding this vehicle."

John Gasson's name, it seems to me, also appeared in the Exhibit Book before the appellant was transferred to Car Theft Section, and so I am unable to understand why the inability to locate Gasson should reflect adversely on the appellant's defence, unless the trial court

reasoned that the inability of the police to find the owner of the vehicle in count 1 was not improbable, but to fail in locating the owners of two vehicles released by the appellant, allegedly to their owners, is more than a coincidence, which typifies an erroneous application of the rules governing "similar facts" evidence.

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The learned trial magistrate was of the view that the appellant's knowledge of Langton Mukwidzah, being limited to a few meetings and playing darts at a city hotel, was insufficient to explain his not inconsiderable participation in his transaction concerning the vehicle in count 2. He therefore concluded "that the transaction surrounding the removal of this vehicle from police custody, its disposal by the appellant to his uncle on behalf of an apparently non-existent person are so fraught with subterfuge and suspicion that no court could come to any conclusion other than (that) the appellant unlawfully removed it and disposed of it in circumstances that amount to theft."

While I agree with the learned trial magistrate that the circumstances in which this vehicle was removed and sold to the appellant's uncle was fraught with suspicion, suspicion alone is not sufficient to sustain a conviction. The assertion that the vehicle was released to Gasson was not disproved, and from then on any number of probabilities could be inferred from the evidence. The circumstantial evidence in support of the State's case does not lead inexorably to the conclusion that the appellant stole this vehicle from the custody of the Car Theft Section in Bulawayo.

The appellant gave an explanation of how the vehicle, after being released to Gasson, came to be possessed by his uncle. It is true that Mukwidzah could not be found, but so also were the police not able to trace Voster. As was stated in *R v Difford* 1937 AD 370 at 373:

"If he (the appellant) gives an explanation, even if the explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable but that beyond any reasonable doubt it is false."

It could not be said that the appellant's explanation, though fraught with suspicion was, beyond a reasonable doubt, false. I am, therefore, of the view that it would be unsafe to sustain the conviction on the evidence adduced in support of this count.

In the result the appeal succeeds. The conviction on count 2 is quashed and the sentence imposed consequent upon that conviction is set aside.

Dumbutshena CJ: I agree.

Ben Baron & Partners, appellant's legal practitioners

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MINISTER OF LABOUR, MANPOWER PLANNING & SOCIAL WELFARE & ORS v PEN

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TRANSPORT (PVT) LTD 1989 (1) ZLR 293 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

6 April 1989

Flynote

Administrative law - administrative decision - judicial review of - limited grounds for.

Practice and procedure - motion proceedings - notice of motion - formalities in - grounds of relief and nature of relief sought must be stated.

Headnote

The respondent company sought to dismiss an employee on grounds of failing to perform his duties satisfactorily. It claimed that the employee was serving a three-month probationary period, terminable by either party on twenty-four hours' notice. The employee declined to accept the dismissal, claiming that he was not serving such a period and that his dismissal was unlawful. He referred the matter to a labour relations officer in terms of the Labour Relations Act 1985. That officer found that the employee's contract of employment was not for a fixed period and so had been unlawfully terminated. Instead of appealing to a regional hearing officer in terms of the Act, the respondent brought the proceedings before the labour relations officer on review before the High Court.

The notice of motion did not comply with Rule 227(2) of the High Court Rules, in that the notice simply asked for the relief particularised in the draft order annexed; the notice itself did not indicate the nature of the relief sought. The notice was also defective in that the founding affidavit did not set out the first of the two grounds of review relied upon. The judge did not deal with the defects in the papers, but instead embarked

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on an investigation into the facts, finding that the contract had been for a fixed period and that the labour relations officer was not empowered to make the determination he did. On appeal,

Held, that practitioners should take more care in the future to avoid shortcomings in the papers such as were present in this case.

Held, further, that if the respondent considered that the labour relations officer's finding was unreasonable on the evidence, its remedy lay in its right to appeal to a regional hearing officer. Unless it could aver (which it did not) that the labour relations officer's determination was so unreasonable as to be explicable only on the basis of *mala fides* or ulterior motive or a failure to apply his mind to the case, examination by way of judicial review was not open to it.

Held, further, that even if the contract had been one for a fixed period of three months, the respondent had terminated the employee's services before the end of the period, which itself was unlawful under the relevant regulations.

Cases cited:

Utterton v Utterton 1969 (2) RLR 404 (GD); 1969 (4) SA 391 (R)

Ellis v Morgan; Ellis v Dessai 1909 TS 576

Clan Transport Co (Pvt) Ltd v Swift Transport Services (Pvt) Ltd 1956 R & N 120; 1956 (3) SA 480 (FSC)

Edwards & Sons (Pvt) Ltd v Stumbles NO & Anor 1963 R & N 68 (SR); 1963 (2) SA 140 (SR)

Cone Textiles (Pvt) Ltd v Ayres & Anor 1980 ZLR 347 (AD); 1980 (4) SA 728 (ZA)

B Q P Simelane for the appellant

J B Colegrave for the respondent

Judgment

Gubbay JA: On 1 December 1986 Mr Frank Tyrell, to whom I shall refer as "the employee", commenced employment with the respondent company, "the employer", as workshop manager of its transport business. His tenure of office was short-lived. In the opinion of the employer he proved to be ill-suited for the position and on 2 February 1987 he was informed that his services were to terminate at the end of that month. It was impressed upon him that during the intervening weeks he was to carry out his duties faithfully and diligently. But on 10 February 1987, not being satisfied that the employee was performing as required, the employer gave him twenty-four hours' notice of termination, tendering one day's pay. This the employee declined to accept. He demanded that he be paid his February salary in full

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with a further month's salary in lieu of notice. When this was refused, the employee referred the "dispute" to a labour relations officer in terms of s 109(1) of the Labour Relations Act 1985, alleging that he had been dismissed in contravention of the Labour Relations (General Conditions of Service)(Termination of Employment) Regulations 1985 ("the Regulations").

On 24 March 1987 the employer's representatives and the employee duly appeared before a labour relations officer. The contention advanced by the employer in justification of the action taken on 10 February 1987 was that, notwithstanding the absence of any reference thereto in its letter of appointment of 24 November 1986, which set out in detail the conditions of employment stated to have been discussed with the employee, it had previously been agreed orally that the employee was to be engaged for a probationary period of three months, terminable by either party on the giving of twenty-four hours' notice. Consequently, the employer's right to terminate fell within the exception specified in s 2(1)(c) of the Regulations,

for the employee "was engaged for a period of fixed duration". The employee, on the other hand, disputed that he was serving a three month probationary period of employment at the time of his discharge, though he conceded that mention had been made of an undefined "settling-in period". He maintained that he was entitled to be paid his February salary in full, plus one month's salary in lieu of notice.

Three days later the labour relations officer determined the dispute against the employer, holding that the contract of employment had been unlawfully terminated and the employee was to be paid as claimed.

The employer did not appeal against the determination to a regional hearing officer. Instead, on 8 May 1987, it brought the proceedings of the labour relations officer on review before the High Court.

The notice of motion itself was not in accordance with proper practice. It simply asked for the relief particularised in an annexed draft order, which was that the determination be set aside and the dismissal of the employee confirmed. I am bound to reiterate the stricture of GREENLAND J in *Utterton v Utterton* 1969 (2) RLR 404 (GD) at 409 F-G; 1969 (4) SA 391 (R) that the requirement of rule 227 (2) of the High Court Rules 1971, that an applicant should append to his notice of motion a draft of the order he seeks, does not relieve him of the necessity to ensure that the nature of the relief appears *ex facie* the notice.

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GUBBAY JA

But there was a far more serious defect in the preparation of the application. Although the existence of two grounds of review were urged upon the court *a quo* only the second, that the labour relations officer had declined to hear the employer's accountant, Mr MacKenzie, and had also failed to investigate from other employees the circumstances surrounding the dismissal, was alleged in the founding affidavit. The first ground was not disposed of at all. It was that the labour relations officer had no jurisdiction to make the determination he did because it had been orally agreed that the employee would serve a probationary period of three months, thereby permitting termination pursuant to s 2(1)(c) of the Regulations. That omission amounts to non-compliance with Rule 257 of the High Court Rules, which provides that the notice of motion (in the wide sense of embracing the supporting affidavit) -

"... shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected."

These shortcomings in the papers were not commented upon by the learned judge, understandably perhaps, since neither was drawn to his attention by the opposing counsel. I mention them, however, in the hope that in future more care will be taken by legal practitioners in the presentation of applications of this nature.

In his consideration of the first ground the learned judge embarked upon a factual enquiry as to whether the contract of employment was for a fixed duration of three months, terminable by twenty-four hours' notice. Coming to an affirmative answer, he held that the termination was lawful and that in consequence the labour relations officer was not empowered to make the

determination.

In regard to the second ground the learned judge found that there had been a failure of natural justice resulting from the refusal of the labour relations officer to accord audience to MacKenzie and the other unnamed employees.

I entertain not the slightest doubt that in both respects the learned judge fell into error.

What the labour relations officer was enjoined to investigate was whether the contract of employment was for a fixed duration of three months. That was a purely factual issue, and one upon which it was not suggested that either MacKenzie or the other unnamed employees could throw any light. The

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labour relations officer heard what the employer's directors, who had negotiated the contract of employment with the employee, had to say, and weighed up their account against the employee's denial, supported as it was by the lack of any reference to a probationary period in the letter of appointment. He then made a factual finding in favour of the employee. Whether he was right or wrong is beside the point.

If the employer considered that the finding was unreasonable on the "evidence", as it obviously did, then its remedy lay in the right to appeal against it to a regional hearing officer. Under its inherent right at common law to review the proceedings of inferior courts and tribunals the High Court does not exercise an appellate jurisdiction. Unless, therefore, the averment was made, which advisedly it was not, that the determination that the employee had not been engaged for a period of fixed duration was unreasonable to so striking a degree as to be inexplicable except on the assumption of something else, of *mala fides* or ulterior motive or failure by the labour relations officer to apply his mind to the matter - a formidable *onus* - any examination by way of judicial review was not open to the employer. It is not enough simply to show that the decision was wrong or unreasonable. Special grounds must exist before a court will enquire into the merits. One does not readily impute dereliction of duty to a responsible quasi-judicial body or official.

The very point was underlined almost a century ago by MASON J in *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 587, in these words:

"A distinction is made in some cases *Brown v Cocking* (1868) LR 4 QB 4; *Joseph v Henry* 19 LJ QB 369 between jurisdiction dependent upon a mere question of fact which the lower court was competent to inquire into and has decided, and jurisdiction dependent upon a question of law; in the former event the reviewing tribunal will almost invariably refuse to examine into the merits of the decision attacked ..."

There is a wealth of authority which reaffirms this principle. I shall content myself by citing only a few decisions in this jurisdiction. They are: *Clan Transport (Pvt) Ltd v Swift Transport Services (Pvt) Ltd* 1956 (3) SA 480 (FSC) at 489B; *Edwards & Sons (Pvt) Ltd v Stumbles NO & Anor* 1963 R&N 68 (SR) at 73; 1963 (2) SA 140 (SR) at 143E-H; *Cone Textiles (Pvt) Ltd v Ayres & Anor* 1980 ZLR 347 (AD) at 358G-H; 1980 (4) SA 728 (ZA) at 734.

Rose Innes, in his work *Judicial Review of Administrative Tribunals in South Africa* at p 215, accurately reflects the position thus:

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"The frequency with which the courts have refused to sit upon the merits of decisions which are entrusted to the determination of extrajudicial bodies, precludes unreasonableness, by itself, from being a ground for review of common law."

But apart from the incorrect approach of the court *a quo* in treating the factual determination of the labour relations officer as if it were on appeal, there existed an alternative basis for it to refuse to interfere with the determination.

Even if it be assumed in the employer's favour that the contract of employment was for a fixed period of three months, regard ought to have been had to the significance attaching to the undisputed fact that the employee's services had been terminated weeks before the expiry of that period on 28 February 1987.

In order to utilise the right to terminate under s 2(1)(c) of the Regulations the employer was obliged to ensure that the fixed duration period had effectively expired. It would have been proper to have informed the employee in advance that on 28 February 1987 his services were to be terminated and either have required him to work until that day or, if not, have paid his salary in full for the month. But notwithstanding any contractually agreed period of notice it was not permissible to terminate, in reliance thereon, before the end of the fixed period.

If during the currency of the fixed period the employer had good cause to believe that the employee was guilty of misconduct, its remedy lay in s 3(1) of the Regulations - to suspend him without pay and apply forthwith to a labour relations officer for an order terminating the contract of employment. This remedy the employer did not avail himself of.

The second ground relied upon for a review of the proceedings is equally without merit and may be shortly disposed of.

Accepting, as I do, that MacKenzie and the other unnamed persons were denied the right of audience, the question to be asked is what precisely did the employer wish them to speak to? The answer given in the founding affidavit is that they had some knowledge of the employee's misconduct. Such information would have been relevant to an enquiry under s 3(1) of the Regulations if the employer had taken the action of suspending the employee; but it was totally irrelevant to the dispute as to whether the contract of employment was lawfully terminated in terms of s 2(1)(e) of the Regulations.

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That was the employer's case. The issue of misconduct was not before the labour relations officer, for the employee had not been suspended.

While, therefore, the learned judge was correct in expressing the view that a labour relations officer is enjoined by the legislation to "investigate" and make "due enquiry" into a dispute and that failure to do so would accordingly constitute a breach of the principles of natural justice, he was wrong in relating his remarks to the dispute in issue. He failed to appreciate that nothing MacKenzie and the other unnamed employees wished to say had any bearing whatsoever on the factual determination of whether the contract of employment had been lawfully terminated.

For these reasons I would allow the appeal with costs and alter the order of the court *a quo* to read:

"This application is dismissed with costs".

Dumbutshena CJ: I agree.

McNally JA: I agree.

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

Coghlan, Welsh & Guest, respondent's legal representatives

1989 (1) ZLR p300

S v MADONDO 1989 (1) ZLR 300 (HC)

Court **High Court, Harare**

Greenland J

Criminal review

12 April 1989

Flynote

Criminal procedure (sentence) - robbery - severe injury caused to complainant - very severe sentence merited
- appropriate forum for trial.

Headnote

The accused, a 24-year-old first offender, pleaded guilty to a charge of robbery and was sentenced to eight months' imprisonment. He and two others had waylaid the complainant in the dead of night in a deserted area, severely assaulted him and robbed him of \$30 in cash, that being all he had in his possession. The assault was a brutal one, consisting of several blows with a blunt instrument and causing serious head injuries, with a strong possibility of permanent damage.

Held, that robbery is an inherently serious offence. It usually involves premeditation, criminal resolve and purpose, brazen execution, an attack on a human victim with an attendant disregard of that person's right to personal security, and forceful dispossession of whatever property the victim has. It is often a terrifying and degrading experience. The victim is injured in

his person and property. The robber acts with contempt and callousness. It is therefore proper to regard robbery as a particularly reprehensible form of criminal behaviour, and that attitude should be reflected in the sentence.

Held, further, that where the perpetrator, though not armed with a firearm, severely injures his victim and endangers the victim's life, the distinction between such a robbery and armed robbery becomes somewhat academic. In such cases, the court should be inclined to impose a sentence approaching that imposed for armed robbery. The proper forum is the

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GREENLAND J

Regional Court.

Held, further, that an appropriate sentence in this case would have been in the region of six years, of which part was suspended.

Cases cited:

S v Ndlovu HB-91-85 (not reported)

S v Mareya HH-493-86 (not reported)

S v Tawanda HB-56-84 (not reported)

S v Sithole & Anor AD-66-81 (not reported)

Judgment

Greenland J: In this case the accused was properly convicted of robbery by a magistrate and sentenced to eight months' imprisonment with labour.

It is clear that the learned magistrate was influenced by the fact that the accused was a contrite first offender aged 24 years. It is clear also that despite these considerations, the sentence is unacceptably lenient.

The facts represent a classical instance of robbery. The accused, in the company of two others, acting in common purpose, waylaid the complainant in the dead of night, ie almost midnight, and set upon him in a deserted vlel adjoining a residential area. The complainant was assaulted and robbed of \$30 in cash. It is safe to assume that the cash is all he had in his possession.

The nature of the assault was brutal. The result was that he sustained a severe head injury inducing real disability. I quote from the relevant psychiatric report:

"The patient sustained a severe head injury on the night of 30 June 1988. He suffers from a retrograde amnesia (he cannot recollect events for about half an hour before the injury) and an anterograde amnesia (he cannot recollect events subsequent to the injury). Even at present he is experiencing some difficulty with his memory.

