

1989 (2)

THE ZIMBABWE LAW REPORTS 1989 [PART 2]

1989 (2) ZLR p1

UDC LTD v BANK OF CREDIT & COMMERCE ZIMBABWE LTD 1989 (2) ZLR 1 (HC)

Court High Court, Harare

Adam J

Civil trial

6, 7 March & 31 May 1989

Flynote

Negotiable instruments - cheques - restrictive crossing making cheque payable to named person - duty of care of collecting bank to drawer of cheque.

Headnote

The plaintiff, a finance company, drew a cheque in the sum of \$50 000 on Barclays Bank Zimbabwe Ltd in favour of "Mixed Tums (Pvt) Ltd". The cheque was drawn to pay for a tractor which one of its clients wished to buy. The cheque was crossed and marked "not negotiable" and "account payee only". On the same day the cheque was presented by the defendant's client, Mixed Tans (Pvt) Ltd, at the defendant's Chitungwiza branch. The defendant's branch manager failed to notice the discrepancy in the names and obtained special clearance from Barclays Bank to credit the sum on the cheque to the account of Mixed Tans (Pvt) Ltd. In consequence, the plaintiff was prejudiced in the sum of \$50 000 and claimed damages in that amount from the defendant. It alleged that the defendant owed it a duty of care either to abide by the instructions on the cheque or to inquire into the discrepancy between the names. The defendant denied liability, saying that as the payee was fictitious or non-existent the cheque could, by virtue of s 6(3) of the Bills of Exchange Act [*Chapter 277*], be treated as payable to bearer.

Held, that a cheque could not be treated as payable to bearer when it clearly indicates that the person who is designated and named as payee is entitled to claim payment. The section did not, in any case, provide that a cheque with a fictitious or non-existent payee on it **must** be treated as payable to bearer, only that it **may** be. A banker is not entitled to give effect

1989 (2) ZLR p2

ADAM J

a right to do a thing which is contrary to a positive instruction to do something else.

Held, further, that a collecting banker may be held liable in negligence to the drawer of a cheque, the scope of the *lex Aquilia* being wide enough to include liability for economic loss. It was clear that the plaintiff intended the cheque to be paid to "Mixed Tums (Pvt) Ltd". The defendant could not ignore the existence of the restrictive crossings on the cheque and treat it as payable to Mixed Tans (Pvt) Ltd. The drawer of a cheque with a restrictive crossing is owed a duty of care by the collecting bank. The fact that the collecting bank collects payment for someone other than the person named in the cheque is indicative of carelessness or negligence.

Cases cited:

Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd 1972 (1) RLR 56 (GD); 1972 (2) SA 703 (R)

Philsam Investments (Pvt) Ltd v Beverley Building Society & Anor 1977 (1) RLR 78 (GD); 1977 (2) SA 546 (R)

Standard Bank of SA Ltd v Sham Magazine Centre 1977 (1) SA 484 (A)

Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd 1985 (1) ZLR 358 (SC); 1985 (4) SA 553 (ZS)

Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd 1982 (1) ZLR 47 (HC); 1982 (3) SA 55 (ZH)

Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A)

Lillicrap, Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd 1985 (1) SA 475 (A)

Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd 1977 (3) SA 188 (W)

M T O'Meara for the plaintiff

A P de Bourbon SC for the defendant

Judgment

Adam J: The plaintiff claims damages of \$50 000 for the defendant's negligence in taking and dealing with a cheque drawn by the plaintiff which was a crossed cheque marked "Not Negotiable" "A/c Payee Only", or, alternatively, in the defendant having notice of irregularity with regard to the cheque by reason of the difference in the name of the payee on the cheque and the name of the account credited by the defendant.

On 5 August 1986 the plaintiff drew a cheque of \$50 000 on the Barclays Bank Zimbabwe Ltd in favour of "Mixed Tums (Pvt) Ltd" (*sic*). The cheque was crossed and marked "Not Negotiable" "A/c Payee Only" and made "Pay

ADAM J

to the Order of" the named payee. This cheque, it is common cause, was presented on 5 August 1986 by the defendant's client, Mixed Tans (Pvt) Ltd, at their Chitungwiza Branch for payment, when the defendant obtained special clearance of the cheque from Barclays Bank Zimbabwe Limited and credited the account of "Mixed Tans (Pvt) Ltd".

The plaintiff alleges that upon the presentation of this cheque to them the defendant owed a duty of care to abide by the instructions on the cheque or alternatively to inquire into the irregularity between the name of the payee on the cheque and that of the defendant's client. The defendant, on the other hand, relies on s 6(3) of the Bills of Exchange Act (*Chapter 277*), in that the payee "Mixed Tums (Pvt) Ltd" was a fictitious or non-existing person and so its duty to the plaintiff was regulated by s 6(3) and therefore it was entitled to treat the cheque as payable to bearer.

The Bill of Exchange Act provides in ss 2; 6(1), (3); 7(1), (2), (4); 30(2), (3), 72 and 84 as follows:

"2. In this Act - . . .

'bearer' means the person in possession of a bill or note which is payable to bearer;

'endorsement' means an endorsement completed by delivery;

'holder' means the payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof; ...

6. (1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

...

(3) Where the payee is a fictitious or non-existing person or a person not having capacity to contract, the bill may be treated as payable to bearer.

7. (1) When a bill contains words prohibiting transfer or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

(2) A negotiable bill may be payable either to order or to bearer.

...

(4) A bill is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

1989 (2) ZLR p4

ADAM J

30.(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the endorsement of the holder completed by delivery.

72. A cheque is a bill of exchange drawn on a banker payable on demand ...the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

84. Where a person takes a crossed cheque which bears on it the words "not negotiable", he shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had."

The English Bills of Exchange Act 1882, which codified the law, served as a model for our Bills of Exchange Act. The English courts have considered the words "fictitious or non-existing" in a number of cases and have determined, according to Byles on *Bills of Exchange* 25 Ed (1983) at 29:

"...whether a payee is fictitious or not, the intention of the drawer of the bill is decisive. If he inserted the name as a mere pretence, to give colour to the instrument, the payee is fictitious, notwithstanding that he in fact exists...If, on the other hand the drawer intended his named payee to receive his money, the payee is not fictitious ...Though the transaction is in fact fictitious, the drawer believes it to be real ...In the case of a non-existing person the intention of the drawer is immaterial."

In *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 (1) RLR 56 at 66-67; 1972 (2) SA 703 (R); GOLDIN J (as he then was) correctly stated:

"The provisions of s 6(3) can entitle a bank to treat a cheque payable to a fictitious person as payable 'to bearer' ...It is difficult to understand, however, how a bank can justifiably treat a cheque like this one as payable only or also to bearer when it is clearly indicated that the person who is designated and named as payee is entitled to claim payment under it. If the defendant was entitled to treat it as payable to bearer because, let us assume, the payee was a fictitious person, then by reason of the provisions of s 6(3) a banker is thus confronted with a contradictory or ambiguous situation ...In my view, neither a paying banker nor a collecting banker is entitled in such a situation to contend that these words conveyed no meaning to him or that he could ignore their existence so that he was justified in treating the cheque as payable to

1989 (2) ZLR p5

ADAM J

bearer by virtue of s 6(3). This section contains the words "may be treated", which means that it is merely permissive, but the banker is not under any obligation to do so ...In other words, a banker is not entitled to give effect to a right to do a thing which is contrary to the positive instruction to do something else. The banker is not faced with a choice but with conflicting and contradictory instructions of which one is peremptory and the other permissive."

In *Philsam Investments (Pvt) Ltd v Beverley Building Society & Anor* 1977 (1) RLR 78 (GD) at 84; 1977(2) SA 546 (R) NEWHAM J followed the ruling of the Appellate Division in *Standard Bank of South Africa Ltd v Sham Magazine Centre* 1977 (1) SA 484(A) that the words "A/c payee only" had no effect on the transferability of the cheque but were a direction to the collecting banker that the specified payee should receive payment, declining to follow GOLDIN J in *Rhostar v Netherlands Bank supra*, when the latter held that it was not transferable.

In *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 (1) ZLR 358 (SC); 1985 (4) SA 553 (ZS) the Supreme Court of Zimbabwe confirmed that the development of the *lex Aquilia* did provide that a collecting banker may be held liable in negligence to the drawer of a cheque and that its scope was wide enough by including liability for pure economic loss not arising from physical injury to person or property, relying on *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* 1982 (1) ZLR 47; 1982 (3) SA 55 (ZH); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 831-832 and *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A).

It is common cause that in this case the cheque drawn on 5 August 1986 was made in favour of "Mixed Tums (Pvt) Limited" which had not been endorsed and which was deposited on the same date at the defendant's Chitungwiza Branch for the credit of "Mixed Tans Global Fashions", an account name of Mixed Tans (Pvt) Ltd. The cheque was presented on the same date for special clearance by the defendant to Barclays Bank Zimbabwe Ltd, who paid on 6 August 1986.

The issues for determination are whether the cheque was made to a fictitious or non-existing person so that the defendant was entitled to treat the cheque as payable to bearer and did deal with the cheque as payable to bearer; and whether the defendant was negligent in dealing with the cheque crossed "Not negotiable A/c payee only".

1989 (2) ZLR p6

ADAM J

In this case Mr Erich, the Chief Inspector of the Standard Chartered Bank with some twenty years banking experience in Zimbabwe, stated that a crossed cheque "Not Negotiable A/c Payee only" was a restrictive type of cheque and that since the client of the defendant who deposited the cheque in question was not the same as the specified payee, the defendant should have returned the cheque. He said that when this cheque was presented to the defendant's manager at their Chitungwiza branch, their manager would have seen who the specified payee was and so should have returned the cheque, since their client was not the specified payee. In cross-examination, when shown Exhibit/Document 11 - this concerned "Special Presentation" by the defendant to Barclays Bank, at their Pearl Assurance Branch for the issue of a clearance voucher and where the drawer was shown as "UDC Limited" and that it was deposited by "Mixed Tans Global" - Mr Erich conceded that in light of this there had been two errors committed - by the defendant and by Barclays Bank, who should also have returned the cheque. He was of the view that the purpose of the special clearance was that Barclays Bank was required to examine the entire cheque sent to it before issuing a clearance voucher.

In his evidence, Mr Mugaba, the manager of the defendant's Chitungwiza branch, said their clients on 5 August 1986 informed him when they saw him that they had a cheque against which they wanted to draw. He indicated that he saw the cheque, thought it was in order and gave it to his people for special clearance. In cross-examination Mr Mugaba agreed that he was concerned with the overdraft maintained by Mixed Tans and that when he received a cheque of \$50 000 it aroused an interest in him. He was asked when he looked at the cheque whether he looked at the specified payee and the crossing. He replied that he had done so and took it that it was a cheque for Mixed Tans (Pvt) Ltd.

It was submitted on behalf of the plaintiff that the defendant's manager had started it all since on receipt of the cheque he was put on enquiry. However, it was argued for the defendant that the manager made an error in that he was induced to misread the cheque given to him due to the presence of the defendant's clients and that this did not amount to negligence. On the other hand it was the plaintiff's contention that the defendant, as a commercial banker, had a principal duty to examine the cheque and had this been done properly their manager should have noticed the specified payee and the restrictive crossing. Accordingly, the plaintiff maintained that the defendant owed it a duty of care and that the proximate cause of its loss was the action of the

defendant. It was submitted, on the other hand, on behalf of the

1989 (2) ZLR p7

ADAM J

defendant that the plaintiffs were negligent in that they failed to check the seller and so there was contributory negligence. Also, it was the defendant's contention that there was no liability on its part since the cheque was payable to bearer.

With regard to the cheque being payable to bearer, it was clear on the evidence presented to this court that when the cheque was drawn by the plaintiff it was their intention to make payment to the specified payee, "Mixed Tums (Pvt) Limited". As stated by GOLDIN J in *Rhostar v Netherlands Bank supra*, when this cheque was presented the defendant would have been "confronted with a contradictory situation" on the assumption that the defendant had treated the cheque payable to a fictitious or non-existing person and so payable to bearer. In such circumstances, the defendant was not entitled to maintain that the restrictive crossing on the cheque "conveyed no meaning" or that the defendant could "ignore their existence" placing reliance on s 6(3) of the Bills of Exchange Act. In any case the evidence present in this court clearly shows that the defendant dealt with the cheque on the basis that it was payable to Mixed Tans (Pvt) Ltd.

In *Rhostar v Netherlands Bank supra*, at 73-76 GOLDIN J pointedly remarked:

"There is no contractual relationship between a collecting banker and the drawer of the cheque. The collecting banker acts on behalf of his customer to collect the proceeds of the cheque from the paying banker. But even as an agent the banker assumes and accepts obligations relating to third parties, and is aware that his failure to act in a reasonable manner can result in loss to the drawer of the cheque accepted for collection ... The collecting banker is the only one who is in a position to know whether or not the cheque is being collected on behalf of the person who is entitled to receive payment ... The evidence revealed that all bankers are fully aware of this position and collecting bankers consider it their duty to ensure that they only present a cheque for collection on behalf of a client who is entitled to receive payment under it. In such a situation and in these circumstances a duty of care arises and is owed by the collecting banker to the drawer of the cheque to take due and reasonable care to prevent him from sustaining loss. The drawer has a right to expect that the collecting banker will not cause him loss by carelessly collecting from his bank on behalf of a person who is not entitled to receive payment ... a collecting bank holds itself out as carrying on the business of collecting from paying banks amounts payable in terms of the drawer's cheque ... the collecting banker owes a duty of care to the drawer to take

1989 (2) ZLR p8

ADAM J

reasonable precautions that no harm comes to him in such circumstances ...

If no duty of care is owed, it would follow that a banker need not examine or even look at a cheque to ascertain to whom it is payable. Such conduct would ensure that he had no knowledge that his customer had no right to the cheque and consequently he would not be liable for any loss incurred by the drawer There is no reason at all why a banker should be in a special position and not be subject to a normal duty of care or why he should be encouraged in not taking care and derive protection from failing to do so. The likelihood of harm to a drawer from failure to observe due care should be realized by any reasonably prudent banker, and in fact undisputed evidence establishes that that is the position.

Therefore, in view of the known risks of harm to others, whether it be to the drawer or paying banker, a collecting

banker should only undertake to, or present, a cheque for collection after he has reasonably assured himself that his client is entitled to payment. The accepted practice also justifies this view and is designed to give effect to it...

It is also relevant to mention that in the case of *Universal Guarantee (Pty) Ltd v National Bank of Australasia* [1965] 2 All ER 98 LORD UPJOHN says at p 102:

'The addition of the words 'a/c payee' or 'a/c payee only' refer to the payee named in the cheque and not the holder at the time of presentation ...but they do not prevent, at law, the further negotiability of the cheque. The words merely operate as a warning to the collecting bank that if it pays the proceeds of the cheque to some other account it is put on inquiry ...These words do not cast on the paying bank, paying the cheque to a banker, any additional obligation to satisfy itself that the collecting bank is collecting it on behalf of the named payee. That is entirely the responsibility of the collecting bank.'

While Byles does not altogether agree with the conclusion in *Dungarvin Trust (Pty) Ltd v Import Refrigeration Co (Pty) Ltd & Another* 1971 (4) SA 300, it is relevant to note what is said by the author about negligence of a collecting banker (*op cit* 25 ed) p 308:

'The practice has arisen in recent times of adding to the crossing 'account payee' or similar words. Though they have no statutory sanction, the addition is not prohibited ...since they are a mere direction to the receiving banker. Though the word 'payee' means the person designated in the cheque as payee and not the owner of the cheque when it is presented, the words 'account payee' are not

1989 (2) ZLR p9

ADAM J

sufficient, in the case of a cheque drawn to order or bearer, to make it non-transferable... At the same time they operate as a caution to the collecting banker to put him on inquiry and disregard by him, in the absence of explanation, amounts to negligence on his part.'

...

What inquiries a collecting banker should make and what facts are sufficient to cause him reasonably to suspect that a customer is not the true owner must depend on current banking practice and the facts of each case."

After dealing with *Rhostar v Netherlands Bank supra*, *Philsom Investments v Beverley Building Society supra* and *Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd* 1977 (3) SA 188 (W), GUBBAY JA, in *Zimbabwe Banking Corporation v Pyramid Motor Corporation supra*, 375 (565 of the SA report) agreed with Professor Malan's approach (1979 De Jure at 34-37) by observing:

"He ...argues that as a banker, by virtue of his calling, has or ought to have special skill and competence ...in the exercise of his expertise and responsibility which arise from the professional services he renders the public, the banker owes a duty of care (in the policy-duty sense) to avoid causing loss to the owner of a stolen cheque by negligently dealing with it. In my view the argument is attractive. After all the collecting banker appreciates or ought to appreciate the significance of instructions upon a cheque and that they are there to be observed. He can verify whether the payee designated on the cheque is his client. He alone is in a position to know whether it is being collected on behalf of the person entitled to receive payment, the paying banker has no knowledge of that ...If the cheque indicates that his client is not so entitled, the collecting banker is able to safeguard the drawer from loss by acting as a buffer. He has the machinery at his disposal to do so. He can allow a reasonable period of time to elapse before paying out to his client the funds represented by the cheque, thereby permitting either enquiries to be made as to the depositor's title, or the drawer an adequate opportunity to instruct the drawee bank to stop payment on the cheque. By exercising reasonable diligence in this regard the collecting banker is able to minimise, if not neutralise, the relatively high risk affecting a cheque in the sense that payment can be obtained by an unlawful possessor with comparative ease."

To summarise the situation, the collecting bank owes a duty of care to the

1989 (2) ZLR p10

ADAM J

drawer or owner of a cheque with a restrictive crossing. As Professor Malan in his *Bills of Exchange, Cheques and Promissory Notes in South African Laws* (1983, Durban-Pretoria) at 326 states:

"Such a duty of care imposes on a collecting bank an obligation to exercise reasonable care in collecting payment of cheques. The degree of care to be exercised is determined by a variety of factors ...The proper approach, it is submitted, is to determine the degree of care with reference to the traditions and practices of the *bonus argentarius*. It is not possible to specify a priori the circumstances that will constitute negligence, but the fact that a bank or other financial institution collects payment for someone other than the person *ex facie* the cheque entitled to it may well be indicative of carelessness or negligence. Irregularities in endorsements on a cheque may also raise doubt as to the title of the customer depositing it for collection. A failure to make inquiries in such circumstances may constitute negligence."

In a footnote he correctly observes that the words "a/c payee only" on a cheque "constitute one of the factors that may affect the degree of care to be applied" and that such words "require a greater degree of care to be exercised than in respect of other cheques."

Applying the foregoing to this case, had the defendant's manager exercised the reasonable diligence required of him by careful examination of the specific cheque presented to him rather than the mere glance he gave to it, the defendant would have discovered that his client was not entitled to payment and so would have been able to safeguard the plaintiff. The defendant's manager's action in obtaining special clearance did not exonerate the defendant since, in relation to the plaintiff, the defendant, as the collecting banker, appreciated or ought to have appreciated the significance of the particular instructions upon the cheque which were there to be observed. It was for the defendant's manager to "verify whether the payee designated on the cheque was his client", since the defendant alone was in a position to know whether the cheque was being collected for the benefit of the specified payee, as Barclays Bank, the paying banker, *vis-à-vis* the plaintiff, would have no knowledge of that.

I am satisfied that the proximate cause for the loss incurred by the plaintiff was due to the negligence of the defendant's manager in not exercising the diligence required of a banker with special skills. It cannot be maintained that the plaintiff's failure to verify the seller of the tractor was a contributory

1989 (2) ZLR p11

ADAM J

factor which, in my view, was too remote. The actual loss was as a result of the actions of the defendant's manager. The defendant has not alleged contributory negligence on the part of Barclays Bank at their Pearl House Branch by making them a party to these proceedings.

Accordingly judgment for the plaintiff in the sum of \$50 000 with interest at the rate of 8 per cent per annum from 6 August 1986 until date of payment and costs of suit.

Byron Venturas & Travlos, plaintiff's legal practitioners

Gollop & Blank, defendant's legal practitioners

1989 (2) ZLR p12

S v LEVY 1989 (2) ZLR 12 (HC)

Editors Note:(1)

High Court, Harare

Smith J

Criminal trial

5 & 6 June 1989

Flynote

Criminal procedure (sentence) - Control of Goods (Price Control) Regulations 1954 - s 18(3) - selling commodity for price higher than maximum allowed under Price Control Order - accused liable to fine not exceeding "value" of commodity - meaning of "value" - Control of Goods (Sale of Motor Vehicles) Order 1981 - s 7 - validity of section.

Headnote

In terms of s 18(3) of the Control of Goods (Price Control) Regulations 1954 (FGN 255/54), a person who sells a commodity at a price in excess of the maximum price permissible under the relevant price control order is liable to a fine not exceeding the value of the commodity, or \$5 000, whichever is the greater. In this context, the word "value" means the market value (or even, in the case of motor cars, which are currently in short supply in Zimbabwe, the black market price) not the controlled price set down in the price control order. The intention of the legislature was clearly that the fine imposed should be greater than the unlawful profit. To restrict the fine to the controlled price, which may be substantially less than the market price, would accord neither with common sense nor with justice.

Section 7 of the Control of Goods (Sale of Motor Vehicles) Order 1981 (SI 578/81), which provides that a person who has received a purchase price for a motor vehicle in excess of the maximum shall refund the excess to the buyer, is *ultra vires* s 16 of the Price Control Regulations, which deals comprehensively with refunds and makes a refund discretionary.

1989 (2) ZLR p13

SMITH J

Cases cited:

van der Merwe NO v van der Merwe 1973 (1) SA 436 (C)

Pietermaritzburg Corporation v SA Breweries Ltd 1911 AD 501

SA Railways v Theron 1917 TPD 67

S v Universal Auto Parts & Accessories CRB 20602, High Court, 1989

A Chikumira for the State

J B Colegrave for the accused

Judgment

Smith J: The accused pleaded guilty to the crime of contravening s 18(3) as read with s 18(1)(b) of the Control of Goods (Price Control) Regulations 1954 (FGN 255 of 1954) (hereinafter referred to as "the Price Control Regulations"). According to the statement of agreed facts, he purchased a 1987 model Toyota Cressida on 16 October 1987 for \$29 821,58. On 23 September 1988 he sold the vehicle to an insurance company, through a senior official of the company. The two agreed upon a price of \$105 000, the senior official having suggested that sum as the appropriate market value of the vehicle. In terms of s 3(1) of the Control of Goods (Sale of Motor Vehicles) Order 1981 (SI 578/81) (hereinafter referred to as the "Price Control Order") the maximum price at which it is permissible to sell a 1987 model Toyota Cressida is \$24 457. See SI 578/81, as amended by SI 36/88. Accordingly, the accused received an amount of \$80 543 more than the maximum permitted selling price. The accused was found guilty in accordance with his plea.

Section 18(3) of the Price Control Regulations provides that any person who contravenes the regulations shall be guilty of an offence and liable, in the case of an offence which involves a commodity, to a fine not exceeding the value of such commodity or \$5 000, whichever is the greater. It is agreed that a commodity was involved in the offence, namely, the Toyota Cressida. What was not agreed, however, was what was the value thereof. Mr *Colegrave* argued that the value was the maximum permissible selling price ie \$24 457, whereas Mr *Chikumira* argued that the value was the actual selling price of \$105 000.

The original s 18(1) of the Price Control Regulations created specific offences. Paragraph (f) thereof made it an offence to sell controlled goods at a price which exceeded the appropriate price at which it was permissible to sell such controlled goods. Likewise para (g) created the offence of rendering an account specifying a price which exceeded the appropriate price at which it was permissible to sell the goods concerned. The said para (f) was

1989 (2) ZLR p14

SMITH J

repealed and substituted in 1958. The new paragraph created the offence of selling any controlled goods at a price which exceeded or was less than the appropriate price at which it was permissible to sell the goods - see FGN 231/58. Then, in 1980, s 18 of the Price Control Regulations was repealed and replaced by SI 310/80. The new provision, which is still in force, created the offence of failing to comply with any Ministerial order and fixed the maximum penalty based on the value of the commodity concerned. I agree with Mr *Chikumira's*

submission that, by departing from the previous references to the appropriate price at which it is permissible to sell the goods and introducing for the first time a reference to value, the intention must have been to introduce a new concept. Had it been intended that the maximum fine would be the controlled price, then the wording that was previously used would have been retained. Mr *Colegrave* has submitted that as the provision is a penal one, where there is any ambiguity, then the construction which is more benevolent for the individual should be adopted. I agree with that submission. However, in the present instance I do not consider that there is any ambiguity. There has been a deliberate change in the terminology used and the word "value" ordinarily means the market value of the commodity concerned. See *van der Merwe NO v van der Merwe* 1973 (1) SA 436 (C) at 438. In *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 at 522 DE VILLIERS JP said:

"When the Legislature prescribes that the value of the property has to be determined, it refers to the exchange value of the property, in other words, the amount of money for which the property can be exchanged or sold...In the absence of any provision to the contrary, I am of opinion, we must take the word 'value' in its more ordinary meaning of temporary or market value."

In *SA Railways v Theron* 1917 TPD 67 at 71 MASON J said:

"When the phrase 'market value' is used in connection with damages, what it means is the general selling price in that particular neighbourhood, and that general selling price is determined not only by the price at the public market but also by the general prices throughout the district among people who deal in that particular market."

Reference to *Stroud's Judicial Dictionary* and *Words and Phrases Legally Defined* shows that England, Australia, Canada and New Zealand the term "value" ordinarily means "market value" or "exchange value" ie what would a person desiring to buy the commodity have had to pay for it to a seller willing to sell it for a fair price. Reference was made by Mr *Colegrave* to the

1989 (2) ZLR p15

SMITH J

amount of \$105 000 being the black market price. That may be so. However, in my view, that was in fact the value of the Toyota Cressida. In the statement of agreed facts it is clearly said that the official of the purchasing company suggested the figure "as being the appropriate market value of the vehicle".

If the maximum penalty is accepted as being the black market price, that does not mean that the court is condoning or in any way legitimating the sale of motor vehicles at prices in excess of the controlled price. The court is merely accepting the current situation. In fact, invariably price controls are instituted because the value of the commodities concerned increases too rapidly and the Government wants to place some curb on the price. Thus if the value of the article were the same as the controlled price there would be no need to have any price control. The value would of course be what purchasers were prepared to pay in the open market.

A further argument in favour of accepting that the value of the commodity, for the purposes of the Price Control Regulations, is the black market price is that such a proposition, in my view, accords with justice and common sense. Where a person sells a commodity at a price which greatly exceeds the controlled price and thereby makes a substantial profit, surely the intention of the Legislature must be that the fine imposed on the offender should be greater than his

unlawful profit. In the present case, the accused has benefited to the extent of \$80 543 by selling the Cressida at a higher price than the controlled price. The State has not pressed for a custodial sentence and I consider it was correct not to do so. However, to impose a fine of \$24 457 when the accused has benefited to the extent of \$80 543 would accord neither with common sense nor with justice.

Mr Colegrave referred to the case of *S v Universal Auto Parts & Accessories (Pvt) Ltd* CRB 20602 (unreported) in support of his argument that the value of the commodity must be regarded as the controlled selling price. In that case, the accused company was convicted on its plea of guilty of contravening the Price Control Regulations in that it failed to submit to the Minister of Trade and Commerce its method of arriving at the selling price of goods it sold to the CMED. It had sold 9000 imported hub seals to the CMED at a price of \$641 250 whereas the maximum controlled price was \$119 095,81. Thus, the excess price it received was \$522 154,19. The accused was sentenced to pay a fine of \$2 500.

Although the judge presiding in that case delivered a short judgment I have not had an opportunity to have sight of it. However, I am not bound by the

1989 (2) ZLR p16

SMITH J

decision in that case. Moreover, it would appear that the facts in that case are somewhat unusual. It was stated that the maximum controlled price was \$119 095,81 but there was no indication that the actual price paid, the \$641 250, was the value of the goods. There may have been collusion between the parties to inflate artificially the price.

For the reasons given above, I consider that in this case the maximum fine which I may impose in terms of s 18(3)(a) of the Price Control Regulations is \$105 000 which in my opinion can be regarded as the value of the Toyota Cressida.

Section 7 of the Price Control Order provides that any person who has received a purchase price for any motor vehicle in excess of the maximum price permitted shall, on conviction, in addition to the penalty imposed, refund to the purchaser, or if his whereabouts cannot be readily ascertained, to the Consolidated Revenue Fund, the amount by which the purchase price exceeded the controlled price. The court convicting the accused is required to determine the amount of the excess. Mr *Chikumira* has applied for this court to determine the excess. In my view, this provision is *ultra vires* and cannot be enforced. The Control of Goods Act [Chapter 280] is an enabling Act which confers wide powers on the President to make regulations controlling, *inter alia*, prices. Section 3(1) of that Act virtually gives the President *carte blanche* to make whatever regulations he considers to be necessary or expedient. Subsection (3) of that section provides that the regulations made by the President may empower a particular Minister to make orders for the purpose for which regulations may be made. Thus, the Legislature specifically permits the President, to whom regulatory powers are delegated, to subdelegate some of his powers. Subsection (3) also provides that any orders made by a Minister may contain such incidental or supplementary provisions as appear to the Minister to be necessary or expedient for the purpose of such orders.

The Price Control Regulations are deemed to have been made by the President and their validity is not in question. I would point out in passing, however, that the Price Regulations were published in the *Federal Gazette* of 25 June 1954. Nowadays it is not possible to obtain copies of the regulations from the Government Printer, hence copies of the law are not readily available to members of the public. This is a most undesirable state of affairs. I would appeal to the Minister of Trade and Commerce to have the regulations replaced so that the statutory instrument becomes readily available. Section 7 of the Price Control Regulations empowers the Minister of Trade

1989 (2) ZLR p17

SMITH J

and Commerce to make orders *inter alia* fixing maximum, minimum or specified prices for different commodities and delivery charges. Section 8 then confers additional powers on the Minister. It includes the power to provide for the prevention of the evasion of the order. In those Regulations provision is made for refunds. Section 16 thereof provides that if any person has received from the sale of controlled goods a price in excess of the controlled price the Minister of Trade and Commerce may, whether or not the seller has been prosecuted, order him to refund to the purchaser or, if his whereabouts cannot readily be ascertained, to the Consolidated Revenue Fund, a sum not exceeding twice the amount by which the selling price exceeded the controlled price.

Section 7 and 8 of the Price Control Regulations do not specifically empower the Minister of Trade and Commerce to provide in the Price Control Order for the seller to refund to the purchaser the excess he has received. Therefore, the validity of s 7 of the Price Control Order can only be upheld if it is found that the provision is impliedly authorized by one of those sections or by the Act itself. The only provision of the Price Control Regulations which might be invoked is s 8(d) ie providing for the prevention of the evasion of the order. In my view, ordering a refund does not prevent the evasion of the order. Could s 7 of the Price Control Order be regarded as an incidental or supplementary provision which appears to be necessary or expedient? In my opinion it could not be so regarded. Section 16 of the Price Control Regulations contains a provision which deals comprehensively with refunds. Indeed, it is not only unnecessary but, in my view, irregular because the provision in the Price Control Regulations conflicts with that in the Price Control Order. The former makes a refund compulsory whereas the latter provides for the exercise of a discretion. In view of the conflict between the two, the provisions of s 7 of the Price Control Order must, in my view, be regarded as *ultra vires* the power conferred upon the Minister.

The Price Control Order contains an unusual feature in that where a motor vehicle is sold at a price in excess of the controlled price, the seller commits an offence but not the purchaser. Thus, where the purchaser incites or tempts the owner of a motor vehicle to sell it to him at an inflated price, the seller commits the offence but not the purchaser. I accept, however, that in such a case the purchaser may well be committing an offence in terms of s 13 of the Price Control Regulations. That section makes it an offence for any person, as an inducement to any other person to sell any controlled goods, to offer or promise any consideration, in money or otherwise, in addition to the price which the latter is permitted to charge for the goods.

SMITH J

It seems to me to be wrong that in a case such as this one, where the buyer voluntarily approaches the owner of the car and tempts him by offering a price more than four times higher than the controlled price, the buyer should be able to get a refund of the excess. Although in terms of s 16 of the Price Control Regulations the Minister of Trade and Commerce may order a refund of a sum not exceeding twice the amount of the excess, it seems to me that such an order should not be made in cases where the purchaser has sought out the seller and freely and voluntarily offered a price in excess of the controlled price.

Mr *Colegrave* has mentioned that Government vehicles are sold by the CMED at public auctions at prices which exceed the controlled prices. If that is so, it is to be deprecated that Government does not comply with its own policies. However it is not unlawful for it to do so because legislation is not binding on the State unless it is specifically expressed or there is a necessary implication that the State will be bound. There is no provision in the Price Control Regulations that the regulations themselves or any orders made thereunder are binding on the State. Therefore, the CMED may continue to sell vehicles at market value without contravening any law.

In this case the accused has made an excess profit of \$80 543. To my mind this constitutes profiteering to an extent which is completely unacceptable. The scarcity of cars in Zimbabwe has reached a stage where their value often exceeds that of an ordinary house.

The number of cars assembled in the country nowhere near satisfies the demand. Thus only those people who are fortunate enough or who have the right contacts are able to purchase cars at the controlled price and they can immediately sell them at highly inflated prices. This has led to gross profiteering which must be curbed. Ordinary citizens of this country cannot purchase cars unless they are prepared to pay black market prices. Only the wealthy of those companies which are operating profitably can afford to do so. Mr *Colegrave* has pointed out that the accused purchased the Toyota Cressida in October 1987 and during the period from then until March 1988 could have sold it lawfully at the market value because there was no controlled price. I accept that. However that was due to laxity or inefficiency on the part of the Ministry of Trade and Commerce. It is not a mitigating feature. In order to do justice in this case, the fine must exceed \$80 543 because that is the unconscionable profit the accused made. It cannot exceed the value of the Cressida which was \$105 000.

SMITH J

In my view a fine of \$95 000 or in default of payment 6 months' imprisonment, would be appropriate. Such fine is hereby imposed.

Atherstone & Cook, accused's legal practitioners

S v BEAHAN 1989 (2) ZLR 20 (SC)

Court Supreme Court, Harare

Gubbay JA, McNally JA & Manyarara JA

Criminal appeal

26 May & 8 June 1989

Flynote

Criminal procedure - witness - extent to which prosecution is obliged to call witnesses who may assist defence
- Constitution of Zimbabwe - s 18 - right to a fair hearing and to obtain witnesses to testify on his behalf -
violation of - what accused must show to establish.

Headnote

On 27 June 1988 the appellant, a citizen of the United Kingdom and a resident of South Africa, entered Zimbabwe at the Kazungula border post. After completing immigration formalities, he was taken to the nearby police post for questioning. He absconded from there and made his way back to Botswana. The next day he was arrested in Botswana and held in custody by the Botswana Police until 2 July, when he was handed over to the Zimbabwe Police at Plumtree. They arrested him on a charge under the Law and Order (Maintenance) Act [Chapter 65] and on 4 July recorded a statement from him. This statement was confirmed before a magistrate, in accordance with s 105C of the Criminal Procedure and Evidence Act [Chapter 59]. On 21 July the appellant's legal practitioner handed in a statement in which he detailed allegations of maltreatment and torture by the Botswana Police. At the appellant's trial before the High Court, it was contended that the warned and cautioned statement was not made freely and voluntarily because of the abuse meted out to the appellant in Botswana, which, it was said, was inseparably connected with maltreatment at the hands of the Police in Zimbabwe. The appellant indicated a desire to call evidence from members of the Botswana Police to support these allegations and claimed that if their presence was not secured his right to a fair trial, as guaranteed by s 18 of the Constitution,

1989 (2) ZLR p21

would be violated. The appellant's representative took the attitude that it was the obligation of the Attorney-General, not that of the defence, to obtain the attendance of these witnesses. The Attorney-General said that he would use his good offices to assist in endeavouring to secure the attendance of the witnesses, but he denied any duty to do so.

Held, that while the prosecution of an accused person must be conducted with due regard to traditional considerations of candour, fairness and justice, the prosecution was not obliged to call witnesses regarded by it as material, not to its own case, but to that of the defence, solely in order to afford the defence the advantage of cross-examination.

Held, further, that the prosecution has a discretion as to what witnesses will be called to support

its case, but a refusal to call those whose testimony is essential to the narrative of the prosecution case is improper. The prosecution, in the exercise of its discretion, must act fairly and not be influenced by any oblique motive. It must also have available the witnesses whom it has indicated to the defence it intends to call. If any such witnesses are not called by the prosecution, they must be made available to the defence.

Held, further, that since the appellant's statement to the Police had been confirmed, it was receivable upon its mere production by the prosecution without further proof. It was for the defence to challenge its admissibility by the adduction of *viva voce* evidence; it was not the prosecution's duty to call the police officers who interrogated the appellant in Zimbabwe. Still less was it obliged to call the members of the Botswana police (even had it the ability to secure their attendance) as the appellant's custody in Botswana was remote from and non-essential to the narrative on which the State case was based.

Held, further, that if an accused person claims his fundamental right to a fair hearing has been violated, in that he has not been afforded facilities to obtain the attendance of witnesses to testify on his behalf, he must make some plausible showing of how their testimony would have been both material and favourable to his defence. The appellant had not only failed in that respect, he was not even able to establish that the witnesses were in fact declining to testify at his trial.

Cases cited:

S v Gwaze & Anor 1978 RLR 13 (AD)

S v Ndebele 1983 (2) ZLR 216 (SC)

R v Oliva [1965] 3 All ER 116 (CCA)

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

Washington v Texas (1967) 388 US 14; 18 L ed 2d 1019

1989 (2) ZLR p22

GUBBAY JA

US v Valenzuela-Bernal (1982) 458 US 858; 73 L ed 2d 1193

R v Cavanagh [1972] 2 All ER 704 (CA)

R v Damana 1958 (1) SA 571 (E)

M J Gillespie for the appellant

Y Omerjee, with him *A O Agyemang*, for the respondent

Judgment

Gubbay JA: In the early evening of 27 June 1988 the appellant, a citizen of the United Kingdom and a resident of South Africa, entered Zimbabwe at the Kazungula border post. After being

allowed to complete immigration and customs formalities, he was escorted by immigration and customs officials to the nearby police post for questioning. While there he succeeded in absconding and made his way, by swimming across the Zambezi River, into Botswana.

The following day, while on foot, the appellant was stopped at a road block within Botswana by members of the National Defence Force. He was arrested and taken to Gaborone where he was handed over to the member-in-charge of the main police station. He remained in custody at the police station until 2 July 1988 when, manacled to the spare wheel of an open truck, he was transported by members of the Botswana Police Force from Gaborone to the Zimbabwean border post at Plumtree. He was received there by members of the Zimbabwe Republic Police and immediately placed under arrest.

On 4 July 1988 and at Harare Central Police Station, a warned-and-cautioned statement was recorded from the appellant. The next day that statement was confirmed before a magistrate in accordance with the procedure as laid down in s 105C of the Criminal Procedure and Evidence Act [*Chapter 59*].

On 21 July 1988 there was put before a magistrate at a remand hearing a written statement prepared by a legal practitioner, who by then had been engaged to represent the appellant. The statement, which bears the appellant's signature as well as that of the legal practitioner, is to the effect that at various times during the course of 29 June 1988 the appellant was interrogated by members of the Botswana Police Force, the questioning *Held*, that a cheque could not be treated as payable to bearer when it clearly indicates that the person who is designated and named as payee is entitled to claim payment. The section did not, in any case, provide that a cheque with a fictitious or non-existent payee on it **must** be treated as payable to bearer, only that it **may** be. A banker is not entitled to give effect *Held*, that a cheque could not be treated as payable to bearer when it clearly indicates that the person who is designated and named as payee is entitled to claim payment. The section did not, in any case, provide that a cheque with a fictitious or non-existent payee on it **must** be treated as payable to bearer, only that it **may** be. A banker is not entitled to give effect being interspersed with several punches and slaps. At one stage in the afternoon he was threatened "with the vultures and torturers tonight". At 8.30 pm he was taken from his cell to a room occupied by fifteen members of the Botswana Police Force. He recognised three or four of them as the persons who had interrogated him earlier that day. His entry was met with an outburst of tremendous noise. He was abused, shouted at and threatened by gesture. He

1989 (2) ZLR p23

GUBBAY JA

was removed to another room where he was stripped naked. He was pinned down by persons holding his arms and legs, and a piece of plastic was tightly held against his nose and mouth, preventing him from breathing. This process was repeated frequently, causing him to lose consciousness on at least eight or nine occasions. Ultimately his interrogators recorded a statement from him, the contents of which he does not recall.

On 23 January 1989 the appellant was arraigned before the High Court upon a charge of contravening s 50(1) of the Law and Order (Maintenance) Act [*Chapter 65*], it being alleged that

he did commit or did attempt to commit an act of terrorism or sabotage within Zimbabwe. Senior counsel who appeared took a plea to the jurisdiction of the court on the grounds that the appellant had been illegally conveyed by members of the Botswana Police Force in Zimbabwe. After hearing full argument on the issue, both in support of and against the contention, the learned judge reserved judgment and adjourned the trial to 15 May 1989. Seven weeks later he handed down a lengthy judgment dismissing the plea.

Thereafter, an outline of the appellant's defence to the charge was lodged with the High Court in terms of s 105(5) of the Criminal Procedure and Evidence Act. It is contended therein that the warned-and-cautioned statement recorded from the appellant on 4 July 1988, which it is intended by the prosecution to produce as evidence, is inadmissible as it was not made freely and voluntarily and without undue influence being brought to bear. Reliance is placed on the physical and psychological abuse allegedly sustained by the appellant while held in custody in Gaborone which, so it is stated, is inseparably connected with subsequent maltreatment received at the hands of members of the Zimbabwe Republic Police on 3 July 1988. This comprised lengthy periods of interrogation of an intimidatory nature, together with veiled threats of physical violence. The final paragraph of the document reads:

"The accused wishes to call the evidence of members of the Botswana Police Force stationed at Gaborone who can testify as to the circumstances of his captivity and torture but is unable to do so. In the absence of their evidence the court cannot fairly rule upon the admissibility of the statement and a trial in such circumstances would be unfair. In the absence of an undertaking by the State, or of due compliance with any such undertaking given, to secure the attendance of the Member in Charge, Gaborone, and such other policemen as the accused may be able to identify from a parade of Botswana policemen stationed at Gaborone,

1989 (2) ZLR p24

GUBBAY JA

the accused will invoke the protection of s 18(2) of the Constitution against an unfair trial."

At the resumption of the trial, for which two weeks were allocated, the appellant proffered a plea of not guilty to the charge. As foreshadowed in the defence outline, his counsel, then Mr *Gillespie*, applied for a stay of proceedings. The learned judge was informed from the Bar that, although a number of letters had been written to the Attorney-General drawing his attention to the need to ensure the presence of the trial of the member-in-charge of the main police station at Gaborone and other police officers who had taken part in the interrogation of the appellant, no favourable response had been received, and nothing had in fact been done. The relevant correspondence was not placed before the court. Nor was it claimed that any further measures in the matter had been taken by the appellant's legal representatives. The approach adopted was that it was the obligation of the Attorney-General and not of the defence to obtain the attendance of the witnesses, and that in the event of their proved unavailability at the trial, for whatever reason, the appellant's constitutional right to be afforded a fair hearing would be violated. In consequence the proceedings were to be stayed in order to allow the Attorney-General another opportunity to comply with what was required of him by the defence.

The application was strenuously opposed by Mr *Omerjee*, who appeared for the State. While disputing any duty to do so, and purely as a matter of grace, he offered to use his good offices, during the course of the trial, to assist in endeavouring to secure the attendance of the

witnesses sought by the appellant.

The learned judge dismissed the application to stay the proceedings and directed the trial to commence. Pursuant to s 44(1) of the High Court of Zimbabwe Act 1981 an appeal as of right was immediately noted against the interlocutory ruling. Thereupon, after entertaining submissions as to the effect of the noting, the learned judge ordered that the trial proceed until the validity of the appeal, set down for 26 May 1989, was determined by this court.

Over the remaining seven court days the prosecution called a number of witnesses to testify but, in view of the imminent appeal, very fairly refrained from tendering the appellant's extra-curial statement to the court. On 25 May 1989, the days set aside having expired, the trial was adjourned to 19 June 1989, with several more State witnesses still to be called.

1989 (2) ZLR p25

GUBBAY JA

Against the background of the inability of the State, the defence and the court to compel the attendance of witnesses beyond the jurisdiction under the powers prescribed in s 215(1) and 218 of the Criminal Procedure and Evidence Act, since the process of the court has no extra-territorial force, Mr *Gillespie's* argument on appeal may be put this way. Where the procedure laid down in s 242(1a) of the Criminal Procedure and Evidence Act is invoked, the vital consequence of which is to make a confirmed extra-curial statement admissible on production without further proof, and to cast upon the accused person the burden of proving on a balance of probability that the statement was not made by him or was not made freely and voluntarily without undue influence (see *S v Gwaze & Anor* 1978 RLR 13 (AD) at 17H; *S v Ndebele* 1983 (2) ZLR 216 (SC) at 219C-D), it lies with the prosecution to secure the attendance of the absent witnesses the defence requires in its effort to discharge the *onus* and to call them so that they may be cross-examined or, at the very least, to tender their presence at the trial to the defence. And a failure to do so will negate the protection enshrined in ss 18(2) and 18(3)(e) of the Constitution of Zimbabwe.

The aforementioned provisions read as follows:

"18. (2) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(3) Every person who is charged with a criminal offence -

...

(e) shall be afforded facilities to examine in person or, save in proceedings before a local court, by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; ..."

While I readily acknowledge that the prosecution of an accused person must be conducted with due regard to traditional considerations of candour, fairness and justice, I am unable to approve of the concept that it is for the prosecution to call witnesses regarded by it as material, not to its own case, but to that of the defence, solely in order to afford the defence the advantage of cross-examination. The adoption of such an approach would amount to discharging the task of

the defence and confusion would be apt to result.

1989 (2) ZLR p26

GUBBAY JA

The prosecution has a discretion in the calling of witnesses. This discretion was outlined by LORD PARKER CJ in *R v Oliva* [1965] 3 All ER 116 (CCA), where he said at 122E-G:

"The prosecution must of course have in court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them, either calling and examining them, or calling and tendering them for cross-examination. The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interest of justice, and at the same time be fair to the defence. If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and if they refuse there is the ultimate sanction in the judge himself calling that witness."

A similar view was expressed by DIEMONT JA in *S v Kelly* 1980 (3) SA 301 (AD) at 310E-311C:

"I am not aware of any rule of practice which compels the State to call witnesses, whether or not they be considered crucial to the prosecution. In my view the discretion of the State is unfettered in its choice of witnesses and indeed the learned Judge, in the case cited (*R v Filanius* 1916 TPD 415 at 417), qualified his general statement by saying:

'But where the prosecution believes that these witnesses are untruthful, they are not going to tell what they believe to be the true story, and where the Crown has reason to believe they are either hostile or in league with the accused the position may be somewhat different. I am not prepared to say in such case it is the duty of the Crown to call these witnesses.'

It seems to me that if the prosecutor was compelled to call all accomplice witnesses he might well be placed in the unhappy position of not being able to cross examine persons whom he had reason to think were hostile or untruthful. Counsel argued further that, even if it were not the duty of the State to call all accomplice witnesses, it was at least its duty to render the witnesses available to the defence. In advancing this argument he relied on a further passage from the judgment of MASON J to the following effect:

1989 (2) ZLR p27

GUBBAY JA

'But I do think it is the duty of the Crown to render these witnesses available for the trial. It is the duty of the Crown to place them at the disposal of the Court and at the disposal of the defence if they are not called, and one can quite see why that should be the case. To begin with, all material should be placed before the court necessary for the investigation of the truth of the matter. The Crown has behind it the whole resources of the State. It has people on the watch in most cases, particularly in trapping cases, in order to examine in detail what happens at the time. It, therefore, not only has the pecuniary resources and the resources of the police, but it also has the opportunity of knowing where the witnesses are likely to be. Under these circumstances I think it is the duty of the Crown, where the witnesses are not called by the Crown, to render those witnesses available for the purpose of the trial, and I think the Crown failed in that duty in this case so far as the record goes. It maybe that they did not know who these people were, but there is nothing to show that upon the record. But we have to consider what the real effect of such a failure in a case of this kind is. Where there are difficulties in the evidence for the prosecution it will, of course, weigh very heavily against the Crown if these witnesses are not called. But where the evidence of the prosecution is conclusive, I am not prepared to say that the accused should escape because of a defect of

procedure.'

With due respect I do not think that failure to call a witness for the prosecution or render him available for the trial constitutes a 'defect of procedure'; it seems to me that at most it may in certain circumstances lead the court to draw an inference adverse to the case for the prosecution.

I am fortified in this conclusion by several cases which were not cited to us in argument. In *R v Heilbron* 1922 TPD 99 MASON J referred to his earlier judgment in the *Filanius* case and stated that the rule that the Crown should call witnesses was a rule of conduct in prosecutions, a rule of fair dealing."

I accept this exposition of the law. The principles which emerge from these cases are, first, that the prosecution has a discretion as to what witnesses will be called to support its case, but a refusal to call those whose testimony is essential to the narrative of the prosecution case, would be improper. For instance, in a prosecution for assault, some witnesses may give an account of the offence which does not coincide with that of the victim. The prosecution would not be justified in refusing to call the witnesses merely for that reason.

1989 (2) ZLR p28

GUBBAY JA

Secondly, that in the exercise of its discretion the prosecution should act fairly and not be influenced by any oblique motive. Thirdly, the prosecution must have available the witnesses whom it has indicated to the defence it intends to call.

In the present case, the State served upon the appellant, prior to his first appearance before the High Court, a detailed outline of its case. A summary of the evidence of thirty-seven witnesses is provided. If any of these named witnesses are not called by the prosecution in the proper exercise of its discretion, they must be made available to the defence.

The warned-and-cautioned statement recorded from the appellant on 4 July 1988 would appear to be a crucial part of the State case but, having been confirmed in terms of s 105C(3) of the Criminal Procedure and Evidence Act, it is receivable in evidence upon its mere production by the prosecution without further proof. It is for the defence therefore to challenge its admissibility by the adduction of *viva voce* evidence. It is not for the prosecution, assisted by the presumption of admissibility, to call witnesses to testify that in making the statement the appellant's freedom of volition was not overcome, in advance of any evidence led by the defence to that effect.

In my view, therefore, it is not open to the defence to contend that it is the duty of the prosecution to call as witnesses the police officers who interrogated the appellant on 3 July 1988. All the more so is the prosecution under no obligation to adduce the evidence of those members of the Botswana Police Force who dealt with the appellant on 29 June 1988, even assuming it had the ability to ensure their availability to testify. The appellant's custody at Gaborone is entirely remote from and non-essential to the narrative on which the State case is based.

I may say that it is not contended in the aforementioned letters written on behalf of the appellant (copies of which were by consent made available to this court) that it is incumbent upon the Attorney-General to call the Botswana police officers as State witnesses and as a consequence

to secure their attendance at the trial. The demand, for certainly it was not a courteous request for assistance, was that the presence of these persons - in particular the member-in-charge of the Gaborone police station - had to be made available at the trial to be called as witnesses for the defence. That was a wholly mistaken and unreasonable attitude. As the attendance of the Botswana police officers was beyond the authority of the Attorney-General to compel, and as their presence was sought for the purposes of the appellant's defence, it was not for the former but for the

1989 (2) ZLR p29

GUBBAY JA

appellant's legal representatives to make every endeavour to discover their identities and ascertain their account of the nature of the interrogation to which the appellant had been subjected.

It is apparent that as early as 21 July 1988 the appellant informed his legal representatives that the written statement he made while in custody at Gaborone had been handed to the Zimbabwe Republic Police at the Plumtree border post on 2 July 1988. The probability of it disclosing the name of the police officer who had recorded the statement ought to have been foreseen. Yet at no stage was the Attorney-General asked for sight of the statement. In fact, as it now transpires, it bears the name of a Superintendent Arnold Mululwane. If the appellant's legal representatives had acted with more forethought, instead of attempting to shift the responsibility upon the Attorney-General, they may well have been able to pursue fruitful enquiries through Superintendent Mululwane. They could also have enlisted the assistance of the Attorney-General to use his influence and good relations with his Botswana counterpart to institute an investigation into the appellant's allegations, or to instruct personnel at the Gaborone police station to allow a Botswana lawyer briefed from Harare to interview them. And other avenues were open which a little ingenuity would have revealed. In the event nothing constructive was done.

It seems to me that in the circumstances pertaining it is idle for the appellant to now complain that without the testimony of these witnesses, the tenor of which is unknown to him, his case will not be afforded a fair hearing.

An accused person who claims that his fundamental right to a fair hearing has been violated, in that he has not been afforded facilities to obtain the attendance of witnesses **to testify on his behalf**, guaranteed to him under s 18(3)(e) of the Constitution of Zimbabwe, must establish certain basic criteria. It is not sufficient for him merely to assert that he desires to call certain witnesses whose attendances at the trial is beyond the power of the Attorney-General and of the court to compel. He must make some plausible showing of how their testimony would have been both material and favourable to his defence. For this particular constitutional protection does not grant to him the right to secure the attendances and testimony of any and all witnesses, only of those whom he seeks to testify on his behalf-that is, witnesses in his favour.

This part of s 18(3)(e) is similar in the scope of its protection to a clause in the Sixth Amendment to the United States Constitution, which guarantees a

GUBBAY JA

criminal defendant "compulsory process for obtaining witnesses in his favour". The effect of this protection was considered in *Washington v Texas* (1967) 388 US 14; 18 L Ed 2d 1019.

WARREN CJ, who gave the lead opinion (which was concurred in unanimously), said at 123 and 1025 respectively:

"We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favour because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."

The same construction was applied in *United States v Valenzuela-Bernal* (1982) 458 US 858; 73 L Ed 2d 1193, the facts of which approximate more closely to the instant case. The respondent, an alien and a citizen of Mexico, entered the United States illegally and was taken by smugglers to a house in Escondido, California. Six days later, in exchange for his not having to pay the smugglers for bringing him across the border, the respondent agreed to drive five other illegal aliens to Los Angeles. During the course of this drive, and after a chase, the respondent and three of his passengers were apprehended by a border patrol, two passengers having escaped. Following their arrest the respondent and the three passengers were interviewed by criminal investigators. The respondent admitted his illegal entry into the country. The three passengers also admitted that they were illegally in the country, and each identified the respondent as the driver. A district attorney concluded that the passengers possessed no evidence material to the prosecution or defence of the respondent in respect of the charge of transporting illegal aliens, and two of the passengers were deported to Mexico forthwith. The third was detained to provide a non-hearsay basis for establishing the offence.

At his trial the respondent moved the District Court to dismiss the indictment, claiming that the Government's deportation of the two passengers violated his right to compulsory process for obtaining favourable witnesses. He asserted that the deportation had deprived him of the opportunity of interviewing the two remaining passengers to determine whether they could aid in his defence. He made no attempt to explain how they could assist him in proving that he did not know that he was transporting illegal aliens. The District Court denied the motion and found the respondent guilty as charged.

GUBBAY JA

The Court of Appeals reversed the conviction, but its decision was subsequently overturned by the Supreme Court by a seven to two plurality. JUSTICE REHNQUIST, as he then was, gave the lead opinion. Commenting upon the effect of the test laid down in *Washington v Texas supra*, he said at 867 and 1202 respectively:

"This language suggests that respondent cannot establish a violation of his constitutional right to compulsory process merely by showing that deportation of the passengers deprived him of their testimony. He must at least make some plausible showing of how their testimony would have been both material and favourable to his

defense.

When we turn from *Washington* to other cases in what might loosely be called the area of constitutionally guaranteed access to evidence, we find *Washington's* intimation of a materiality requirement more than borne out."

He continued at 873 and 1206 respectively:

"Because prompt deportation deprives the defendant of an opportunity to interview the witnesses to determine precisely what favourable evidence they possess, however, the defendant cannot be expected to render a detailed description of their lost testimony. but this does not, as the Court of Appeals concluded, relieve the defendant of the duty to make some showing of materiality. Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favourable to his defense, in ways not merely cumulative to the testimony of available witnesses."

In a separate but short concurring opinion JUSTICE BLACKMUN remarked at 874 and 1207 respectively:

"At least a 'plausible theory' of how the testimony of the deported witnesses would be helpful to the defense must be offered. None was advanced here; therefore, the motion to dismiss the indictment was properly denied by the District Court."

In dissenting, JUSTICE BRENNAN (in whose opinion JUSTICE MARSHALL joined) expressed the view that a criminal defendant has a constitutional right under the Sixth Amendment to interview witnesses to his alleged crime before they

1989 (2) ZLR p32

GUBBAY JA

are whisked out of the country by the Government. It was the respondent and not the Government who was entitled to decide whether or not the illegal alien witnesses could give testimony material and relevant to the defence, but their deportation had prevented him from being able to demonstrate such materiality.

Finally, the decision of the Court of Appeal, Criminal Division, in *R v Cavanagh* [1972] 2 All ER 704, is deserving of mention, for although in England there is no constitutional protection to be afforded a fair hearing, that right is embodied and enforced under principles of the common law. This case held that, where the prosecution takes all reasonable steps to secure the attendance of a witness whom it is anxious to call and whom the defence might reasonably expect to be present, that is all that can be expected. If such steps prove unavailing in ensuring the witness's presence, the court has a discretion to permit the trial to proceed, provided no injustice will thereby result. The most material consideration affecting the court's discretion will be whether the testimony of the absent witness would be likely to assist the defence (see at 707a-b *per* GEOFFREY LANE J).

This approach accords, in my view, with that enunciated by the United States Supreme court. See also *R v Damana* 1958 (1) SA 571 (E) at 572E.

In the present case the position of the State is far stronger against the appellant than it was against Valenzuela-Bernal. For even if the reasoning of JUSTICES BRENNAN and

MARSHALL be taken as correct, there can be no question of any blame in respect of the present unavailability of the Botswana police officers attaching to the Attorney-General. It was the appellant whose function it was to demonstrate before the court *a quo* that their testimony was both material and favourable to his defence. Not only did he fail in that respect, but he was not even able to establish that the witnesses were in fact declining to testify at his trial.

In the result I am entirely satisfied that the learned judge was correct in allowing the trial to proceed as he did. The appeal is accordingly dismissed.