As a result of these observations I formed the opinion that: -

The above observations are consistent with the type of amnesia resulting from a severe head injury."

The nature of this injury is revealed in a medical report which lists the injuries found as:

"Deep laceration on skull.

Unconscious from head injury.

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GREENLAND J

Bruising of eyes.

Subarachnoid Haemorrhage."

The doctor was of the opinion that these injuries were caused by several blows with a blunt instrument administered with severe force. He described the injuries as serious with great possibility of permanent damage. The psychiatric report, *supra*, indicates that the doctor's fears were, in all probability, realized.

The learned sentencing magistrate does not appear to have appreciated the gravity of the whole matter. Unfortunately, it is apparent from cases coming on review that this is a general problem in the magistrates courts. The starting point is to accept that robbery is an inherently serious offence. It may properly be regarded as iniquitous as it usually involves premeditation, criminal resolve and purpose, brazen execution, an attack on a human victim with the attendant disregard of that person's right to personal security and forceful dispossession of whatever property the victim has. For the victim it is often a terrifying and degrading experience. He is injured in his person and property. The perpetrator acts with contempt and callousness. It is therefore proper to regard robbery as a particularly reprehensible form of criminal behaviour and that attitude should be reflected in the sentence.

This much has been recognised by this court and spelled out by KORSAH J, as he then was, in the case of *S v Ndlovu* HB-91-85, where he said:

"What is more the robbery was premeditated and was executed at night in concert with another thus lending to it the colour of gangsterism. Even conceding that the accused is 22 years of age and the loss to the complainant was only \$7 his conduct was most reprehensible. Robbery, unlike theft, involves a threat to life or limb and it is, for that reason, a more serious offence than theft. When it is carried out at night and in concert with others it becomes even more reprehensible."

The learned judge refused to certify a sentence of 12 months of which 5 months was suspended. The learned magistrate admits that he did not have regard to this precedent and this is unfortunate as the facts therein are not dissimilar to those in the present matter.

It is helpful to advert to a case in which REYNOLDS J approved a sentence of 12 months, part of which was suspended, *S v Mareya* HH-493-86.

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GREENLAND J

Analysis of the facts in that case reveal conduct which, though constituting robbery, equated with a form of exaggerated "bullying". That case represents, perhaps, the least reprehensible

form the crime of robbery can take.

Contrast also the other extreme as represented in the case of *S v Tawanda* HB-56-84. In this case the victim was threatened with being shot and robbed of a cheque book. He was struck by one of the assailants a severe blow to the head with a blunt instrument causing a compound depressed fracture of the skull and severe compression of the neck. In the result he was hospitalized for three weeks but still suffers partial paralysis of the face. Manyarara J and Korsah J, as they then were, had no difficulty, following *S v Sithole & Anor* AD-66-81, in dismissing an appeal against a sentence of eight years' imprisonment with labour.

Again the facts in that case are not all that dissimilar to the facts in the present case and it is unfortunate that the learned magistrate did not have regard to this precedent. It should be realised that the only reason why the courts treat armed robbery as a particularly serious form of crime is because of the inherent danger to life. However where the perpetrator, though not armed with a firearm, severely injures his victim and endangers his life the distinction between this type of robbery and armed robbery becomes somewhat academic.

In such cases the court should be inclined to impose a sentence approaching that imposed for armed robbery and the proper forum is the Regional Court. The present case ought to have been tried in the Regional Court especially as it has the colour of gangsterism. An appropriate sentence would have been in the region of six years, partly suspended. Had the victim not been so severely assaulted and injured a sentence in the region of four to five years partly suspended would have been indicated. Obviously the offence can also be mitigated in other ways and it would be unwise to attempt to categorise all possible permutations. However it should now be possible for magistrates to approach the problem of sentence for robbery in a more realistic way.

In the result the proceedings are not confirmed as being in accordance with real and substantial justice.

1989 (1) ZLR p304

ART CORPORATION LTD v MOYANA 1989 (1) ZLR 304 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Civil appeal

20 March & 25 April 1989

Flynote

Employment - Labour Relations Act 1985 - s 12 - whether enshrines right of employer to terminate contract on notice - Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 - s 2 - whether ultra vires s 17 of Act - reinstatement following wrongful dismissal - whether only remedy available to employee - employee's claim for acting allowance - no contractual obligation to pay - whether

employer's failure to pay amounts to an "unfair labour practice" in terms of Act.

Headnote

Section 12 of the Labour Relations Act 1985 does not enshrine the right of an employer to terminate a contract of employment on notice. All it does is introduce a statutory term into such contracts where they are made without reference to time, and deem that where the contract is to pay wages at a monthly rate the contract is itself terminable on a month's notice. This provision does not affect the regulatory powers given to the Minister under s 17 of the Act, particularly the power to specify or restrict the circumstances in which contracts of employment may be terminated summarily or otherwise. Consequently, s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/85), in terms of which the Minister's approval is required for termination of a contract on notice, is not *ultra vires* the powers granted to the Minister under s 17 of the Act.

Where the Labour Relations Board hears a matter involving the wrongful dismissal of an employee, it has a discretion as to whether or not to order reinstatement of the employee in his post. Incompatibility between the

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parties may be a ground not to order reinstatement. Reinstatement is not the only or inevitable remedy for wrongful dismissal; it is a remedy. An alternative remedy is a claim for damages.

If an employee's contract of employment does not entitle him to an acting allowance, the employer's failure to pay one is not an "unfair labour practice" in terms of the Labour Relations Act. It may give rise to a civil claim.

Cases cited:

Jarvis v Commercial Careers College (1980) (Pvt) Ltd HH-312-88

Jaga v Dönges NO & Anor; Bhana v Dönges NO & Anor 1950 (4) SA 653 (A)

Cheng v Governor of Pentonville Prison [1973] 2 All ER 204 (HL)

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

A P de Bourbon SC for the appellant

Appellant in person

Judgment

McNally JA: This is a labour dispute between the parties. A brief history of the matter is as follows.

The appellant (the Corporation) employed the respondent (Mr Moyana) on 20 October 1980 as a Marketing Executive. The contract was a simple one, providing that his functions were to be

assigned to him from time to time. His starting salary was specified and it was provided that "salary reviews are carried out in Nedlaw as and when an executive shows himself to have performed well and produced results" (Nedlaw was the Corporation's holding company). There was also provision for one month's notice of termination of the contract to be given by either side.

Mr Moyana became a Training Officer in the Training Department in 1981 and a Principal Training Officer on 9 January 1982.

On 27 May 1986 the Group Personnel and Training Director wrote complaining about certain alleged shortcomings in Mr Moyana's work, and Mr Moyana replied rejecting the complaints. He claimed that the problems arose out of shortage of staff, and pointed out that the Training Manager had been transferred and not replaced. He claimed that his request for a salary review had been ignored and asserted that he was entitled to an acting allowance during the absence of the Training Manager. The Corporation's Chairman then wrote withdrawing the letter of 27 May 1986 and adding "Your reply

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dated 2 June 1986" "therefore falls away". Mr Moyana at once responded that he did not withdraw his claim to be paid as a Training Manager from the time the actual Training Manager had left. (He did not at any stage rely on an actual appointment as Training Manager).

After a certain amount of bickering which need not be set out the Corporation suspended Mr Moyana without pay with effect from 16 July 1986 and referred the dispute to a Labour Relations Officer in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/85).

Thereafter events developed as follows:

1. On 1 October 1986 the Hearing Officer made a determination that Mr Moyana be reinstated and paid \$12 000 in "Back payment in salary".
2. The Corporation appealed to the Regional Hearing Officer, but meanwhile, on 6 October 1986, reinstated Mr Moyana as directed.
3. On 22 December 1986 the Regional Hearing Officer upheld the Hearing Officer's decision and increased the "back payment" from \$12 000 to \$15 184.
4. On 25 March 1987 the High Court, in Judgment No. HH-168-87, set aside both these determinations on the grounds of procedural irregularity. In doing so it commented: "It may well be that, in practical terms, the applicant will be obliged to approach the labour relations officer once again for authority to dismiss the second respondent, but that is not the concern of this court".
5. Ignoring this advice, and after further criticism by the Corporation's senior officers of Mr Moyana's performance, the chairman wrote to him on 28 May 1987 formally terminating his

contract of employment and giving him a month's pay in lieu of notice.

6. On 8 June 1987 Mr Moyana referred this dismissal and his claim for an acting allowance of \$33 750 to a Labour Relations Officer.
7. The matter was referred to the Labour Relations Board in terms of s 109(2)(d) of the Act.
8. The Board made determination on 8 April 1988. In summary it ordered:
 - a. Payment of an acting allowance for the twenty-four months preceding the date of the order.

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- b. Payment of emoluments from the date of illegal termination to date.
 - c. Termination of the contract of employment forthwith (ie with effect from 8 April 1988) on the ground of incompatibility.
9. The Corporation appealed against this decision to the Labour Relations Tribunal which, in an undated judgment apparently handed down on 12 October, 1988, ordered as follows:
 - "1. That the termination of Mr Moyana's contract of employment as per the Corporation's letter of 28 May 1987 was of no force or effect.
 2. That Mr Moyana be and is hereby reinstated as the Corporation's Principal Training Officer without loss of salary or other benefit accompanying his post.
 3. That the Corporation pay Mr Moyana acting allowance for carrying out the functions of a Training Manager for a period of 24 months extending from 8 July 1987 and dating back to 7 July 1985 at the rate for the job less his salary as Principal Training Officer.
 4. That there be no order as to costs."

Against this order the Corporation appealed to the Supreme Court. It alleged a number of procedural irregularities and sought a reversal of each of the orders made by the Tribunal. I will deal with them in turn.

A. THE VALIDITY OF MR MOYANA'S DISMISSAL ON 28 MAY 1987

I noted earlier that the Corporation seemed to ignore the advice of the High Court that it should again seek authority to dismiss Mr Moyana.

The letter of 28 May 1987 is very curiously worded. It begins by saying: "This letter is to inform you of the termination of your employment with the Art Printers Group in terms of sections 3(a), 3(b), 3(g) and 3(h) of Statutory Instrument 371 [of 1985]". Yet those subsections do not deal with termination of employment. They deal with summary suspension without pay. The Corporation was well aware of this because earlier, on 16 July 1986, it had acted under this section and had summarily suspended Mr Moyana. It is difficult to understand how the

Corporation thought it could dismiss Mr Moyana under this section.

Before us Mr *de Bourbon* did not seek either to defend or explain these contradictions. He asserted that the letter of 28 May 1987 was a dismissal on

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one month's notice and contended that dismissal on notice was lawful in terms of the Labour Relations Act. Insofar as s 2 of the Regulations contradicted the assertion it was, he claimed, *ultra vires* the Act.

I will assume that the letter of 28 May 1987 can be regarded as a dismissal on notice because it reads in part:

"However, the Company intends nevertheless to pay you not only your salary in respect of May 1987 (which has already been paid) but also a month's pay in lieu of notice, that is to the 30th June 1987."

Despite this, I remain unpersuaded that the Regulations are *ultra vires*. Basically I agree with the reasoning of the President of the Tribunal, who relied in turn upon a decision of the JUDGE PRESIDENT of the High Court in *Jarvis v Commercial Careers College* (1980) (Pvt) Ltd HH-312-88. I will therefore set out my reasons only briefly.

Mr *de Bourbon*'s central submission was that s 12(1)(a) of the Labour Relations Act No. 16 of 1985, enshrines the right of an employer to terminate a contract on notice. That being so, the Minister has no power by regulations to qualify or, *a fortiori*, to eliminate that right.

I will accept, for purposes of argument, that the conclusion is correct. It is the premise, in my view, which is false.

Section 12(1)(a) reads as follows:

"Except where a longer period of notice has been provided for in any contract or in any relevant enactment, every contract of employment made without reference to time, not being a contract to perform some specific service, shall be deemed in the case where -

- (a) the contract is to pay wages at a monthly rate, to be a contract from month to month, terminable by either party at any time upon giving not less than one month's notice, terminating on the last day of a month ..."

This section does not enshrine the right of an employer to terminate a contract on notice. All it does is to introduce a statutory term into employment contracts which are "made without reference to time".

The section in fact says nothing about the contract with which we are

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concerned, because that contract did specify a month's notice. It was not "made without

reference to time". I am entirely satisfied that the section is no more than a deeming section. It speaks only of the content of a contract of employment; it says nothing about the enforceability of the terms deemed to be part of the contract.

It is interesting, as confirmation of the above, that s 13, 14 and 15 of the Act, to which Mr *de Bourbon* referred by way of analogy, all contain the words "shall be entitled". No such words appear in s 12.

There is a further reason, if further reasons are necessary, why I am unable to accept the submission that s 12(1)(a) enshrines the right of an employer to terminate a contract of employment on notice. Insofar as there is ambiguity in the provisions, although I do not believe there is any, one must look for an interpretation which is consistent with the context within which the words came into existence. In looking at the context, one has in mind the words of SCHREINER JA in *Jaga v Dönges NO & Anor: Bhana v Dönges NO & Anor* 1950 (4) SA 653 (A) at 662H:

"[T]he context' as here used is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted.

Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its backgrounds."

The long title of the Labour Relations Act No. 16 of 1985 sets out its purpose to be:

"To declare and define the fundamental rights of employees; to define unfair labour practices; to regulate conditions of employment and other related matters ..."

The provisions of the Act itself confirm the clear impression that one of its fundamental objects is to improve the lot of the employee. Thus -

- a. There is no definition or declaration of the fundamental rights of employers, whereas Part II sets out the fundamental rights of employees;
- b. Part III sets out unfair labour practices which may be committed by employers, by trade unions and by workers' committees. There is no specific reference to unfair labour practices by individual employees,

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though s 20 allows the Minister to prescribe acts or omissions which constitute unfair labour practice by employees. Apart from failure to comply with the provisions of a collective bargaining agreement (s 87 (3) of the Act) no such practice has been defined - see the Third Schedule to SI 368/1985;

- c. The general conditions of employment defined are all minimum requirements and may be improved, in favour of the employee, by contract or by regulations, industrial agreement or determination. See generally Part IV of the Act;
- d. Specifically s 17 gives the Minister regulatory powers for the "development,

improvement, protection, regulation and control of employment and conditions of employment". These regulations have overriding force - see section 17(2).

In the wider context, too, one construes the Act according to its historical setting and in terms of the "mischief" rule. LORD SIMON OF GLAISDALE in his speech in *Cheng v Governor of Pentonville Prison* [1973] 2 All ER 204 (HL) at 215a spoke of:

"... ascertaining, first, the general situation in which Parliament was legislating and, secondly, the particular situation for which Parliament was providing a remedy. These are really different aspects of the same canon of construction; though the former is sometimes called construction according to 'historical setting', the latter 'the mischief rule'."

Thus, when the decision in *S v Jovner* 1982 (2) ZLR 252 (SC) showed that the Employment Act 1980, in its s 8, and the Employment (Conditions of Service) Regulation 1981, in s 4, did not serve to prevent termination on notice, the President clarified the State's intentions by means of the Emergency Powers (Termination of Employment) Regulations 1982, published in SI 714B/1982. The existence of the Statutory Instrument was obviously known to the Legislature when the Labour Relations Act was enacted in 1985 and the overwhelming probability must be that the Legislature did not intend to go back to the *status quo ante*. Indeed, one has only to look at the difference between s 17(2) of the 1985 Statute and s 5(2)(a) of the 1980 Statute to appreciate that the Legislature intended to confirm the reversal of *Jovner supra*, achieved by s 4 and 5 of the Emergency Powers Regulations, which were only finally repealed by SI 77/1987.

I have taken this further argument more or less directly from the heads of

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McNALLY JA

argument of Mr *Gillespie* in the *Jarvis* matter, which was heard some days after the present appeal was argued.*(3) I acknowledge the force of the submissions, and I adopt them, without deviating from my primary view that the words of the enactment are clear and do not require interpretation.

Once it is accepted that s 12 does not give or enshrine a right to give notice, then one may turn again to s 17 of the Act, which begins:

"(1) Subject to the provisions of this Act, the Minister may make regulations providing for the development, improvement, protection, regulation and control of employment and conditions of employment."

Clearly the Minister's power under this subsection to "regulate" dismissal on notice is not subject to the provisions of s 12. Section 12, as we have seen, concerns only the *content* of contracts of employment, and s 17(2) makes it clear that regulations override content, when it says -

"Regulations made by the Minister in terms of subsection (1) shall, unless such regulations otherwise provide, prevail over the provisions of any other statutory instrument or of any agreement or arrangement whatsoever ..."

Finally, the Minister's power is defined in s 17(3)(r) which permits him to make regulations -

"... specifying or otherwise restricting the circumstances in which contracts of employment may be terminated

summarily or otherwise."

I am therefore satisfied that s 2 of SI 371/1985 is not *ultra vires* the powers granted to the Minister in terms of s 17 of the Act and is not in conflict with the provisions of s 12 of the Act.

The first point must therefore be decided against the appellant.

B. REINSTATEMENT

It is quite obvious that the Corporation does not want to take Mr Moyana back. For this part, Mr Moyana has tended to blow hot and cold. On the one hand he accepted his terminal benefits, including a refund of his pension

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contributions, after he was "dismissed" in May 1987. At times in his argument, which is not always easy to follow, he seemed to accept that the termination of his employment was inevitable and acceptable to him. Thus at p 51 of the transcript of the submissions before the Tribunal (although it is headed "Labour Regulations Board" it is clearly the proceedings before the Tribunal) he is recorded as saying:

"In the final analysis also, the termination of the ... I think it was very fair. Secondly, the fact that they are saying 'Why did you not contest', whereas, in all honesty, in management, you would not want to be seen to be forcing yourself on people when, it has become obvious the sun has set. All I can ask through your office, My Lord, is that they should desist from following me up. We should be allowed to part amicably..."

A little later he seems to go back on that statement and says categorically: "I would like to be reinstated". Overall, however, one gains the very strong impression that he sees reinstatement as a bargaining counter. He wants to establish his claim to have been wrongfully dismissed, and it is in that sense, really, that he speaks of reinstatement. What he wants is to have the dismissal set aside, to have his financial rights determined, and then to part company with the Corporation.

It is important to clarify this attitude on his part because the Corporation is taking what might in different circumstances be regarded as a somewhat technical point against him. They say that the Board had a discretion to reinstate him; it decided not to do so; he did not appeal against that decision; and therefore the Tribunal had no jurisdiction to reverse the decision.

The Board which made the decision not to reinstate was undoubtedly a "determining authority" as defined in terms of s 2. The Board is given the power in s 111(2)(c) to order reinstatement in a job. Obviously it must have a discretion in that regard. In this case it decided not to do so on the grounds of incompatibility. That can hardly, in the circumstances, be described as a decision no reasonable Board could make.

No appeal was lodged in terms of s 40 of the Labour Relations (General) Regulations 1985, (SI 368/85) by Mr Moyana. The Tribunal, which is a creature of statute and whose powers therefore must be founded within the four walls of the Act, has its powers defined in s 107 of the Act, which reads:

"In determining an appeal in terms of this Part, the Tribunal may confirm,

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vary or set aside the **decision appealed against** and make an order accordingly, and may include in such order any order that to costs as it thinks fit" (my emphasis).

The decision of the Board not to reinstate Mr Moyana was not appealed against. He himself did not appeal at all, and the Corporation appealed only on other parts of the Board's determination. It is true that the Corporation appealed against the date with effect from which reinstatement was refused (8 April 1988) and claimed it should have been as from 28 May 1987, but that was not an appeal against the decision not to reinstate.

The Tribunal does not seem to have addressed itself to the legal implications of this question. The judgment of the President does record that in terms of s 7(1) of the relevant Regulations (SI 369/1985) "an appeal from a decision of the Board to the Tribunal shall be an appeal on the Record of the Proceedings before the Board and shall not be in the nature of a re-hearing ...". This provision was, however, not considered in the context of whether the issue of reinstatement was before the Tribunal.

The Tribunal appears to have taken the view that if the dismissal was unlawful Mr Moyana was *ipso facto* entitled to reinstatement. They found his dismissal was unlawful and therefore they ordered his reinstatement.

It seems to me with respect that in this the Tribunal was wrong. Reinstatement is not the only or the inevitable remedy for wrongful dismissal. It is a remedy. There is an alternative remedy which is a claim for damages for wrongful dismissal. The matter is expressed as follows in "*Labour Law; Cases and Materials*" by Benedictus & Bercusson:

"The obvious remedy for unjustified ('unfair') involuntary termination is re-employment, if the employee so wishes, and otherwise compensation. The first remedy is not available at common law. The essentially reciprocal nature of contractual obligations means that it is impossible to force an unwilling party to remain bound to a contract against his will. This in effect gives a veto to either side to prevent the continuance of a contract of employment notwithstanding the possible merits of the other party's case for maintaining the contractual relationship. Compensation at common law is minimal, being confined to the precise contractual loss suffered ... Statute, as will be seen, has only partially overcome these limitations. "

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The authors then go on, at p 394, to quote another book which says:

"Although reinstatement is clearly the primary remedy for unfair dismissal provided by law, very few successful applicants are awarded it. The usual remedy for successful applicants is compensation."

It would seem that the English legislation has more detailed provisions for compensation than ours, but the point that I am making is that reinstatement is not the inevitable consequence of a finding of wrongful dismissal. The Board decided against it, and the Tribunal had no jurisdiction

to interfere with the decision in the absence of an appeal against it.

Towards the end of its judgment the Tribunal reverted to this point. It said:

"We are unable to support the Board's finding that 'the two parties could no longer work together' on account of incompatibility. Mr Moyana has asked to be reinstated. We believe that had the position been that he was no longer prepared to work for the Corporation, he would not have prayed for this relief. In any event, incompatibility between an employer and an employee, even where it has been established, is not in our law a ground for the employer to terminate the contract of employment unilaterally."

This passage calls for comment in two respects.

First of all, the Board's finding was not an incompetent finding. It was within the Board's powers to make such finding. That being so, the Tribunal had no power to question the finding in the absence of an appeal against it. Note that the Tribunal's review powers are very limited - s 24 of SI 369/1985.

Secondly, incompatibility was not a ground upon which the employer had sought to terminate the contract of employment. It was a ground upon which the Board had decided not to order reinstatement.

I conclude therefore that the question of reinstatement was not before the Tribunal and it had no jurisdiction to make an order on the subject.

C. ACTING ALLOWANCE

The main argument put forward by the Corporation was that the claim for an acting allowance was not a dispute under the Labour Regulations Act. At best

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it is a civil claim which should be brought in a civil court.

It seems to me that there is a great deal of merit in this argument. Unless Mr Moyana can found his claim for an acting allowance squarely on some basis cognisable by the Act, then it is not a matter for determination under the Act.

His contract of employment makes no provision for acting allowances. In fact, it makes it clear that the salary structure in the group is particularly flexible. Compare the explicit provisions of s 19 of SI 325/1979, which deals with acting allowances in the Public Service. There is thus no contractual basis upon which the claim may be founded.

The statute itself makes no specific provision about acting allowances, nor is there any other statutory provision in terms of which a "rate for the job" is laid down which is applicable to the facts of this case.

It has not been suggested that the failure by the Corporation to pay an acting allowance amounted to an "unfair labour practice" as defined in the Act, nor have I been able to find in s 8 of the Act or in the Third Schedule to the Regulations (SI 368/1985) anything which would

indicate that failure to pay an acting allowance in these circumstances is an unfair labour practice. Accordingly the provisions of s 111(2)(b) of the Act, which begin with the words "in the case of an unfair labour practice involving a failure or delay to pay or grant anything due to an employee ...", are not applicable.

I guard against saying that Mr Moyana has a claim under the civil law. All that I would say is that if he has a claim based in some way upon a *quantum meruit*, as Mr *de Bourbon* suggested, such a claim should be brought before the civil court.

D. COSTS

The Corporation did not press its appeal against the Tribunal's refusal to order costs either way, and Mr *de Bourbon* indicated that, while he did not abandon his prayer for the costs of appeal, he was content to leave the matter to the Court. It seems to me that since each party has been partially successful, there should be no order as to the costs of appeal.

In the result I would make the following order:

1. The appeal against the decision of the Labour Relations Tribunal handed

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down on 12 October 1988 is in part upheld and in part dismissed. More particularly -

- a. The appeal against the orders in para 1 and 4 of the Tribunal's judgment is dismissed.
 - b. The appeal against the orders in para 2 and 3 of the Tribunal's judgment is allowed, and the orders as to reinstatement and the payment of an acting allowance are set aside.
2. There will be no order as to the costs of appeal.
 3. For the avoidance of doubt it is recorded that the order of the Labour Relations Board declining, with effect from 8 April 1988, to reinstate Mr Moyana in his employment, stands. Accordingly he is entitled to his full emoluments as Principal Training Officer up to that date, from which date his employment is deemed to be terminated.

Gubbay JA: I agree.

Manyarara JA: I agree.

Kantor & Immerman, appellant's legal practitioners

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HOKONYA v DIRECTOR OF PRISONS & ANOR 1989 (1) ZLR 317 (HC)

Court High Court, Harare

Adam J

Opposed application

17 & 26 April 1989

Flynote

Constitutional law - Constitution of Zimbabwe - Declaration of Rights - s 13(3) and (4) - rights of arrested or detained persons - applicability to arrest and detention in terms of Defence Act [Chapter 94].

Headnote

The petitioner, a former army officer, was arrested by military police and detained pursuant to a remand warrant issued in terms of s 52(1) of the Defence Act [*Chapter 94*]. The warrant stated that he was awaiting trial on a charge of contravening Treasury Instructions. No such offence appears in the First Schedule to the Act, which sets out military offences. The petitioner was not informed of the reasons for his arrest and detention either at the time of his arrest or afterwards. Although he was in custody for some 12 days before the application was brought, there was no indication that a special report on the necessity for further delay was made by his commanding officer 8 days after his arrest, as required by s 51(2) of the Act.

Held, that the petitioner's detention was unlawful. The provisions of the Constitution of Zimbabwe are paramount and supercede all other enactments. Section 13(3) of the Constitution requires that any person who is arrested or detained shall be informed as soon as reasonably practicable of the reasons for his arrest or detention. Section 13(4) requires that such a person must be brought without delay before a court and if not tried within a reasonable time must be released either unconditionally or on reasonable conditions. The provisions of ss 48(6) and 51(1) of the Defence Act, which are to similar effect, had also not been complied with. Unless these requirements are fulfilled, the arrest and detention are not lawful.

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Case cited:

R v Markoes 1929 CPD 41

E Manikai for the petitioner

Miss *A Zambuko* for the respondent

Judgment

Adam J: The petitioner seeks an order declaring his arrest and detention unlawful and his release from custody. In his petition he states that on 5 April 1989 Major Mugwisi of the

Zimbabwe Military Police arrested him and he was detained at the Harare Remand Centre pursuant to a remand warrant issued in terms of s 52(1) of the Defence Act [Chapter 94]. He indicates that he is a retired colonel and that neither at the time of his arrest nor at any time thereafter was he informed of the reasons for his arrest. He also says that the remand warrant merely stated that he was awaiting trial on a charge of contravening Treasury Instructions. He avers that the remand warrant was unlawful since contravening Treasury Instructions is not an offence in terms of the Defence Act as envisaged by s 52(1) of that Act. Further, his continued detention is unlawful in that there was no reasonable basis for his arrest.

In his replying affidavit, Major General Chiwenga of the Zimbabwe National Army does not admit that the petitioner was not at any time informed of the reasons for his arrest. He does not aver that the petitioner was given the cause of his arrest by either himself or in his presence. He states that the petitioner was the Deputy Director of Army Services Corps, with responsibility for all the support services in the army and in that position was aware of Treasury Instructions in respect of purchasing of supplies. In terms of the Quarter Master General Standing Orders for the Zimbabwe National Army an evasion of tender procedures is a breach of the financial regulations and subject to disciplinary action. Procedures for purchases of over \$2500 are laid down in Treasury Instructions. He avers that the petitioner, despite Standing Orders, wrote a letter (Annexure 'E' to his affidavit), which was dated 30 June 1988, to various Agricultural Suppliers, outlining the requirements for the financial year 1988/89. He states that it was on that basis that he ordered the petitioner's arrest, since he had reasonable grounds to suspect that the petitioner had committed an offence in terms of the Defence Act. He indicates that a special report on the necessity for further detention was made which was Annexure 'G' to his affidavit, and date-stamped 12 April 1988, with him as the reporting officer. He disputed that the petitioner's detention was unwarranted.

The Defence Act, under s 47(1) as read with the First Schedule, specifies

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those military offences that apply to members of the Regular Force. Section 48(1) states that any member found committing a military offence or who is on reasonable grounds suspected of having committed a military offence may be arrested and taken into custody. Section 48(6) states that any member who arrests any other member shall forthwith inform him of the cause of arrest. Section 51(1) provides that allegations against any member under military custody shall be duly investigated without unnecessary delay and proceedings instituted as soon as possible or the member must be released. Section 51(2) provides that whenever any member under military custody remains under arrest for more than 8 days without a court martial hearing, a special report on the necessity for further delay must be made by his Commanding Officer to the prescribed authority in a prescribed manner and a similar report must be made every 8 days until a court martial hearing is held or the member released. Section 53(1) states that a court martial may try a member for a military offence and any person within 3 months after he ceases to be a member of the Regular Force for a military offence committed whilst he was a member.

The Constitution of Zimbabwe, under ss 3, 13(3) and (4) provides as follows:

"3. This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

13. (3) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and hold communication with him.

13. (4) Any person who is arrested or detained -

(a) ...

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;

and who is not released, shall be brought without undue delay before a court, and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular

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such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

The provisions of the Zimbabwean Constitution are paramount and supercede all other enactments and laws and apply to all arrests and detentions whatsoever, including arrest and detention pursuant to the provisions of the Defence Act. The Constitution of Zimbabwe decrees that any person arrested or detained must be informed in a language he understands as soon as is reasonably practicable of the reasons of his arrest or detention and must be brought without undue delay before a court and if not tried within a reasonable time must be released unconditionally or upon reasonable conditions.

In *R v Markoes* 1929 CPD 41 at 42-43 GARDINER JP correctly observed:

"...There is no evidence that the complainant informed the accused of the cause of arrest. To my mind this is a most important provision made in the interest of the liberty of the subject and of the maintenance of the peace, and unless it is complied with, the person arrested is not in lawful custody ... It seems to me essential that a person, who is deprived of liberty, should know that his custody is lawful. He knows it when he is arrested under a warrant, and where the arrest is made without a warrant, he should know it from the information given."

It cannot be maintained on the papers filed in this matter that the petitioner was informed of the reasons for his arrest or detention either when arrested by Major Mugwisi or when detained pursuant to the remand warrant which merely recited that he was awaiting trial on a charge of contravening "Treasury Instructions". It is not clear from the remand warrant how contravening Treasury Instructions constituted an offence and what particular Treasury Instructions were contravened by the petitioner.

Further, a special report on the necessity for further delay must be made by the Petitioner's Commanding Officer. In the papers filed the special report is signed by the "Reporting Officer". It is not clear at all on the information before me that the petitioner's Commanding Officer had made the special report. The provisions of s 51(2) of the Defence Act are most explicit and must be strictly adhered to where a member is being detained beyond 8 days.

In the circumstances I am satisfied that the arrest and detention of the petitioner was not lawful. Accordingly the rule is confirmed whereby the

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arrest and detention of the petitioner is declared illegal; the Director of Prisons is ordered forthwith to release the petitioner from custody and the Minister of Defence is ordered to pay the costs of this petition.

Gill, Godlonton & Gerrans, petitioner's legal practitioners.

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JAMES NORTH (ZIMBABWE) (PVT) LTD & ORS v MATTINSON 1989 (1) ZLR 322 (HC)

Court **High Court, Harare**

Smith J

Ex parte application

21 & 26 April 1989

Flynote

Company law - director - notice of board meeting not given to - whether meeting valid - director - removal of by shareholders - irregularity in convening of meeting for this purpose - whether proceedings necessarily invalid - majority required for removal of director - whether articles may give certain shareholders special voting rights in respect of removal of directors - Companies Act [Chapter 190] - s 152 - effect of - resolution described by conveners as "special" - whether must be passed by three - quarters majority - director - resignation of - when resignation becomes effective - Companies Act, s 147 - whether can validate acts done bona fide by director after his resignation.

Headnote

The respondent was managing director of the first petitioner (James North). The majority of the shares in James North were held by a company incorporated in England and the remainder, referred to in the articles of association as the B shares, were held by the respondent (Mattinson) and his father. The B shareholders were entitled to appoint a director and they alone were entitled to remove that director. Mattinson's father was appointed the B director. Mattinson was an ordinary director, as were the second and third petitioners (Kelly and Hurst). Under the articles, the office of a director became vacant if by notice in writing he resigned that office.