All is not lost to the appellant however, for the Attorney-General, in an affidavit filed with this court, has endorsed the gratuitous undertaking given to the trial court on 15 May 1989 by his representative, Mr *Omerjee*, and has stated that:

"...everything practical will be done to ensure the availability of the

1989 (2) ZLR p33

GUBBAY JA

Botswana Police Force to enable the appellant to fully meet the case presented against him."

That assurance is to be commended. It conforms with the high ideals of fairness and justice invariably displayed in the conduct of criminal proceedings in this country. It can only be hoped that prior to the resumption of the trial on 19 June 1989 the combined efforts of the Attorney-General and the defence will have met with success.

McNally JA: I agree.

Manyarara JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

1989 (2) ZLR p34

S v KOKANI 1989 (2) ZLR 34 (HC)

Court High Court, Harare

Smith J & Gibson J

Criminal appeal

29 May & 21 June 1989

Flynote

Criminal procedure (sentence) - Customs and Excise Act [Chapter 177] - forfeiture of smuggled goods - forfeiture the rule rather than the exception - forfeiture and payment of duty - whether competent to order both.

Headnote

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In cases of smuggling, even where the goods are intended for the personal use of the offender, it is the rule rather than the exception for courts to order forfeiture of the goods. The only cases where forfeiture should not be ordered are those where the offender can show that special circumstances exist, such as that the article concerned has great sentimental value or is of such value to the offender that the penalty he would thereby suffer would be out of proportion to the gravity of the offence.

It is competent for a court to order forfeiture of goods and payment of the unpaid duty, though not to order both forfeiture and payment of the value of the goods.

Cases cited:

S v Mohamed 1977 (2) RLR 207 (GD)

S v de Wet 1979 RLR 147 (AD); 1979 (2) SA 1183 (RA)

S v Chalimba HH-402-86 (not reported)

C F Dube for the appellant

M Jones for the respondent

1989 (2) ZLR p35

SMITH J

Judgment

Smith J: On 3 June 1988 the appellant was charged with two counts of contravening the Customs and Excise Act [*Chapter 177*]. The first count involved a contravention of s 157(1)(d), in that in the written declaration which the appellant made when he imported goods into Zimbabwe he made false statements as to the value of the goods concerned. The second count involved a contravention of s 165, in that he smuggled goods into the country. The appellant pleaded guilty to both counts. The goods referred to in the first count were spare parts for motor vehicles valued at R1 255,38 (whereas the appellant declared their value as R215), hardware fittings valued at \$318,38 (whereas the appellant declared their value R30) a wall clock valued at R67,19 (whereas the appellant declared its value as R20) and a blank video tape, a stylus and a watch. The goods referred to in the second count were 6 watches. Their value was \$73. In the statement of agreed facts it was said that the spare parts and hardware fittings were intended for commercial trucks (it is difficult to see how the hardware fittings could have been so intended) and the watches and other property were for the appellant's personal use (here too it is difficult to accept that he would want 7 watches for his own personal use). The duty payable on the goods concerned in both counts amounted to \$908,05.

The appellant pleaded guilty to both charges and was duly convicted. He was sentenced to pay a fine of \$700 on the first count and \$150 on the second count and a term of 5 months' imprisonment was imposed and conditionally suspended. In addition, summary judgment in the sum of \$908,05 (being the unpaid duty) was granted in favour of the Controller of Customs and Excise and the goods which were the subject matter of the two offences were declared forfeited.

The appellant appealed against sentence on three grounds -

- (a) the magistrate erred in granting both summary judgment of an amount equal to the duty-paid value of the goods and ordering forfeiture of the goods;
- (b) it was inequitable to declare forfeiture of the goods;
- (c) the overall sentence and the *quantum* of the fine in particular was so excessive as to induce a sense of shock.

In his reply to the notice of appeal, the magistrate conceded that on the authority of *S v Mohamed* 1977 (2) RLR 207 (GD) he should not have ordered the payment of duty in respect of the goods which were the subject matter of

1989 (2) ZLR p36

SMITH J

the first count. Furthermore, he said that the 6 watches which were the subject matter of the second count, and the wall-clock, video tape, stylus and watch referred to in the first count were for personal use and, on second thoughts, should not have been declared forfeited. Despite the concession made by the magistrate, it is competent for a court to order forfeiture of goods and payment of unpaid duty - see *S v de Wet* 1979 RLR 147 (AD); 1979 (2) SA 1183 (RA) and *S v Chalimba* HH-402-86. The magistrate did not order payment of an amount equal to the duty-paid value of the goods, as alleged in the notice of appeal. It would not have been competent for him to have ordered both payment of the value of the goods and the forfeiture of the goods - see *de Wet's* case *supra*. Such an order would have amounted to a double penalty because the appellant would then have lost the goods themselves and have been required to pay an amount equal to their value to the Controller of Customs. *Held*, that a cheque could not be treated as payable to bearer when it clearly indicates that the person who is designated and named as payee is entitled to claim payment. The section did not, in any case, provide that a cheque with a fictitious or non-existent payee on it **must** be treated as payable to bearer, only that it **may** be. A banker is not entitled to give effect and Excise.

The real gravamen of the appeal concerns the forfeiture of the goods. It is common knowledge that at present spare parts for vehicles are in very short supply in Zimbabwe. The appellant has a farm and owns 3 pick-up trucks, 2 motor cars and 2 tractors. Obviously he imported the spare parts with the intention of using them, or most of them, on his fleet of vehicles. In *Mohamed's* case *supra*, PITTMAN J at p 211 set out various factors which should be taken into account in deciding whether a forfeiture order would be equitable. The list of factors set out was not exhaustive and was not intended to be so. In his judgment PITTMAN J did say:

"In normal non-commercial cases, however, it has now become the rule rather than the exception to order forfeiture."

Mr *Dube* pressed strongly that the spare parts and hardware fittings were intended by the appellant for his own use and not for resale and that the spare parts, in particular, were important to the appellant because they would be used to repair his tractors, which would otherwise be unusable, and it would be difficult for him to replace them, given the present

shortage of spare parts and foreign currency. Furthermore, he submitted that there would be no discernible harm to the community if the appellant were allowed to retain them. Mr *Jones* concurred with Mr *Dube* that forfeiture of the spare parts and hardware fittings should not have been ordered. However, both legal practitioners conceded that the arguments raised did not apply to the other goods, namely the watches, wall-clock, video tape and stylus.

I sympathise with the appellant in his difficulties in obtaining spare parts for

1989 (2) ZLR p37

SMITH J

his vehicles. However, he is to blame for his present misfortune. He was fortunate enough to be able to acquire the things he needed and then, when he imported them, he gave a false declaration as to their value. He did this deliberately, well knowing that he was contravening the law. He is a man of means and could well have afforded to pay the appropriate duty on the goods that he was importing but he decided to save himself a little money and at the same time to defraud the State. The enforcement of the provisions of the Customs and Excise Act [*Chapter 177*] is not an easy task. Customs officials are required to enforce the law and to collect the duties which the Legislature has prescribed. In doing so they have to rely to a large extent on the honesty of the people importing goods. Those who deliberately fail to declare goods being imported or declare a false value know that they are breaking the law and will be punished if they are caught. They are aware of the risk they are taking and should not squeal when they are caught.

In a case like the present, the only way to punish the offender is to declare the goods concerned to be forfeited. If he can keep the goods and be required instead, to pay the duty-paid value of the goods or only the duty, the game would be well worth the candle. In my opinion, in cases such as the present, it should be the rule rather than the exception to order forfeiture of the goods. If that is appreciated by members of the public it will be the only effective deterrent. The only cases where forfeiture should not be ordered are those where the offender can show that special circumstances exist such as that the article concerned has great sentimental value or is of such value to the offender that the penalty he would thereby suffer would be out of proportion to the gravity of the offence.

In my view, there are no special circumstances in this case which would justify a decision not to order the forfeiture of the goods. Furthermore, I do not consider that the cumulative effect of the fine, the forfeiture order and the order for payment of duty induces a sense of shock. The appeal is dismissed.

Gibson J agrees.

Kantor & Immerman, appellant's legal practitioners

1989 (2) ZLR p38

S v HAMADZIRIPI 1989 (2) ZLR 38 (HC)

Court High Court, Harare

Smith J

Criminal review

21 June 1989

Flynote

Criminal procedure - prosecution - declining to prosecute - right of prosecutor to do so where no useful purpose served by prosecuting.

Headnote

It is a legitimate tool in the prosecutor's kit to decline to prosecute where it is considered that the institution of a prosecution would serve no useful purpose. Such a discretion is not a proper subject for review, although there can be abuse because the prosecution can preserve silence in less meritorious cases. It is desirable to exercise the discretion to decline to prosecute in cases where the police "come down like a wolf on the fold".

Cases referred to:

Smedleys Ltd v Breed [1974] AC 839 (HL)

State (at the prosecution of Killian) v Attorney-General (1958) 92 ILTR 182 (Supreme Court of Eire)

S v Khubeka en Andere 1980 (4) SA 221 (O)

Judgment

Smith J: The accused was the hospital administrator at Chegutu District Hospital. On 27 November 1988 at about 11:10 hours he was driving an ambulance when it was involved in an accident with a bus. Minor damage was sustained by both vehicles. The accused was charged with contravening s 6(1) of the Road Traffic Act 1976 (unlicensed driving) and s 42(1) of the Road Traffic Act 1976 (careless driving). He pleaded guilty to both charges and after a cursory examination of his understanding of the essential elements of the two charges, the magistrate entered verdicts of guilty. When the accused was asked if he had anything to say in mitigation before sentence was

1989 (2) ZLR p39

SMITH J

passed he said *inter alia*:

"I drove the motor vehicle because the ambulance driver had gone to Kadoma. The doctor came saying there was an emergency needing a patient to undergo an operation. I had to go and collect the driver from CMED."

The magistrate paid no heed to this explanation and proceeded to sentence the accused to a fine of \$120 on the first count and \$150 on the second count.

I referred the case to the Attorney-General for his views on the conviction. He did not support the conviction. In his letter expressing his views he said:

"There is much that is wrong with these proceedings.

Firstly, it is arguable that the accused should never have been prosecuted at all. The exercise of a prosecutorial discretion sadly miscarried. It is certainly a legitimate tool in the prosecutor's kit to decline to prosecute where it is considered that the institution of a criminal prosecution will serve no useful purpose: see, generally, the remarks of VISCOUNT DILHORNE in *Smedleys Ltd v Breed* [1974] AC 839 at 856G. It has in fact been suggested that this particular discretion is not a proper subject for review: refer to *State (Killian) v Attorney General* (1958) 92 I LTR 182 and *Held*, that a cheque could not be treated as payable to bearer when it clearly indicates that the person who is designated and named as payee is entitled to claim payment. The section did not, in any case, provide that a cheque with a fictitious or non-existent payee on it **must** be treated as payable to bearer, only that it **may** be. A banker is not entitled to give effect *Held*, that a cheque could not be treated as payable to bearer when it clearly indicates that the person who is designated and named as payee is entitled to claim payment. The section did not, in any case, provide that a cheque with a fictitious or non-existent payee on it **must** be treated as payable to bearer, only that it **may** be. A banker is not entitled to give effect *Held*, that a cheque could not be treated as payable to bearer when it clearly indicates that the person who is designated and named as payee is entitled to claim payment. The section did not, in any case, provide that a cheque with a fictitious or non-existent payee on it **must** be treated as payable to bearer, only that it **may** be. A banker is not entitled to give effect *Held*, that a cheque could not be treated as payable to bearer when it clearly indicates that the person who is designated and named as payee is entitled to claim payment. The section did not, in any case, provide that a cheque with a fictitious or non-existent payee on it **must** be treated as payable to bearer, only that it **may** be. A banker is not entitled to give effect effect KC Davis *Discretionary Justice* (Chicago 1971) Chapter VII. The decision in *Killian* obviates the need for public disclosure in such circumstances - but it also opens the door to abuse because the prosecution may preserve silence in less meritorious cases. An effective safeguard in this respect is found in s 29(2)(b) of the High Court of Zimbabwe Act which ensures that, if real and substantial justice has not been done in the court below, then such deficiency can be swiftly remedied. Further, it is certainly desirable to exercise a discretion in cases where police come down like a wolf on the fold; see the comments of Dr Glanville Williams in his *Textbook of Criminal Law* at p 922. In respect of the matter of the exercise of discretion in the instant case, I am unable to point to any useful purpose whatsoever in the institution of this prosecution.

Secondly, a defence of obedience to orders or compulsion was clearly indicated. One would expect a person in the shoes of this particular hospital administrator to obey the directions of his doctors in a case of an emergency. After all, that is what a hospital is for and perhaps there were and are difficulties in ensuring a ready supply of ambulance drivers.

1989 (2) ZLR p40

SMITH J

What was the hospital administrator to do otherwise? Was he to let the patient die for the sake of complying with the most technical of requirements in the Road Traffic Act? If he had chosen not to drive the ambulance, and the patient had died, the legal consequences attending his omission as a hospital administrator may have been more drastic. What would the learned magistrate, police prosecutor or investigating officer have done in his shoes? In respect of the matter of compulsion or obedience to orders, convenient reference may be made to *S v Khubeka en Andere* 1980 (4) SA 221. It could be argued that the learned magistrate ought to have ordered a trial on the basis of a plea of not guilty. (It should be noted that such a plea could extend to both counts for neither crime was a serious one: refer to Burchell & Hunt *South African Criminal Law and Procedure* Vol 1 2 ed p 355.)

Thirdly, the sentence in respect of each count was starkly disparate to the accused's criminality or moral blameworthiness. He was engaged in hospital business; in fact, the immediate and urgent business of saving a life. In these circumstances, any pecuniary sanction would have been immodest. In the event that the convictions

were in accordance with real and substantial justice, a caution and a discharge would have been ample."

I agree with the views so ably expressed. The conviction and sentence on both counts are set aside.

Gibson J agrees.

1989 (2) ZLR p41

BUSUMAN MOTORS (PVT) LTD v SAMUEL OSBORN (PVT) LTD 1989 (2) ZLR 41 (HC)

Court **High Court, Bulawayo**

Blackie J

Application for rescission of judgment

23 June 1989

Flynote

Practice and procedure - renunciation of agency - filing of new address for service requirements for.

Headnote

The applicant's legal practitioners filed a renunciation of agency, in which they gave the applicant's physical address as his future address for service of process. Subsequently, the respondent applied for a date of hearing. Notice of the application was sent to the applicant's former legal practitioners. There was no appearance on behalf of the applicant when the Registrar allocated dates for hearing, notice of which was sent to the applicant's former legal practitioners. At the hearing, the applicant being in default, the respondent obtained judgment against the applicant. The applicant applied for rescission of the judgment on the grounds *inter alia* that the correct procedures for setting down the matter for trial were not followed because a valid address for service was included in the notice of renunciation of agency.

Held, that in terms of O2 R8 of the High Court of Zimbabwe Rules 1971, any process served on a legal practitioner who has renounced agency is good service until the **client** furnishes the Registrar with and notifies the opposing party of a new address for service. This the applicant had not done; neither had the retiring practitioner, in his renunciation of agency, claimed that he was acting on behalf of the applicant in providing the applicant's address for future service. The respondent was accordingly entitled to continue to serve process on the retiring legal practitioner.

K Esat for the applicant

R Smithwick for the respondent

1989 (2) ZLR p42

BLACKIE J

Judgment

Blackie J: The applicant applies for rescission of a judgment given against it in default of appearance on the day of trial.

The respondent issued summons against the applicant claiming damages in the sum of \$40 250. The declaration alleged applicant had purchased and used for its own benefit import permits issued to respondent which had been stolen from the respondent, the applicant knowing that the person selling them had no authority to sell such permits or reckless as to whether he had such authority.

The applicant entered appearance to defend and pleaded to the declaration. After the pleadings were closed there were two abortive attempts to have the matter set down for hearing. The dates selected were not suitable to one or other of the parties. Finally, the Registrar allocated the 3rd, 4th and 5th October 1988 as dates for trial and the matter was set down for those dates. On 3 October, when the case was called, there was no appearance for the applicant and judgment was given against it by default in the sum of \$18 201,69.

In its application for rescission of judgment, the applicant alleges, firstly, that the proceedings on 3 October 1988 were invalid in that the procedures prescribed in the Rules of Court for the setting down of an action for trial were not correctly followed. Secondly, and in any event, the applicant submits that it is entitled to a rescission because it was unaware of the dates of set down until 29 September 1988 and that it did not appear on 3 October 1988 because, on that date, it was reasonably believed that the matter would be postponed and new dates for trial would be allocated to it.

There is no doubt that if the correct procedures for setting a case down for hearing were not followed and the applicant was prejudiced thereby, the applicant would have a valid ground for obtaining a rescission of judgment given against it by default.

The papers show the following to be the procedure followed and the sequence of events which took place in relation to the setting down of this matter for 3 to 5 October 1988.

In May 1988, the Registrar, acting in terms of Rule 215(1), allocated 3 to 5 October as the dates for trial. A letter to that effect was sent to the legal practitioners acting for each party. Neither legal practitioner made any immediate response to the Registrar's letter. On 17 June 1988, the appli-

1989 (2) ZLR p43

BLACKIE J

cant's legal practitioner renounced his agency. The notice of renunciation gave the applicant's physical business address as the applicant's future address for service. That address complied with the provisions of Rule 15 as to distance from the Court House.

On 8 July 1988 the respondent's legal practitioner gave notice that he intended to apply to the Registrar on 12 July 1988 in terms of Rule 215(2) for the case to be set down on the dates

allocated. Notice of the application was served on the applicant's former legal practitioner.

On 12 July 1988, at the hearing before the Registrar, there was no appearance for the applicant. The Registrar set the case down for hearing on the dates allocated. Notice of set down for these dates was then served on the applicant's former legal practitioners on 13 July 1988.

The applicant's criticism of the procedure followed for set down relates to the service of the notice of application and the notice of set down on its former legal practitioners. The applicant submits that, as a valid address for service was included in the notice of renunciation of agency, it was not competent to serve any notices subsequent to that renunciation on its former legal practitioner.

Rule 8 of the High Court Rules deals with the procedure to be followed to renounce agency and that to be followed subsequently. That Rule reads as follows:

"A legal practitioner may at any time renounce his agency by giving notice to his client and to the registrar but, until the client furnishes the registrar with and notifies the opposite party of a new address for service, any process served on the retiring legal practitioner at the address for service shall be considered good service and the retiring legal practitioner shall notify his former client of the service of any such process by letter addressed to the client's last known address."

It is common cause that the renunciation of agency by the applicant's former legal practitioner did not claim that it was providing the applicant's address for future service on behalf of the applicant. It is also common cause that the applicant itself has never provided the respondent with an address for service after renunciation of agency.

The applicant contends, however, that the words "until the client furnishes

1989 (2) ZLR p44

BLACKIE J

... a new address for service" are satisfied where the legal practitioner renouncing agency provides a new address for service.

I cannot accept that submission. The words of the Rule are clear and unambiguous both in themselves and in the context in which they appear. The interpretation which the applicant seeks to place upon those words is directly contrary to that plain meaning. No reason was advanced by the applicant that satisfies me that I should depart from that meaning, much less that I should adopt an interpretation of the words which is contrary to that meaning.

I hold that the respondent was entitled to serve both the notice of application for dates of set down and the notice of set down on the applicant's former legal practitioners and the proceedings of 3 October 1988 were not invalidated by reason of any want of compliance of the Rules of Court.

[His Lordship then dealt with the applicant's second ground for rescission, and continued:]

The application is dismissed with costs.

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

Coghlan & Welsh, respondent's legal practitioners

1989 (2) ZLR p45

SHINGA EXPRESS (PVT) LTD v HUBERT DAVIES (PVT) LTD 1989 (2) ZLR 45 (HC)

Court High Court, Bulawayo

Blackie J

Application for rescission of judgment

23 June 1989

Flynote

Practice and procedure - default judgment - rescission of - common law principles - "sufficient cause" test to be used in preference to traditional test based on justus error.

Headnote

When determining applications for rescission of default judgments, such applications not being covered by the High Court of Zimbabwe Rules, the High Court has traditionally applied the test set out in *Voet* 2.4.14. This requires the applicant to show "a supremely just cause of ignorance, free from any blame whatsoever" in order to obtain *restitutio in integrum*. However, it represents too rigid a view of the court's discretionary powers under the common law. The test that should be followed is that set out in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A), which requires "sufficient cause" to be shown for relief. This term defies precise or comprehensive definition, for many factors have to be considered, but the two essential elements are -

- (a) that the party seeking relief must present a reasonable and acceptable explanation for his default;
- (b) that, on the merits, that party has a *bona fide* defence which *prima facie* carries some prospect of success.

Both these requirements must be met.

This test has the advantages of greater historical accuracy, of allowing the court to exercise its discretion on the basis of fairness and justice, taking into account all the factors and circumstances of the case, and of bringing such applications into line with the test used in applications to condone a failure to note or prosecute an appeal timeously.

1989 (2) ZLR p46

BLACKIE J

Cases cited:

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

Childerley Estate Stores v Standard Bank of SA Ltd 1924 OPD 163

Uzande v Katsande 1988 (2) ZLR 47 (HC)

Bennett v Fleming 1976 (1) RLR 405 (GD)

Public Service Commission & Anor v Mutsonziwa & Anor HH-109-88 (not reported)

SA Clay Industries Ltd v Katzenellenbogen NO & Anor 1957 (1) SA 220 (W)

Louis Joss Motors (Pty) Ltd v Riholm 1971 (3) SA 452 (T)

Bristow v Hill 1975 (2) SA 505 (N)

Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd 1977 (2) SA 576 (W)

Herbst v Hessells NO en Andere 1978 (2) SA 105 (T)

de Wet & Ors v Western Bank Ltd 1979 (2) SA 1031 (A)

Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)

M Nyekete for the applicant

K A Esat for the respondent

Judgment

Blackie J: The applicant applied for rescission of a judgment granted against it in a contested action in default of appearance on the day of trial. At the end of the hearing of this application, I refused to grant the relief sought. I undertook to give my reasons later and these are my reasons.

It is not disputed that an application of this sort is not covered by the Rules of Court and is to be maintained in terms of common law.

This court, in *Vista Estates (Pvt) Ltd v Animal Breeders Co-operative Co Ltd* 1974 (2) RLR 147; 1975 (1) SA 193 (R), has, in determining an application of this sort in the cases to which I have been referred, applied a test defined in Voet and set out in *Childerley Estate Stores v Standard Bank of South Africa Ltd* 1924 OPD 163:

"Voet 2.4.14 is to the effect that ignorance of a pending claim can justify restitution but only if the litigant is able to show 'a supremely just cause of ignorance free from any blame whatsoever'. The principle involved is justus error. See *Stewarts Assignee v Walls Trustees & Ors* (1881) 3 Juta 243. In *Childerley Estate Stores v Standard Bank of South Africa Ltd* 1924 OPD 163 at 166, the *locus classicus* on rescission of judgments, it was pointed out that the limits of justus error to grant relief against a

BLACKIE J

judgment are narrow."

See also *Uzande v Katsande* 1988 (2) ZLR 47 (HC).

There is a formidable body of authority in favour of this proposition, most, if not all, based on the same passage in *Voet* and requiring a defendant to show "a most just cause of ignorance, free of all negligence" in order to obtain *restitutio in integrum*. In Zimbabwe, see *Bennett v Fleming* 1976 (1) RLR 405 (GD); *Public Service Commission & Anor v Mutsonziwa* HH-109-88 and *Uzande v Katsande supra*. In South Africa, see *SA Clay Industries Ltd v Katzenellenbogen NO & Anor* 1957 (1) SA 220 (W); *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T); *Bristow v Hill* 1975 (2) SA 505 (N); *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) and *Herbst v Hessels NO en Andere* 1978 (2) SA 105 (T).

However, in *de Wet & Ors v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F, TRENGOVE AJA (as he then was), after reviewing the Roman-Dutch authorities, came to the conclusion that:

"[U]nder the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance on sufficient cause shown."

That was the test which he applied to the application before him and which has subsequently been applied by the South African Appellate Division to similar applications. In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764, the criteria for "sufficient cause" were redefined to this extent:

"The appellant's claim for rescission of the judgment ...must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance provided sufficient cause therefor has been shown (see *de Wet & Ors v Western Bank Ltd* 1979 (2) SA 1031 at 1042 and *Childerley Estate Stores v Standard Bank of South Africa Ltd* 1924 OPD 163). The term 'sufficient cause' (or 'good cause') defies precise or comprehensive definition, for many factors have to be considered (see *Cairns Executors v Gaarn* 1912 AD 181 at 186 per INNES JA). But it is clear that in principle and in the long standing practice of our Courts, two essential elements of 'sufficient cause' for rescission of a judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

BLACKIE J

- (ii) that on the merits, such party has a *bona fide* defence which *prima facie* carries some prospect of success: *de Wet's case supra* at 1042; *PE Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO & Anor*; *Smith NO v Brummer* 1954 (3) SA 352(O) at 357-8.

It is not sufficient if only one of these two requirements is met."

In the view I take of this application, it is not necessary to analyse or attempt to define the

concept of "sufficient cause" further than has been done in *Chetty's* case.

It seems to me, with respect, that the test which has been applied in this court for applications for rescission of judgment in default of appearance, represents too rigid a view of the court's discretionary powers under the common law. The test now adopted by the South African Appellate Division, has these advantages: Its greater historical accuracy; it enables the court to exercise its discretion on the basis of fairness and justice taking into account all the factors and circumstances of the particular case; it also brings an application of this sort into line with the test used in an application to condone a failure to note or prosecute an appeal timeously, where, if the relief is refused by the appeal court the judgment is final. I therefore propose, in determining this application, to use the test which has been adopted and defined in *de Wet's* case *supra* and *Chetty's* case *supra*.

Even if I am wrong in adopting that test for applications of this sort, it is a test which is less burdensome on the applicant than the test which is set out in the *Vista Estates* case *supra*. If the applicant fails to meet the test set out in the *Chetty's* case *supra* it goes without saying it will fail to meet the test in the *Vista Estates* case.

his case was set down for hearing and heard on 2 February 1989. The application for rescission of judgment revolves around the service of the notice of set down.

Until October 1988, the applicant was represented by one set of legal practitioners. They then renounced agency. No new address for service was provided and, in November 1988, the respondent served one copy of the notice of set down on the applicant's former legal practitioners in terms of Rule 8 of the High Court Rules and sent another copy of the notice of set down by registered post directly to the applicant. It is not suggested that the first copy of the notice of set down was not received by the applicant's former

1989 (2) ZLR p49

BLACKIE J

legal practitioners and it is not disputed that the registered letter containing the second copy of the notice of set down was delivered.

In serving the notice of set down as it did the respondent acted in accordance with the Rules of Court and no fault can be attributed to it.

The *onus* of showing sufficient cause for the relief sought in this case lies on the applicant.

The applicant explained its failure to attend the hearing on the 13 February 1989 by saying it did not receive either of the notices of set down. It says that it instructed its former legal practitioners to hand its files over to a new set of legal practitioners. The former legal practitioners did so in respect of a number of matters but not this matter. Unknown to the applicant, and contrary to the applicant's instructions, its former legal practitioners renounced agency in respect of this matter. It was only on 19 February 1989 that the former legal practitioners told the applicant's director it had renounced agency and that the matter had been set down for hearing. The former legal practitioners then gave the applicant a wrong date for set

down, namely 17 March 1989.

In respect of the notice of set down sent directly to the applicant by registered post, the applicant says even if the letter was delivered to the applicant (of which the applicant has no knowledge) the fact of its receipt was not brought to the attention of the sole director of the applicant. That director was, in any event, away from the applicant's office on business at the time the registered letter would normally have been delivered to the office.

The essential part of the excuse advanced in respect of the notice of set down sent to its former legal practitioners is that the legal practitioners only advised the applicant at a very late stage that they had renounced agency and that the case had been set down for hearing and that they then advised the applicant of the wrong date for the set down. In a nutshell the applicant puts the blame on his former legal practitioners.

For this allegation, there is only the applicant's word. In *Uzunde v Katsande supra*, the applicant in that case alleged that he had been given a wrong date of set down by his legal practitioner. This was disputed by the respondent. It was held that the failure of the applicant to produce supporting evidence for his assertion that he had been given the wrong date of set down meant that the applicant in that case had failed to discharge the *onus* which was on him.

1989 (2) ZLR p50

BLACKIE J

The facts of this case are slightly more complicated. The respondent does not explicitly dispute the applicant's allegation. The allegation of negligence was made against a former legal practitioner. It may be it is more difficult to obtain support for such an allegation from a former legal practitioner. However, it is not necessary for me to decide this application on that basis. Even if what the applicant says is perfectly true, it seems to me that the applicant cannot be absolved from blame.

This action started in 1987. The respondents have set out in detail a whole series of delays caused (in the respondent's view) by the applicant's failure to comply with the Rules of Court. Some of these failures resulted in applications to the court for orders compelling the applicant to comply. In each case the application was granted with costs against the applicant. The applicant puts the blame for all this on his former legal practitioners. Even if they were entirely at fault, it must have been obvious to the applicant by October 1988, that its former legal practitioner's methods of conducting its affairs was not satisfactory or reliable. Indeed, on its own story, the applicant instructed the former legal practitioners to hand over the files to other practitioners. Notwithstanding the unsatisfactory history in this matter, the applicant did nothing between October 1988 and February 1989 to ensure that its former legal practitioners had carried out its instructions. In these circumstances, the applicant cannot simply divest itself of responsibility for action to say, *vis-à-vis* the respondent, that its legal practitioners have let it down. It seems to me that the applicant, to a large extent, is the author of its own misfortune and that it would be inequitable to place upon the respondent the prejudice and inconvenience which will result from condoning the applicant's failure to ensure its affairs were properly conducted.