In early 1989 Mattinson was told by the principal shareholder that his employment as managing director was terminated forthwith and that steps were being taken to convene an extraordinary general meeting to

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remove him from the office of director. Before the meeting was held, Mattinson's father resigned as the B director and the B shareholders appointed Mattinson the B director in his place. Also before the meeting, Kelly wrote to the chairman of James North, resigning from the board of directors but indicating a willingness to continue to work for a three month period.

The general meeting was duly held and attended by all the shareholders of James North either in person or by proxy. Hurst presided. The resolution to remove Mattinson as director was passed by two-thirds of the shareholders. Mattinson and his father objected that the meeting was not duly convened, having been convened by Hurst, not by the board of directors. They also objected that the resolution had not been duly passed, as the notice convening the meeting had referred to the resolutions as "special resolutions", for which a three-quarters majority was required.

Mattinson instituted legal action to challenge the validity of his removal. He was told by Kelly, who described himself as "acting managing director", that he would not receive any notices of future meetings of the board of directors. A meeting of the board was subsequently held, attended by Kelly, Hurst and another person, at which, *inter alia*, Mattinson's dismissal was ratified.

After Mattinson had entered the premises of James North and taken action to try to exclude Kelly and Hurst therefrom, James North, Kelly and Hurst brought an *ex parte* application, seeking a rule *nisi* restraining Mattinson from trespassing on the premises and other forms of relief. Mattinson repeated the objections raised at the general meeting. It was also argued that since Kelly had resigned as director before the board meeting there was no quorum and the business conducted had no validity. It was argued on Kelly's behalf that s 147 of the Companies Act [Chapter 190] could be invoked to validate Kelly's acts at the board meeting.

Held, that a failure to comply with the requirements of s 103(1) of the Companies Act, which require that an extraordinary meeting of the shareholders be convened by the directors, should not impair the validity of the meeting itself. All the shareholders were present, in person or by proxy, and the business being discussed, though of significant importance to Mattinson, was not of the utmost importance as far as the company was concerned.

Held, further, that the mere fact that the notice convening the meeting described the resolutions as "special" did not mean that they had to be passed as such, if an ordinary resolution would have sufficed for the purpose of giving effect to the action proposed.

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Held, further, that although the validity of the meeting itself had been upheld, this did not mean that the business conducted there was also valid. Mattinson, although appointed a director by the shareholders, was employed by James North. His purported suspension by the majority shareholder and the purported ratification of it by the shareholders of James North were of no

effect because they were not the acts of James North, which should be effected by the directors of James North.

Held, further, that by resigning as a director before the board meeting, Kelly had vacated his office with immediate effect. His offer to work out three months' notice could only apply to his capacity as an employee. There was thus no quorum at the board meeting and any resolution adopted was a nullity.

Held, further, that section 147 of the Companies Act, which provides that the acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification, did not save the proceedings at the board meeting. This was not a situation in which there was a defect in an appointment, but one in which there was no appointment at all.

Held, further, that the shareholders of James North could not in any event remove Mattinson from office. The articles provided that only the B shareholders could remove the B director. Although s 152 of the Act provided that nothing in the articles or memorandum could impair the power of a company to pass an ordinary resolution for the removal of a director, this did not mean that effect should not be given to any increased or reduced voting values attached to particular shares. In respect of the removal of B directors, only the votes of B shareholders counted.

Held, further, that because Mattinson was still a director after the general meeting, notice of any board meeting had to be given to him, he being within reach. The failure to give notice, though not *mala fide*, was an additional ground for holding that the board meeting was invalid.

Cases cited:

Foss v Harbottle (1843) 67 ER 189; 2 Hare 461

Edwards & Anor v Halliwell & Ors [1950] 2 All ER 1064 (CA)

Re State of Wyoming Syndicate Ltd (1901) 84 LTR 868 (Ch)

Bentley-Stevens v Jones & Ors [1974] 2 All ER 653; [1974] 1 WLR 638 (Ch)

van Tonder v Pienaar & Ors 1982 (2) SA 336 (SECLD)

Morris v Kanssen & Ors [1946] AC 459 (HL)

Bushell v Faith & Anor [1969] 1 All ER 1002 (CA)

Bushell v Faith [1970] 1 All ER 53 (HL)

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Swerdlow v Cohen & Ors 1977 (1) SA 178 (W)

Swerdlow v Cohen & Ors 1977 (3) SA 1050 (T)

African Organic Fertilizers & Associated Industries Ltd v Premier Fertilizers Ltd 1948 (3) SA 233 (N)

Rentekor (Pty) Ltd & Ors v Rheeder & Berman NO& Ors 1988 (4) SA 469 (T)

Sage Holdings Ltd v Unisec Group Ltd & Ors 1982 (1) SA 337 (W)

J W Jagger & Co (Rhodesia)(Wholesaling)(Pvt) Ltd v Mubika 1972 (1) RLR 397 (GD); 1972 (4) SA 100 (R)

M J Gillespie for the petitioners

E Chatikobo for the respondent

Judgment

Smith J: The first petitioner (hereunder referred to as "James North") is a company registered in Zimbabwe. The second and third petitioners (hereunder referred to as "Kelly" and "Hurst" respectively) are employees of James North, Kelly being the sales director and Hurst the financial director and company secretary. The majority of shares in James North are held by a company registered in Jersey (hereunder referred to as "Rocsi") which is ultimately controlled by a company incorporated in terms of the laws of England (hereunder referred to as "Siebe"). The shares held by Rocsi amount to two-thirds of the total shareholding in James North and are referred to as the A Shares. The remaining one-third of the shares, which are the B Shares, are held by the respondent (hereunder referred to as "Mattinson"), his father (hereunder referred to as "Mattinson Snr") and Avon Products (Pvt) Ltd, a company owed by the Mattinson Trust. Mattinson Snr as chairman of James North but resigned from that position and as a director on 28 February 1989. Mattinson was the managing director of James North. Various provisions of the articles of association of James North are relevant for the purposes of settling the dispute amongst the parties. They are as follows:

"DIRECTORS

84. (1) Unless otherwise determined by Special Resolution, the number of Directors shall not be less than 3 (three) and not more than 8 (eight) and the First Directors at the date of the adoption of these Articles as the Articles of Association of the Company shall be James Murray Tait and Sydney Tait (called "A" Directors) who at that date represent certain shareholders (called "A" shareholders) holding two-thirds of the shares in the Company and Eric William Mattinson (called "B" Director) who at that date represents certain shareholders (called "B" shareholders) holding one-third of the shares of the Company.

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(2) In the event of the death, retirement or removal of one or both of the "A" Directors, the "A" shareholders alone shall at all times have the right to appoint a successor or successors, subject to a maximum of two "A" Directors. Similarly the "B" shareholders alone shall at all times have the right to appoint not more than one "B" Director.

(3) The "A" shareholders shall alone be entitled to remove a Director appointed by them and the "B" shareholders shall alone be entitled to remove a Director appointed by them. All appointments and removals of Directors shall be made by a notice in writing addressed to the Company signed by the holder or holders of a majority of the "A" shareholders or of the "B" shareholders as the case may be.

85. The continuing Directors at any time may act notwithstanding any vacancy in their body, but the continuing Directors shall forthwith take steps to summon a meeting of the Shareholders for the purpose of electing another Director in the place of the Director vacating office. One such Shareholder shall be a quorum for the purposes of this Article.

DISQUALIFICATION OF DIRECTORS

94. The office of a Director shall be vacated -

- (a) If he becomes bankrupt or makes any arrangement or composition with his creditors.
- (b) If he is found lunatic or becomes of unsound mind.
- (c) If he gives notice in writing to the Company he resigns his office.
- (d) If he becomes prohibited from being a Director by reason of any Order made under Section 299 of the Act, or is disqualified under the provisions of Section 144 thereof.
- (e) If the Shareholders determine by a majority vote to remove him from the office of Director in accordance with the provisions of Section 146 of the Act."

The reference in para (e) of Art 94 to s 146 of the Act is a reference to the Companies Act 1951. The corresponding provision in the 1974 Revised Edition of the Laws is s 152 of the Companies Act [*Chapter 190*] (hereunder referred to as ("Chapter 190") which reads as follows:

"152 (1) A company may, by resolution of which special notice has been given, remove a director before the expiration of his period of office notwithstanding anything in its articles or in any agreement between it and him."

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The proviso to subs (1) is irrelevant. Sub section (2) of that section provides for the director concerned to be able to make representations to the members of the company and then subs (3) provides that a vacancy created by the removal of a director under s 152, if not filled at the meeting at which he is removed, may be filled as a casual vacancy.

At the beginning of December 1988 there were six directors of James North. Mattinson Snr was the B director, there were two A directors and Mattinson, Kelly and Hurst were ordinary directors. On 20 December 1988 Mattinson, who was in England on holiday at the time, was given a letter from the divisional chief executive of Siebe advising him that his employment as managing director of James North was terminated forthwith. Mattinson refused to accept the termination of his services. The legal representative of Siebe wrote a letter dated 29 December 1988 informing Mattinson of conduct on his part which allegedly caused prejudice to James North and advising him that he was forthwith suspended without pay and that an application was being made to the Ministry of Labour for authority to terminate his employment. He received this letter on his return from holiday in the middle of January 1989. He was also told that Siebe had appointed Kelly as acting managing director and that the bankers and auditors of James North had been advised of Mattinson's dismissal. The locks of Mattinson's office had been changed soon after his dismissal and on 20 January 1989 he was allowed to enter his office in the presence of Kelly and remove some of his personal papers.

The legal representative of Siebe wrote a further letter, dated 30 January 1989, addressed to

Mattinson's legal representative, advising that as James North was a subsidiary of Siebe and was managed as a subsidiary of the Siebe group, Mattinson's suspension was perfectly valid. Furthermore, as it was inappropriate for Mattinson to remain as a director, steps had been taken to convene an extraordinary general meeting to remove him from such office and, at the same time, to ratify the actions taken in suspending him and authorizing his dismissal.

Notice of the said meeting was issued by Hurst, dated 31 January 1989. It stated that the extraordinary general meeting would be held on 2 March and the agenda was that Rocsi intended to move two special resolutions: one, to remove Mattinson from his office of director; and two, to ratify his suspension from the post of managing director and to authorize the termination of his employment. The notice purported to be issued by order of the board of directors. The meeting was duly held on 2 March and was attended by all

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shareholders of James North in person or represented by proxy. Hurst presided as chairman of the meeting. The resolution removing Mattinson from his office as director was passed with two-thirds of the shareholders voting in favour of the resolution and one-third against. At the meeting objections were raised on behalf of Mattinson and Mattinson Snr that the meeting had not been duly convened because it had not been convened by the board of directors. It had been convened by Hurst acting at the request of Rocsi or Siebe. At the meeting, a letter dated 28 February was tabled in which Mattinson Snr tendered his resignation as the director representing the B shareholders and as chairman of James North. A further letter of the same date was tabled giving notice that Mattinson had been appointed with immediate effect as the director representing the B shareholders. A further objection raised at the meeting was that the resolutions had not been duly passed because they were referred to in the notice convening the meeting as special resolutions and a special resolution could not be passed unless at least three-quarters of the shareholders voted in favour.

Prior to the meeting referred to above, Kelly wrote to the chairman of James North tendering his resignation. The first paragraph of his letter read as follows:

"I hereby tender my resignation from the Board of Directors of James North (Zimbabwe) (Pvt) Ltd as well as from the Company as of the 31st January, 1989. Should my services be required, I will be happy to work off a period of notice, ie three months from 1st February, 1989."

Kelly continued working for James North after 31 January. Mattinson instituted legal action challenging the validity of his suspension and removal from office of director. His legal representative wrote to Hurst setting out a number of grievances. He received a reply dated 15 March from Kelly, who signed the letter as acting managing director, in which he stated that Mattinson would not receive any notices of meetings of the board of directors because he was no longer a director.

A meeting of the board of directors was held on 28 March at which the following three were present: Mr Merrington, an A director, Kelly and Hurst. At that meeting a number of resolutions were passed. One was to ratify all acts taken in connection with the suspension of Mattinson as managing director and to authorize the termination of his contract of employment. Thereafter the

Ministry of Labour was approached for the grant of an order terminating the employment of Mattinson. An earlier approach had been

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made to the Ministry of Labour and a hearing had been arranged for 11 January, but it had not taken place because Mattinson had not then returned from his holiday.

On 30 March, Mattinson entered the premises of James North, caused the gates to be locked and directed the security guards to refuse entry to Kelly and Hurst. He also wrote two letters dated that date which he signed as managing director of James North. One was to Kelly, referring to his letter of resignation, in which Mattinson advised him that his services were no longer required as of that date. The other was to Hurst, in which Mattinson stated, *inter alia*, that he had decided to implement an immediate investigation into the affairs of the company and that Hurst was granted leave of absence until the investigation was completed. Such action resulted in James North, Kelly and Hurst petitioning this Court as a matter of urgency for the issue of a rule *nisi* restraining Mattinson from trespassing upon the premises of the James North and for other forms of relief. The rule *nisi* was duly issued on 27 March. The return day was extended to 21 April when leave was granted on the basis of urgency for the matter to be argued during vacation. At the commencement of the hearing the parties agreed that there were a number of issues which they wished to be determined but which did not strictly arise from the rule *nisi*. The attitudes adopted by the parties and the legality of their actions depended upon the validity of the meeting of the shareholders held on 2 March (hereinafter referred to as "the 2 March meeting") and the meeting of the board of directors held on March 28 (hereinafter referred to as "the 28 March meeting"). Furthermore, the status of Kelly had been challenged and should be decided. It was agreed that the question of the termination of Mattinson's contract of employment was before the hearing officer in the Ministry of Labour and therefore was not relevant for the purposes of the present hearing. I accept the contention of the parties that before their present rights can be determined, the validity of the decisions taken at the 2 March meeting and the 28 March meeting must be settled. Accordingly will first deal with those issues and the status of Kelly.

With regard to the 2 March meeting, s 103 of Chapter 190 provides for the convening of extraordinary general meetings on requisition. Subsection (1) thereof provides that on the requisition of members of the company holding not less than one-twentieth of the paid-up capital carrying voting rights, "the directors of the company, notwithstanding anything in its articles, shall, within twenty-one days of the deposit of the requisition, issue a notice to members for a date not less than fourteen nor more than twenty-eight days from the date of the notice". In terms of subs (3) of that section, if the directors

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do not, within twenty-one days of the requisition, issue a notice convening the meeting, the requisitionists may themselves convene the meeting. Mr *Gillespie* conceded that the

abovementioned provisions were not complied with. Relying, however, on what is known as the rule in *Foss v Harbottle*, (1843) 2 Hare 461; 67 ER 189, he submitted that the result desired by the majority of shareholders could be brought about by a simple majority of votes and therefore it would be futile, and contrary to principle, for the Court to set aside what the majority had already effected. As stated in Gibson's *South African Mercantile and Company Law* 4 ed p 408, the rule in *Foss v Harbottle* is not a universal rule. It is a rule subject to exceptions. One of those exceptions allows a shareholder an action where he has an individual right to sue - *Edwards & Anor v Halliwell & Ors* [1950] 2 All ER 1064 (CA). In that case JENKINS LJ said at p 1067:

"In my judgment, this is a case of a kind which is not even within the general ambit of the rule. It is not a case where what is complained of is a wrong done to the union, a matter in respect of which the cause of action would primarily and properly belong to the union... The gist of the case is that the personal and individual rights of membership of each of them have been invaded by a purported, but invalid, alteration of the tables of contributions. In those circumstances, it seems to me the rule in *Foss v Harbottle* (1) has no application at all, for the individual members who are suing sue, not in the right of the union, but in their own right to protect from invasion their own individual rights as members."

It seems to me, however, that the failure to comply with the requirements of s 103(1) of Chapter 190, in that there was no meeting of the directors to convene the extraordinary meeting of the shareholders, should not impair the validity of the meeting itself. Mr *Chatikobo* argued strenuously that the irregularities were sufficiently serious to vitiate the meeting. He relied on *Re State of Wyoming Syndicate Ltd* (1901) 84 LTR 868 (Ch). That case concerned a resolution for the voluntary liquidation of a company. A meeting to consider the resolution was convened by the secretary within twenty-one days after requisition therefor without the authority of the directors. According to the headnote, which correctly reflects the judgment delivered, WRIGHT J held as follows:

"...the summoning of the meeting by the secretary without the authority of the directors was not a mere irregularity which, upon the principles of equity laid down in *Browne v La Trinidad* 58 LTR 137; 37 Ch D 1, would not be regarded as fatal to the validity of the proceedings, but that, in accordance with the decision of COZENS-HARDY J in *Re Haycraft Gold*

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Reduction and Mining Co 83 LTR 166; [1900] 2 Ch 230, such principles could not be applied to a case like the present, where upon so important a question as whether the company should proceed to voluntary liquidation, all the proceedings should be conducted with substantial propriety; that the meeting was improperly convened; that the directors had no knowledge of the irregularity, and had done nothing to ratify the secretary's action; that no valid resolution for the voluntary winding-up of the company had been passed; and that, consequently, the usual compulsory winding-up order must be made."

At p 869 WRIGHT J said:

"I think I should not be deciding in accordance with the decision of COZENS-HARDY J, if I were to hold that in a matter of this kind a secretary could act entirely on his own authority. If he does summon a meeting without authority I do not think I ought to hold that a resolution passed at the meeting is valid. If it had been a mere question of informality with reference to the constitution of the board which summoned the meeting, for instance, some question as to whether there was a proper quorum present, I might have applied the principle of *Browne v La Trinidad (ubi sup)*, but I think I should be going too far if I held that it applied to the present case. No doubt two directors, the requisitionists, and many shareholders were present at the meeting, and there would have been great reason for argument if there had been full knowledge of the irregularity, and recognise the act of the

secretary as their act. Then a different question would have arisen, but there is no question here of ratification, and I must hold that the meeting was improperly convened, and that no valid resolution of the voluntary winding-up was passed."

Mr *Gillespie* urged strongly that the reasoning of PLOWMAN J in *Bentley-Stevens v Jones & Ors* [1974] 2 All ER 653; [1974] 1 WLR 639 (Ch) should rather be adopted. That case was also concerned with irregularities in the convening of an extraordinary general meeting of a company. The board of directors of a company convened an extraordinary general meeting of a subsidiary company for the purpose of removing a director from the board of the subsidiary company. As in the case under consideration, the director who convened the general meeting of the subsidiary company purported to be acting by order of the board thereof whereas in fact no board meeting had been held. At the extraordinary general meeting Bentley-Stevens was removed from the board of directors. He applied to the court for a declaration that due to the irregularities the resolution for his removal was a nullity. At pp 640-641 PLOWMAN J said:

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"In my judgment, even assuming that the plaintiff's complaint of irregularities is correct, this is not a case in which an interlocutory injunction ought to be granted. I say that for the reason that the irregularities can all be cured by going through the proper processes and the ultimate result would inevitably be the same. In *Browne v La Trinidad* (1887) 37 ChD 1 at 17, LINDLEY LJ said:

"I think it is most important that the Court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment."

It seems to me that the motion which is before me falls within the principle stated by Lindley LJ."

In the case under consideration, all the shareholders were present, in person or by proxy, at the extraordinary general meeting, were fully aware of the business that was to be conducted and were able to state their views on the resolutions that were on the agenda. In the *Wyoming Syndicate* case *supra* one of the main factors that influenced WRIGHT J was that the meeting in question was to consider whether or not the company should proceed to voluntary liquidation and he felt that, in the circumstances, nothing could be more important as far as the company was concerned. Therefore the proceedings ought to be conducted with substantial propriety. In my opinion, the question of whether or not a particular director should be removed, whilst of significant importance to the director concerned, is not of the utmost importance as far as the company is concerned. Accordingly I prefer the attitude adopted by PLOWMAN J in the *Bentley-Stevens* case *supra*. Had a meeting of the directors of James North been held to consider the requisition by Siebe to convene the extraordinary general meeting, the views of the directors of Siebe would have prevailed because they owned the majority of the shares in James North. If the requisition for an extraordinary general meeting had been made by a minority of the shareholders the position might have been different. In such a case, although the meeting would have had to be convened, the directors would have been able to put additional items on the agenda.

The notice convening the 2 March meeting stated that two special resolutions were to be proposed. They were in fact passed by two-thirds majority but not by the three-quarters majority

required for a special resolution. It seems to me, however, that the mere fact that they were referred to as special

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resolutions does not mean that they had to be passed as special resolutions. If an ordinary resolution sufficed for the purpose of giving effect to the action proposed, it would be pedantic to require a special resolution merely because the notice convening the meeting so described the resolution. Furthermore, the fact that the notice purported to be issued "By order of the Board" when in fact that board of directors had not so ordered does not, in my opinion, invalidate the notice convening the meeting in this instance because all members were well aware of the fact that the board of directors had not met for the purpose of ordering the meeting.

Although the validity of the 2 March meeting has been upheld, it does not follow that the business has been upheld, it does not follow that the business conducted at the meeting was also valid. At that meeting the shareholders resolved that Mattinson should be removed from office and that all acts taken in connection with his suspension as managing director were ratified. Those steps had been taken by Siebe, the majority shareholders. *Van Tonder v Pienaar & Ors* 1982 (2) SA 336 (SECLD) at 341 concerned a case where the chairman of a company had suspended a fellow director. The board of that company consisted of two directors and the chairman had a casting vote. The chairman decided that his fellow director should be suspended and that there was no need for a meeting to be called for the purpose. It would, he felt, be pointless because he would vote in favour of the suspension and his fellow director would vote against and then he would exercise his casting vote. KANNEMEYER J at p 341 said

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"In my view the first respondent's approach is not correct. In terms of art 72 the directors are charged with the management of the second respondent's affairs. There is no suggestion that there has been a delegation by the directors of any of their powers to the first respondent.

In *Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 (CA) at 134 GEER LJ is reported as saying:

'A company is an entity distinct alike from its shareholders and directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors they and they alone can exercise these powers.'

These powers are, in the absence of delegation, exercised by means of resolutions adopted at meetings of directors, or in terms of art 80 (C) by a written decision signed by all directors then present in the Republic. "

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Mattinson, although he had been appointed as director by the shareholders, was employed by James North as managing director. He was paid by James North and he was working for the company. His contract of employment was with James North. Accordingly, in my view, his purported suspension by Siebe and the purported ratification thereof by the shareholders of

James North were of no effect because they were not the acts of James North.

At the 28 March meeting, the board of directors adopted and approved the resolutions referred to above that had been passed by the shareholders of James North at the 2 March meeting. The directors present at that meeting were Merrington, an A director, Kelly and Hurst. In terms of Article 97 of the article of association of James North, three directors constitute a quorum at any meeting. Mr *Chatikobo* argued that Kelly had resigned as a director with effect from 31 January 1989 and therefore, because there had not been a quorum at the 28 March meeting, the business purportedly conducted at that meeting had no validity. Mr *Gillespie* argued that Kelly's letter of resignation contained an offer to work out his three month's notice, which offer was accepted and therefore he remained a director until 2 April. I do not agree with him. Article 94 of the articles of association of James North, which has been set out at the beginning of this judgment, provides in para (e) thereof that the office of a director **shall** be vacated if, by notice in writing to the company, he resigns his office. Kelly wrote to the chairman resigning from his office as a director with effect from 31 January. In my view it automatically followed that he vacated his office as a director on that date. There is no question that his resignation had to be accepted before it could take effect. His offer to work out his three months' notice could only apply to his capacity as an employee of James North. There was no meeting of shareholders to continue his appointment as a director after 31 January. That, in my opinion, was necessary before he could remain as a director after the date of his resignation. The chairman of James North had no authority to request or to direct that Kelly continue as a director after his resignation. He did not even have any authority to decide whether or not the resignation should be accepted. In view of my finding on this issue, it follows that any resolution adopted at the 28 March meeting must be regarded as a nullity because there was no quorum at the meeting.

Mr *Gillespie* submitted that s 147 of Chapter 190 could be invoked to validate the acts of Kelly at the 28 March meeting. Section 147 provides that the acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification. As LORD SIMONDS said in *Morris v Kanssen & Ors* [1947] AC 459 (HL) at 470, the section can be

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invoked only where there is a defect afterwards discovered in the appointment or qualification of a director. He said further, at p 471:

"There is, as it appears to me, a vital distinction between (a) an appointment in which there is a defect, in other words, a defective appointment, and (b) no appointment at all. In the first case it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose; in the second case there is not a defect, there is no act at all. The section does not say that the acts of a person acting as director shall be valid notwithstanding that it is afterwards discovered that he was not appointed a director. Even if it did, it might well be contended that at least a purported appointment was postulated. But it does not do so, and it would, I think, be doing violence to plain language to construe the section as covering a case in which there has been no genuine attempt to appoint at all. These observations apply equally where the term of office of a director has expired, but he nevertheless continues to act as a director, and where the office has been from the outset usurped without the colour of authority."

There is no question in this case, of course, that Kelly usurped the office of director. He no

doubt genuinely believed that he continued to remain in office as a director because he was serving his period of notice. However, for the reasons given above, I consider that his letter of resignation effectively terminated his service as a director on 31 January 1989. Consequently there is no question of any defective appointment.

One further issue which requires determination is whether the shareholders of James North could validly remove Mattinson from his office of director. The relevant provisions of the articles of association and s 152 of Chapter 190 have been set out at the beginning of this judgment. There is a clear conflict between articles 84 and 94(e). Article 84 specifically provides that the A shareholders shall alone be entitled to remove a director appointed by them and alone shall have the right to appoint a successor and the same applies in relation to the B shareholders. Article 94(e), on the other hand, provides that the office of a director shall be vacated if the shareholders determine by a majority vote to remove him from office. On the face of it, therefore, art 94(e) completely nullifies the provisions of art 84. In my view, this could not have been intended by the members of James North when they approved and adopted the articles of association. It was obviously intended by the parties that the A shareholders should be able to appoint two directors to represent their interest and dismiss them whenever they so desired. Likewise the B

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shareholders, who were in the minority, were afforded the right to appoint one shareholder to represent their interests. In my opinion, in order to give effect to the obvious intention of the parties, the maxim *generalia specialibus non derogant* must apply in attempting to reconcile these two provisions. Thus the provisions of art 94(e) must be interpreted as applying only to those directors who are not A directors or B directors. Not to do so would not only nullify the express provisions of art 84 concerning the removal of A and B directors but would also lead to an absurdity. Article 84 confers on the B shareholders the right to appoint any person they consider fit to represent them to be the B director. Consequently if the majority of the shareholders were able to remove a B director in terms of art 94(e), the B shareholders could immediately re-appoint that person as a B director and they could continue doing so every time the majority shareholders purported to remove him. It seems to me that art 94(e) should be given the limited application I have suggested above, not only to avoid the absurd situation that could result but also to avoid a manifest injustice to the B shareholders that would result if art 94(e) were to be given its superficial *prima facie* meaning.

Mr Gillespie submitted that as Mattinson was at that time an ordinary director and had not resigned as such, he could not be appointed as a B director. I do not agree with him. I see no reason why the A shareholders or B shareholders should be precluded from appointing an ordinary director as an A director or B director, as the case may be. It would, in my opinion, be pedantic in the extreme to require that an ordinary director must resign from his office as an ordinary director to be eligible for appointment as an A or B director. His appointment as an A or B director would, in my view, merely supersede his appointment as an ordinary director.

The determination of the proper interpretation of art 84 and 94(e) does not, however, dispose of the matter. One has to look further at s 152 of Chapter 190 and ascertain its effect. Section

184(1) of the English Companies Act is identical to s 152 of Chapter 190. The provision in the English Act was considered in *Bushell v Faith* [1970] 1 All ER 53. In that case, art 9 of the articles of a private company provided that, in the event of a resolution being proposed at a general meeting for the removal of a director, any shares held by the director should carry three votes per share. The company had issued 300 shares which were held by the plaintiff, the defendant and one other in equal shares. The three were all directors of the company. The plaintiff and her sister convened a general meeting to consider a resolution to remove the defendant from his office as director. They voted in favour and he voted against. The plaintiff argued that the resolution had been carried by 200 votes

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to 100 whereas the defendant submitted that in terms of the abovementioned art 9, his 100 shares carried 300 votes to 200. The plaintiff relied on s 184(1) *supra* to support her argument and the claim succeeded before UNGOED-THOMAS J who held that the said art 9 was invalid because it infringed s 184(1). The Court of Appeal reversed the decision (see [1969] 2 ChD 438) holding that since s 184 did not prevent certain shares from having special voting rights attached to them on certain occasions, it did not invalidate an article giving the shares of a director loaded voting rights. The plaintiff's appeal to the House of Lords failed. By a majority of four to one the Lords held that in s 184(1) Parliament had only sought to make an ordinary resolution sufficient to remove a director and had not sought to fetter a company's right to issue a share with such rights or restrictions as it thought fit, and further that these need not be of general application but could be attached to special circumstances and particular types of resolution. LORD MORRIS, the dissenting judge, held that while some shares might carry greater voting powers than others, and on a resolution to remove a director would carry the voting power they possessed, the said art 9 introduced a device, the unconcealed effect of which was to make a director irremovable, for the special purpose of circumventing s 184.

Bushell's case, supra, was very carefully considered by BOTHA J in *Swerdlow v Cohen & Ors* 1977 (1) SA 178 (W). Section 220(1)(a) of the South African Companies Act 61 of 1973 is identical to s 152 of Chapter 190 and s 184(1) of the English Companies Act. Article 42(3) of the memorandum of the company in question provided that questions arising at any meeting of members were to be decided by a majority vote but conferred a veto on the three founding members of the company. At a duly convened meeting all the members, other than one of the founding members, voted in favour of a resolution that that founding member should be removed from office as a director. He voted against the resolution. He claimed that, because of his right of veto, the resolution had not been duly passed whereas the other members claimed that the resolution had been validly passed by virtue of the provisions of s 220(1)(2) of the South African Companies Act. BOTHA J considered that the case was indistinguishable from *Bushell's case supra* and therefore felt constrained to examine that case in some detail. He was of the opinion that "the succinct and forceful reasoning in the short minority judgment of Lord Morris' was unanswerable and he did not find any satisfactory answer to it in the majority judgment. At p 185 he said:

"The real issue in that case, as I see it, was whether art 9 constituted a legitimate and permissible 'avoidance' of s

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amounted to an impermissible attempt to 'evade' the section, *in fraudem legis* (cf *Dadoo Ltd & Ors v Krugersdorp Municipal Council* 1920 AD 530 at 542 et seq). It was accepted in the majority judgments (*per* LORD UPJOHN at p 1108E, and *per* LORD DONOVAN at p 1110A) that the mischief which sec 184 was designed to meet was the practice of providing in the articles of a company that a director should be irremovable or removable only by a special or an extraordinary resolution; so, it was enacted that an ordinary resolution would suffice for the purpose, notwithstanding anything in the articles. For myself, I would add the observation that the Legislature must be taken to have intended to override any provision in the articles specifically designed to entrench the position of a director in any manner which would prevent his removal by means of an ordinary resolution. This approach is in accordance with the basic canons of interpretation of statutory provisions (see *Steyn, Uitleg van Wette* 3 ed pp 53-54; *Neethling v Klopper en Andere* 1967 (4) SA 459 (A) at p 464G-H). Upon that footing, art 9 was, in my view, plainly in conflict with the intention of the legislature as embodied in s 184, and, accordingly, void. In this regard I cannot usefully add anything to the reasoning of Lord Morris. In my judgment, therefore, I decline, with respect, to accept the majority decision in *Bushell v Faith*, in respect of the actual result arrived at on the facts, as persuasive authority in favour of the applicant's contention in the present case."

Accordingly he held that the said art 42(3) was not effective to exclude the company's power to pass a resolution under s 220(1)(a) of the South African Companies Act for the removal of Swerdlow as a director. Thus the resolution was valid despite the provisions of art 42(3).

The appeal against BOTHA J's decision was dismissed - see *Swerdlow v Cohen & Ors* 1977 (3) SA 1050 (T). However the court decided that it was not necessary to examine the validity or otherwise of the opinion on the main issue in *Bushell v Faith* because the case under consideration was distinguishable in that it was not one in which an article had been formulated with the express purpose of circumventing the provisions of s 220(1) of the South African Companies Act. Article 42(3) which was under consideration was of general application, MARGO J said in delivering the judgment of the court, and there was nothing to suggest that it was a device *in fraudem legis*. The legality of the article was therefore not in question, but only its effectiveness when it was sought to be used to deny the company the power conferred by s 220(1) to remove a director. At pp 1053-4 MARGO J gave the court's interpretation of the intention of the Legislature in enacting s 220(1)(a) of the

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South African Companies Act. He said:

"The reference in s 220(1)(a) is simply to a 'resolution', and there can be little doubt that Parliament's intention was to empower a company to exercise the rights accorded by the section by means of an ordinary resolution. However, it does not follow that the voting on an ordinary resolution is invariably to be on the basis of one share one vote'. In terms of s 193(1) of the Act, every member of a company having a share capital has a right to vote at meetings of the company in respect of each share held by him, but this is subject to the provisions of ss 195 and 196, *inter alia*. Section 195(2) provides that the voting rights of a member of a private company shall, 'subject to the provisions of section 193(1)', be determined by the articles of the company. Furthermore, s 196(1) provides that s 193(1) is not to apply in respect of shares without voting rights or with different voting rights if such shares were issued at the date of commencement of the Act, or were issued subsequently, but in pursuance of a right or

obligation to issue them which existed at the date of commencement of the Act.