The matter does not end there, however. Even if I had been unduly harsh on the applicant concerning the notice of set down sent to its former legal practitioners, there remains the notice of set down set directly to the applicant by registered post. In respect of that notice, the applicant does not deny that the notice was received at the applicant's offices. It says, however, that the company has only one director. The notice of set down may have been received and seen by other personnel employed by the applicant but it has not been seen by the sole director. It further claims that that sole director was away from the company's office on business at the time that the registered letter would normally have been delivered to the office.

In operating with one director, the applicant is, of course, in contravention of s 146(1) of the Companies Act [*Chapter 190*]. In any event, the words of Voet

1989 (2) ZLR p51

BLACKIE J

2.4.14 and 4.6.4 seem to be particularly apposite to the applicant:

"A summons in law will be valid, even though it is proved that it never came to the knowledge of the defendant himself at all. It would be his own fault that either he left no agents at home or that he left servants too careless to point out to him the notices given" (2.4.14).

If one substitutes "notice of set down" for "summons", as one is certainly entitled to do, the passage fits the present facts perfectly.

Similarly,

"Clearly if he omitted to put someone else in charge of his affairs at home by manifest negligence and as it were contempt he should certainly not receive restitution, for the reason not so much of his absence as his own fault and negligence caused his loss" (4.6.4).

I am not satisfied that the applicant has provided a reasonable and acceptable explanation for its failure to attend court on 13 February 1989. In the light of that finding it is unnecessary to make any findings or to consider any arguments relating to the applicant's prospects of success. The applicant must establish both a reasonable explanation and a *bona fide* defence. If one of the two requirements are not met, the applicant has not shown "sufficient cause". *Chetty's case supra* at 765A-F and 767J-768C.

In the result the application must fail and it is accordingly dismissed. The applicant is to pay the costs.

Anthony Murphy & Associates, applicant's legal practitioners

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

1989 (2) ZLR p52

S v NCUBE (1) 1989 (2) ZLR 52 (HC)

Court High Court, Harare

Smith J

Criminal review

28 June 1989

Flynote

Criminal procedure (sentence) - suspended sentence - accused convicted of two disparate offences and given single suspended sentence in respect of both - impropriety of.

Headnote

The accused was convicted of malicious injury to property and of the cultivation of dagga and sentenced to a term of imprisonment on each count. A portion of the total sentence was suspended on condition that he was not convicted of any offence involving malicious injury to property or the possession, use or cultivation of dagga. On review,

Held, that it was improper for the court to include both offences in the conditions of suspension. The two offences which the accused committed were entirely different from each other; there was no common element. The effect of incorporating two disparate offences within the conditions of suspension meant that part of the condition would bear no relationship to the crime being punished by the bringing into effect of the suspended sentence. The magistrate ought to have treated each count separately and suspended a portion of each sentence on appropriate conditions.

Cases cited:

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

R v Enslin 1960 (1) SA 882 (N)

S v de Bruin 1967 (3) SA 399 (SWA)

S v Davids 1969 (3) SA 569 (E)

S v Taylor 1971 (2) RLR 55 (GD); 1971 (3) SA 86 (R)

S v Mnguni & Ors 1985 (2) SA 448 (N)

1989 (2) ZLR p53

SMITH J

Judgment

Smith J: The accused resides on a resettlement scheme at Sanyati. In January and February 1988, resettlement officers pegged fields for the various members of the scheme. Each member was given a field of 7 hectares. The accused had previously had a big field in the area. This field was subdivided into three small fields, each of which was allocated to a member of the

Scheme. One of the fields was allocated to the complainant. At the beginning of the growing season the complainant ploughed his field and sowed cotton seed. When the plants were about a foot high, the accused saw the complainant inspecting his cotton plants and chased him off the land. The accused then ploughed in some of the cotton plants. He destroyed the plants in approximately 1,5 hectares, valued at \$100. When the land resettlement officer and members of the police force went on 23 January 1989 to question the accused about his actions, they found four dagga plants growing in the accused's garden.

The accused was charged with malicious injury to property and contravening s6(1) of the Dangerous Drugs Regulations 1975 (RGN 1111/75). He pleaded guilty to both charges but when he said that he had ploughed in the cotton plants because the complainant had planted in his, the accused's field, his plea on the first count was altered to not guilty. The accused was duly convicted on both counts. He was sentenced to eight months' imprisonment on the first count and six months' imprisonment on the second. Of the 14 months' imprisonment, six months were suspended for five years on condition that the accused did not, within that period, commit any offence involving malicious injury to property or the possession, use or cultivation of dagga for which he was sentenced to imprisonment without the option of a fine.

The two offences which the accused committed are entirely different from each other. There is no common element. Accordingly, it was improper for the court to include both offences in the condition of suspension. In *R v Cloete* 1950 (4) SA 191 (E) at 192 REYNOLDS J said:

"While the words of s 360(b) of [the Criminal Procedure and Evidence] Act 31 of 1917 are wide and the discretion of the judicial officer should not be lightly interfered with, it does seem that two principles at least should be observed in the imposition of the conditions. The first is that the condition imposed should bear at least some relationship to the circumstances of the crime which is being punished by the imposition of the suspended sentence. It need not be closely related but should be related to it in some degree at least, even though slightly related, and not

1989 (2) ZLR p54

SMITH J

divorced from it, or remote from it. The second is that the condition be stated with such precision that the convicted person may understand the ambit of the condition."

This statement of the law has been quoted with approval in many cases - *R v Enslin* 1960 (1) SA 882 (N); *S v de Bruin* 1967 (3) SA 399 (SWA); *S v Davids* 1969 (3) SA 569 (E); *S v Taylor* 1971 (2) RLR 55 (GD); 1971 (3) SA 86 (R); *S v Mnguni & Ors* 1985 (2) SA 448 (N). It clearly sets out the principles to be observed by a court when exercising its powers under s 337(1)(b) of the Code. The effect of incorporating two disparate offences within the condition of suspension of any sentence means that part of the condition bears no relationship to the crime which is being punished by the imposition of the suspended sentence. Thus, in the present case, six months' imprisonment is suspended but will be brought into effect if the accused commits an offence relating to dagga or to malicious injury to property and thereafter sentenced to imprisonment. Thus, the accused was sentenced to six months imprisonment on the second count and yet he has a six months' suspended sentence that would be brought into effect if he is again convicted of a contravention of the Dangerous Drugs Regulations 1975. The magistrate should not have conjoined both sentences for the purpose of suspending a portion thereof. He

should have treated each count separately and suspended a portion of each sentence on the appropriate conditions.

With regard to the sentence on the first count, the imposition of a term of imprisonment induces a sense of shock. The accused obviously had a grievance concerning the allocation of part of his former fields to the complainant. He said that whenever he wished to discuss the matter with the complainant, the latter kept avoiding him. Thus, whilst the accused had no right to act as he did and was therefore properly convicted, the background to the offence shows that there were mitigating factors. Furthermore the value of the damage caused amounted to only \$100. This court has said on numerous occasions that first offenders should, in appropriate circumstances, be sentenced to a fine rather than imprisonment. I consider that the offence to which the first count related was one for which a fine would have been appropriate.

The convictions are confirmed but the sentences are set aside and the following substituted:

Count 1 : a fine of \$200 or, in default of payment, 30 days' imprisonment. In addition 3 months' imprisonment all of which is suspended

1989 (2) ZLR p55

SMITH J

for a period of 5 years on condition that the accused is not convicted of an offence committed within that period of which malicious injury to property is an element for which he is sentenced to imprisonment without the option of a fine.

Count 2 : 6 months' imprisonment, of which 3 months is suspended for a period of 5 years on condition that the accused is not convicted of an offence committed within that period of which the possession, sale or growing of dagga is an element for which he is sentenced to imprisonment without the option of a fine.

The accused was convicted and sentenced on 14 February 1989. The record did not reach the High Court for review until 6 June 1989 - almost four months later instead of the seven days required by law. As the accused has already served four months' imprisonment he is entitled to his immediate release without payment of the fine imposed on the first count. The necessary arrangements for his release have been made.

Reynolds J concurs.

1989 (2) SLR p56

LAPHAM v MINISTER OF MINES & ORS 1989 (2) ZLR 56 (HC)

Court High Court, Harare

Reynolds J

Review proceedings

28 June 1989

Flynote

Administrative law - administrative decision - when official becomes *functus officio* - whether mining commissioner may reconsider decision not to cancel registration of claims.

Headnote

The third respondent pegged mining claims on the applicant's farm and registered them in terms of the Mines and Minerals Act [Chapter 165]. The applicant objected to the pegging of the claims and requested the mining commissioner to cancel the claims. The commissioner heard both parties and visited the farm and in October 1987 decided that the certificates of registration should not be cancelled. The applicant continued to object, with the result that in mid-1988 the commissioner concluded that his original decision was not correct and notified the parties that he intended to cancel some of the claims. The third respondent appealed to the Minister, who ruled that the commissioner's second decision should not be upheld. The applicant brought the Minister's decision on review. The question on review was whether, when he made his second decision, the mining commissioner was *functus officio*.

Held, that the principle set out in s 11(4) of the Interpretation Act [Chapter 1] - that powers and duties may be exercised or performed from time to time as the occasion requires - and the principle that an administrative officer, having made a decision which bears directly upon an individual's interests, is *functus officio* may be reconciled thus: the public authority should be obliged to reconsider its decision when asked to do so, but only if it is shown that circumstances have changed in such a

1989 (2) ZLR p57

REYNOLDS J

manner that it is likely to come to a different conclusion, or if a reasonable time has elapsed. The administrative act must be a completed and valid one and one which does not affect rights already acquired by the parties.

Held, further, that the mining commissioner's original decision was at that stage intended to be final and definitive, whether he had acted in terms of s 376 of the Act or less formally. Circumstances had not changed, nor had a reasonable time elapsed. The commissioner was therefore not entitled to reconsider his decision.

Cases cited:

Brown v Leyds NO (1897) 4 OR 17

Garment Workers' Union (Western Province) & Ors v Industrial Tribunal & Minister of Labour 1963 (4) SA 775 (A)

Sekretaris van Binnelandse Inkomste v Florisfontein Boerdery 1969 (1) SA 260 (A)

Holden v Minister of the Interior 1952 (1) SA 98 (T)

Cinamon v Independence Mining (Pvt) Ltd 1980 ZLR 247 (AD)

Cape Coast Exploration Ltd v Scholtz & Anor 1933 AD 56

C Lloyd for the applicant

J Sayce for the third respondent

Judgment

Reynolds J: A brief history of this matter is as follows. The applicant acquired a farm in 1984 known as Manna Crest Estates. The third respondent pegged mining claims on this farm during the first half of April 1985 and these were registered in terms of the Mines and Minerals Act [Chapter 165]. The applicant wrote to the third respondent on 26 April 1985, objecting to the pegging of those claims on the basis that land included was under cultivation, and was not open to prospecting. In February 1986, the applicant lodged an objection to the pegging of the claims with the second respondent - the mining commissioner - and he requested the cancellation of the registration of the claims. At the end of June 1987, the second respondent invited the third respondent, if he so wished, to contest that application. Following upon that, the parties, together with certain others, attended the farm in question on 21 August 1987. The second respondent considered reports and representations made following this, and came to the decision that the certificates of registration should not be cancelled. This first hearing was, possibly, convened in terms of s 376 of the Act, although this is not clear. The decision of the commissioner was conveyed to the applicant by letter dated 9 October 1987.

1989 (2) ZLR p58

REYNOLDS J

Following upon further representations made by the applicant, however, and after some form of hearing in the middle of 1988, the second respondent came to the conclusion that this original decision was not correct, and he notified the parties of his intention to cancel portions of the claims. The third respondent appealed against this decision to the Minister, who ruled that this second decision of the second respondent - ie to part-cancel the claims - "should not be upheld", and the original registration of the claims should stand. The applicant has now brought on review the Minister's decision.

Mr Sayce, for the third respondent, has submitted that the second respondent should not have entertained the second approach to him by the applicant as he was then *functus officio*. Mr Lloyd, who appears for the applicant, contends that the third respondent was not in fact *functus officio* at that stage. Mr Lloyd argued that an administrative official is entitled to amend or revoke earlier decisions, provided that this would not affect or abolish rights which had been thus created. He submitted that no new rights had been created by the second respondent's first decision as the third respondent already held rights by virtue of the registration of his claims.

I believe, with respect, that the conflicting principles on this aspect of the matter are succinctly stated in Baxter *Administrative Law* at 372 *et seq.* The learned author cites KOTZE CJ in *Brown v Leyds NO* (1897) 4 OR 17 at 39 as saying, in regard to administrative acts other than

legislative acts,

"The general rule is that the same authority which introduces anything may also abolish it."

Reference is also made to the Interpretation Act applicable - which provides that where powers are conferred or duties imposed these may be exercised or performed "from time to time as the occasion requires". A similar provision exists in s 11(4) of the Interpretation Act of Zimbabwe [Chapter 1]. The learned author continues:

"Indeed, effective, daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities, and intolerable uncertainty would result if these could be reversed at any moment. Thus, when an administrative official has made a decision which bears directly upon an individual's interests, it is said that the decision maker has discharged his office or is *functus officio*."

1989 (2) ZLR p59

REYNOLDS J

The reconciliation suggested, and which is, I believe, generally accepted by the courts, is:

"...a balanced approach which accommodates the interests of all the parties: the public authority, in accordance with its duty to exercise its powers, 'from time to time as the occasion requires', should be obliged to reconsider its decision when asked to do so, but only if it is shown that circumstances have changed in such a manner that it is likely to come to a different conclusion, or if a reasonable time has elapsed."

I would add to this that the administrative act in question must, subject to some exceptions, be a completed and valid one, and one which does not affect rights already acquired by the parties. See *Garment Workers' Union (Western Province) & Ors v Industrial Tribunal & Minister of Labour* 1963 (4) SA 775 (A); *Sekretaris van Binnelandse Inkomste v Florisfontein Boerdery (Edms) Bpk en 'n Ander* 1969 (1) SA 260 (A); and *Holden v Minister of the Interior* 1952 (1) SA 98 (T).

This approach is accepted by the parties, but, as already adverted to, Mr Lloyd has submitted that the second respondent here did not become *functus officio* following his decision not to cancel the claims as the third respondent did not acquire any rights which he did not already have by virtue of the registration of these claims.

As I see it, there are two important considerations applicable here in deciding whether the mining commissioner's original decision not to cancel the claims could properly be varied subsequently. Firstly, the nature of the decision or decisions taken must be examined to ascertain whether those decisions were final and definitive, and were intended to be so. In the present matter, I believe that it is clear that the original registration of the claims could in no way have given the impression that a final and definitive act had been carried out. To my mind such a registration is *prima facie* good, but is subject to objection, and possible amendment or revocation. Having given full consideration to the objection lodged however, and after hearing the parties, I am of the view that the mining commissioner's decision at that stage was final and definitive, and was intended as such. See *Cinamon v Independence Mining (Pvt) Ltd* 1980 ZLR 247 (AD). I would hold that this is so whether he acted in terms of s 376 of the Act, or whether he acted less formally in a summary manner. This later decision served to confirm the

provisional or *prima facie* rights acquired by the registration of the claims.

1989 (2) ZLR p60

REYNOLDS J

Secondly, the nature of the decision *vis-à-vis* the parties must also be considered. If this decision is unfavourable to the one party, the public authority may only reconsider its decision if circumstances have changed, or if a reasonable period of time has elapsed (*Baxter op cit* 373). In the present matter I do not believe that either of these preconditions applies.

If the decision is favourable to the one party, it may only be varied or withdrawn with the consent of that party (*Brown v Leyds NO supra*; *Cape Coast Exploration Ltd v Scholtz & Anor* 1933 AD 56 at 65; *Holden v Minister of the Interior supra*). Again in the instant case, the third respondent obviously does not consent to the part cancellation of his claims.

In applying these considerations to the facts of the present matter, I find that the mining commissioner had discharged his office in deciding not to cancel the third respondent's claims, and he was not entitled to reconsider that decision. The subsequent appeal to the Minister against his purported amendment does not, in my view, affect that situation, and the third respondent has not waived his rights in that regard. Those proceedings were, therefore, of no force or effect, and it is unnecessary to consider whether the first respondent's decision was arrived at properly or not.

In the result the application is dismissed with costs.

Atherstone & Cook, applicant's legal practitioners

Gill, Godlonton & Gerrans, third respondent's legal practitioners

1989 (2) ZLR p61

S v A JUVENILE 1989 (2) ZLR 61 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

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

Criminal appeal

22 March & 29 June 1989

Flynote

Constitutional law - Constitution of Zimbabwe - Declaration of Rights - s 15(1) - protection against inhuman or degrading punishment - corporal punishment of juvenile offenders under s 330 of Criminal Procedure and Evidence Act [Chapter 59] - constitutionality of.

Headnote

The sole issue for determination in this appeal was the constitutionality of sentences of corporal punishment imposed upon juveniles in terms of s 330 of the Criminal Procedure and Evidence Act [Chapter 50]. Section 15(1) of the Constitution of Zimbabwe provides that no person shall be subjected to inhuman or degrading punishment. The Supreme Court, in *S v Ncube & Ors* 1987 (2) ZLR 246 (SC); 1988 (2) SA 702 (ZS), had examined the method of carrying out corporal punishment of adults, as laid down by s 109 of the Prison regulations 1956. It unanimously concluded that such punishment was unconstitutional, being barbaric, inherently brutal and cruel, stripping the recipient of all dignity and self-respect and treating humans as non-humans.

In his judgment, the CHIEF JUSTICE found that there was little to distinguish the manner of carrying out the sentence on juveniles from that of carrying it out on adults. The strictures applied to corporal punishment of adults would apply *a fortiori* to such punishment when inflicted on juveniles. He went on to express the opinion that corporal punishment meted on school children would also be proscribed by s 15(1) of the Constitution.

GUBBAY JA agreed with the CHIEF JUSTICE'S conclusion, though for different reasons. He distinguished between whipping of juveniles imposed in terms of s 54 of the Magistrates Court Act [Chapter 18] or by the High

1989 (2) SLR p62

Court under s 329(1) of the Criminal Procedure and Evidence Act and the sentence of a "moderate correction" imposed on a male juvenile under s 330 of the Criminal Procedure and Evidence Act. Although a moderate correction was undoubtedly somewhat less of physical endurance than a whipping, it was still a form of institutionalised violence, compounded by the whole aura of official procedure attendant on it and by the fact that those inflicting it were total strangers to the offender. It could not be compared with parental chastisement. It was an inherently brutal and cruel punishment. Whipping, which invades the integrity of the human body, was an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime.

KORSAH JA agreed with the judgments of the CHIEF JUSTICE and GUBBAY JA.

In his dissenting judgment, McNALLY JA disagreed with the notion that there is inevitable brutalisation and brutality in the imposition of juvenile cuts and still more with the suggestion that all corporal punishment is *ipso facto* unconstitutional. He considered it inappropriate that the highest courts should intervene in the disputes of pedagogues about matters of discipline. The question of corporal punishment in schools was a matter for policy determined by pedagogues and educational psychologists.

MANYARARA JA also considered that a distinction should be drawn between a whipping under s 333 and a moderate correction under s 330. There was no evidence that the latter involved brutalisation and brutality. If it had acquired undesirable characteristics, it had done so from the indiscriminate application of the section by the courts themselves.

Cases cited:

S v Ncube & Ors 1987 (2) ZLR 246 (SC); 1988 (2) SA 702 (ZS)

S v Harry & a Juvenile S-146-88 (not reported)

S v Kumalo & Ors 1965 (4) SA 565 (N)

R v Dematema 1967 RLR 311 (GD); 1967 (4) SA 371 (R)

Tyrer v United Kingdom (1978) 2 EHRR 1

S v Ximba & Ors 1972 (1) PH H66 (N)

S v Maisa 1968 (1) SA 271 (T)

S v Kantor 1972 (4) SA 683 (O)

S v Seeland 1982 (4) SA 472 (NC)

S v Nkoana 1985 (2) SA 395 (T)

S v Machwili 1986 (1) SA 156 (N)

S v V en 'n Ander 1989 (1) SA 532 (A)

S v November en 'n Ander 1988 (1) SA 661 (C)

S v C; S v F 1979 RLR 7 (GD)

S v du Chattlier 1973 (2) RLR 339 (GD)

1989 (2) ZLR p63

R v M & Ors 1958 (3) SA 681 (SR)

R v Bafana 1942 SR 119

R v Runyowa 1966 RLR 42 (PC); [1966] 1 All ER 633; 1966 (2) SA 495 (PC)

Gundu & Anor v Sheriff of Southern Rhodesia & Anor 1965 RLR 301

S v Ndhlovu & Ors 1981 ZLR 600 (HC)

S v Mathe 1983 (2) ZLR 178 (HC)

S v F 1988 (1) ZLR 327 (HC); 1989 (1) SA 460 (ZH)

Trop v Dulles (1958) 356 US 86; 2 L ed 2d 630; 78 S Ct 590

Cleary v Booth [1893] 1 QB 465

S v Mangwarira 1988 (2) ZLR 372 (SC)

Campbell & Cosans v United Kingdom (1980) 3 EHRR 531

Ingraham v Wright (1977) 430 US 651

Warwick v United Kingdom European Commission of Human Rights, 18 July 1986

R v Samson 1956 (4) SA 205 (SR)

S v M & Anor 1973 (2) SA 455 (R)

R v Msibi 1935 NPD 655

S v Nqandiale & Ors 1962 (4) SA 518 (E)

R v Panganayi 1964 RLR 495 (GD); 1965 (1) SA 260 (SR)

R v Wakapae & Kabitore 1927 SWA 61

R v Fako 1932 TPD 352

S v S 1988 (3) SA 257 (C)

R v Gushele 1936 (2) PH H160 (E)

R v Zhuwankinyu 1938 SR 132

R v Mtsho 1936 (2) PH H179 (E)

R v Mggobelo 1945 EDL 207

R v Bezuidenhout 1914 CPD 365

R v Makatshe Pieta 1932 (2) PH H165 (E)

R v Breakfast 1937 EDL 97

R v Dibden 1966 RLR 528 (AD)

R v Obert & Ors 1968 (2) RLR 99 (GD)

R v Adams 1921 EDL 335

R v Joubert 1934 SR 105

R v E 1967 (3) SA 627 (R)

S v du Preez 1975 (4) SA 606 (C)

R v Sameli & Zipi 1943 SR 150

S v C; *S v F* 1979 RLR 7 (GD); reported *sub nom S v Chinyangari*; *S v Fayife* 1979 (2) SA 630 (R)

S v M 1982 (1) SA 240 (N)

S v P 1985 (4) SA 105 (N)

1989 (2) ZLR p64

S v Manuel en Andere 1975 (3) SA 790 (C)

S v Masondo & Anor 1969 (1) PH H58 (N)

R v Bafana 1942 SR 119

R v Penias & Anor 1967 RLR 104 (GD).

R M Fitches, for the appellant. Punishment is defined as the authoritative intentional infliction of suffering upon an offender against the criminal law: Rabie & Strauss *Punishment: an Introduction to Principles* (1979). The suffering contemplated involves loss of life or liberty or property or the infliction of pain. See too Caldwell *Criminology* 2 ed (1965) at 449-454. Tappan *Crime, Justice and Correction* (1960) p 425 says that "Modern concepts of justice and humanity deny the utility of corporal punishment both as a statutory sanction and as a disciplinary measure...the penalty has been used infrequently in modern times and is generally disapproved of as a retributive and cruel device". In rejecting the argument that whipping reforms the offender Caldwell *op cit* cites statistics which showed that the amount of recidivism was not only great among those who had been whipped, but also actually greater than it was among those who might have been whipped but were not. Another comparative exposition on the fallacy of the deterrence argument is to be found in Herbert *The Roots of Evil* (1963) at 406-411. Section 330(1) of the Criminal Procedure and Evidence Act creates an anomaly, in that according to the Legal Age of Majority Act No. 15 of 1982, the legal age of majority since 10 December 1982 is 18 years. Although a person of 18 years and over is regarded as an adult, he is still liable to be whipped under s 330. The First Schedule to Act 15 of 1982 shows this to have been an oversight, because Chapter 59 is specifically dealt with and all other sections reduce the age from 19 to 18 years. In any event, whether the age is 18 or 19 years, whipping of such a person is inhuman or degrading and there can be no difference between adult and juvenile offenders. The object of s 330 appears to be that of avoiding sending juveniles to prison, where they could be contaminated by association with hardened offenders: *S v Sidambi* HH-122-85 (not reported); Storry *Rhodesian Criminal Practice* (1978) p 183. This object is defeated where on one of two counts a whipping is imposed and imprisonment is imposed on the other: *R v Bafana supra*; cf *R v M & Ors supra*. A whipping should not be coupled with a sentence of detention in a reformatory: *R v de la Rosa* 1948 SR 153. Corporal punishment is a severe punishment for a young offender despite the euphemistic approach taken in Storry *op cit* p 184 that it is "an exemplary and mild form of corporal punishment ... equivalent of parental punishment". See *S v du Chattlier supra*; *S v Gosha* HH-309-85 (not reported). Despite judicial exhortation to moderation in whipping young offenders, there is no judicial

1989 (2) ZLR p65

control of the administration of the actual whipping: *S v J & Anor* GS-156-81 (not reported); *S v Chinyangani* 1979 (2) SA 630; *S v Ncube & Ors supra*. There is nothing in the legislation to prevent further whippings in the event of subsequent offences: *R v Chimuna* 1943 SR 186.

Once it is accepted or shown that corporal punishment involves the infliction of physical pain, the State must bear the onus of showing that it is not inhuman or degrading: *Deena v Union of India* AIR 1983 SC 1155 at 1172, 1188. The words "cruel and unusual punishment" impart the same idea as "inhuman or degrading punishment": *S v Petrus & Anor* [1985] LRC (Const) 714. In this context see *Furman v Georgia* (1972) 408 US 238; 33 L ed 2d 346 per BRENNAN J. Punishment should not be imposed that is contrary to accepted norms of humane treatment: *Wood v Ondangwa Tribal Authority & Anor* 1975 (2) SA 294 (A). Whipping has been branded as cruel and degrading in numerous cases. There is nothing deterrent or rehabilitative in it and it is likely to encourage the offender to react to situations by violence. The lack of judicial control over juvenile whippings renders it prone to abuse and the pain and trauma should not be underestimated: *S v M* 1982 (1) SA 240 (N). It cannot be compared to parental chastisement: *S v Manuel en Andere supra*. That whipping is an efficacious punishment is not supported by available evidence: *Midgeley Sentencing in the Juvenile Court* (1974) 91 SALJ 451; *S v Ruiters & Ors* 1975 (3) SA 526 (C). See also M C J Ohlesdahl in *Corporal Punishment in Schools* (1984) 101 SALJ 527.

I Houston, for the respondent. Parents have a common law right to administer reasonable corporal punishment to those over whom they exercise parental control. School teachers have a similar common law right, though it is qualified in Government schools by regulation: *S v Mangwarira supra*. If corporal punishment *per se* is inhuman or degrading it cannot be reconciled with this common law right. It can only be rendered inhuman or degrading by the nature and extent of the punishment. The question of deterrence is irrelevant. The only criterion is whether the punishment is inhuman or degrading. The right of a parent to chastise a child is subject to the constraint of reasonableness; the same constraint should apply to the State. Imprisonment could also be said to be inhuman or degrading if out of all proportion to the crime: *S v Ncube & Ors supra*; *Coker v Georgia* (1977) 433 US 584; L ed 2d 982; *Rummel v Estelle* (1980) 445 US 263; 63 L ed 2d 382; *Tyrer v United Kingdom supra* at 10. The severity and method of execution of sentence can be controlled to ensure that it does not become inhuman or degrading.

1989 (2) ZLR p66

DUMBUTSHENA CJ

Judgment

Dumbutshena CJ: This appeal is solely concerned with the constitutionality of a sentence of a moderate correction of four cuts to be administered in private on a juvenile by a prison officer at the Bulawayo Prison. The question this court is asked to answer is: "Is the imposition of a sentence of whipping or corporal punishment upon juveniles an inhuman or degrading punishment or treatment which conflicts the s 15(1) of the Constitution of Zimbabwe?".

This court had occasion to decide on whether judicial corporal punishment inflicted on an adult breached s 15(1) of the Constitution. We decided in *S v Ncube & Ors* 1987 (2) ZLR 246 (SC); 1988 (2) SA 702 (ZS) that judicial corporal punishment breached s 15(1). In *S v Ncube*, three adults were convicted in separate court proceedings of rape. They were each sentenced to varying terms of imprisonment and in addition each one of them was sentenced to six strokes with the cane. They were granted leave by a judge of this court to appeal against the sentences

of whipping.