In resolutions proposed in a private company, the voting rights accorded to the holder of shares of a particular class or designation are therefore as determined by the articles ...

With reference particularly to s 220 (1)(a), the intention does not appear to have been to interfere with such voting rights or restrictions as are validly attached to particular shares by the articles. The expression 'notwithstanding anything in its memorandum or articles' is given the same weight as the expression 'or (notwithstanding anything) in any agreement between it and any director'. That would seem to indicate that the exclusion of the memorandum and articles, and of any such agreement, relates to anything therein which would prevent the removal of a director in the manner described. What the section in effect provides is that nothing in the memorandum or articles may impair the power of a company to pass an ordinary resolution for the removal of a director.

The essential characteristics of such a resolution are that the proposal is to be put before a meeting of members, and that they are to vote thereon, with the resolution being carried as a valid and enforceable decision of the company if the votes cast in favour thereof count up to a simple majority.

However, in the voting by members on such a resolution, the section does not prevent effect being given to any increased or reduced voting values attached to particular shares by the articles."

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Section 105(1)(e) of Chapter 190 provides that every member of a company shall have one vote in respect of each share held by him unless the articles of the company make other provision in that behalf.

It is clear therefore that the Act envisages that some shares might carry greater voting powers than others. Could it have been the intention of the Legislature, when enacting s 152(1), to interfere with the voting rights or restriction on voting rights conferred by the articles of association of a company? I do not think so. I find the reasoning of the majority in *Bushell's* case and of MARGO J in *Swerdlow's* case *supra* to be very persuasive. As RUSSELL LJ said *Bushell v Faith* [1969] 1 All ER 1002 at 1005-6:

"There are of course many cases in which directors are appointed and removed at the instance of a particular group of shareholders. Examples may be found in Forms 199 to 201 of *Palmer's Company Precedents*. If the company in general meeting by ordinary resolution purported to remove such a director, such provision would stultify the removal by an immediate reappointment, but it would be I think impossible to say that such provision was therefore contrary to s 184. Counsel for the plaintiff said that that would be because for a *punctum temporis* the director was removed, and that of course is true. But if one is arguing on broad lines of conflict with the purpose of the section this technical point seems out of place. In my view it would equally not conflict with the section if the article provided that on a resolution for the removal of the director either: (a) shares other than the class should have no vote, or (b) that the shares of that class should have attached to them enough votes to pass or defeat a resolution for that removal."

Thus in the present instance, if the members of James North were to be able to remove Mattinson as a director by an ordinary resolution passed at a general meeting the B shareholders could, immediately thereafter and without even leaving the meeting, re-appoint him as a B director. That would lead to a manifestly absurd situation. With due respect, I concur with the views expressed by MARGO J in *Swerdlow's* case *supra* that s 152 does not prevent effect being given to the reduced voting value attaching to B shares in relation to the removal of an A director or to A shares in relation to the removal of a B director. Consequently, when the

resolution was put to the 2 March meeting that Mattinson be removed from his post as a director, whereas all the members could have voted in relation to his removal as an ordinary director, as he was a B director, only the votes of the B shareholders should have been counted in relation to his removal as a B director. It is clear.

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from the papers before the court that at the 2 March meeting the A shareholders voted in favour of the resolution that he be removed as a director whereas the B shareholders voted against. For the reasons given I consider that the A shareholders were precluded from voting on the resolution. It follows therefore that Mattinson's purported removal from office as a B director was invalid.

I have earlier found that the business conducted at the 28 March meeting was invalid because of the lack of a quorum. My finding that Mattinson was not properly removed from the office of director meant that he was still a director on 28 March. To constitute a valid meeting of directors, notice of the meeting must be given to every director who is within reach: See *African Organic Fertilizers & Associated Industries Ltd v Premier Fertilizers Ltd* 1948 (3) SA 233 (N) and *Rentekor (Pty) Ltd & Ors v Rheeder & Berman NO & Ors* 1988 (4) 469 (T) at 494. As it was thought by Hurst that Mattinson was no longer a director he was not given notice of the 28 March meeting. He was 'within reach'. This failure to give him notice, even though not *mala fide*, would be an additional ground for holding that the 28 March meeting was not a valid meeting of directors.

Mattinson has, in his capacity as managing director of one of the B shareholders, written to the Minister of Justice, Legal and Parliamentary Affairs by letter date 30 March 1989, requesting him to appoint an investigator in terms of s 134 of Chapter 190 to investigate the affairs of James North. Section 135 of that Act provides that the Minister shall appoint an inspector to investigate the affairs of a company if the court declares that its affairs ought to be so investigated. Respondent has prayed for an order that this court makes such a declaration. There have been a number of cases in South Africa which considered the investigation of the affairs of a company in terms of s 258 of the South African Companies Act, which is equivalent to s 135 of Chapter 190. The principles laid down in the various judgments are set out in *Sage Holdings Ltd v Unisec Group Ltd & Ors* 1982 (1) SA 337 (W) at 359-360. I do not consider that it is necessary for me to repeat them.

The appropriate Minister has been requested to appoint an inspector to investigate the affairs of James North. That does not preclude this court from ordering an investigation. However, I do not consider it advisable that this court should order an investigation. One of the principles set out in *Sage Holdings supra* is that the grounds which make it right or desirable to order an investigation should be undisputed or clearly established. That is not the case here. The allegations made by Mattinson are that attempts have been

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made by Siebe to involve James North in a contravention of the Exchange Control Regulations. These are not undisputed and have not been clearly established. It seems to me that the appropriate Minister is in a better position than I am, with the limited information before me, to decide whether or not an investigation should be held. The appropriate Minister is able to call for additional evidence, if he considers it necessary, before making a decision on the request by Mattinson.

At the commencement of his submissions, Mr *Gillespie* applied to strike out from the respondent's affidavit certain paragraphs and annexures on the basis that they were irrelevant, argumentative and superfluous. These mainly concerned the respondent's case concerning an investigation into the affairs of James North in terms of s 134, referred to above, and the hearing by the Ministry of Labour in connection with his dismissal from James North. Although the issues concerned are not determined in this judgment they were considered. The application to strike out is refused.

As regards costs, Mr *Chatikobo* submitted that they should be borne by Kelly and Hurst. He alleged that in their *ex parte* application they had concealed vital facts from the Court and that a serious view should be taken of such non-disclosure - see *JW Jagger & Co (Rhodesia) (Wholesaling) (Pvt) Ltd v Mubika* 1972 (1) RLR 397 (GD); 1972 (4) SA 100 (R). In my view all the relevant information was contained in the papers before the Court, although some of it had to be gleaned from the correspondence attached to the petition. As the respondent has been substantially successful, it seems to me that the petitioners should be ordered jointly and severally to pay the cost.

It is accordingly ordered -

1. That the resolutions in annexure "D" to the papers filed of record by the petitioners in this matter be and are hereby declared not to be valid resolutions of the members of the first petitioner.
2. That the resolutions in annexure "G" to the papers filed of record by the petitioners in this matter be and are hereby declared not to be valid resolutions of the Board of Directors of the first petitioner.
3. Pending the issue of the Labour Relations Officer's determination concerning the application to terminate the services of the respondent, the respondent be and is hereby restrained from entering the premises of the first petitioner save to the extent that his presence there:

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SMITH J

- 3.1 is required by the Labour Relations Officer; or
- 3.2 whilst the respondent holds the office of director of the first petitioner, is necessary for the respondent to attend or requisition a meeting of the Board of Directors of the first petitioner; or

- 3.3 whilst the respondent is a registered shareholder of the first petitioner or holds proxy for such registered shareholder, is necessary for the respondent to requisition or attend any meeting of the members of the first petitioner; or
- 3.4 is required by the auditors of the first petitioner; or
- 3.5 whilst the respondent holds the office of director of the first petitioner and until such time as he is informed in writing of his release from the guarantee for the first petitioner's indebtedness furnished by him to Grindlays Bank plc, is necessary for the respondent to inspect financial statements or books of account of the first petitioner.
4. That the second and third petitioners be and are hereby restrained from preventing the respondent from entering the premises of the first petitioner for any of the purposes mentioned in paragraph 3 of this Order.
5. That the secretary of the first petitioner be and is hereby directed to give notice to the respondent, by delivering such to Messrs Atherstone & Cook, of any meeting of the Board of Directors of the first petitioner in the convening of which he may be involved. This Order shall remain in force until and cease to have effect when and if, the respondent is removed from the office of director of the first petitioner.
6. That the first, second and third petitioners jointly and severally pay the costs of the respondent in this matter.

Stumbles & Rowe, petitioners' legal practitioners

Atherstone & Cook, respondent's legal practitioners

1989 (1) ZLR p344

COMMERCIAL CAREERS COLLEGE (1980) (PVT) LTD v JARVIS 1989 (1) ZLR 344 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

4 & 28 April 1989

Flynote

Employment - wrongful dismissal of employee - reinstatement - discretion of court to award.

Headnote

The respondent reported to a labour relations officer a dispute she and other employees had with their employer. The reaction of the managing director of the appellant, her employer, was to

give her two months' notice of termination of her contract of employment. He failed to obtain the necessary approval of the Minister under s 2(1)(a) of the Labour Relations (General Conditions of Service)(Termination of Employment) Regulations 1985. In an action for wrongful dismissal, the High Court ordered the respondent's reinstatement in her post. The main question for determination on appeal was whether the Court was right so to order.

Held, that there is no legal principle for not ordering specific performance of an employment relationship, although the commonplace assertion used to be that such an order would amount to one for specific performance of a contract for personal services of a continuing nature, a remedy not available to an employee. While that view indicated the general approach of the courts, it did not mean that the court should close its eyes to other material factors and refuse to evaluate them. In the present case, the dismissal was not only unlawful but, because the provisions of the legislation had not been complied with, a nullity. The relief sought, therefore, was dependent not on the ability of the court to order specific performance but upon the nullity of the appellant's action.

Held, further, however, that an order for reinstatement was discretionary. It

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GUBBAY JA

is easy to conceive of circumstances where reinstatement would lead to the continuation of an intolerable personal relationship between employer and employee. Here, however, the employee's behaviour was beyond reproach, whereas the employer did not come to court with clean hands. The parties in this case would not have to work closely together. To deny reinstatement would be to frustrate the legislation's object of protecting the tenure of office of employees by allowing an employer to circumvent it, albeit upon pain of rendering himself liable to prosecution and a civil action for damages.

Held, further, that "reinstatement" here meant no more than a directive that the employee be replaced in her post and remunerated. It did not entail the further obligation on the part of the employer to provide work.

Cases cited:

Art Corporation Ltd v Moyana 1989 (1) ZLR 304 (SC)

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

Ngewu & Ors v Union Co-operative Bank & Sugar Co Ltd 1982 (4) SA 390 (N)

Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A)

Schierhout v Minister of Justice 1926 AD 99

Ranch International Pipelines (Transvaal) (Pty) Ltd v L M G Construction (City)(Pty) Ltd 1984 (3) SA 861 (W)

Myburgh v Danielskuil Munisipaliteit 1985 (3) SA 335 (NC)

Tshabalala & Ors v Minister of Health & Ors 1987 (1) SA 513 (W)

Zvoma v Amalgamated Motor Corporation (Pvt) Ltd 1988 (1) ZLR 60 (HC)

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

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

Faberlan v McKay & Fraser 1920 WLD 23

Bramdaw v Union Government 1931 NPD 57

Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court & Ors 1986 (3) SA 786 (A)

D P Carter for the appellant

M J Gillespie for the respondent

Judgment

Gubbay JA: Pursuant to the institution of motion proceedings before the High Court, the respondent obtained with costs an order against her employer, the appellant company, that she be reinstated forthwith in her post as commercial subjects tutor and be paid her salary for the month of May 1988.

1989 (1) ZLR p346

GUBBAY JA

The appeal is against that order. For convenience I shall refer to the parties as "the employer" and "the employee".

The facts of the dispute are short and unremarkable. On 13 August 1986 the employee was appointed to the post of commercial subjects tutor at a college administered by the employee and commenced her duties on 1 October 1986. During February 1987 she and three other tutors questioned the right of the employer's managing director to deduct public holidays from the number of leave days permitted under their contracts of employment. He undertook to examine the complaint, but despite many reminders failed to respond. Ultimately, on 11 February 1988, the employee and her colleagues, having lost patience, reported the matter to a labour relations officer, who on 24 February 1988 contacted the managing director for the purpose of holding an investigation. This provoked a totally unreasonable reaction from the managing director. On the very next day, and without obtaining the prior written approval of the Minister to do so, he gave the employee two calendar months' written notice of termination of her contract of employment. She was informed that she would not be required to return to work during the period of notice and that she was immediately at liberty to seek employment elsewhere. Appended to the letter were two cheques for payment of salary for the months of March and April, and a third cheque in respect of the terminal benefits owing to her. It was this

cheque that the employee declined to accept.

In justification of the termination it was argued before the court *a quo* (SANDURA JP) that an employer is entitled in law to terminate the contract of employment on giving due notice - such a right being enshrined in s 2(1) of the Labour Relations Act 1985 - and that, to the extent that s 2(1)(a) of the Labour Relations (General Conditions of Service) (Termination of Employment) Regulations 1985 ("the Regulations") provides to the contrary, it is *ultra vires* the Act. The argument did not find favour and as a corollary to its rejection the reinstatement of the employee to her post was ordered.

Subsequent to the hearing of the appeal, judgment was delivered in the case of *Art Corporation Ltd v Moyana* S-43-89 *(4). It decided that, *sans* the approval of the Minister, s 2(1)(a) of the Regulations precludes the right of an employer to terminate the contract of employment upon the giving of notice. It is unnecessary to reiterate the reasoning which led this to court to

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GUBBAY JA

that conclusion. Suffice it to say that nothing in the submissions advanced by Mr *Carter* on behalf of the employer had caused me to doubt its correctness. It follows that the action taken by the employer amounted to an unlawful termination of the employee's contract of employment.

The remaining question that falls for determination is whether the learned JUDGE PRESIDENT was right in reinstating the employee in her post.

Prior to the advent of the decision of the full Bench of the Transvaal Provincial Division in *National Union of Textile Workers & Ors v Stag Packings (Pty) Ltd & Anor* 1982 (4) SA 151 (T), it had become commonplace to assert that in the case of a common law employee who had been wrongfully dismissed no court of law could compel the employer to allow him to perform his duties; for to do so would amount to an order for specific performance of a contract for personal services of a continuing nature, a remedy not available to the employee, who was therefore restricted to a claim in damages. See, for instance, *Ngewu & Ors v Union Co-operative Bank & Sugar Co Ltd* 1982 (4) SA 390 (N) at 400F-H, and the several authorities there cited.

This conventional view was closely re-examined in the *National Union of Textile Workers* case. VAN DIJKHORST J, who delivered the judgment, based his rejection on the accepted approach to specific performance as enunciated in *Haynes v Kingwillamstown Municipality* 1951 (2) SA 371 (A), which held that the remedy, being discretionary, should not be confined to specific types of cases, though there might well be general rules and exceptions. Such rules were not absolutely binding in every instance and were subject to review. Adopting that approach, the learned judge opined that the policy considerations which had mitigated against the specific performance of employment contracts were not to be elevated into a rule barring such a remedy. The oft-quoted *dictum* of INNES CJ in *Schierhout v Minister of Justice* 1926 AD 99 at 107, to the effect that "the only remedy open to an ordinary servant (as opposed to a public servant whose tenure of employment is protected by statute) who has been wrongfully dismissed is an action for damages", was no more than a pronouncement of the general

approach to be followed by courts in matters of this nature. The considerations set out in *Schierhout supra* were "weighty indeed and in the normal course they might well be conclusive. But that is a far cry from saying that the court should therefore close its eyes to other material factors and refuse to evaluate them" (at 158D-E).

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GUBBAY JA

It is plain that van DIJKHORST J saw the problem of the enforcement of employment contracts against a larger background of the discretionary nature of the remedy of specific performance - there being no legal principle for not ordering specific performance of an employment relationship.