In a landmark judgment, GUBBAY JA, after examining decisions of whipping from jurisdictions that abolished judicial corporal punishment and those that still have corporal punishment, said at 273H-274G (721H-722D of SALR):

"I am firmly of the opinion, reached, I must confess, with little hesitation, that the whipping each appellant was ordered to receive breaches s 15(1) of the Constitution of Zimbabwe as constituting a punishment which in its very nature is both inhuman and degrading. In coming to this conclusion I have had regard to: (i) the current trend of thinking amongst those distinguished jurists and leading academics to whom reference has been made; (ii) the abolition of whipping in very many countries of the world as being repugnant to the consciences of civilised men; (iii) the progressive move of the courts in countries in which whipping is not susceptible to constitutional attack, to restrict its imposition to instances where a serious, cruel, brutal and humiliating crime has been perpetrated; and (iv) the decreasing recourse to the penalty of whipping in this country, especially over the last 10 years, and the declining number of laws on the Statute Book in which it remains a permissible penalty; compare *R v Lobi* 1942 SR 152.

But more especially I place reliance upon the following adverse features which are inherent in the infliction of a whipping. They are:

1. The manner in which it is administered, as I have described it, is somewhat reminiscent of flogging at the whipping post, a barbaric

1989 (2) ZLR p67

DUMBUTSHENA CJ

occurrence particularly prevalent a century or so past. It is a punishment, not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency.

2. By its very nature it treats members of the human race as non-humans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord him human status.
3. No matter the extent of regulatory safeguards, it is a procedure easily subject to abuse in the hands of a sadistic and unscrupulous prison officer who is called upon to administer it.
4. It is degrading to both the punished and the punisher alike. It causes the executioner, and through him society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime in particular and the system of justice in general."

These factors, together with persuasive authorities from other jurisdictions, influenced this court in coming to the conclusion that judicial corporal punishment inflicted on an adult offender breached s 15(1) of the Constitution.

In the instant case the appellant, a juvenile, was charged with three adults with assault with intent to do grievous bodily harm. They denied the offence but were convicted. One of the accused who had previous convictions was sentenced to six months' imprisonment with labour.

Three months of that sentence were suspended on appropriate conditions. The other two adults were each sentenced to a fine of \$200 or, in default of payment, 100 days' imprisonment with labour. In addition, they were each sentenced to three months' imprisonment with labour, wholly suspended on appropriate conditions. The appellant in this case, then eighteen years of age, was sentenced to receive a moderate correction of four cuts with a light case which was to be administered in private by a prison officer at the Bulawayo Prison.

The appellant and his co-accused sentenced to a term of imprisonment appealed against both conviction and sentence. The other two did not appeal.

1989 (2) ZLR p68

DUMBUTSHENA CJ

Their appeal was heard by this court on 19 September 1988, as *S v Harry & A Juvenile* S-146-88 (not reported). The appeal against conviction succeeded to this extent: the conviction for assault with intent to do grievous bodily harm was set aside and substituted by one of common assault. The sentence of imprisonment on the adult offender was set aside and in its place this court substituted a sentence of a fine of \$200 or, in default of payment, 100 days' imprisonment with labour; in addition three months' imprisonment with labour wholly suspended on the usual conditions. In the exercise of its review powers the court altered the convictions of the two accused who did not appeal to convictions for common assault.

The appellant's appeal against sentence was postponed *sine die* because some of his grounds of appeal against sentence challenged the constitutionality of judicial corporal punishment imposed on a juvenile.

The constitutionality of judicial corporal punishment imposed on a juvenile was raised because, as pointed out above, this court decided in *S v Ncube & Ors supra*, that the punishment of whipping upon an adult offender contravened s 15(1) of the Constitution.

The imposition of judicial corporal punishment on a juvenile is prescribed by s 330 of the Criminal Procedure and Evidence Act [*Chapter 59*]. The section reads:

"330. (1) As often as any male person who has not attained the age of nineteen years is convicted of any offence, the court before which he is convicted may -

- (a) in lieu of any other punishment; or
- (b) if such person has been sentenced to pay a fine or to undergo a period of imprisonment and the operation of the whole of such sentence has been suspended, in addition to such fine or imprisonment;

and as well as in the case of a first conviction as of any subsequent conviction, sentence such person to receive in private a moderate correction of whipping, not exceeding ten cuts.

(2) moderate correction in terms of subsection (1) shall be administered by such person and in such place and with such instrument as the court may appoint.

(3) The parent or guardian of a person sentenced to receive a moderate correction shall have the right to be present."

DUMBUTSHENA CJ

When the Legislature fixed in terms of s 330 the age of male persons to be sentenced to a whipping to those under the age of nineteen years the legal age of majority was still twenty-one years. By s 3 of the Legal Age of Majority Act No. 15 of 1982, the Legislature reduced the age at which a person attains the legal age of majority from twenty-one to eighteen years. It seems to me that the Legislature in its wisdom has not seen it fit to relate the age that qualifies a person for a judicial juvenile whipping to the legal age of majority. Similarly, in terms of s 314 of the Code the High Court can impose a sentence of death by hanging on a person who is sixteen years of age. It seems to me these punishments are not related to the legal age of majority.

In this case, when the appellant committed the offence for which he was convicted he was seventeen years of age, but was sentenced when he had already attained the age of eighteen years.

The facts of this case need not detain us as they were fully covered by McNALLY JA in *S v Harry & A Juvenile supra*. This appeal is solely concerned with the constitutionality of a sentence of whipping imposed by the trial court.

It was common cause that with effect from 18 April 1985 the power of the magistrate or a judge to impose a whipping upon an adult under the authority of s 54 of the Magistrates Court Act [Chapter 18] or s 314(2)(e) as read with s 329 of the Criminal Procedure and Evidence Act or any other Act:

"...became unconstitutional and of no force and effect as being in violation of the protection from inhuman or degrading punishment provided for in s 15(1) of the Declaration of Rights. ...in terms of s 26(2)(b) as read with s 26(3)(b) of the Constitution, the protection not to be held in contravention of the Declaration of Rights afforded to any written law which had effect immediately before the appointed date (that is 18 April 1980 when Zimbabwe became a sovereign republic) and which has continued to have effect as law since that date, ceased to apply after the expiration of a period of five years", *per* GUBBAY JA in *S v Ncube & Ors supra* at 248H-249B (704A-C of SALR).

Section 15(1) reads:

"No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

DUMBUTSHENA CJ

It is salutary to examine the methods and means by which judicial corporal punishment is carried out. The punishment is regulated and carried out in terms of s 109 of the Prison Regulations contained in FGN 42/1956 which had effect in Southern Rhodesia in terms of SRGN 123/1956. Section 109 of the Regulations reads as follows:

"109. (1) The type of cane with which corporal punishment shall be inflicted approved by the Minister in terms of section 99 of the Act shall be -

- (a) in the case of a prisoner under the age of nineteen years, a rattan cane, three feet long and not more

than three-eighths of an inch in diameter;

- (b) in the case of a prisoner who is nineteen years of age or over, a rattan cane four feet long and not more than half an inch in diameter.

(2) The manner in which corporal punishment shall be inflicted approved by the Minister in terms of section 99 of the Act shall be as follows -

- (a) a blanket or similar form of protection shall be placed across the small of the prisoner's back above the buttocks;
- (b) a small square of thin calico shall be dipped in water, wrung out and tied over the prisoner's buttocks;
- (c) strokes shall be administered from one side upon the buttocks of the prisoner and on no account on the back."

Now these Regulations are administered in terms of s 106-109 of the Prisons Act [*Chapter 21*]. The type of cane to be used and the manner of executing the sentence is done in terms of s 106 of Chapter 21. As can be seen from the above Regulations, the difference between corporal punishment inflicted on a juvenile and on an adult is in the size of the rattan cane. In the case of a juvenile the rattan cane must be three feet long and not more than three-eighths of an inch in diameter while that used to whip an adult prisoner is four feet long and not more than half an inch in diameter.

In subs (2) of s 109 there is no difference in the way corporal punishment is inflicted on a juvenile offender and on an adult prisoner. In both cases a blanket or similar form of protection is placed across the prisoner's back above the buttocks. Then a small square of thin calico dipped in water and

1989 (2) ZLR p71

DUMBUTSHENA CJ

wrung out is tied over the prisoner's buttocks. After that whoever is administering the strokes does so from one side upon the buttocks of the prisoner and not on the back.

The Regulations are silent on the degree of force to be used by the prison officer. The force used depends to some extent on the character and personality of the person administering the strokes. A sadistic officer will slash with ferocity both the juvenile offender and the adult prisoner. In *S v Ncube & Ors supra*, GUBBAY JA said at 263D (714C of SALR):

"It is within the power of the officer administering the strokes to determine their strength, timing and, to some extent, their placement upon the buttocks. A second stroke upon the same part as an earlier stroke undoubtedly causes greater pain than were it to be placed elsewhere."

In fact it is up to the officer to decide whether the lashing should be on the same spot or at different areas of the buttocks. He is free to do what he likes. His superior officers cannot control the way he carries out the execution of the punishment, nor can the court which imposed the sentence. FANNIN J put it thus in *S v Kumalo & Ors* 1965 (4) SA 565 (N) at 574G-H:

"The severity of the punishment depends, to a very large extent, upon the personality of the officer charged with the duty of inflicting it, and over that the court ordering the punishment can have little, if any, control."

I agree with Von Hentig, the German authority who is reported in an article by James Midgley in (1974) 91 SALJ 465 as saying:

"...in corporal punishment I see a crimogenuous and thus injurious means of punishment. There is no lasting deterrent of the perpetrator. The only thing certain is the brutalisation of the punishment, the inflictors of the punishment, the public officials present and especially the population."

In *R v Dematema* 1967 RLR 311 (GD); 1967 (4) SA 371 (R), a review judgment, YOUNG J complained of the fact that the punishment of whipping was carried on in Rhodesia while:

"A scientific study of the prevention and punishment of crime is wanting in this country and is, in my view, long overdue. The need is especially

1989 (2) ZLR p72

DUMBUTSHENA CJ

urgent in relation to corporal punishment, since most advanced Western countries have abandoned this type of penalty, so that the field of comparison is limited to the Republic of South Africa where, however, as here, the science of penology as a systematic aid to the punishment and prevention of crime is virtually unknown."

The position is still the same. There has never been any scientific inquiry made in this country on the effect of corporal punishment or for that matter any type of punishment. However, Zimbabwe has a Constitution with a justiciable Bill of Rights. One of its provisions prohibits torture, or inhuman or degrading punishment or other such treatment. It is now possible for an accused person sentenced to a whipping to challenge the constitutionality of the punishment in terms of s 15(1). An added advantage is that the courts of this country are free to import into the interpretation of s 15(1) interpretations of similar provisions in International and Regional Human Rights Instruments such as, among others, the International Bill of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Convention on Human Rights. In the end international human rights norms will become part of our domestic human rights law. In this way our domestic human rights jurisdiction is enriched. See *S v Ncube & Ors supra* for a practical implementation of this policy.

In the instant case it is useful to approach the constitutionality or otherwise of judicial corporal punishment inflicted on juveniles bearing in mind the decision of *S v Ncube & Ors supra*. I would like therefore to deal with the difference, if any, in the methods of whipping adults and juveniles.

There are not many differences in the execution of a sentence of whipping. Besides the size of the rattan cane used on adults and juveniles referred to above, the only other difference is that in terms of s 333 of the Code the punishment of whipping imposed on an adult is carried out privately in a prison (s 333) whereas that on a juvenile is, in terms of s 330 of the Code, carried out in private in such place as the court may direct (s 330(2)), the parent or guardian of the juvenile having the option to be present. Because there is very little difference to the method of administering corporal punishment on either adults or juveniles, I am of the opinion that all that need be said about this type of punishment was so ably and succinctly laid down by GUBBAY JA in *S v Ncube & Ors supra*. It takes cognisance of the fact that the juvenile offender is subjected to a moderate correction with a light cane. Even then it is up to the inflicter alone to

moderate the degree of force he uses.

1989 (2) ZLR p73

DUMBUTSHENA CJ

The European Court of Human Rights considered in *Tyrer v United Kingdom* (1978) 2 EHRR 1 at 11 para 33, circumstances which made the punishment of whipping degrading within the meaning of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 3 reads:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The European Court of Human Rights was of the view that -

"The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender."

It would be strange were we to come to a contrary view because, as I see it, the circumstances described above are present in any judicial corporal punishment. It is a type of institutionalised violence inflicted on one human being by another. The only difference between it and street violence is that the inflicter assaults another human being under the protection of law. He might, during the execution of the punishment, vent his anger in a similar manner on his victims as the street fighter does. But, as I have pointed out above, the degree of force he elects to use is of his own choosing. Because this institutionalised violence is meted out to him, the victim's personal dignity and physical integrity are assailed. In the result the victim is degraded and dehumanised. In a street fight he can run away from his assailant or he can defend himself. The juvenile offender cannot because he is tied down to the bench.

1989 (2) ZLR p74

DUMBUTSHENA CJ

In *S v Ncube & Ors supra* this court held, in respect of adults, that corporal punishment degrades "both the punished and the punisher alike. It causes the executioner, and through him society, to stoop to the level of the criminal". In my opinion, even the juvenile offender comes out of the ordeal angry against both the perpetrator of the punishment and society which prescribes such a punishment. He comes out of it debased and vengeful. Any judicial punishment which does that to a fellow human being must degrade or dehumanise him.

It is interesting to take notice of the well researched synopses of the attitudes of other jurisdictions to judicial corporal punishment so ably drawn up by GUBBAY JA in *S v Ncube & Ors* at 253E-262A (707A-713D of SALR). The majority of the countries mentioned by GUBBAY

JA have abolished corporal punishment. It is because South Africa still has judicial corporal punishment and has no constitutional safeguards against inhuman or degrading punishment that the attitude of some of its judges towards whipping as a penalty draws out significantly their abhorrence towards the penalty. See *S v Kumalo & Ors supra* at 574F-H and 575C-G; *S v Ximba & Ors* 1972 (1) PH H66 (N); *S v Maisa* 1968 (1) SA 271 (T); *S v Kantor* 1972 (4) SA 683 (O) at 684B; *S v Seeland* 1982 (4) SA 472 (NC) at 477A; *S v Nkoana* 1985 (2) SA 395 (T) at 401H-I; *S v Machwili* 1986 (1) SA 156 (N). In *S v V en 'n Ander* 1989 (1) SA 532 (A), the Appellate Division held:

"...that whipping was by its very nature an extremely humiliating and physically very painful form of punishment and ought to be imposed with great circumspection and only when the personal circumstances of the accused or the nature and circumstances of the crime clearly justified it: it was imposed on juveniles and on adults where there was a significant degree of cruel violence in the commission of the crime.

Held further, that there had for some time already been a growing degree of temperance discernible in the attitude to corporal punishment; this appeared from various judgments, the lowering of the maximum age for the imposition thereof to 30 years and the introduction during 1986 of the proviso to s 292(1) of the Criminal Procedure Act 51 of 1977; and this further tempering development had also seen the view increasingly come to the fore that it was undesirable and even ill-advised to couple corporal punishment to a long term of imprisonment because it served no acceptable end."

In *S v November en 'n Ander* 1988 (1) SA 661 (C) TEBBUTT J said at 664C-D of whipping:

1989 (2) ZLR p75

DUMBUTSHENA CJ

"Corporal punishment is a drastic punishment. It is also humiliating and demoralising. It has repeatedly been laid down by our courts that it should be imposed circumspectly (see Hiemstra "*South African Criminal Procedure*" 4 Ed pp 663-4). It must in my view be repeated that proceedings in an officers court in a prison are of the same nature as these in any other criminal court. (See Hiemstra *op cit* p 4); *S v Vermaak* 1984 (2) SA 88 (C))" (Translation).

In Zimbabwe there was less condemnation of corporal punishment before independence. Before independence judges were more concerned with one of the primary purposes of s 330 of the Code or its predecessor sections which was "to enable a court to sentence a juvenile to a whipping instead of sentencing him to prison where he would come into contact with hardened criminals, to the detriment of his character"; per BEADLE AJ in *S v C*; *S v F* 1979 RLR 7 (GD) at 8; reported *sub nom S v Chinyangari*; *S v Fayife* 1979 (2) SA 630 (R). See also *S v du Chattlier* 1973 (2) RLR 339; *R v M & Ors* 1958 (3) SA 681 (SR) (reported *sub nom In the matter of three sentences on Juveniles* 1958 R&N 395); *R v Bafana* 1942 SR 119. It is true that they warned against inflicting a whipping for trivial offences and expressed the view that the whipping administered in terms of s 330 was a very severe punishment. See *S v C*; *S v F supra*.

Although the 1961, 1966 and 1979 Constitutions had identically worded provisions against torture and inhuman treatment, whipping could not be challenged because the Declarations of Rights in those Constitutions were not justiciable. In each of the provisions there was a saving of previously existing law.

Section 123(1) of the 1979 Constitution of Zimbabwe Rhodesia read:

"(1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment"

and subsection (3) of the same section provided:

"(3) Nothing contained in or done under the authority of any written law shall be held to be in contravention of subsection (1) to the extent that the law in question authorises the doing of anything by way of punishment or other treatment which might lawfully have been so done in Zimbabwe Rhodesia immediately before the fixed date."

1989 (2) ZLR p76

DUMBUTSHENA CJ

In terms of subs (3) of s 123 of the Constitution of Zimbabwe Rhodesia the constitutionality of s 330 of the Code or any other section prescribing corporal punishment could not be challenged in court because the laws were enacted "immediately before the fixed date". See *R v Runyowa* 1966 RLR 42 (PC); [1966] 1 All ER 633; 1966 (2) SA 495 (PC), in which the effect of a challenge to s 60 (1) and (3) was discussed; and *Gundu & Anor v Sheriff of Southern Rhodesia & Anor* 1965 RLR 301, a case in which QUENET ACJ and LEWIS AJA held that s 60 "prohibits only the imposition of a mode or type of punishment which is inhuman or degrading", and the full court of QUENET ACJ, MACDONALD AJP and LEWIS AJA held that "Section 60(3) of the (1961) Constitution ...saves any mode of punishment which was sanctioned by a law in existence before the appointed day ...". The principle of the proportionality of a sentence was rejected.

I endorse the views expressed by GUBBAY JA in *S v Ncube & Ors supra* at 716C-G. Since independence this court has consistently given a broad and benevolent interpretation to provisions of the Constitution of human rights and fundamental freedoms.

Reference has been made already to the critical assessment of whipping as a penalty expressed by YOUNG J in *R v Dematema supra*. After Zimbabwe had acquired sovereign status in 1980, GUBBAY J (as he then was) in *S v Ndhlovu & Ors* 1981 ZLR 600 (HC), categorised the punishment of whipping of an adult as "an inhuman, humiliating and degrading mode of punishment" and in *S v Mathe* 1983 (2) ZLR 178 (HC) he called it "judicial barbarism". See also *S v Ncube & Ors supra* at 253D (707D of SALR).

In *S v F* 1988 (1) ZLR 327 (HC); 1989 (1) SA 460 (ZH), GREENLAND J expressed abhorrence at the imposition of a sentence which was cruel and inhuman on a ten-year-old boy. He remarked at 332E-333B (463I-464C of SALR):

"Not for a moment did he consider the brutalising effect such a punishment would have on this child at such an extremely impressionable age. The accused's interests were neither considered nor weighed up in the scales of justice. The magistrate simply did not proceed with the caution required in view of the fact that whipping has always been resorted to with judicial reluctance. I quote from MA Rabie and SA Strauss *Punishment* 3 ed at 202:

'Judicial disapproval of injudicious imposition of whipping as a punishment for juvenile offenders was voiced again in *Ruiters*,

1989 (2) ZLR p77

DUMBUTSHENA CJ

Beyers, Louw 1975 (3) SA 526 (C). STEYN J observed that the unshakeable faith of some judicial officers in the efficaciousness of whipping as a method of correction is not supported by available evidence in the United Kingdom and other Western countries. Strokes should not be imposed at random and without reference to the character and the needs of a specific offender. In *Du Preez* 1975 (4) SA 606 (C) it was held that judicial strokes are altogether inappropriate as punishment for a boy 8 to 9 years old.'

The basis for judicial disapproval is articulated by VAN HEERDEN J in *S v Du Preez supra* where he points out the real danger of:

'...the humiliation and shock connected with the infliction of judicial strokes by a (prison) official - with whom he has no emotional or any other bond - would quite possibly ...'

have such a detrimental effect on a child as to result in a 'twisted person' being returned to society."

At 465 A-B the learned judge remarked:

"The Supreme Court (in *S v Ncube & Ors supra*) went on to hold that such whipping of adults was unconstitutional. The court found that such treatment of an offender was barbaric, inherently brutal, cruel, inhuman and degrading. I hold that the same must apply, *a fortiori*, in the present instance where a ten-year-old boy was whipped in consequence of criminal proceedings which a probation officer was satisfied the child was too immature to appreciate.

Though the constitutionality of the matter is not up for decision, as this court is the upper guardian of all minors, I must express its condemnation of what has occurred."

I think it is proper for the punishment of whipping to "be examined 'in the light of the basic prohibition against inhuman treatment' and the Amendment (in our case s 15(1)) was intended to preserve the 'basic concept ... (of), the dignity of man' by assuring that the power to impose punishment is 'exercised within the limits of civilised standards'". See *Constitution of the United States of America, Analysis and Interpretation* (1987) at 1395. In *Trop v Dulles* (1958) 356 US 86; 2 L ed 2d 630; 78 S Ct 590, the case from which most of what is in the above citation was extracted, WARREN CJ said at 642 of Amendment 8 of the United States Constitution:

1989 (2) ZLR p78

DUMBUTSHENA CJ

"The court recognised in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

The Eighth Amendment reads in that part which is relevant to the point in issue "...not cruel and unusual punishments inflicted."

Section 15(1) of the Constitution of Zimbabwe does have a meaning that springs from the "evolving standards of decency that mark the progress of a maturing" Zimbabwean society and what is more important is that its meaning is precise. This fact was recognised by this court in *S v Ncube & Ors supra*. Besides, s 15(1) is worded in a form which is similar to provisions of International and Regional Bills of Human Rights. It is therefore proper, when interpreting s 15(1), to have regard to international human rights norms for assistance. We have already done so in *S v Ncube & Ors*.

I need not say what the duty of this court is when a legislative enactment's constitutionality is challenged. It is necessary, however, to draw attention to what WARREN CJ said in this regard in *Trop v Dulles supra* at 644. The learned CHIEF JUSTICE remarked:

"In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the court believes that in this case the statute before us can be construed to avoid the issue of constitutionality. That issue confronts us, and the task of resolving it is inescapably ours.

This task requires the exercise of judgment, not the reliance upon personal preference. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.

We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

1989 (2) ZLR p79

DUMBUTSHENA CJ

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorise and limit governmental powers in our Nation. They are rules of government. When the constitutionality of an Act of Congress is challenged in this court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication."

This, in my view, is the correct approach to the consideration of the constitutionality of judicial corporal punishment *vis-à-vis* s 15(1) of the Constitution. We can do no better than heed the words uttered by WARREN CJ on the duty of the court when the constitutionality of an Act of Parliament is challenged as in this case. It is not the preferences of judges that count, but the duty to interpret the provisions of the Declaration of Rights in a manner that safeguards the rights of the people.

Mr *Houston*, for the respondent, while conceding that corporal punishment was inhuman and degrading and that the system of meting out judicial corporal punishment is degrading, made a plea for the retention of the authority delegated by the parents of pupils to a teacher to inflict reasonable personal chastisement upon the pupils. See *Cleary v Booth* [1893] 1 QB 465. In that case COLLINS J said at 468:

"It is clear law that a father has the right to inflict reasonable personal chastisement on his son. It is equally the law, and it is in accordance with very ancient practice, that he may delegate that right to the schoolmaster. Such a right has always commended itself to the common sense of mankind. It is clear that the relation of master and pupil carries with it the right of reasonable corporal punishment."

Mr *Houston* submits in his written heads of argument that:

"...in Zimbabwe and probably also in other countries, the right of teachers to administer corporal punishment was

DUMBUTSHENA CJ

However, this common law right is qualified by regulations made under s 62(2)(c) of the Education Act, namely the Education (Disciplinary Powers) Regulations (95/79) at regulation 6. It is submitted that this regulation simply qualifies a right which already existed at common law instead of creating a right. (For brief general discussion on the origin of the right of teachers see case of *S v Mangwarira* S-194-88.)" *(2)

He then says:

"If corporal punishment, *per se*, is inhuman or degrading, as has been stated, it cannot be reconciled with the rights of parents to inflict such punishment upon their juvenile charges. It is submitted therefore that the correct approach in relation to the issue of corporal punishment on juveniles is that it can only be rendered inhuman or degrading by the nature and extent of the punishment and that it is not, *per se*, inhuman or degrading."

Mr *Houston* then conceded finally that the proposition he put forward was contrary to *dicta* in *Campbell and Cosans v United Kingdom* (1980) 3 EHRR 531, in which Mr Klecker, in a dissenting opinion in the European Commission of Human Rights, said at 556:

"Corporal punishment amounts to a total lack of respect for the human being; it therefore cannot depend on the age of the human being.

The arguments set out here regarding Gordon Campbell are equally valid in the case of Jeffrey Cosans.

The sum total of adverse effects, whether actual or potential, produced by corporal punishment on the mental and moral development of a child is enough, as I see it, to describe it as degrading within the meaning of Article 3 of the Convention."

This court is not called upon to decide on corporal punishment meted on school children. If it were, I would, speaking for myself, go along with what was said by Mr Klecker above. I also prefer the view expressed by MR JUSTICE WHITE in his dissenting opinion in *Ingraham v Wright* (1977) 430 US 651, in which he said at 743:

"Where corporal punishment becomes so severe as to be unacceptable

DUMBUTSHENA CJ

in a civilised society, I can see no reason that it should become any more acceptable just because it is inflicted on children in the public schools."

In *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, the European Court of Human Rights considered that the criteria used in judicial corporal punishment were applicable in a case concerning school corporal punishment. See the opinion of the European Commission of Human Rights in *Warwick v United Kingdom*, Report of 18 July 1986. It appears to me that in a system of education, which has formal rules on corporal punishment drawn by a competent authority, the same considerations governing judicial corporal punishment must apply. See *Warwick v United Kingdom supra* at 16. It seems to me also that Government schools in Zimbabwe would fall under the above rule because there are formal rules governing the infliction of corporal punishment. See RGN 95 of 1979. The Education (Disciplinary Powers)

Regulations, 1979, made in terms of s 62(2)(c) of the Education Act No. 5 of 1987, read as follows:

"3. Corporal punishment at a Government school may be inflicted only in cases of continued or grave neglect of work, of lying, bullying, insubordination, indecency, truancy or other offences of like gravity.

4. No girl attending a Government school shall be subjected to corporal punishment.

5. Corporal punishment shall be inflicted only by -

- (a) the head of the Government school; or
- (b) the teacher to whom authority has been delegated by the head; or
- (c) a teacher in the presence of the head, after due inquiry; or
- (d) superintendents and housemasters in their own hostels when authority has been delegated to them by the head.

6. Corporal punishment at Government schools shall be inflicted on the buttocks with a suitable strap, cane or smooth, light switch."

There are no safeguards against inflicting serious injury such as those provided by the Prison Regulations, cited above. In *S v Mangwarira supra*, the pupil whipped by a school mistress sustained a fracture to one of his arms. Can it be said corporal punishment in schools is justified in a civilised society

1989 (2) ZLR p82

DUMBUTSHENA CJ

with "evolving standards of decency that mark the progress of a maturing society" such as Zimbabwe?

The cases from the European Court of Human Rights cited above strengthen my belief that once an authority has enacted legislation for the chastisement of school children by school masters the authority delegated by the parents to school teachers to inflict reasonable physical chastisement on pupils disappears, that is, the common law no longer applies and with it the delegated authority vanishes.

I am, however, of the view that any parent whose child has been physically chastised by a school master, by means of a "strap, cane or smooth, light switch", whether in a Government school or a private school, can bring the case to court on an allegation that such punishment is contrary to the prohibition in s 15(1) of the Constitution.

I am mindful of the fact that most parents spank their wayward children on the buttocks, usually with an open hand or a small switch. Some believe that such spankings make men out of children. I can not think so. It is said that spanking children is the parents' common law right. I agree. But if the parents in the process inflict bruises, lacerations, fractures or other such injuries, such corporal punishment would be beyond the protection afforded to the parents by their common law right. Such infliction of injury would, in my view, amount to child abuse and would be punishable at common law and, more importantly, it would violate the prohibition

contained in s 15(1).

In conclusion, I agree with Mr *Fitches*, for the appellant, that the imposition of a sentence of whipping or corporal punishment upon juveniles is an inhuman or degrading punishment or treatment which violates the prohibition against such punishment contained in s 15(1) of the Constitution of Zimbabwe. In my opinion, judicial corporal punishment is unconstitutional and breaches s 15(1), whether it is imposed on an adult or on a juvenile. I endorse without reservation the reasoning in *S v Ncube & Ors supra* in which my learned brother, GUBBAY JA, with the concurrence of McNALLY JA, MANYARARA JA, KORSAH JA and myself, was of the opinion "that the whipping each appellant was ordered to receive breaches s 15(1) of the Constitution of Zimbabwe as constituting a punishment which in its very nature is both inhuman and degrading".

Accordingly the appeal against the sentence of whipping imposed on the appellant is allowed. The sentence of a moderate correction of four cuts with

1989 (2) ZLR p83

DUMBUTSHENA CJ

a light cane, to be administered in private by a prison officer at the Bulawayo Prison, is set aside.

The appellant was sentenced to a moderate correction of four cuts with a light cane on 7 January 1988. He has been anxiously waiting for the imposition of the cuts for a period of more than a year. Part of the reason for the delay was that he appealed against both conviction and sentence, as he was entitled to do. The appeal was only heard on 19 September 1988 and judgment was delivered on 3 October 1988. On that day his appeal against sentence was postponed *sine die* for a hearing before a full Bench of this court. That occasioned further delay. That too must have increased his anxiety.

It is for this reason that I have decided to proceed in terms of s 337(1)(a). I propose to postpone the passing of the sentence for a period of two years on condition that the appellant does not commit within that period an offence involving an assault on the person of another.

Gubbay JA: I have had the benefit of reading the judgment of the learned CHIEF JUSTICE, and I agree that the appeal must be upheld and the sentence altered as he proposes. However, in view of the importance of the matter, and particularly as I have reached my decision by a somewhat different route, I wish to advance reasons of my own.

The appellant was sentenced in a magistrates court to receive a moderate correction of whipping of four cuts with a light cane, to be administered in private by a prison officer at Bulawayo Prison. The order was made by virtue of the authority vested in the court under s 330 of the Criminal Procedure and Evidence Act [*Chapter 59*], which provides:

" (1) As often as any male person who has not attained the age of nineteen years is convicted of any offence, the court before which he is convicted may -

- (a) in lieu of any other punishment; or
- (b) if such person has been sentenced to pay a fine or to undergo a period of imprisonment and the operation of the whole of such sentence has been suspended, in addition to such fine or imprisonment;

1989 (2) ZLR p84

GUBBAY JA

and as well in the case of a first conviction as of any subsequent conviction, sentence such person to receive in private a moderate correction of whipping, not exceeding ten cuts.

(2) A moderate correction in terms of subsection (1) shall be administered by such person and in such place and with such instrument as the court may appoint.

(3) The parent or guardian of a person sentenced to receive a moderate correction shall have the right to be present."

In the forefront of the argument by the appellant's counsel against the constitutionality of the punishment was the submission that, save for the size of the instrument used, which in the case of a juvenile (so it was said) is prescribed in s 109(1)(a) of the Prison Regulations 1956 (FGN 42 of 1956) to be a rattan cane three feet long and not more than three eighths of an inch in diameter, as opposed to a rattan cane one foot longer and one eighth of an inch thicker, both juvenile and adult alike are whipped in the abhorrent manner alluded to in *S v Ncube & Ors* 1987 (2) ZLR 246 (SC) at 263B-D; 1988 (2) SA 702 (ZSC) at 714 B-C, that is:

"Once the prisoner is certified fit to receive the whipping, he is stripped naked. He is blindfolded with a hood and placed face down upon a bench in a prone position. His hands and legs are strapped to the bench, which is then raised to an angle of 45 degrees. (A) calico square is tied over his buttocks and the kidney protector secured above his buttocks at waist level. The prisoner's body is then strapped to the bench. The cane is immersed in water to prevent splitting. The strokes are administered to one side across the whole of the buttocks."

It is correct that the lawful mode of inflicting the four cuts upon the appellant will be as laid down in s 109(2) of the Prison Regulations 1956 and as described above, then the *ratio decidendi* in *S v Ncube & Ors supra* applies *a fortiori* to this appeal. There would be no room to differentiate between a moderate correction of whipping and the whipping of an adult solely on account of the dimensions of the cane used. If anything, the extent of the inhumanity, traumatic and psychological effect, present in such a method of administration would be, in my opinion, far greater where the recipient is an impressionable youth. In this connection I have no reason to doubt the validity of the informed view expressed by the Provincial Social Welfare Officer (whose report was handed in by consent) that:

1989 (2) ZLR p85

GUBBAY JA

"...the experience is dehumanising, humiliating and arouses feelings of rebellion, resentment, lack of self-respect and lack of respect for authority ...and the possibility of physical damage to the juvenile qualifies **this practice** to be classified as abuse".

The submission, however, is too widely stated. It is only when the whipping upon the juvenile is imposed in terms of s 54 of the Magistrates Court Act [*Chapter 18*] or by the High Court under s

329(1) of the Criminal Procedure and Evidence Act, that the number of strokes given are to be carried out in accordance with the manner laid down in the Prison Regulations. This is spelt out in s 333 of the Criminal Procedure and Evidence Act, which reads:

"Every punishment of whipping by whatever court imposed, other than a moderate correction imposed in terms of section *three hundred and thirty*, shall be carried out privately in a prison, and in accordance with the regulations made under the law relating to prisons."

See *R v Samson* 1956 (4) SA 205 (SR) at 206A-D; *R v M & Ors* 1958 (3) SA 681 (SR) at 687E; *S v M & Anor* 1973 (2) SA 455 (R) at 455H; reported *Sub nom S v Mlauzi*; *S v Kwaidza* 1973 (1) RLR 44 (GD).

The review judgment of GREENLAND J in *S v F* 1988 (1) ZLR 327 (HC); 1989 (1) SA 460 (ZH), cited on behalf of the appellant, is no authority for the proposition that a whipping of a juvenile ordered by a court pursuant to s 330 of the Criminal Procedure and Evidence Act is as inhuman and degrading as a whipping inflicted upon an adult person. In that case the accused, a ten-year-old boy, had been convicted of rape, an offence specified in s 54(8)(b) of the Magistrates Court Act as permitting the imposition of a whipping not exceeding ten **strokes** to be carried out in accordance with the Prison Regulations. It is not clear from the judgment, however, whether in imposing the whipping he did, the magistrate had acted under s 54 of the Magistrates Court Act or s 330 of the Criminal Procedure and Evidence Act. If the latter provision was utilised, as I suspect, because it is inconceivable that a judicial officer would punish so young a child to **strokes**, the Officer-in-Charge, Kadoma Prison, acted illegally in executing it in the manner prescribed by the Prison Regulations. He would have failed to administer a **moderate correction of cuts** but instead would have inflicted a whipping of **strokes** in contravention of the order of the court.

If this is the practice which is currently in force in instances where a prison officer is nominated by a court to administer a moderate correction at a

1989 (2) ZLR p86

GUBBAY JA

prison, as I am led to believe it is, it cannot be deprecated too strongly. It is obvious to me that the use in s 330(2) of the Criminal Procedure and Evidence Act of the terms "moderate correction" and "cuts", and the vesting in the court of a discretion to appoint a place different from a prison and a person other than a prison officer, where and by whom the moderate correction is to be administered, and to specify an instrument such as a smooth, light switch, as opposed to a cane, evidence that it was not envisaged by the law-giver that the juvenile be subjected to the same barbaric and medieval manner of whipping as that pertaining to adults under the Prison Regulations. Stated otherwise, the whipping is to be inflicted with a less degree of severity than if the offender were ordered to receive strokes. See *R v Msibi* 1935 NPD 655 at 659; *S v Nqandiale & Ors* 1962 (4) SA 518 (E) at 518H; *R v Panganayi* 1964 RLR 495 (G) at 497; 1965 (1) SA 260 (SR) at 261H.

At the outset, consideration as to whether the imposition of a moderate correction of whipping, when **lawfully** administered, breaches the protection enshrined in s 15(1) of the Declaration of Rights contained in the Constitution of Zimbabwe as amounting to inhuman or degrading

punishment, necessitates a detailed examination of s 330 of the Criminal Procedure and Evidence Act.

The phrase "moderate correction" is important. It is not to be regarded as an instruction addressed by the court to the nominated executive officer as to the degree of severity with which he is to administer the cuts; for it is the function of the court, in the exercise of its discretion, to determine the severity of the punishment and not that of the official who carries it out. The court does this by fixing the number of cuts from one to ten and by specifying the type of instrument with which they are to be inflicted. See *R v Wakapae & Kabitore* 1927 SWA 61; *R v Fako* 1932 TPD 352 at 354. It assumes that the punishment will be properly inflicted and that each of the cuts ordered will take full effect - yet that they be administered as judiciously and humanely as possible by a person able to exercise a healthy and balanced judgment. See *S v S* 1988 (3) SA 257 (C) at 258C.

Although subs (2) of s 330 is silent as to where upon the person of the juvenile the cuts are to be administered, the invariable practice in this country, inherited from the colonial era, is to inflict them upon the unclothed buttocks rather than across the palm of the hand. (Compare s 294(2) of the South African Criminal Procedure Act No. 51 of 1977, which stipulates that the whipping is to be inflicted over the buttocks covered with normal attire.)

1989 (2) ZLR p87

GUBBAY JA

The most relevant factors a court must bear in mind in its assessment of what is a moderate correction are the age of the boy, his physique and the nature of the offence committed. Discrimination in respect of these criteria must be observed. What may be moderate in the case of a youth close to the age of nineteen years will hardly be so for a ten-year-old. And what is moderate for a violent and callous assault would be immoderate for the theft of an article of nominal value. See *R v Gushele* 1936 (2) PH H160 (E); *R v Zhuwankinyu* 1938 SR 132 at 133.

Other guidelines afforded by case law with regard to the implementation of s 330 are as follows:

1. Albeit the selection of the instrument with which the whipping is to be administered is left to the discretion of the court, it is objectionable to specify that a heavy cane or a cane used for adults be employed, see *R v Mtsho* 1936 (2) PH H179 (E); *R v Mggobelo* 1945 EDL 207 at 209; and Gardiner and Lansdown *South African Criminal Law and Procedure* Vol 1 at p 714; or the "cat" a leather strap, both of which are not consonant with the word "cuts", see *R v Bezuidenhout* 1914 CPD 365; *R v Makatshe Pieta* 1932 (2) PH H165 (E).
2. As already mentioned, the whipping need not be executed in a prison. A cell attached to the court or a private room in a police station would not be an inappropriate venue, so long as privacy is available. See *R v Breakfast* 1937 EDL 97 at 98; *R v Dibden* 1966 RLR 528 (AD) at 530 G-I; *R v Obert & Ors* 1968 (2) RLR 99 (GD) at 101A.
3. It is not a competent sentence to order that the parent or guardian of the juvenile administer the whipping. See *R v Adams* 1921 EDL 335; *R v Joubert* 1934 SR 105 at 106. Since under subs (3) one or other has the right to be present, it necessarily follows that the law-giver intended to exclude both from the class of persons whom the court may order to

inflict the corrections. It is to be carried out by a State official.

4. The view has been expressed, with which I respectfully agree, that a moderate correction of whipping is entirely inappropriate as a form of punishment for a child of nine years whose capability of distinguishing between right and wrong can scarcely be fully developed. See *R v E* 1967 (3) SA 627 (R) (reported *sub nom R v Eva* 1967 RLR 113) *S v Du Preez* 1975 (4) SA 606 (C).

The degree of severity of a moderate correction of whipping has been, over the years, the subject of some judicial dissension. In *R v Sameli & Zipi* 1943

1989 (2) ZLR p88

GUBBAY JA

SR 150 at 151, TREDGOLD J (as he then was), while properly recognising that a moderate correction must be distinguished from the form of corporal punishment ordinarily imposed, went on to characterise it as "relatively mild" and to be regarded "as the equivalent of parental punishment". Fortunately, in accordance with accepted present day norms of humane treatment of offenders, judicial officers have come to appreciate that the cold, clinical administration of cuts by an official with whom the juvenile has no emotional or other bond is nothing less than an inherently severe punishment, which is not to be applied blindly as the appropriate antidote for all offences committed by juveniles. See *S v C* 1979 RLR 7 (GD); *S v M* 1982 (1) SA 240 (N) at 245A; *S v P* 1985 (4) SA 105 (N) at 108D. It constitutes a violent corrective impact. One should not underestimate the physical pain a whipping by such an official will cause. It cannot be compared with parent chastisement, which normally takes place within a loving family circle. In the words of VAN WINSEN AJP in *S v Manuel en Andere* 1975 (3) SA 790 (C) at 791D-E:

"The infliction of cuts by an official in the police cells is in no way to be compared with the administration of cuts by a father in the exercise of his parental duty. The first mentioned act can in many cases have an injurious psychological effect on the child."

Nor is a moderate correction to be likened in severity to the caning by a schoolmaster of a disobedient pupil. See *S v Mathe* 1983 (2) ZLR 178 (HC) at 179E.

In a dissenting opinion in *Tyrer v United Kingdom* (1978) 2 EHRR 1, SIR GERALD FITZMAURICE, with commendable candour, admitted that his view that corporal punishment, when applied to juveniles and young offenders under proper restrictions and safeguards, did not constitute a breach of Article 3 of the European Convention of Human Rights, "may be coloured by the fact that I was brought up and educated under a system according to which the corporal punishment of schoolboys ...was regarded as a normal sanction for serious misbehaviour and even sometimes for what was much less serious" (see at para 12). Plainly, he saw no difference between the caning of errant schoolboys and a judicial caning. With that assessment I cannot agree. Certainly the identity of the two punishments is not borne out in the other authorities to which I have referred.

Against this interpretational background of what an order properly and circumspectly made under s 330 of the Criminal Procedure and Evidence Act

GUBBAY JA

involves, it seems to me that the real question is not so much whether the cumulative effect of the four cuts, if visited upon this appellant, will contravene s 15(1) of the Declaration of Rights, but the broader one of whether a legislative provision that allows a court to impose upon any male convicted person who has not attained the age of nineteen years a moderate correction of whipping violates his absolute right to be protected against inhuman or degrading punishment. Put another way, the concern is not with the gradation of the number of cuts; it is with the essential nature of the punishment itself.

Section 24(1) of the Constitution of Zimbabwe enjoins judges of the Supreme Court to examine challenged legislation in order to determine whether or not it infringes one of the entrenched fundamental rights and freedoms of the individual. We are required to measure the effect of the enactment against the particular guarantee it is claimed it offends. And in the exercise of that paramount function, to echo the pertinent advice of WARREN CJ in *Trop v Dulles* (1958) 356 US 86; 2 L Ed 2d 630, at 104 and 644 respectively:

"We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication ...the ordeal of judgment cannot be shirked."

In *S v Ncube & Ors supra* at 267B-D (717B-D of SALR) I expressed the view that:

"The *raison d'être* underlying s 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency, against which penal measures should be evaluated. It guarantees that the power of the State to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant. Thus a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances."

I went on to say that an application of this approach to whether a punishment

GUBBAY JA

is inhuman or degrading is dependent upon the exercise of a value judgment (see at 268C; 717I of SALR).

I have endeavoured to show that, provided a moderate correction of whipping is not carried out in conformity with the unlawful practice presently adopted by prison officers, it must be regarded as a form of punishment different from an adult whipping. It is undoubtedly somewhat less of a physical endurance. But this is not to concede that it is constitutionally unobjectionable.

In *S v Ncube & Ors supra* at 270F-272G (719G-720I of SALR), the majority judgment in *Tyrer v United Kingdom supra* was cited with approval. That case decided that the judicial birching of a fifteen-year-old youth by the Isle of Man authorities ran afoul of Article 3 of the European

Convention of Human Rights as amounting to a degrading punishment. The rationale is to be found in para 33, where it is said:

"The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender."

See also *S v Masondo & Anor* 1969 (1) PH 58 (N), in which LEON J opined that "a whipping is not only an assault upon the person of a human being but also upon his dignity as such".

I reiterate my concurrence with these observations. I would merely emphasise that judicial whipping in any form must inevitably tend to brutalise and debase both the punished and the punisher alike. It causes the latter, and through him society, to stoop to the level of the offender. It marks a total lack of respect for a fellow human, be he adult or juvenile. It treats members of

1989 (2) ZLR p91

GUBBAY JA

the human race as non-humans. By its very nature it is extremely humiliating to the recipient. See *S v Ven 'n Ander* 1989 (1) SA 532 (A) at 543D.

I am, however, prepared to go further than the European Court of Human Rights and hold that judicial whipping, no matter the nature of the instrument used and the manner of execution, is a punishment inherently brutal and cruel; for its infliction is attended by acute physical pain. After all, that is precisely what it is designed to achieve. It may cause bleeding and scarring and at the very least bruises and swellings. Irrespective of any precautionary conditions which may be imposed, it is a procedure subject to ready abuse in the hands of a sadistic or overzealous official appointed to administer it. It is within his power to determine the force of the beating.

In short, whipping, which invades the integrity of the human body, is an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime. It has been abolished in very many countries of the world as being incompatible with the contemporary concepts of humanity, decency and fundamental fairness. The main categories of exception appear to be some former British colonies and some States where *shari'a* (Islamic law) is practised. Although there is no explicit reference in international human rights instruments to corporal punishment as a judicial sanction, a recent inroad has been made by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (The Beijing Rules). According to Rule 17:3: "Juveniles should not be subjected to corporal punishment". The definition of juvenile is left to national practice.

Furthermore, I am persuaded by the findings of the academicians that the whipping of young offenders is counter-productive, because it breeds resentment and hostility towards the society that authorises it and frustrates any attempt at social readjustment. See, for instance,

Kirkpatrick "*Corporal Punishment*" (1967-68) 10 Criminal Law Quarterly 320 at 323; Olmesdahl "*Corporal Punishment in Schools*" 1984 SALJ 527 at 543-544; Van Zyl-Smit and Offen "*Corporal Punishment - Joining Issue*" (1984) 8 SACC 69 at 73.

The prohibition against inhuman or degrading punishment is couched in absolute terms and permits no derogation therefrom. It excludes the concept of justifiability. Thus it is no argument for the retention of a moderate correction of whipping to plead that the underlying object is to keep young persons, whose offences demand a stern measure of punishment, out of prison. See *R v Bafana* 1942 SR 119; *R v Penias & Anor* 1967 RLR 104 (GD)

1989 (2) ZLR p92

GUBBAY JA

at 1041; *S v V en 'n Ander supra* at 543E. Laudable though that aim may be, it must be achieved by fairer and more constructive means.

In the result I am satisfied that s 330 of the Criminal Procedure and evidence Act is repugnant to s 15(1) of the Constitution of Zimbabwe as being an inhuman and degrading form of State redress for criminal acts.

This conclusion, I am confident, will prove acceptable to all who care for the reputation of the legal system in this country and are anxious for it to be thought humane and civilised. For we must never be content to keep upon our Criminal Code provisions for punishment having their origins in the Dark Ages.

McNally JA: While I agree with the CHIEF JUSTICE and my brother GUBBAY, whose judgments I have read, that in this particular case the sentence of a moderate correction of cuts is inappropriate, I do not agree with the generalised statement that any corporal punishment inflicted in terms of a court order is necessarily a contravention of the provisions of s 15(1) of the Declaration of Rights in the Constitution of Zimbabwe. Nor, with respect, can I agree that corporal punishment in schools violates those provisions, as stated by the learned CHIEF JUSTICE.

There are many subjects upon which it is said the world is divided into two schools of thought. Corporal punishment is one of them. Indeed the use of the phrase "schools of thought" may be misleading. We are not dealing merely with processes of logical thought. Attitudes towards corporal punishment are deeply influenced by the emotional and psychological make-up of the people holding those attitudes. The view of the sensitive and articulate minority tends inevitably to be heard more frequently and more persuasively than that of the silent majority. It does not necessarily follow that the former is more "right-thinking" than the latter.

I do not agree that because this court has ruled adult strokes to be unconstitutional, it must follow that juvenile cuts are unconstitutional. Nor, progressing down the scale, does it follow that corporal punishment in schools is unconstitutional, or that smacking a naughty child is *ipso facto* a violation of that child's fundamental human rights.

In all these matters one is exercising a discretion. One is weighing the

1989 (2) ZLR p93

McNALLY JA

advantages against the disadvantages. It is widely accepted that the very term "inhuman or degrading punishment or other such treatment", which is used in s 15(1) of the Declaration of Rights, involves a value judgment.

The court in *Tyrer v United Kingdom* (1978) 2 EHRR 1 put it this way:

"In the court's view, in order for a punishment to be degrading and in breach of Article 3, the humiliation or debasement involved must attain a particular level and must in any event be other than that usual level of humiliation referred to in the preceding sub-paragraph. The assessment is, in the nature of things, relative; it depends on all the circumstances of the case, and in particular on the nature and context of the punishment itself and the manner and method of its execution."

That view was endorsed by the same court in *Campbell & Cosans v United Kingdom* (1982) 4 EHRR 293, although the European Commission of Human Rights in *Warwick v United Kingdom*, reported on 18 July 1986, came very close to saying that corporal punishment is *per se* degrading. But it did not actually go so far.

I will return later to consider the facts and decisions of those three cases. At present I am concerned only to show that they all accept that a value judgment is involved. In other words, corporal punishment is not necessarily either inhuman or degrading *per se*. The cases accept that, when properly controlled, the question of inhumanity does not arise. The dispute centres on the word "degrading".

It seems to me that there is a very clear distinction between the corporal punishment of adults and the corporal punishment of juveniles. A young person is a person whose character is being formed. He or she is by nature open to advice, correction, example and encouragement by parents, teachers, elders and those in authority. An adult's character is already formed, for better or for worse.

Of course, these are generalisations. There is no particular magic in the age of nineteen. Some children may be brutalised by a caning, just as some adults may be brought to their senses by a flogging. But the general and conventional wisdom is that moderate correction by way of corporal punishment may have a reformatory effect on children and young persons, whereas corporal punishment on adults is considered likely to have the opposite effect. In any event adults were normally flogged at the beginning of a long

1989 (2) ZLR p94

McNALLY JA

prison sentence which suggests that the purpose of the flogging was always more retributive than correctional.

I would hope and expect that in deciding on the appropriateness or otherwise of a sentence of cuts, magistrates would normally have regard to the physical and psychological robustness of

the young delinquent before them.

In referring to "conventional wisdom" I am conscious of the fact that I am generalising without evidence. I defend that stance on the basis that it is for those who seek to change the *status quo* to prove their case. The evidence that has been put before us is minimal and equivocal.

We have seen a letter from a Provincial Social Welfare Officer who has herself never witnessed the imposition of cuts. (Nor, I should add, have I) Clearly she does not like the idea of punishing juveniles by means of cuts. But she says "a short glimpse at the following statistics ...indicates that cuts have acted as a deterrent in the majority of the cases given cuts and only a few reappeared as recidivists."

Then there is an affidavit from a person who received juvenile cuts in 1963. He speaks with feeling about his "dehumanising, humiliating and cruel" treatment. I cannot forbear from noting, however, that he is now a Social Welfare Officer. If I were an American lawyer I would be tempted to say: "I rest my case".

Why do I say that corporal punishment of young people can, in a general way, be differentiated from corporal punishment of older people?

The first point I have made is that young people are of their nature more open to correction, more malleable than adults. In that sense, young people are humble in the dictionary sense: "Having a low estimate of one's importance, worthiness or merits; marked by the absence of self-assertion or self-exaltation; lowly; the opposite of proud; of lowly condition, rank or estate" (Oxford English Dictionary).

The point is important because the European Court of Human Rights equates "degrading with humiliating". It makes the point, in *Tyrer supra* that:

"However what is relevant for the purposes of Article 3 is that he should be humiliated not simply by his conviction but by the execution of the punishment which is imposed on him."

1989 (2) ZLR p95

McNALLY JA

That one can accept that an adult whose character has already formed and hardened may be adversely affected by punishment which humiliates him (ie forcibly makes him humble). Yet a young person will not be adversely affected by similar punishment because he is accustomed to subordination and open to correction. This "humility" is part of the very nature of youth, however rebellious.

I am in danger of straying into fields of sociology and psychology where I have no expertise. In a sense I am forced into them by being presented with this question. But I can say as a lawyer of many years of practice that young people often appear before the courts on charges of doing wicked things, cruel things, irresponsible things, stupid things, thoughtless things. Very often a large element in the offence is their lack of judgment, their lack of experience, their lack of forethought. Sending them to prison achieves nothing and usually does them a great deal of harm; the same can be said of remand homes and reformatories; they cannot pay a fine and there is little point in their parents paying it. The imposition of a moderate correction of cuts

enables a magistrate or judge to avoid all these unpleasant alternatives. It enables him to impose a short, sharp, salutary and briefly painful punishment which achieves in very many cases exactly what is required. I must say that in twenty-five years in the law I have never heard a complaint about the brutality of cuts. Indeed the only comment I have had was from one client who said his headmaster hit much harder than the prison officer.

I do not accept that this is an irrelevant consideration. That is why I have laid such stress on the European Court's acceptance of the fact that a value judgment is involved. The European Court has not, to my knowledge, said that all and any violence to the person is wrong in itself. Some judges have said so. They have been in a minority.

Once a value judgment is involved one is entitled to weigh the pros and cons. And into that balance the value of juvenile cuts as a way of avoiding worse punishments must go. To my mind it is a consideration of enormous weight.

I am not influenced or impressed with the argument that there are some sensitive souls who will suffer psychological trauma as a result of receiving a moderate correction, and on the other extreme that there will be young thugs who will be even further brutalised by such punishment. Nor am I greatly influenced by the spectre of sadistic prison officers dehumanising themselves and debasing their victims by their brutality.

1989 (2) ZLR p96

McNALLY JA

One does not condemn the concept of imprisonment itself as unconstitutional simply because some prisoners may be subjected to inhuman or degrading treatment by cruel prison officers or brutal cell-mates. The answer is not to do away with imprisonment but to weed out cruel prison officers and curb the brutality of cell-mates. The whole penal system is inherently imperfect. We cannot do away with it. We can only strive to improve it.

Similarly, unless there is evidence (and it would surprise me if there were) that there is inevitable brutalisation and brutality in the imposition of juvenile cuts, I would not agree with a generalised statement that the provisions of s 330 of the Criminal Procedure and Evidence Act [Chapter 59] are unconstitutional. Far less would I agree that all corporal punishment is *ipso facto* unconstitutional.

It will be apparent from what I have said that I associate myself with the minority judgment of SIR GERALD FITZMAURICE in the *Tyrer* case *supra*. That case involved a sentence of three strokes of the birch imposed on a fifteen-year-old boy by a juvenile court in the Isle of Man. It is of some interest that the boy (by then an adult) sought to withdraw the case, but was not permitted to do so. It is clear that the court, while agreeing that a value judgment was involved, came very close to making the value judgment that corporal punishment as such was degrading within the meaning of the term "degrading punishment" as prohibited by the European Convention of Human Rights.

It is, of course, inherently difficult to argue with a value judgment. I can say only that to the extent that corporal punishment of juveniles necessarily involves an element of degradation, I do not regard that element as being of significance. To those who would say: "Once you admit

there is an element of degradation that is the end of the matter", I would answer: "No, all punishment, including imprisonment, involves an element of degradation. The constitution does not prohibit all punishment".

The *Campbell & Cosans* case *supra* did not take the question of degrading punishments any further, because it was found that there had been no violation of Article 3 of the Convention (identical to s 15(1) of our Declaration of Rights). The judgment is interesting in that it reveals the extreme views of one dissenting member of the Commission (not the court) who considered that Article 3 had been breached. This Commissioner, Mr Klecker, expressed the following views:

1989 (2) ZLR p97

McNALLY JA

"What modern pedagogy challenges is punishment as such corporal or otherwise ...

Corporal punishment as well as the threat of corporal punishment is calculated to prevent the emergence of a relationship of trust and respect...

Corporal punishment amounts to a total lack of respect for the human being; it therefore cannot depend on the age of the human being".

Such views are widely held and equally widely opposed. It does not seem to me that the highest courts, concerned with the fundamental rights of men, women and children, should intervene in the disputes of pedagogues about matters of discipline. The issue is whether one approach or the other is effective, not whether one approach is constitutional and the other unconstitutional.

The *Warwick* case *supra* is of interest because it shows how far the European Commission (not the court) is prepared to go. This was a case where a sixteen-year-old girl, caught smoking in the street outside her school, was given one stroke with a cane on the hand by her headmaster in the presence of the Deputy Head and of the other offender who was also caned. It seems to me that to describe this incident as "a physical injury inflicted by a man, in the presence of another man, on a 16-year-old girl, who under domestic legislation is a woman of marriageable age" is to conjure up the image of a sadistic sexual orgy which is wholly unwarranted by the facts. Nonetheless the Commission (not the court), by a vote of 12 to 5, regarded this as a breach of Article 3; in other words as "degrading punishment". Again, with respect, I would align myself with the view of the five dissenters.

I think we must face up squarely to the fact that if we outlaw juvenile cuts, the practical consequence of our decision will be that many young men between the ages of sixteen and nineteen will go to prison who would not, under the present system, go to prison. It is all very well to say that is not our concern; that a better system of probation or something similar must be developed. The fact is that we are a country with many demands upon our resources. We are not likely to improve our manpower and transport problems in the Social Welfare Department for many years. Nor am I convinced that even in the most sophisticated countries the probation system works satisfactorily. The number of juvenile delinquents tends to grow faster than the number of probation officers.

McNALLY JA

I am not able to support an interpretation of the Constitution which will lead to what I think are far worse results than those which flow from the present system. The cure is worse than the disease.

In summary, then, I would state my conclusions as follows:

1. I agree with the order proposed by the CHIEF JUSTICE that, in view of the fact that the offence of which the appellant was convicted was reduced on appeal to common assault, and in view of the long delay, the sentence of corporal punishment be set aside and replaced by an order postponing the passing of sentence.
2. I do not agree that the provisions of s 330 of the Criminal Procedure and Evidence Act are repugnant to s 15(1) of the Constitution of Zimbabwe.
3. I think it is desirable that the prison authorities should consider amending the regulations controlling the imposition of juvenile cuts, though I am not prepared to declare the present system unconstitutional.
4. I am confident that magistrates who are considering the imposition of juvenile cuts give thought to the physical and psychological make-up of the juvenile before imposing such a sentence. But generally I have more confidence in the robustness of our youth than my colleagues appear to have.
5. I do not believe that the question of corporal punishment in schools is a matter of consideration under the Declaration of Rights. It is a matter for policy determination by pedagogues and educational psychologists.
6. I consider it unnecessary to scrutinise parental discipline in terms of the Declaration of Rights, believing that the matter is adequately governed by the Common Law.