This bold decision has much to commend it and is to be welcomed. It has since been applied in *Ranch International Pipelines (Transvaal)(Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 861 (W) at 879F-I; *Myburgh v Danielskuil Munisipaliteit* 1985 (3) SA 335 (NC) at 347A; *Tshabalala & Ors v Minister of Health & Ors* 1987 (1) SA 513 (W) at 522H-I; *Zvoma v Amalgamated Motor Corporation (Pvt) Ltd* HH-69-1988 (as yet not reported).*(5) See also *Christie Business Law in Zimbabwe* at pp 314-315; *Joubert General Principles of the Law of Contract* at p 226.

Even if one were to favour the restrictive approach, which I do not, it is important to appreciate that *in casu* the position of the employee is somewhat different from that of **ordinary** employees, for the tenure of her employment is protected by legislation. Its termination was not in accordance with statutory provisions because the written approval of the Minister was not first obtained. Consequently, it may be argued with some force that the employee falls into the same category as that of a public servant, making the principle discussed by INNES CJ in *Schierhout's case supra* at 109 applicable. It is "that a thing done contrary to the direct prohibition of the law is void and of no effect. So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the law-giver has expressly so decreed or not; the mere prohibition operates to nullify the act."

In *Stoop v Lichtenburg Town Council* 1952 (2) SA 72 (T) ROPER J extended the principle beyond that of a public servant. The learned judge held that the removal from office of the applicant, who was a chief health inspector in the service of the respondent town council, without Ministerial approval and in contravention of s 14(3) of the Public Health Act 36 of 1919 was a nullity and was to be regarded as never having been done. Accordingly the applicant was entitled to an order declaring that he was still the lawfully appointed chief

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GUBBAY JA

health inspector of Lichtenburg. Stated otherwise, the relief sought was not dependent upon the ability of the court to order specific performance but upon the nullity of the action of the town council. Since there was no lawful removal from office the applicant could not be prevented from

doing his work. See also *Rogers v Durban Corporation* 1950 (1) SA 65 (D) at 70.

It would seem that the learned JUDGE PRESIDENT decided the issue, not upon the favourable exercise of a discretion to order specific performance, but on the basis that as the employer's action was a nullity the employee had an uncontrovertible right to be reinstated to the post of commercial subjects tutor.

There is much to be said for that view, for the denial of the remedy of reinstatement would defeat the very protection that s 2(1)(a) of the Regulations is designed to afford an employee.

Although there may be little room to distinguish the position of the present employee from that of the chief health inspector Stoop, I prefer to leave open the point of whether to the category of public servants there should be added these ordinary employees in Zimbabwe whose contracts of employment enjoy statutory protection.

I propose to adopt the approach that even where the unlawful dismissal relates to an employee whose tenure of employment is protected by legislation the court retains a discretion to consider whether it is appropriate to order reinstatement. I do so for two reasons.

It is easy to conceive of a situation in which, albeit no blame whatsoever attaches to the employee, the inescapable inference is that the personal relationship between him and the employer has broken down to the extent that trust in one another has been lost. For a court to order reinstatement against such a backdrop of animosity and ill-will, solely because an employee unreasonably and out of wounded pride seeks it, would be to permit the continuation of an intolerable personal relationship - one which would make it impossible for the employee to perform his duties either to his own satisfaction or to that of his employer.

Secondly, although the law-giver deemed it necessary to protect the position of the ordinary employee, by enacting s 110(2) and 111(2)(e) of the Labour Relations Act 1985, it nevertheless reposed in the "determining authority" a discretion to order reinstatement in contrast to an obligation to do so. It

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GUBBAY JA

appears, therefore, that the law-giver did not envisage that an unlawful dismissal from employment would necessarily give rise to an inalienable right to reinstatement.

In the determination of whether the present order is to stand, regard must be had to the following remarks of INNES CJ in *Schierhout's case supra* at 107:

"... the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no Court could by its order compel a servant to perform his work faithfully and diligently."

As against these features, which normally weigh heavily against the grant of the decree of specific performance, are those urged by Mr *Gillespie*. In the first place, the employee is guilty of no wrongdoing against the employer. Her behaviour was beyond reproach. See *Tshabalala's case supra* at 523D. Secondly, the employer did not come before the court *a quo* with clean

hands. It is not denied that the managing director sought to terminate the contract of employment solely because the employee had referred what must be taken to be a legitimate complaint to a labour relations officer. See *Tshabalala's case supra* at 523C. Thirdly, as a tutor at an educational institution there is little need for the employee and the managing director to enjoy cordial relations. Her services, involving as they do the teaching of students, are such as to distance the parties from one another. They are not likely to come into frequent personal contact. See *Joubert op cit* at p 226. Finally, I think some account must be taken of the law-giver's object in protecting the tenure of office of employees. To deny the remedy of reinstatement is to frustrate that object by allowing an employer to circumvent it, albeit upon pain of rendering himself liable to prosecution and to a civil action for damages.

On balance I am satisfied that the order of the court *a quo* was not inequitable in the circumstances pertaining, and I have no reluctance in confirming it.

I would, however, add a caveat: "reinstatement" in the context of this case means no more than a directive that the employee be replaced in her post. It does not entail the further obligation on the part of the employer to provide work for her, because there is no term in their contract of employment requiring it to do so. This emerges clearly from the *dictum* of BRISTOWE J in *Faberlan v McKay & Fraser* 1920 WLD 23 at 26-27:

"*Prima facie* a man who is employed at a wage is only entitled to his

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GUBBAY JA

wages. the employer is not bound to provide him with work, but merely to pay him his wages and the employee has no complaint if he is given no work to do: *Turner v Sawden* [1901] 2 KB 653."

See also *Bramdaw v Union Government* 1931 NPD 57 at 78; *Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court & Ors* 1986 (3) SA 786 (A) at 798I. Thus the order of the court is a *quo* is to be understood in the sense that the employer's obligation is to continue to remunerate the employee upon the tendering of service. It must restore her to the payroll with effect from the month of May 1988.

In the result, the appeal must be dismissed with costs.

Dumbutshena CJ: I agree.

McNally JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

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WORKER'S COMPENSATION COMMISSIONER & ANOR v UNITY INSURANCE CO LTD &

ANOR 1989 (1) ZLR 352 (HC)

Court High Court, Bulawayo

Blackie J

Civil trial

5 May 1989

Flynote

Statutes - Worker's Compensation Act [Chapter 269] - s 10(1)(a) - proviso thereto - deduction from damages of amount paid by Worker's Compensation Commissioner - purpose of proviso - requirement for court to "have regard to" amount paid by Commissioner - meaning of - when amounts need not be deducted.

Headnote

The proviso to s 10(1)(a) of the Worker's Compensation Act [*Chapter 269*] provides that when awarding damages to a workman following an accident, the court shall "have regard to" the amount which is likely to be reimbursed by the guilty party to the Worker's Compensation Commissioner in respect of compensation paid by the Commissioner to the injured workman. The purpose of the proviso is to limit the total liability of the guilty party to the aggregate amount of his common law liability in damages to the injured worker. The injured worker is not entitled to obtain recompense for his injury in any sum which, when added to the compensation recoverable by him under the Act, would exceed his common law damages.

The words "have regard to" generally mean "deduct", but they do not mean that the court must automatically, as a matter of law, deduct from the worker's common law claim for damages whatever sum is reimbursed to the Commissioner. The proviso is not intended to relieve a negligent party of any part of his liability or to prevent the injured party from obtaining his full damages. Consequently, the court is not obliged to deduct from the general damages any sums paid out in compensation,

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BLACKIE J

where the compensation and damages do not overlap. For example, where damages are awarded for pain and suffering and loss of amenities, those sums need not be deducted because those are not matters in respect of which compensation is awarded.

Case cited:

Maasberg v Springs Mines Ltd 1944 TPD 1

R Smithwick for the plaintiffs

A Morris-Davies for the defendants

Judgment

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Blackie J: On 29 August 1985, the second plaintiff was driving a motor scooter along Stockton Road, Bulawayo, when he was overtaken from the rear by a motor vehicle driven by the second defendant. The second defendant's motor vehicle was insured for the purposes of the Road Traffic Act by the first defendant.

Either just as the second defendant overtook second plaintiff, or immediately thereafter, the second plaintiff fell from his motor scooter and broke his leg.

The second plaintiff alleges that the second defendant caused him to fall from his motor scooter by passing too close as he overtook or turning back into the second plaintiff's path before it was safe to do so. In either event, the second plaintiff says some part of the second defendant's motor vehicle caught his foot, tipping him from the motor scooter and causing his leg to be broken.

At the time of the accident, the second plaintiff was covered by the provisions of the Worker's Compensation Act [*Chapter 269*]. As a result of the accident and the injury he received in it, the second plaintiff was entitled to and was paid compensation by the first plaintiff in the following amounts :

(i)	Ambulance fee	\$ 7,00
(ii)	Salary payments	\$1017,84
(iii)	5% disability lump sum payment	\$1311,62
		\$2336,46

In this action the second plaintiff alleges negligence by the second defendant in causing him to fall from his motorbike and claims general damages for pain and suffering, temporary and permanent disability and loss of amenities from both defendants. The first plaintiff seeks (in terms of s 10(1)(b) of the

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BLACKIE J

Worker's Compensation Act) to recover from the defendants the compensation which he was obliged to pay to second plaintiff under the Act as a result of the accident.

The defendants have made certain admissions in regard to this action and the issues have therefore been limited to the following :

- (1) did any negligence on the part of the second defendant cause the second plaintiff to fall from his motor scooter?
- (2) if there was negligence on the part of the second defendant, what is the extent of the second plaintiff's damages;

(3) what is the effect of the proviso to s 10(1)(a) of the Worker's Compensation Act on any award of damages made to the second plaintiff?

Each party called only one witness. These were the second plaintiff and the second defendant. As they are both called Moyo, it is easier to continue to refer to them as the second plaintiff and the second defendant.

The central point for determination in the first issue is which, if either, of these two witnesses do I believe?

[The learned judge analysed the evidence and continued:]

I am satisfied that I can rely on what the second plaintiff says and I am not satisfied I can rely on what the second defendant says.

In the result I find, in respect of the first issue, that the second defendant negligently overtook the second plaintiff too close for safety or turned back into the path of the second plaintiff's motor scooter before it was safe to do so. One or other of these actions caused the second plaintiff to fall off his motor scooter and to break his leg.

The second issue is the extent of the second plaintiff's damages. As a result of the collision, the second plaintiff suffered dislocated fractures of his right tibia and fibula. He was taken to Mpilo Hospital where the fractures were set under general anaesthetic and his right leg was encased in plaster from foot to upper thigh. The second plaintiff suffered the normal pain associated with a fracture of this sort and the repair procedure involved. He was in Mpilo Hospital for approximately five days. He was then released. He could walk on crutches, but it was difficult and uncomfortable.

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BLACKIE J

The plaster was removed from second plaintiff's leg after six or seven weeks. At that time it was discovered that his knee was swollen. It had developed a supra patella bursa which had to be excised by a further operation under general anaesthetic. For this operation, he was re-admitted to hospital for a few days. After the operation the leg remained swollen for several months and he had to undergo physiotherapy treatment over a period of months.

The second plaintiff has now recovered almost the full use of his leg. The leg is, however, still painful especially in cold weather and when walking for long distances. His disability is assessed at five per cent.

His claim for general damages is for \$7 500. This is claimed for pain and suffering, temporary and permanent disability and loss of amenities. I have been referred by each side to identical cases. They have been used by each side to justify or refute the second plaintiff's claim. I do not think it is necessary for me to analyse these cases in detail in relation to this case. In my view, an award of \$6 000 general damages can be justified on the facts.

The final issue in this case is the effect on the award of damages of the proviso to s 10(1)(a) of

the Workers Compensation Act.

Section 10(1) of that Act reads:

"Where an accident in respect of which compensation is payable was caused in circumstances creating a legal liability in some person other than the employer (hereinafter referred to as "the third party") to pay damages to the worker in respect thereof -

- (a) the worker may both claim compensation under this Act and take proceedings against the third party in a court of law to recover damages;

Provided that where any such proceedings are instituted the court shall, in awarding damages, have regard to the amount which, by virtue of the provisions of paragraph (b), is likely to become payable to the Commissioner or the employer individually liable, as the case may be, by the third party; and

- (b) the Commissioner or the employer individually liable by whom compensation is payable shall have a right of action against the third party for the recovery of the compensation he is obliged to pay under this Act as the result of the accident and may exercise such right either by intervening in proceedings instituted by the

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BLACKIE J

workman against the third party or by instituting separate proceedings;

Provided that -

- (i) in the case of a worker who has not died the amount recoverable in terms of this paragraph shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the worker but for the provisions of this Act;
- (ii) in the case of a worker who has died, the amount recoverable in terms of this paragraph shall not exceed the total amount of damages, if any, which, in the opinion of the court, but for the provisions of this Act, would have been awarded to all the dependants of the worker, notwithstanding that they may have had separate or distinct claims in respect of such damages."

The defendants admit that, the second defendant having been found liable to second plaintiff for damages in negligence, they are liable in terms of s 10(1)(b) to the first plaintiff for the amount of compensation paid by the first plaintiff to the second plaintiff in terms of the Worker's Compensation Act. They also admit that the amount due by them to the first plaintiff is \$2 336,46. The defendants submit, however, that the proviso to s 10(1)(a) obliges the Court to deduct in full the \$2 336,46 due to the first plaintiff from the \$6 000,00 awarded as general damages to the second plaintiff.

This submission is based on the underlying purpose of the proviso to s 10(1)(a) and the meaning to be attached to the phrase "have regard to" in that proviso.

I accept that the underlying purpose of the proviso to s 10(1)(a) is to limit the total liability of the third party to the "aggregate amount of his common law liability in damages to the injured [worker] and that the injured [worker] is not intended to obtain recompense for his injuries in any sum which, when added to the compensation recoverable by him under the Act, would exceed his common law damages". See Corbett, Buchanan & Gauntlett *The Quantum of Damages in Bodily and Fatal Injury Cases* Vol 1 p 19 and the authorities quoted therein (referring to s 8(1) of

the Workmen's Compensation Act No 30 of 1941 in the Republic of South Africa, which, for this purpose, is the same as s 10(1)(a) of the Zimbabwe Workmen's Compensation Act).

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BLACKIE J

As SCHREINER J (as he then was) said in *Maasberg v Springs Mines Ltd* 1944 TPD 1 at 12, "it is not intended that [the worker] should be paid twice for the same injury".

I also accept that the phrase "have regard to" has generally been treated as meaning "deduct": Corbett, Buchanan & Gauntlett (*supra*) p 19 and the authorities quoted therein.

I do not, however, understand the proviso to mean that I have no discretion and must automatically, as a matter of law, deduct from the worker's common law claim for damages whatever sum is awarded to the Commissioner under s 10(1)(b). Firstly, the legislature has used the phrase "have regard to" - a phrase which itself implies an element of discretion. Had the legislature intended an automatic deduction in the manner claimed by defendants in this case, it would have been easy enough to have expressed it in that way. Secondly, even if the section is designed to prevent double payment to a worker for his injury, it cannot have been the intention to relieve a negligent party of any part of his liability to an injured worker or to prevent an injured worker from obtaining such amount in damages as, when added to the sum receivable by him as compensation under the Act, would constitute his full common law damages.

The amounts paid by the first plaintiff to the second plaintiff as compensation in terms of the Worker's Compensation Act, fall into three categories: medical expenses, temporary salary payments and compensation for disability. The second plaintiff's claim against the defendants in common law is for general damages for pain and suffering, temporary and permanent disability and loss of amenities. It is only in respect of the compensation for disability that the two claims overlap. I accept that, because they do overlap in that respect; the \$1 311,62 paid to the second plaintiff as compensation for disability should be deducted from second plaintiff's general damages.

However, I cannot see any reason in the wording of the proviso, in equity, in logic or in any authority to which I have been referred, why I should be obliged to deduct from the second plaintiff's general damages in common law the sums paid to him as compensation by first plaintiff where such compensation and the damages that he claims do not overlap.

In my view, the award to second plaintiff of general damages in the sum of \$6 000 should be reduced in terms of the proviso to s 10(1)(a) of the Worker's Compensation Act by the sum of \$1 311,62, and by that sum only.

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BLACKIE J

Judgment is granted against the first and second defendants jointly and severally, the one

paying the other to be absolved;

(a) in the sum of \$2 336,46 in favour of the first plaintiff; and

(b) in the sum of \$4 688,38 in favour of the second plaintiff;

both together with interest *a tempore morae* from date of this judgment to date of payment and costs of suit.

Coghlan & Welsh, plaintiff's legal practitioners

Calderwood, Bryce Hendrie & Partners, defendants' legal practitioners

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S v BEAHAN (2) 1989 (1) ZLR 359 (HC)

Court High Court, Harare

Chidyausiku J

Criminal trial

18 May 1989

Flynote

Appeal - right of - High Court of Zimbabwe Act 1981 - s 44(1) - "judgment" - meaning of - whether includes interlocutory matters - suspension of order appealed against - right of court to order execution pending appeal.

Headnote

At the beginning of his trial the accused applied for a stay of proceedings, pending an undertaking from the State that it would make available certain possible defence witnesses from Botswana. The trial judge dismissed the application and ordered the trial to proceed, whereupon the accused's counsel noted an appeal against that ruling. He submitted that the effect of noting the appeal was to stay the proceedings pending the hearing of the appeal.

Held, that s 44(1) of the High Court of Zimbabwe Act 1981 gave a right of appeal from any judgment of the High Court, and there was no doubt that an interlocutory ruling of this nature was a judgment as defined in the Act. The noting of appeal has the effect of suspending the judgment. However, in both civil and criminal cases a court has the jurisdiction to order execution of the judgment despite the noting of the appeal. This discretion should be exercised judicially and in criminal cases only to ensure the due and proper administration of justice and to prevent abuse of court process.

Held, further, that this was a case where it was desirable, for the due and proper administration of justice, for the court to order the execution of its judgment despite the noting of the appeal.

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Cases cited:

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

S v Mharapara 1985 (2) ZLR 211 (SC); 1986 (1) SA 556 (ZS)

Ndhlovu v Regional Magistrate, Eastern Division & Anor 1989 (1) ZLR 264 (HC)

Y Omerjee assisted by *A O Agyemang* for the State

M J Gillespie for the defence

Judgment

Chidyausiku J: The accused is facing a charge of contravening s 50(1) of the Law and Order (Maintenance) Act [*Chapter 65*]. He has pleaded not guilty. After the plea the State produced a few exhibits, including the summary of the State case and the defence outline. After the production of the above exhibits Mr *Gillespie*, for the accused, applied for a stay of proceedings, pending an undertaking from the State that it will make available certain possible defence witnesses from Botswana.

The background to this application is that the accused was initially taken into the custody of the Zimbabwe Republic Police at the Kazungula border post on 27 June 1988. He escaped from police custody and crossed into Botswana. He was arrested by the Botswana Police on the following day, 28 June 1988. He was handed over to the Zimbabwe Republic Police on 1 July 1988. It is the accused's contention that he was tortured by the Botswana Police while he was in their custody and that that torture negated his volition when requested by the ZRP to write his statement and when he wrote that statement on 4 July 1988. The accused wishes to call the evidence of members of the Botswana Police Force stationed at Gaberone to give evidence on the torture. He applied for the stay in the proceedings in the absence of an undertaking by the State to secure the attendance of the member-in-charge Gaberone and other police officers from that station. It is also the contention of the accused that he runs the risk of an unfair trial in contravention of his constitutional right in terms of s 18(9) of the Constitution if the Botswana witnesses are not available.

After hearing submission from both counsel I dismissed the application to stay proceedings and directed the trial to proceed. I urged the defence to avail itself of the offer of the Attorney-General's good offices to assist them, in having access to the police in Botswana, interview them and ascertain if they indeed wish to give evidence for the defence and the gist of their evidence. Once that has been done the court can review the matter in the light of what

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would have been ascertained.

Immediately upon the pronouncement of the above ruling, Mr *Gillespie* noted an appeal against that ruling in terms of s 44(1) of the High Court Act No 29 of 1981. Mr *Gillespie* submitted that my ruling was a judgment as defined by s 2 of the High Court Act, the relevant portion of which reads as follows:

"Judgment" includes a decision or order..."

It was also submitted by Mr *Gillespie* that this was a judgment in a criminal case and the accused can appeal as of right against such judgment in terms of s 44(1) of the High Court Act, which section reads as follows:

"44. (1) Subject to the provisions of this section, an appeal in any criminal case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction."

Mr *Gillespie* also submitted that once an appeal has been noted the effect of noting that appeal is to suspend my ruling that the trial should proceed. In other words, the effect of noting the appeal is to stay proceedings pending the hearing of that appeal.

The State's submission, as I understood it, was that my ruling was on a matter of an interlocutory nature and the accused has no right of appeal and the trial should proceed. Both parties relied on the following authorities: (1) *Paweni & Anor v Acting Attorney-General* 1984 (2) ZLR 39 (SC); 1985 (3) SA 720 (ZS); and (2) *S v Mharapara* 1985 (2) ZLR 211 (SC); 1986 (1) SA 556 (ZS).

These authorities, in my view, clearly support Mr *Gillespie's* contention that any judgment, as defined in the High Court Act, in a criminal case, whether interlocutory or not, is appealable as of right. It is clear from *Paweni's* case (*supra*) that even a dismissal of an application for postponement of a criminal trial is appealable as of right in terms of s 44(1) of the High Court Act.

For the purposes of this decision I will assume, without deciding the issue, that the ruling I made yesterday is a judgment as defined by s 2 of the High Court Act and it is a judgment in a criminal case, which is appealable as of right at the instance of the accused.

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Mr *Gillespie* has also submitted that, at common law, the noting of an appeal has the effect of suspending the judgment appealed against. There are a number of authorities supporting this proposition and again for the purposes of this judgment I accept, without deciding, that proposition. In other words, I accept that the noting of the appeal by the accused had the effect of suspending my ruling that the trial should proceed.

This, in my view, however is not the end of the matter. In my view, both at civil law and at criminal law the court that gives a judgment has the competence and jurisdiction to order execution of its judgment despite the noting of an appeal. This discretion is judicial and should

be exercised on sound judicial grounds.

In criminal matters this discretion, in my view, should only be exercised in order to ensure the due and proper administration of justice and to prevent abuse of Court process. As I have said, it would appear on the authorities cited above that even a mere dismissal of an application for a postponement is appealable as of right and such a noting of an appeal has the effect of staying proceedings. This no doubt can easily lead to gross abuse of Court process. The courts have inherent jurisdiction to suppress any abuses of its process and to defeat any attempt to thwart its process. In the present case, I do not see an abuse of process but I note with some concern that defence were virtually harassing the State to go to trial in this matter (so it was submitted and not disputed) and now that the trial is ready to proceed, the defence appear to be developing cold feet and do not wish to proceed.

As I have already said this court has the competence to order the execution of its own judgment despite the noting of an appeal. In the present case I have decided to exercise that discretion because it is desirable to do so for the due and proper administration of justice. The following are my reasons for coming to that conclusion:

1. The accused will not suffer any irreparable damage or irrevocable prejudice if the trial continues. If the trial runs its full course and the accused should be found guilty he can appeal as of right to the Supreme Court and the Supreme Court can decide the whole matter at the same time and in the light of all the evidence led.
2. It is highly undesirable and prejudicial to the proper administration of justice that appeals should be heard piecemeal. My brother ADAM in the recent case of *Ndhlovu v Regional Magistrate, Eastern Division & Anor*

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HH-54-89 *(6) was highly critical of interrupting a criminal trial for the purpose of having certain issues decided on review. I entirely agree with my learned brother's views in this regard and they are as applicable to interruption of trial for review as they are to an interruption of trial for determining some sub-issue on appeal.

3. The balance of convenience in this case would be better served by the continuance of the trial. The matter has been set down for 9 days. Witnesses have been subpoenaed. A lot of security measures have had to be undertaken. Counsel for the defence, I am advised, has prior commitments until after August 1989.
4. This matter has received a certain degree of publicity and thus attracted considerable public interest. In the light of that it is in the interests of justice that this trial be brought to finality with the minimum of delay.

I accordingly order that the trial proceeds despite the appeal noted against the dismissal of the application to stay proceedings.

Coghlan, Welsh & Guest, defendant's legal practitioners

JECHE v MAHOVO 1989 (1) ZLR 364 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, McNally JA & Manyarara JA

Civil appeal

30 May 1989

Flynote

Family law - custody of children under customary law - principles applicable.

Headnote

In customary law, as in the general law, in any case relating to the custody of children the interests of the children are the paramount consideration. The fact that the father may have paid *roora* or *chiredzwa* or any other customary payment is irrelevant, as are such questions as whether the father can afford to pay maintenance to the mother for the upkeep of the children or whether the mother might marry a man who could not afford to look after the children. Because it is the child's best interests which remain paramount until the child attains its majority, presiding officers at community courts should not issue orders that the mother should deliver custody of her minor child to the father when the child reaches a certain age.

Case cited:

Nugent v Nugent 1978 RLR 66 (GD); 1978 (2) SA 690 (R)

T N Chitapi, for the appellant

Respondent in person

Judgment

Manyarara JA: This is an appeal from a judgment of the Kadoma District Court by which it upheld the decision of the Chegutu Community Court awarding the custody of two minor children, aged 6½ and 4 years respectively, to their father, the respondent.

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The record states that the appellant is a 34-year-old policewoman in Chegutu, whilst the respondent is a 56-year-old hotel manager in the same town. The respondent is married to two wives with nine children whose ages have not been disclosed. It seems that his family resides in the Harare suburb of Waterfalls.

The parties to this matter commenced their sexual relationship in 1980. Out of this relationship the two minor children in dispute were born. The appellant seems to have obtained employment at the hotel managed by the respondent during this period. She already had another child by a previous association with some other man.

In 1983 her relationship with the respondent ended because he had turned his attention to the woman who is now his second wife. The appellant left the hotel, presumably to take up her present employment, taking the minor children with her. She applied successfully to the court for maintenance by the respondent of their two minor children in a global amount of \$100 per month.

It is clearly this maintenance award which prompted the respondent to claim custody of the children, which he was awarded by the Community Court on 5 March 1987. The appellant appealed to the District Court and lost, as I have already stated. Hence the appeal to this court. The minor children have never been removed from her custody. The respondent is in arrears with his maintenance payments to the tune of about \$1 175.

At the hearing, we allowed the appeal and set aside the order of the Community Court. Our reasons are obvious and may be summarized as follows.

In seeking custody the respondent has been fighting the wrong battle. His true complaint is that he simply cannot afford to pay the \$100 per month for the maintenance of the minor children. That is why he has left them in the care of the appellant since his victory before the Community Court in early 1987.

The respondent already has a large family to look after. It was not suggested that the possibility of further offspring from his polygamous marriage could be ruled out. His income as hotel manager was \$500 per month when the matter came before the Community Court. He has not told us of any increase in his salary. The mind boggles at the manner of budgeting which could

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possibly sustain a family as large as the respondent's on his level of income. It follows that to add to his family a further two mouths to feed would be unrealistic if not unconscionable. In fairness, the respondent has grudgingly conceded the point before this court and below.

It seems to us, without in any way attempting to pre-judge the issue, that the respondent would be better advised to apply for a variation of the maintenance to such an amount, if any, as he can reasonably afford.

The appellant, on the other hand, earns \$273 per month and has already demonstrated her ability to provide for the children without the respondent's assistance since she left him in 1983. She occupies a three-roomed house and employs a maid. She has placed the older child in school and the younger one in a creche.

In the circumstances, the material well-being of the children is better guaranteed by leaving them where they are. But more importantly, each child has been in the appellant's custody since

birth. The respondent confesses that he hardly knows the children, who are also complete strangers to the rest of his large family. The appellant is entitled to refuse to have the children plucked from her care and thrown into a strange family.

As I have indicated, the best interests of the children are the paramount consideration in determining questions concerning custody. It seems, with respect, that the presiding officers below have no understanding whatsoever of the meaning and effect of that principle. It will be sufficient to list their erroneous reasons for awarding custody to the respondent. These are -

1. that he has paid *lobola*;
2. that he is finding it difficult to pay maintenance "in addition to his two wives and 9 children";
3. that he can "best maintain all his children under one roof";
4. that the appellant has an "illegitimate child" by another man;
5. that she may marry a man who would not be in a position to look after the two children.

The presiding officer then added to his "reasons" a gratuitous insult that the appellant "is presently leading a life of prostitution". There is no evidence of this on the record. The only clear testimony one finds is that of the res-

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pondent's reluctance to maintain the minor children. The presiding officer's injudicious remark followed an unwarranted interference with the conduct of the proceedings when he practically took it upon himself to cross-examine the appellant on irrelevant matters. That the appellant may yet attempt another marriage is also true of the respondent. Therefore, nothing turns on that assumption. Suffice it to point out that the appellant answered the presiding officer's searching questions calmly and stated that she feared only that the respondent would not be able to look after the children "properly".

A senior magistrate heard the appeal in the District Court. He not only endorsed the presiding officer's decision without any reservation but he went a step further. He instructed the respondent to take a copy of the Community Court's or his own judgment to the Messenger of Court "and instructing that court official to arrange for the permanent removal of the children from their mother ...".

Lest I go overboard in correcting those alarming mistakes, let me advise the officers concerned to peruse any of the numerous authorities on custody for guidance. My random choice is *Nugent v Nugent* 1978 RLR 66 (GD); 1978 (2) SA 690 (R), which concerned a dispute over the religious upbringing of the minor children after the divorce in that case. The passage I shall quote should be read with the provisions of the Customary Law and Primary Courts Act 1981 in mind, because the principles set out in that judgment now apply to all marriages (customary or otherwise) and to all forms of parental rights over minor children. The passage is to be found at pp 70F to 71A (693 of the SA report) and it reads:

"The real position that emerges from all the authorities is that the interests of the children are the paramount or the sole consideration in determining questions concerning or arising from disputes relating to custody. In applying this principle, the Court will not give effect to parental power or any other right enjoyed by a parent at common law during the subsistence of a marriage. Upon dissolution of the marriage, it is stating the obvious that only one parent can be entrusted with the custody of the children of the marriage while the other parent can only be granted such access as is in the interests of the children. Accordingly, the custodian parent who is made responsible for the upbringing of the children must be given, subject to the powers of the Court and any prior agreement between the parties which has been sanctioned by the Court, the rights of decision and the responsibility concerning the welfare of the children which, during the subsistence of the marriage, were exercised by both

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parties. It can be said that in a sense the custodian parent exercises the powers unilaterally which, during the subsistence of the marriage, are exercised by the parents jointly and when the parental power of the father can prevail so as to override the views of the mother. In practice, it often happens that after divorce the parties do not even reside in the same town or country, and this further supports the powers vested in the custodian parent, as mentioned above."

I emphasize that since 1981 the position under custom is now identical to that under the common law in custody matters because subs (4) of s 3 of the Customary Law and Primary Courts Act provides as follows:

"(4) Notwithstanding anything to the contrary in this section [ie the application of customary law] **in any case relating to the custody of children the interests of the children shall be the paramount consideration, irrespective of which law or principle is applied**" (emphasis provided).

In this case, it is indisputable that the best interests of the minor children will be served by leaving them in their mother's custody. She is better placed than the respondent to provide their material and educational needs. She has a comfortable home, domestic help, a stable job and income as well as the natural love evinced by her prosecution of this case up to this court.

I would add that the form of an order which one often encounters, that the mother shall deliver custody of her minor child to the father when that child attains a certain age, is meaningless because it is the child's best interests which remain paramount until the child attains its majority, when it is legally free to decide for itself with which parent it will live. In this regard the payment or non-payment of *roora*, *chiredzwa* or any other customary payment is irrelevant.

I believe I have shown why we allowed this appeal and I respectfully suggest that this judgment should be brought to the attention of the presiding officers concerned.

Dumbutshena CJ: I agree.

McNally JA: I agree.

Gambe, Chinyenze & Associates, appellant's legal practitioners

Endnotes

1 (Popup - Popup)

the appeal was heard on 16 March 1989; the judgment is reported below in this volume.

2 (Popup - Popup)

(See *Mackeson v Minister of Information, Immigration and Tourism & Anor* 1979 RLR 481 (GD) - *Editor*.)

3 (Popup - Popup)

See the judgment below in this volume - *Editor*.

4 (Popup - Popup)

See *ante* in this volume - *Editor*.

5 (Popup - Popup)

See 1988 (1) ZLR 60. See also *Ventab (Pvt) Ltd & Anor v Gondo & Anor* 1988 (2) ZLR 197 where GREENLAND J, instead of ordering specific performance against a servant who breached a contract of employment, issued an interdict preventing the servant from taking up planned new employment - *Editor*.

6 (Popup - Popup)

See above in this volume - *Editor*