Manyarara JA: I have read the judgments of the learned CHIEF JUSTICE, and my brothers GUBBAY and McNALLY. I have had the opportunity of perusing some of the authorities they have cited.

I agree that the appeal should be allowed and the sentence altered as the learned CHIEF JUSTICE suggests. I accept the correctness of the law as set out by my brother GUBBAY in *S v Ncube & Ors* 1987 (2) ZLR 246 (SC); 1988 (2) SA 702 (ZS),

MANYARARA JA

which does not deal with juvenile whipping, however, as the question was not before the court.

Like my brother McNALLY, I am not satisfied that s 330 of the Criminal Procedure and Evidence Act [*Chapter 59*](the Criminal Code) breaches s 15(1) of the Constitution.

The two provisions are fully set out in the judgments of the learned CHIEF JUSTICE and my brother GUBBAY and, as my brother GUBBAY explains, there is a distinction between a "whipping" under s 333 of the Criminal Code as read with the Prison Regulations (FGN 42 of 1956) and a "moderate correction of cuts" in terms of s 330(2), which nowhere states that a court shall order the juvenile cuts be administered in terms of the Prison Regulations: *R v Obert & Ors* 1968 (2) RLR 99 (GD).

In the light of that distinction, which I consider to be clear and important, I can see no reason for declaring s 330 to be unconstitutional. To my mind, such a ruling is no different from painting s 330 and s 333 with the same brush and then, in a single breath, denouncing both as "torture ...or inhuman or degrading punishment". To quote from the judgment of my brother McNALLY, it cannot be said that there is evidence of inevitable brutalisation and brutality in the imposition of juvenile cuts.

It seems to be that what I would term the characteristics of "institutionalised violence" by the State against juveniles which have been vividly described by the learned CHIEF JUSTICE and my brother GUBBAY are not what s 330 of the Criminal Code provides. I would go so far as to suggest that these "characteristics of institutionalised violence" are in fact undesirable phenomena which s 330 has "acquired" from its indiscriminate application by the courts themselves in the first place.

I believe that it is this unfortunate administrative development which has transformed s 330 beyond recognition and turned it into an evil vehicle for the unwarranted stripping naked of juveniles, their being ritualistically prepared for a "whipping at the post", not infrequently administered by sadistic officials using unnecessarily cruel instruments deliberately selected for their likelihood to inflict the maximum pain with little or no regard to any danger of real physical harm to the unfortunate victim.

It seems to me that, in tracing the present callous flogging of juveniles back to s 330, one is resorting to a fiction to attack the provision in order to ban **any**

1989 (2) ZLR p100

MANYARARA JA

form of corporal punishment.

A juvenile who is dealt with in terms of s 330 is but a child who is brought before a court as his upper guardian for punishment by the State. Therefore I believe that s 330, properly construed, merely presents the court with the same problem as an average parent will face when he has to punish his child for a misdeed. My view is that, in terms of s 330, it is for the court, as it is for a parent, to decide the nature of the punishment to be imposed. Since no reasonable parent could ever administer corporal punishment on his child in the manner provided by the Prison Regulations, and the court is a reasonable institution, the same considerations should guide it in its application of the provisions of s 330. See *S v du Chattlier* 1973 (2) RLR 339 (GD); *S v F* 1979 RLR 7 (GD).

The headnote to *R v Obert & Ors supra* reads as follows:

"Where a juvenile is convicted of a venial offence, the imposition of corporal punishment should be avoided, as the concomitant circumstances of its infliction in prison might well have a traumatic psychological effect on the accused.

R v Dibden 1966 RLR 528 (refd).

Where juveniles are sentenced to corporal punishment in cases where the normal element of juvenile delinquency is absent, the caning should, if possible, be administered in a special room at court, in circumstances which resembles a headmaster's caning."

It is briefly on this basis that I feel that we would be going too far if we struck down s 330 of the Criminal Code on the ground that it is unconstitutional. Therefore, I associate myself with the views of my brother McNALLY. I would decide the constitutional point against the appellant.

Korsah JA: I have also had the benefit of reading the opinions expressed in this matter by His Lordship the CHIEF JUSTICE and my brothers GUBBAY, McNALLY and MANYARARA. For the reasons given by the learned CHIEF JUSTICE and by my brother GUBBAY, I am of the view that the appeal should succeed and the sentence altered as proposed by His Lordship the CHIEF JUSTICE.

1989 (2) ZLR p101

KORSAH JA

However, I do not think it would be out of place to make a few general remarks on the subject of judicial corporal punishment of juveniles. As my brother Gubbay so ably demonstrated, if the only difference between adult whipping and juvenile whipping is the length and size of the cane, then the *ratio decidendi* in *S v Ncube & Ors* 1987 (2) ZLR 246 (SC); 1988 (2) SA 702 (ZS) applies to this appeal.

It seems to me that the Supreme Law of the Land has bestowed on the Supreme Court the sacred trust of protecting human rights of people in Zimbabwe by declaring whether or not any punishment imposed by the laws of this country is inhuman or degrading. In bestowing upon us this sacred trust, I believe the Legislature calls upon us as experts in our field to assist them in passing laws that are just and humane. After all, the Judiciary is the third arm of Government.

In the exercise of this duty, the paramount consideration, as I perceive it, is to determine whether or not, in the light of existing social norms, such punishment unnecessarily humiliates, debases or lowers the image of the individual in his own esteem. We cannot shirk this duty merely because there is no alternative suitable punishment on the Statute Books for errant juveniles. If there is the need for such alternative punishment, the task of promulgating the requisite legislation lies with Parliament.

Speaking for myself, I think any law which compels a person, against his will, to expose his posterior to the gaze of total strangers while blindfolded and strapped to a wooden bench degrades and debases that person, and if this is done for the sole purpose of subjecting him to a whipping, then it also dehumanises him.

Even if corporal punishment were to be administered without the victim taking his clothes off, the mere idea of inflicting physical pain as a form of punishment corresponds, in my view with

torture and the *lex talionis* - an eye for an eye, a tooth for a tooth, a life for a life - all of which have been condemned because they represent an inhuman approach to punishment; and I would, like my brother GUBBAY and the learned CHIEF JUSTICE, maintain that judicial corporal punishment of juveniles offends s 15(1) of the Constitution, even if administered in terms of s 330 of the Code.

Pro Deo

1989 (2) ZLR p102

S v CHIRISA 1989 (2) ZLR 102 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Korsah JA

Criminal appeal

13 June & 4 July 1989

Flynote

Criminal procedure (sentence) - road traffic offences - culpable homicide - accused under influence of alcohol - prison sentence appropriate.

Appeal - criminal appeal - magistrate omitting to provide reasons for sentence - a misdirection entitling appeal court to make its own assessment.

Headnote

Culpable homicide arising from driving will not normally attract a sentence of imprisonment without the option of a fine unless there has been recklessness or gross negligence or where the accused was driving under the influence of liquor or drugs. Where a person drives through a give way sign and hits a lighted vehicle travelling on the main road, he is *prima facie* grossly negligent. That *prima facie* view is confirmed where the accused was under the influence of alcohol. Such conduct warrants a prison sentence, although generally speaking a short period of imprisonment is sufficient.

Failure by a magistrate to provide his reasons for sentence, as he is required to do by Order V Rule 2(1)(a)(ii) of the Magistrates Court (Criminal) Rules 1966, is itself a misdirection entitling an appeal court to make its own assessment on sentence. This is because the appeal court is prevented from determining whether or not the magistrate misdirected himself.

Cases cited:

S v Lusenge AD-138-81 (not reported)

S v Simoyi S-133-88 (not reported)

McNALLY JA

S v Kupeta S-149-88 (not reported)

S v Gonye S-219-88 (not reported)

S v Chibhuwa HH-36-89 (not reported)

S v Rwizi S-7-89 (not reported)

S v Dzvatu 1984 (1) ZLR 136 (HC)

S v Mtizwa 1984 (1) ZLR 230 (HC)

M R D Stonier for the appellant

M T Boylan for the respondent

Judgment

McNally JA: The appellant was charged with culpable homicide arising out of a car accident which occurred a few minutes after 1 am on 27 June 1987.

The deceased, an 18-year-old woman driving a white Mercedes Benz 220, was travelling north along Mazowe Street which is a through road between Rhodes Avenue and Cork Road in Harare. The appellant was driving a light green BMW 2800 west along Fifth Avenue. Traffic on Fifth Avenue is required to give way to traffic on Mazowe Street where they intersect. The appellant, who lives and works in the area, knew this. He did not give way, and his vehicle struck the deceased's vehicle in the middle of the intersection. His car was damaged extensively in the front. Hers was struck on the off side, apparently just behind the driver's seat. She died of head injuries and a dislocated spine.

The police were called to the scene at 1.09 am and they found his vehicle on the western side of the intersection, facing back the way he had come. Her vehicle was about 20 m north of the point of impact, partly off the road in some parking bays. No brake marks were noted. The area was lit by street lights though it was said that trees to some extent cast shadows on the road.

The appellant seemed to the police at the scene to be drunk. He smelt of alcohol and was unsteady on his feet. He was taken to the nearby hospital and a blood sample was taken. The police evidence was somewhat uncertain about the time the blood sample was taken. The one policeman said it was taken at 1.40 am and they had left the hospital by 2 am. The other said they took the appellant home about 4.30 am. The two statements are *prima facie* contradictory, though the contradiction might have been explained away by further questions.

Prosecutors should remember the importance of clarifying this sort of

McNALLY JA

evidence because of the requirements of ss 45(2) and 46(2)(b) of the Road Traffic Act. Unless it is clear that the blood sample was taken within a two hour period after the offence, the presumption that the concentration of alcohol in the blood was the same at the time of the offence as it was when the sample was taken does not operate.

The appellant says it was taken at 3.45 am which is outside the two hour period. Therefore the presumption does not arise. But since there was no drinking after the accident, the magistrate rightly pointed out that by 3.45 am the blood alcohol level must have been dropping. So if it was, as analysis showed, 121 mg per 100 ml of blood at about 3.45 am it must have been higher at some earlier stage. There can be no doubt therefore that the appellant could well have been appreciably affected by his consumption of alcohol at the time of the accident. Note the comment in Walls and Brownlie *Drink, Drugs and Driving* 2 ed p 43:

"It has been suggested, probably correctly, that normal social drinking rarely leads to blood -alcohol levels above about 50 mg/100 ml."

The factual evidence shows that he must have been seriously and substantially affected. How else does one explain his failure to see a large white car, with its headlights on crossing his path from left to right at an intersection which he knew to be a controlled intersection giving the other car right of way? Mr *Stonier* sought to persuade us that the lights of the Mercedes might not have been on. He could not persist in this submission when we pointed out to him:

1. That it was not mentioned in the defence outline;
2. That it was not put by him to the police witnesses;
3. That if he had put it to them they would have pointed to the entry in the TARB which alleged that the Mercedes when inspected by them had its headlights switch in the "on" and "dip" positions.

Total failure to see a vehicle with its headlights on - and I say total failure because there is no sign of brake marks - is, in these circumstances so inexplicable that one can only conclude that the influence of alcohol was such as to render him incapable of having proper control of his vehicle.

The fact that his car was found to be in second gear indicates only that he was so familiar with the area that he knew he was at a controlled intersection. This makes his failure to see the white Mercedes even more inexplicable.

1989 (2) ZLR p105

McNALLY JA

We were satisfied therefore that the magistrate was entirely correct in his approach to the question of conviction. In particular it cannot be true that the appellant had three or four beers at a party which ended at 11.30 pm. He must have drunk a great deal more.

There remains the question of sentence. The magistrate does not seem to have given any

reasons for his sentence, which was one of eight months' imprisonment with labour, of which two months were suspended for three years on the standard conditions. Mr *Stonier* submitted that this was a case in which a fine, a suspended prison sentence and a prohibition from driving would have been appropriate.

In *S v Lusenge* AD-138-81 FIELDSEND CJ spoke of:

"...the view that has been expressed before that culpable homicide resulting from driving a vehicle will not normally attract a sentence of imprisonment without the option of a fine unless either there has been recklessness or gross negligence, or the accused was driving whilst under the influence of liquor or drugs."

See also *S v Simoyi* S-133-88; *S v Kupeta* S-149-88; *S v Gonye* SC-219-88; *S v Chibhuwa* HH-36-89; *S v Rwizi* S-7-89. I would refer also to remarks I made in *S v Dzvatu* 1984 (1) ZLR 136 (HC) at 138F-G:

"To my mind anyone who drives straight through a 'Give Way' sign at a T-junction and hits a lighted vehicle travelling in the main road, killing two people, is *prima facie* grossly negligent. When it also seems that that person is to an unspecified degree under the influence of alcohol, then that belief is confirmed. In view of the current increase in the number of tragedies on our roads, such conduct warrants a prison sentence."

See also *S v Mtizwa* 1984 (1) ZLR 230 (HC). The facts in the present case are not significantly different. I can find no fault with the magistrate's decision to impose a sentence of imprisonment.

Generally speaking, however, it is felt that the shock, disgrace, discomfort and unpleasantness of a short period of imprisonment is a sufficient punishment in such cases. A sentence of eight months, even with two suspended, does seem rather on the high side. The question therefore arises whether in assessing the sentence the magistrate misdirected himself, or, if he did not do so, whether it is so high as to induce a sense of shock.

1989 (2) ZLR p106

McNALLY JA

I am prepared to leave open the latter question because the magistrate has omitted to provide his reasons for sentence as he is required to do in terms of Order V Rule 2(1)(a)(ii) of the Magistrates Court (Criminal) Rules 1966. This amounts to a misdirection because we are effectively prevented from determining whether he misdirected himself or not.

Accordingly we are free to make our own assessment of the appropriate sentence. Comparing the facts of the case and the personal circumstances of the appellant with those in similar cases we are satisfied that the usual sentence in such cases is a shorter period of imprisonment.

Accordingly, the order we make is as follows:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is allowed to the extent that the sentence is altered to one of four months' imprisonment with labour.

Gubbay JA: I agree.

Korsah JA: I agree.

Atherstone & Cook, appellant's legal practitioners

1989 (2) ZLR p107

S v SHAVA 1989 (2) ZLR 107 (HC)

Court **High Court, Harare**

Smith J

Criminal trial

30 June & 4 July 1989

Flynote

Criminal procedure (sentence) - perjury and subornation of perjury - Government Minister giving false evidence before commission of inquiry and inducing another person to do so - breach of oath of loyalty as a Minister - imprisonment appropriate.

Headnote

The accused, who at the time of the offences in question, was a Government Minister, was convicted on his plea of guilty on two counts of contravening s 18 of the Control of Goods (Price Control) Regulations 1954. These charges related to the selling of motor vehicles at prices far in excess of the maximum fixed in the Control of Goods (Sale of Motor Vehicles) Order 1981. He was also convicted on one count of perjury and one of subornation of perjury, to which he had also pleaded guilty.

The President had appointed a commission of inquiry to investigate the sale of motor vehicles from the Willowvale vehicle assembly plant; the accused had been subpoenaed to give evidence before the commission regarding the selling of a vehicle he had purchased from Willowvale and immediately resold at a vast profit. He had wilfully and deliberately stated that the vehicle had been sold for \$30 000 (the maximum price allowed under the Order being \$29 821). In fact he had sold it for \$95 000. To support this story he had suborned the person who carried out the sale on his behalf and the buyer of the vehicle to give false evidence to the commission. Despite persistent and searching questioning by the members of the commission, the accused persisted in his lies until the person who sold the car eventually changed his evidence and told the truth.

1989 (2) ZLR p108

SMITH J

Held, that perjury and subornation of perjury are very serious offences, the latter being much more serious than the former. While it is unusual to bring a subsequent prosecution for perjury

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against a person who has told lies in his own defence to a criminal charge, in appropriate cases the adoption of this course may act as a salutary check upon the readiness of many people to give patently false evidence in the hope of escaping the consequences of their acts. In this case, the accused did not give false evidence in the course of his own defence to a criminal charge; he gave false evidence to a commission of inquiry set up by the President. He thereby breached not only the oath he took before the commission but the oath of loyalty he took as a Minister, and betrayed the trust imposed in him by the President. The post of Minister is a very high office which carries great status, privileges and powers. It also carries great responsibilities. The incumbent of such an office is expected to lead by example. His primary duty is to observe the laws of the country and in this regard he had failed miserably.

Held, further, that while ordinarily offences that involve the selling of motor vehicles for amounts in excess of the controlled selling price do not warrant a custodial sentence, this position may have to be reviewed if deliberate and open contraventions of the Price Control Order continue to take place. However, in the case, a fine in the region of the price at which the vehicles were sold was appropriate.

Held, further, that the appropriate sentence for the counts of perjury and subornation of perjury was one of imprisonment, part of which would be suspended.

Cases cited:

S v Levy 1989 (2) ZLR 12 (HC)

R v Samuels 1930 CPD 67

S v Dhansay 1963 (3) SA 259 (C)

S v Beukman 1974 (2) PH H43 (C)

R v Malianga 1962 (3) SA 940 (SR)

R v Naik 1929 SR 102

A Chikumira for the State

D Drury for the accused

Judgment

Smith J: The accused has been convicted on his plea of guilty to two counts of contravening s 18 of the Control of Goods (Price Control) Regulations 1954 (FGN 255 of 1954). About 22 June 1988, he sold a Mazda B1600 for \$65 000 when the maximum selling price as fixed by the Minister of Trade

1989 (2) ZLR p109

SMITH J

and Commerce in the Control of Goods (Sale of Motor Vehicles) Order 1981 (SI 578 of 1981) (hereinafter referred to as the 'Price Control Order') was \$16 907. The excess amounted to \$48

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093. In the following month, about 19 July, the accused sold a Toyota Cressida for \$95 000, when the maximum selling price fixed in the Price Control Order was \$29 821. The excess amounted to \$65 656. Thus, within the short space of less than 30 days, the accused sold two new vehicles for \$160 000. The illegal proceeds from these two deals was \$113 749. Admittedly he paid a Mr Sly, who acted as his agent in the sale of the two vehicles, commission in the sum of \$7 000. Thus the illegal profit to the accused amounted to almost \$107 000. According to the Statement of agreed facts, the accused did not take any part in the negotiations preceding the sales of the vehicles. He asked a friend of his, Mr Sly, to sell the vehicles and left everything to him. It can be accepted, therefore, that the sales were conducted on a willing buyer/willing seller basis. The buyers had no special relationship with the accused. Therefore they must be deemed to have paid what they considered was the going rate for the vehicles concerned. Accordingly I think it can safely be held that the prices realised were the market prices at the time and hence the value of the vehicles. In *S v Levy* (3) 1989 (2) ZLR 110 this court held that where the Control of Goods (Price Control) Regulations 1954 specified that the maximum fine that could be imposed for a contravention of the Price Control Order was the value of the vehicle concerned, that meant the market price of the vehicle. Mr Drury has submitted that the decision in *Levy's* case *supra* was wrong. He based his submission on two grounds. Firstly, if the market price was to be taken as being the value of the vehicle, the maximum penalty would vary from case to case. For example, in *Levy's* case, the vehicle concerned was a 1987 model Cressida which had been sold for \$110 000 whereas in the present case the accused had sold a 1988 model Cressida for \$95 000. I accept that there is this disparity in the level of sentences that will be imposed in different cases. It does not seem to me, however, that there is anything untoward in such a provision. Section 5(3a) of the Exchange Control Act [Chapter 170] prescribes penalties for contraventions of that Act or the regulations made thereunder. Where the offence involves gold, currency or other property, the court is required to impose a fine of not less than the value of the gold, currency or other property. Here, too, persons who commit similar offences will be liable to different fines, depending on the value of the gold, currency or other property concerned. So far as I am aware, it has never been suggested that this provision of the Exchange Control Act makes bad law because it fixes different penalties for similar offences. Mr Drury referred to the

1989 (2) ZLR p110

SMITH J

vagaries of the market in determining the selling prices of vehicles. I agree that the price of a vehicle may vary, depending on how desperate the situation of the buyer is. However in each case the seller decides, either personally or through his agent, what price he will accept for the vehicle. Therefore, as far as he is concerned, he is being paid a price which he accepts as being the value of the vehicle as between himself and the buyer. I can see nothing wrong in principle in accepting that price as being the criterion for determining the fine that should be imposed. That is, after all, the actual amount of money received by the offender.

The second submission on this point by Mr Drury was that the aspect of profiteering should not be taken into account because s 16 of the Control of Goods (Price Control) Regulations 1954 empowers the Minister of Trade and Commerce to order that a refund of the excess amount received be made, either to the buyer or to the Consolidated Revenue Fund. I do not consider

that this provision can be used as an aid in the interpretation of s 18(3) of those regulations which prescribes that the fine shall not exceed the value of the commodity. I say that because the said s 18(3) merely repeats the provisions of subs (2) of s 6 of the Control of Goods Act [Chapter 280]. Section 28 of the General Laws Amendment Act No. 41 of 1978 amended s 6 of the Control of Goods Act [Chapter 280] by substituting a new subs (2) which specifies the maximum penalty that may be prescribed in regulations made in terms of the latter Act. That subs (2) refers to "an amount equivalent to the value of such goods". Since the Act itself refers to "value", one cannot look to the regulations made in terms of the Act in order to construe the meaning of the term. The President cannot, in regulations made in terms of the Control of Goods Act [Chapter 280], determine what meaning should be given to words used in the Act itself, neither can the content of such regulations be used as an aid to decide the intention of the Legislature in enacting a provision in the parent Act. When sentencing an accused, the court must decide what it considers to be an appropriate penalty. The Minister of Trade and Commerce may make an order for a refund at any time. The court cannot wait for him to decide whether or not to order a refund before pronouncing sentence. Furthermore, as was said in *Levy's case* at p 6 of the cyclostyled judgment, it would be wrong for the Minister to order a refund some 12 months after a sale when the buyer has voluntarily agreed to pay the excessive price demanded by the seller.

For the reasons given in *Levy's case supra*, I will not make an order in terms of s 7 of the Price Control Order requiring the accused to make a refund to the buyer of the vehicle concerned of the amounts received by him in excess

1989 (2) ZLR p111

SMITH J

of the controlled selling price. Both Mr *Drury* and Mr *Chikumira* have submitted that offences involving the sale of motor vehicles for amounts in excess of the controlled selling price do not warrant a custodial sentence. I accept that ordinarily that is the case. It may well be, however, that if contraventions continue to take place in deliberate and open defiance of the Price Control Order this position may have to be reviewed.

Having regard to the *ratio decidendi* in *Levy's case supra*, the maximum fine that may be imposed on the accused in respect of count 1 is \$65 000 and in respect of count 2 is \$95 000. The excess profit made by the accused in respect of the sales was just over \$48 000 and \$65 000 respectively. Mr *Drury* has stressed the mitigating factors. The accused is a first offender, he has expressed contrition for his acts, he pleaded guilty and has been co-operative with the prosecution and investigating officers. The accused had, and still has, pressing financial commitments which was why he sold the vehicles. He did not participate directly in the sales but left it to Mr Sly, his agent, to sell them to the best advantage. He acquired the vehicles in his personal capacity and therefore there was no clear abuse of his official position. He did not coerce the seller into selling the vehicles to him.

I accept these factors, except that concerning abuse of position, and take them into account in determining sentence. There are, however, a number of aggravating features. The most serious one is that the accused was at the time a Minister of State. He was a member of the Government which adopted the policy of controlling the prices of vehicles assembled in

Zimbabwe. It was his colleague, the Minister of Trade and Commerce, who, in accordance with Government policy, made the Price Control Order. Government adopted this policy because vehicles were in short supply due to the constraints on foreign exchange from which this country was and is still suffering. Individuals, firms and co-operatives who are carrying on business in this country need vehicles to enable them to carry on their businesses. If they cannot get vehicles they must either curtail or even close down their businesses. If they want vehicles they are forced to pay the exorbitant prices demanded by people like the accused. The payment of these high prices naturally increases the operating costs of the businesses concerned which are in turn recovered from ordinary members of the public by way of increased prices for goods and services. Thus the actions of the accused and of other unscrupulous persons of his ilk have contributed to the increases in the cost of living which have brought hardship and suffering to many people in this country.

The accused, as I have said, was a Government Minister and as such had a

1989 (2) ZLR p112

SMITH J

Mercedes-Benz with a driver placed at his disposal. His basic transport needs were therefore well catered for. However, the accused then bought a Mazda B1600 in May 1988 which he sold the following month. It can in my view be safely assumed that he purchased the vehicle with the intention of selling it as soon as possible at a profit. Then, at about the same time, he also bought the Toyota Cressida, the subject of count 2. It must also have been with the intention of selling it as soon as possible. The accused said that he did not coerce the sellers into selling these vehicles to him. However, I have no doubt that they were sold to him because he was a Minister of State. Thus he was using his office to obtain a privilege or favour not available to ordinary members of the public.

In terms of the Constitution a Minister of State is required to take the Oath of Loyalty. By that oath he swears to be faithful and bear true allegiance to Zimbabwe and to observe the laws of Zimbabwe. The accused failed to do so. He deliberately breached the law which he and his colleagues had adopted and made the law of the land. He deliberately purchased a motor vehicle at a low price which he immediately sold at an exorbitant price and then soon afterwards bought another vehicle from Willowvale, which is a State-owned company, and resold it at a vast profit. In doing so the accused has tarnished the image of his office. The post of Minister is a very high office which carries great status, privileges and powers. It also carries great responsibilities. The incumbent of such office is expected to lead by example. His primary duty is to observe the laws of the country. In this regard the accused failed miserably. He must have been well aware that charges of corruption on the part of Government officials have been widespread. This must have been one of the factors that led the President to appoint the Commission of Inquiry into the Sale of Motor Vehicles by Willowvale. By his actions the accused has given credence to the allegations of corruption in high places.

With regard to counts 1 and 2 the aggravating features far outweigh the mitigating features.

The accused has also been convicted on his plea of guilty, on one count of subordination of perjury and on one count of perjury. These are very serious offences. As was said by

GARDINER JP in *R v Samuels* 1930 CPD 67 at 71:

"Perjury is a very serious offence...it is a very serious crime, because if justice is struck at there will be little security for people."

In *S v Dhansay* 1963 (3) SA 259 (C), which concerned an appeal against a

1989 (2) ZLR p113

SMITH J

sentence of 8 months' imprisonment which had been imposed on a conviction of statutory perjury, the court set aside the sentence of imprisonment. The court held that the trial magistrate had adopted the wrong approach in stressing the seriousness of the offence without regard being had to the circumstances surrounding the commission of the offence and factors personal to the accused. The accused in that case had committed perjury, not for any personal gain or other advantage, but in an attempt to help a friend of his family to escape from the clutches of the law. In delivering the judgment of the court HALL AJ said that a list of 22 reported cases, which represented all the reported cases of perjury between 1948 and 1960, with the punishments imposed in them, had been laid before the court. Whilst that might be useful, he said, for determining whether a particular sentence might, or might not, be more severe than the general run of sentences in such cases, no general rule could be deducted from a series of that kind. Each case must be dealt with on its merits.

The headnote to *S v Beukman* 1974 (2) PH H43 (C) reads as follows:

"Perjury is frequently committed especially by accused persons or their relatives. Nevertheless prosecutions are rare. The public interest does not require that such cases be treated as of a very serious nature."

No authorities are quoted in support of the view so expressed by WATERMEYER J, with the concurrence of BURGER JP. In my opinion, the views are too generalised to carry any weight.

In *R v Malianga* 1962 (3) SA 940 (SR) at 943 LEWIS J (as he then was) said that it was most unusual to bring a subsequent prosecution for perjury against a person who has told a lie in the course of his own defence to a criminal charge. However, at p 943 he referred to *R v Naik* 1929 SR 102 at 103 where SIR MURRAY BISSETT SJ said:

"[T]here is no reason in law why a further charge of perjury committed in the course of the accused's defence should not be brought, and the adoption of this course, where the circumstances call for it, may act as a salutary check upon the readiness of many people to give patently false evidence in the hope of escaping the consequences of their acts."

In the present case, the accused did not commit perjury in the course of his own defence to a criminal charge. The President appointed in terms of the Commissions of Inquiry Act [Chapter 80] a Commission of Inquiry, under

1989 (2) ZLR p114

SMITH J

the chairmanship of SANDURA JP, into the Sale of Motor Vehicles by Willowvale, a motor assembly firm owned by the State. The accused was subpoenaed to give evidence before that

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commission concerning the Toyota Cressida he had purchased from Willowvale and subsequently resold. Despite being reminded, immediately before he gave evidence before the commission of inquiry, of the provisions of the Commissions of Inquiry Act [*Chapter 80*] that the giving of false evidence under oath would constitute perjury, the accused wilfully and deliberately stated that the Toyota Cressida had been sold for \$30 000 whereas in truth and in fact he well knew it had been sold for \$95 000. Despite persistent and searching questioning by the members of the commission of inquiry the accused persisted in his lies until he was forced to tell the truth because Mr Sly eventually changed his evidence and told the truth.

The Toyota Cressida referred to above was sold to a Dr Girach. When the accused became aware that the commission of inquiry would inquire into the sale thereof he met with Mr Sly and then indicated that he wanted to try to establish that the selling price of the vehicle had been in the region of \$30 000. Mr Sly said that he had a cheque for \$26 000 made in favour of a Building Society which could be used for that purpose. Although he appreciated that the suggestion would be untruthful and would mislead the commission of inquiry, the accused agreed therewith. Subsequently, on two occasions the accused met with Mr Sly and Dr Girach to discuss what evidence would be tendered to the commission of inquiry in an effort to induce it to believe that the selling price of the Toyota Cressida had been \$30 000. According to the statement of agreed facts, the accused did not threaten Mr Sly or Dr Girach or give out that he would reward them should they comply with his request to corroborate his story as to the selling price of the vehicle. Mr Sly apparently had been a friend of the accused for about 4 years. He may well have agreed to go along with the accused's request because of the friendship. However, in the case of Dr Girach, he had not met the accused before the accused asked to meet him in order to discuss the evidence that the parties would give to the commission of inquiry. I have no doubt that he was influenced into agreeing to commit perjury by the fact that the accused was a Minister of State. As I have said earlier in relation to counts 1 and 2, the accused was at the time a Minister of State. He held high office and, as such, had responsibilities. He was expected to set an example. The commission of inquiry was appointed by the President to inquire into the sale of vehicles by Willowvale, a State-owned company. That commission can only carry out its functions and report accurately to the President if the witnesses who appear and give evidence tell the truth, the whole truth and nothing but the

1989 (2) ZLR p115

SMITH J

truth. If members of the public are expected to tell the truth when giving evidence to the commission of inquiry, there is an even greater *onus* on Ministers of State to tell the truth. If a Minister fails to do so, not only is he breaching the oath taken before he gives evidence, he is also breaching the oath of loyalty he has taken as a Minister. He is betraying the trust imposed upon him by the President or Prime Minister when he selected him for appointment as a Minister. When a Minister not only breaks his oath but also conspires with others to induce them to commit perjury, his behaviour cannot be condoned. The President, or former Prime Minister, has a heavy responsibility in administering the Government of Zimbabwe. To assist him he appoints a Cabinet of Ministers in whom he expects to be able to trust. The accused has grossly abused the trust placed in him by the President. He has lied and cheated and has induced

others to lie on his behalf. Subornation of perjury is a much more serious offence than perjury.

I accept that, since his public retraction of his evidence before the commission of inquiry and his resignation from his office of Minister, the accused has suffered great emotional and psychological stress. However, he has brought this misfortune upon himself. His financial constraints have not been forced upon him. He has voluntarily incurred the debts he owes. Once he found himself in financial straits, which were of his own making, he resorted to criminal offences in an effort to extricate himself. He used his position to purchase vehicles at comparatively low prices and then sold them at exorbitant profits. He then lied in an effort to protect himself and prevailed upon two members of the public to lie in order to protect him and to hide the truth from the President and the Government. The accused did not decide to tell the truth until after one of the conspirators, Mr Sly, had decided to tell the truth. The accused went to great lengths to attempt to deceive the commission of inquiry.

The accused is sentenced as follows:

- Count 1: a fine of \$60 000 or, in default of payment, 12 months' imprisonment.
- Count 2: a fine of \$90 000 or, in default of payment, 15 months' imprisonment.
- Count 3: 18 months' imprisonment, of which 9 months is suspended for a period of 5 years on condition that the accused is not convicted of an offence involving dishonesty committed within that period for

1989 (2) ZLR p116

SMITH J

which he is sentenced to imprisonment without the option of a fine.

- Count 4: 6 months' imprisonment of which 3 months are suspended on the same condition as is the sentence on Count 3. However, this sentence of 3 months will run concurrently with the sentence imposed in respect of Count 3.

Gollop & Blank, accused's legal practitioners

[The day after this sentence was pronounced, the President granted a free pardon to the accused on Counts 3 and 4. The accused was released from prison, having spent less than 24 hours there - *Editor*.]

1989 (2) ZLR p117

BOKA ENTERPRISES (PVT) LTD v MANATSE & ANOR 1989 (2) ZLR 117 (HC)

Editor's Note:(4)

Court High Court, Harare

Ebrahim J

Exception

12 July 1989

Flynote

Delict - vicarious liability - civil servant defaming a third party - defamatory letter written in servant's official capacity - no claim by Minister that servant not authorised to write letter on his behalf - State liable for servant's delict.

Delict - defamation - plaintiff a fictional legal persona - whether can sue for damages for defamation without proof of special damages.

Headnote

The first defendant, an official of the Department of Customs and Excise, wrote a letter in that capacity to the Senior Representative at the Zimbabwe Trade Mission in South Africa. The letter alleged certain dishonest conduct on the part of the plaintiff company, which brought an action for defamation against him and the Minister responsible for his Department.

The defendants excepted to the plaintiff's declaration, claiming that it revealed no cause of action because the plaintiff, as a fictional *persona*, lacked the *locus standi* to sue for defamation in the absence of alleged patrimonial loss. A further point which fell to be decided *in limine* was whether the second defendant, the Minister, was vicariously liable for the actions of the first defendant.

Held, that to impute vicarious liability to the Government for the actions of its servant, the plaintiff must show that the servant's actions did not deviate from the normal course of his employment to a degree which would lead to the conclusion that he was not exercising the functions for which he was appointed. While it was true that it was not part of the first defendant's duties to make defamatory remarks in official letters, his

1989 (2) ZLR p118

delict was committed while he was executing at least some of the functions to which he was appointed. A master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; and because he has created the risk for his own ends he is under a duty to ensure that no-one is injured by the servant's improper conduct or negligence in carrying on his work. The letter purported to be written in an official capacity and the second defendant had not claimed that the first defendant lacked authority to write letters on his behalf. Consequently, the State must be taken to have assumed responsibility for the risk that the first defendant might use his powers improperly and so could not escape liability.

Held, further, that although the courts of Zimbabwe are bound by the Constitution to follow Roman-Dutch law, this is not necessarily the same as South African law. While the position in South African law appeared to be that a corporation could not sue for defamation, although it

might well be able to recover damages should it suffer patrimonial loss as the result of an unlawful attack on its reputation as an integral part of its patrimony, this was not necessarily the law in Zimbabwe. Just because fictional persons lack certain attributes possessed by natural persons, this did not mean that they should be debarred from certain remedies available to the latter. By creating such juristic beings and calling them "persons", the legislature must have intended that they would, as far as practicable, assume the rights, duties, privileges and protections at law enjoyed by natural persons. Defamation is a delict against the *corpus*, *fama* or *dignitas* of a free man (Voet 47.10.1). Although a fictional person might lack a *corpus* and *dignitas* (a person's self respect), it certainly possesses *fama*, even where the detraction from it cannot be quantified in money. The basis for demanding proof of special damages is thus questionable in the extreme. There is, in addition, no basis for distinguishing between a trading and a non-trading juristic person in this regard.

Held, further, that the words complained of could be regarded as defamatory by a reasonable person of normal intelligence who has knowledge of the circumstances.

1989 (2) ZLR p119

Cases cited:

South British Insurance Co v du Toit 1952 SR 239; 1952 (4) SA 313 (SR)

Mkize v Martens 1914 AD 382

Feldman (Pty) Ltd v Mall 1945 AD 733

Nott v ZANU (PF) 1983 (2) ZLR 208 (SC)

Minister of Police v Mbilini 1983 (3) SA 705 (A)

Minister of Police v Rabie 1986 (1) SA 117 (A)

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

Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T)

Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1979 (1) SA 441 (A)

Ahmadiyya Anjuman Ishaati-Islam Lahore (SA) v Muslim Judicial Council (Cape) & Ors 1983 (4) SA 855 (C)

Die Spoorbond & Anor v SA Railways; van Heerden & Ors v SA Railways 1946 AD 999

Union Government v Ocean Accident & Guarantee Corporation Ltd 1956 (1) SA 577 (A)

Atlas Organic Fertilisers v Pikkewyn Ghwano (Pty) Ltd & Ors 1981 (2) SA 173 (T)

Pilkington Bros v Lillicrap, Wassenaar & Partners 1983 (2) SA 157 (W)

Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd 1982 (1) ZLR 47 (HC); 1982 (3) SA 55

(ZH)

Reid-Daly v Hickman & Ors (2) 1980 ZLR 540 (AD); 1981 (2) SA 315 (ZA)

R v Holliday 1927 CPD 395

S v Jana 1981 (1) SA 671 (T)

GA Fichardt Ltd v The Friend Newspapers Ltd 1916 AD 1

Association of Rhodesian Industries & Ors v Brookes & Anor (3) 1972 (2) RLR 1 (GD); 1972 (4) SA 106 (R)

Maxwell v White 1936 SR 59

Gent v Taylor & Anor 1972 (2) RLR 336 (AD)

South Hetton Coal Co v North-Eastern News Association Ltd & Ors [1894] 1 QB 133; [1891-4] All ER Rep 548 (CA)

Metropolitan Saloon Omnibus Co v Hawkins [1843-60] All ER Rep 430

The Mayor, Aldermen & Citizens of Manchester v Williams [1891] 1 QB 94

Bognor Regis Urban Development Council v Campion [1972] 2 All ER 61 (QBD)

1989 (2) ZLR p120

EBRAHIM J

National Union of General & Municipal Workers v Gillian & Ors [1945] 2 All ER 593 (KBD)

D & L Caterers Ltd & Jackson v d'Anjou [1945] 1 All ER 563 (CA)

EETPU v Times Newspapers Ltd & Ors [1980] 1 All ER 1097 (QBD)

Ward v James [1965] 1 All ER 563 (CA)

Zvobgo v Mutjuwadi & Ors 1985 (1) ZLR 333 (HC); 1985 (3) SA 1055 (ZH)

Basner v Trigger 1945 AD 22

Demmers v Wyllie & Ors 1980 (1) SA 835 (A)

Dhlomo NO v Natal Newspapers (Pty) Ltd 1989 (1) SA 945 (A)

D Drury for the plaintiff

J Sayce for the defendants

Judgment

Ebrahim J: The plaintiff, a duly incorporated limited liability trading company, has sued the first

defendant, a civil servant in the Department of Customs and Excise and the second defendant, the Minister in charge of the Ministry by which the former was employed, for damages in the sum of \$300 000 for an alleged defamation.

The cause of action arises from a letter which the first defendant wrote, in his capacity as an official of the Department of Customs and Excise, to the Senior Representative at the Zimbabwe Trade Mission in South Africa. The relevant portions of this letter allege that the plaintiff company, through its officers, had attempted to bribe certain customs officers and had unlawfully cleared or attempted to clear a certain consignment of goods without due payment of duties amounting to some £70 000. It had not been denied that these statements were published and were intended to convey the *prima facie* meaning complained of. Nor has it been denied that they were unjustified.

The defendants have now excepted to the plaintiff's founding declaration, claiming that it reveals no cause of action inasmuch as the plaintiff, being a fictional *persona*, lacks the *locus standi* to sue for defamation in the absence of alleged patrimonial loss.

LIABILITY OF SECOND DEFENDANT

Before discussing the merits of this exception it seems to me that I should mention the joinder of the second defendant, the Minister. The inclusion of the Minister in the action leaves no doubt that the plaintiff intends to impute vicarious liability to the Government for the actions of its servant, the first defendant. In order to do so the plaintiff must show that the actions of the first

1989 (2) ZLR p121

EBRAHIM J

defendant did not deviate from the normal course of his employment to a degree which would lead to the conclusion that he was not exercising the functions for which he was appointed. This might seem to place the issue of vicarious liability on unsteady ground for, as has already been observed, the duties of the first defendant decidedly did not include making defamatory remarks in official letters.

The general principle of our law relating to vicarious liability was stated by TREDGOLD CJ in *South British Insurance Co v du Toit* 1952 SR 239; 1952 (4) SA 313 (SR). The learned Chief Justice adopted the South African principle, as stated in *Mkize v Martens* 1914 AD 382 at 390

"...that a master is answerable for the torts of his servants committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment. Such an act cannot be said to have taken place 'in the exercise of the functions to which he (the servant) is appointed'."

On the basis of this test, the Minister would escape liability, for undoubtedly the first defendant wrote the defamatory statements for his own purposes, or at least not for any proper purpose connected with his employment and he was not exercising the functions to which he was appointed.

However the concept of vicarious liability in law has developed with the increasing sophistication of society. In *Feldman (Pty) Ltd v Mall* 1945 AD 733, a leading South African case

on the subject, WATERMEYER CJ said (at 742):

"If he does not abandon his master's work entirely but continues partially to do it and at the same time devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work, and not entirely to an improper management by the servant of his own affairs."

This test brings us closer to a solution to the present problem in that it clearly allows for a situation where the servant, in the course of his duties, deviates therefrom for his own purposes. But in stressing that the deviation should be for his own purposes it leaves open the situation where the cause

1989 (2) ZLR p122

EBRAHIM J

of the deviation is either the negligent performance of a duty or is unknown. That the law should have developed in this way is not surprising. Most of the cases on vicarious liability, including the authoritative Zimbabwean decision in *Nott v ZANU (PF)* 1983 (2) ZLR 208 (SC), have arisen where servant drivers have taken literal deviations to attend to business other than that authorised by their masters. While on such unauthorised deviations they have become involved in accidents which have given rise to questions of liability. Emphasis in cases such as this has been placed on the "space and time" aspect of the degree of deviation or digression from the master's business (see *Feldman's* case at p 784 and *Nott's* case at p 212).

In the latter case BECK JA recognised that the "space and time" test would not be the best "touchstone" for liability in every case where vicarious liability is in question (at p 213H). Certainly this would seem true where a servant has misused his office to defame another. Considerations of "space and time" can have little relevance in determining liability in such a case.

Recent developments in South African case-law are relevant to the determination of liability where a master disputes that this exists in circumstances where the servant's delict was committed while he was executing at least some of the functions to which he was appointed. The cases I refer to are *Minister of Police v Mbilini* 1983 (3) SA 705 (A), and *Minister of Police v Rabie* 1986 (1) SA 117 (A).

Mbilini's case concerned a policeman who, two days after having an altercation and threatening Mrs Mbilini in his official capacity, met her by chance on the street and swore at her and repeated the threat. It was held that because the threat issued by the policeman at the time of the original altercation was made in the course of his duties, the combined insult and threat two days later was similarly issued. In these circumstances the latter threat was uttered in the course of his employment, notwithstanding the fact that he was acting improperly.

Mbilini's case concerned the defamation of a woman by a member of the South African security police. The policeman in question had an altercation with the woman, during which he indicated that she was considered a security risk and threatened to detain her if she did not supply details of the vehicle she was driving. She partially complied and was allowed to go on her way. Two days later the two chanced to meet in the street. The policeman made a remark to the woman

which was both abusive and threatening. The court held that the original threat had been made within the scope of his duties as

1989 (2) ZLR p123

EBRAHIM J

a security policeman and the subsequent threat was supplementary thereto. Accordingly, it had been proved that the policeman had uttered the second threat in the course of his employment, although he had abused the authority vested in him by uttering it. Consequently, the Minister of Police, as his employer, was liable for his delict.

It seems to me that a similar logic can be applied to the present case. The first defendant wrote the letter to the trade representative in his official capacity. Although there is no evidence to this effect, it may be assumed that it was part of his job to write letters to people such as the trade representative. In any case, the letter containing the statements complained of purported to be written in an official capacity and the second defendant has not claimed that the first defendant lacked authority to write letters on his behalf. The trade representative was, therefore, entitled to take notice of the information contained in the letter and to act on this information as she deemed appropriate. Needless to say, the offending statements would be liable to bias her against the plaintiff and against promoting or recommending its products in the country in which she is responsible for promoting Zimbabwean products generally. This is the essence of the plaintiff's complaint. As the first defendant wrote the letter in the course of his duties as servant of the second defendant, albeit that he acted improperly, the second defendant must accept responsibility for his servant's delict.

In *Rabie's* case *supra* (which involved a malicious arrest by a policeman) JANSSEN JA considered the application of the principle of vicarious responsibility in cases where misuse of power is concerned. After drawing attention to the fact that, as I have already noted, the principles adumbrated in "deviation" cases such as *Feldman v Mall supra*, (and, I may add, *Nott v ZANU (PF) supra*) do not necessarily prescribe rules for all cases, the learned JUDGE OF APPEAL said (at p 134G-I):

"In my view a more apposite approach to the present case would proceed from the basis of vicarious liability mentioned by WATERMEYER CJ in *Feldman (Pty) Ltd v Mall (supra)* at 741:

'...a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created the risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work...'

By approaching the problem whether van der Westhuizen's acts were

1989 (2) ZLR p124

EBRAHIM J

done 'within the course of his employment' from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State."

In this case, while the powers invested in the first defendant as a customs officer were admittedly not as great as those vested in a policeman, they were sufficiently extensive to enable him to potentially prejudice the plaintiff's well-being by his unlawful action. In appointing him to a position where he was empowered to write letters on its behalf, the State must be taken to have assumed responsibility for the risk that he might use the power improperly. He did so and the State, as represented by the Minister of Finance, Economic Planning and Development, cannot escape liability for its servant's delict.

LOCUS STANDI OF PLAINTIFF

As indicated above, the defendants have taken exception to the plaintiff's declaration on the grounds that, as a fictional legal *persona* (ie a private limited liability company, incorporated (given body) in terms of the Companies Act [Chapter 190]), the plaintiff lacked the capacity to sue for damages for defamation without proof of special damages.

This would be the position if a similar action was brought in South Africa. The point was stated crisply by VAN DEN HEEVER J in *Church of Scientology in SA & Anor v Reader's Digest Association SA (Pty) Ltd* 1980 (4) SA 13 (C) at 317H, where her Ladyship said:

"It seems to me, in the light of the comments of RABIE JA, that the present position is what it should in logic be: that a corporation cannot sue for defamation but may well be able to recover damages should it suffer patrimonial loss as the result of an unlawful attack on its reputation as an integral part of its patrimony."

The reference to the opinion of RABIE J evokes a leading South African case on this subject: *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441(A), which will be discussed below. Similar reasoning was approved by TEBBUTT J in *Ahmadiyya Anjuman Ishaati-Islam Lahore (SA) v Muslim Judicial Council (Cape) & Ors* 1983 (4) SA 855 (C) at 865. Professor Boberg, in his authoritative text on aquilian liability - *Law of Delict* - discusses the subject under the heading of "Unlawful Competition". At Vol 1 p 152 he notes:

1989 (2) ZLR p125

EBRAHIM J

"After a misleading suggestion in *GA Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 that the plaintiff's remedy for injurious falsehood (disparagement of his goods, service or business) is the *actio injuriarum*, it is now accepted that the proper remedy is the Aquilian action, for the right infringed (ie goodwill, the right to attract custom) is proprietary rather than personal in character ... Moreover, though the question has not yet been finally settled, the better view is that a corporation has no rights of personality entitling it to bring an *actio injuriarum* - whether for defamation or otherwise."

The difficulty concerning the attribution of personality rights to corporations appears to stem from the judgments of WATERMEYER CJ and SCHREINER JA in *Die Spoorbond & Anor v SA Railways; van Heerden & Ors v SA Railways* 1946 AD 999. After noting that damages for defamation in Roman and Roman-Dutch rested on outraged feelings, not economic loss, both learned judges pointed out that, in their views, there were differences between "natural" and "non-natural" persons. See, especially SCHREINER JA's view at p 1011: "Corporations (have) no feelings to outrage or offend". Compare MOSTERT J in the initial judgment of the *Tommie Meyer Films* case 1977 (4) SA 384 (T) at 384F (p 844 of 1977 translated volume):

"In the present enquiry it is unnecessary for me to give an opinion on the moot point whether the legal subjectivity

of the legal *persona* relies on a fiction or reality... Even if one accepts that the legal subjectivity of the legal *persona* is a reality, then there still remain human characteristics which cannot be imputed to the *universitas*.

Defloration, assault, adultery - to mention but a few - are causes of action which are exclusively associated with the human being. I am of the opinion that infringement of the right of privacy belongs to this class."

With the greatest of respect to the opinions of the learned judges noted above, I find myself unable to agree with the proposition that because "non-natural" persons lack certain attributes possessed by "natural" persons, they should be debarred from certain remedies available to the latter. If certain attributes are logically amenable to judicial protection there seems no reason why they should not receive that protection. Being creatures of statute, legal persons are subject to the rule of interpretation which provides that each expression should receive its full meaning. It therefore follows that by creating juristic beings and giving them humanistic names such as "person", the Legislature

1989 (2) ZLR p126

EBRAHIM J

must have contemplated that such beings would, as far as practicable, assume the rights, duties, privileges and protections at law enjoyed by natural persons. These are, of course, limited by the fact that "legal persons" or juristic beings are disabled by their nature from performing certain human functions and so from committing such delicts as are mentioned by MOSTERT J (*supra*).

Voet 47.10.1 defines a delict as an injury to the *corpus*, *fama* or *dignitas* of a free man. As was pointed out in the Appellate Division decision of the *Tommie Meyer Films* case 1977 (4) SA 441 at 454G, this definition obviously applies to a natural person. A juristic or legal person clearly lacks a *corpus* against which a delict can be committed. It is trite law, however, in other areas of delict that wrongs can and often are committed against companies and other artificially constituted bodies, and that satisfaction for these wrongs may be obtained through the courts. This is so not only in the commonplace delictual situation (see, for instance, *Union Government v Ocean Accident & Guarantee Corporation Ltd* 1956 (1) SA 577 (A)), but more relevantly in fields touching on commercial activity (see, for instance, *Atlas Organic Fertilisers v Pikkewyn Ghwano (Pty) Ltd & Ors* 1981 (2) SA 173 (T); *Pilkington Brothers v Lillicrap, Wassenaar & Partners* 1983 (2) SA 157 (W); *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* 1982 (1) ZLR 47 (HC); 1982 (3) SA 55 (ZH). The reluctance in according an action for defamation to a body which has no visible *corpus* is attributable to a perceived inability of a juristic *persona* to "feel" the indignity and embarrassment of being defamed. Certainly, such a *persona* is unable to feel emotional hurt. I venture to suggest that true emotional hurt forms the basis of few actions for defamation in contemporary times (with the possible exception of cases where female modesty has been impugned). More usually the motivation for an action for defamation (insofar as it is non-pecuniary) would appear to be the tendency for the person against whom the defamation has been committed to be brought into disrepute. Hurt feelings, *per se*, matter to a decreasing extent in a crowded, materialistic society. The reality, I perceive, is that actions for defamation are used to an ever increasing extent to protect what was referred to in the *Tommie Meyer Films* appeal (at p 454F) as "the external dignity" of the *persona*. Juristic persons have an equal interest with natural persons in protecting such external dignity, even where the

detract from the external dignity cannot be quantified in terms of money. This point is well illustrated by the present case where the defamation cast a slur on the plaintiff company's name in respect of which it is difficult to estimate financial damage. I think the point is well made that the first defendant, by virtue of his official position, was well-placed to harm the plaintiff by the

1989 (2) ZLR p127

EBRAHIM J

publication of the defamatory passages. If the words complained of had been published by a man in the street there would have been little immediate danger of harm to the plaintiff's external dignity for the person of normal intelligence would (dare one say particularly in Zimbabwe?) be alive to the possibility that what was said was "just another rumour". But the publisher of this defamation was an officer in the public service of sufficient seniority to be able to assure himself of the veracity of the statements made and clothed by the State with the authority to make statements on which reliance would be placed. He published the defamation to the Chief Trade Representative in a country which is among Zimbabwe's most lucrative export markets. The representative concerned could hardly fail to be ill-disposed towards the plaintiff after reading the remarks made by the first defendant. The losses which might have been made thereby are speculative and cannot be claimed by Aquilian action. Nonetheless, in my view the plaintiff's right to maintain an external dignity was violated.

I am to some extent, fortified in this view by the judgment of RABIE JA (in which four other Judges of Appeal concurred) in the Appellate Division decision on the *Tommie Meyer Films* case. The learned JUDGE OF APPEAL accepted that the University of Pretoria did have a *dignitas* in the sense of "respect", and that in suitable circumstances it could complain about the impairment thereof (p 455E). The learned JUDGE OF APPEAL also accepted, for the purposes of argument, that the University might, in suitable circumstances, claim a right to privacy - the invasion of which would constitute a delict. On the facts of the case before him he found that there had been no such invasion. Similarly, in the instant case, I do not believe the plaintiff's privacy, assuming that, as a trading company, it has such a right (which is by no means free of doubt), has been invaded. The right to privacy is a comparatively recent legal development and in Zimbabwe it has received little attention from either the courts or academic writers. It seems that we will follow the judicial precedent of South Africa (see *Reid-Daly v Hickman & Ors* (2) 1980 ZLR 540 (AD) at 552D; 1981 (2) SA 315 (ZA)). It would be unnecessary and improper for me to comment further on the "privacy" aspect. The purpose of its mention has been to illustrate the relatively liberal tendency of the Appellate Division in this matter despite their insistence on strict adherence to the fundamental principles of Roman-Dutch delict.

It has long been the position in South Africa that a juristic person has *locus standi* to protect its *fama* as opposed to its *dignitas*, *fama* being defined as the esteem in which a person is held by others, as opposed to *dignitas* which is a person's self-respect as well as his *fama*: *R v Holliday* 1927 CPD 395

1989 (2) ZLR p128

EBRAHIM J

at 400; see also *S v Jana* 1981 (1) SA 671 (T) at 675A, where *fama* is taken to be equivalent to "bodily security"; and *dignitas* as referring to a person's right to self-respect, mental tranquility and privacy. *Fama* would seem confined to the physical aspects of the personality and therefore be more easily attributed to a being without human feeling.

In *GA Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1, INNES CJ decided that a trading company could sue for defamation:

"Such a body is a juridical *persona*, a distinct and separate legal entity duly constituted for trading purposes. It has a business *status* and reputation to maintain. And if defamatory statements are made reflecting upon that *status* or reputation, an action for the *injuria* will lie ... In the present case no special damages were proved; but that circumstance does not really affect the position. Where words are defamatory of the business *status* and reputation of a trading company, I am not aware of any principle of our law which would make the right of action depend on proof of special damage."

The first part of that statement (relating to ability to sue) has been accepted (see *Tommie Meyer Films* appeal at p 454G) but the second part has been criticised on the grounds that the appropriate action for the recovery of damages for an alleged trading loss was the *lex Aquilia* and not the *actio injuriarum*, which encompasses usual actions for defamation. Damages under the *lex Aquilia* would have to be specially pleaded in an action for defamation because the Aquilian damages were not awardable under the *actio injuriarum*.

With the greatest of respect to the very learned South African authorities it seems to me that their interpretation of the law regarding the defamation of juristic persons (also known as *universitates*) is not in keeping with modern commercial law and practice. The number of such bodies sanctioned by law grows daily. For convenience of modern society they are termed *personae* in law and regarded as individuals in practice. As their numbers grow so their interaction with other individuals - both natural and legal-fictional - increases. While it is undeniable that there are crimes and delicts which a non-natural person cannot commit, it is also true that such legally created beings are capable of a vast array of wrongdoings and of having such wrongdoings visited on them. Defamation is but one delict which a *universitas* can suffer. It seems to me that it is illogical and likely to cause confusion to distinguish between natural and non-natural persons for the

1989 (2) ZLR p129

EBRAHIM J

purposes of claiming damages in defamation. Once it is accepted that a corporate body has a *fama*, and possibly also a *dignitas*, to protect, the basis for demanding the additional requirement of proof of special damages becomes questionable in the extreme. Special damages are purportedly required because the actual loss to the *universitas* is a loss arising otherwise than from an injury to *fama* or *dignitas*. In the case of a trading company it will usually be a trading loss. But it is not always possible to assess the damage a defamation might cause within a reasonable time after its publication. Apart from this, by the very nature of the delict, it will often be difficult to quantify the probable harmful effects of a defamation. This will depend on customer or client reaction to the wrongful statements, which is notoriously fickle. When it is accepted, as appears to be the case in South Africa, that the distinction between trading and non-trading companies is unwarranted (*Tommie Meyer Films* trial judgment at p 386C) the

insistence on proof of special damages appears to be little more than an anachronistic quirk in the legal system. Some semblance of respectability is retained when one supposes the basis of the discrimination to be that defamation of a money-making concern is actionable because it detracts from the profitability of the concern whereas defamation *per se* is actionable because it attacks *fama*, *dignitas* and goodwill in general, but no discernable and practical basis remains when this distinction is removed. And I agree with MOSTERT J *loc cit* where he compares a successful sporting club (non-trading corporation) with a large cash turn-over and a commercial undertaking (trading corporation) with minimal turnover, and concludes that there is no reason why the latter should enjoy legal protection while the former is denied it. On appeal no comment was made on this aspect of the trial judgment and the Appellate Division must be understood, by its silence, not to have disapproved.

I have analysed, albeit superficially, the South African position on the defamation of *universitates* because the one local case on the subject, *Association of Rhodesian Industries & Ors v Brookes & Anor; Associated Chamber of Commerce of Rhodesia & Ors v Brookes & Anor* (3) 1972 (2) RLR 1 (GD); 1972 (4) SA 106 (R) makes no mention of the procedural difficulties of suing a *universitate* under the *actio injuriarum*. BECK J (as he then was) appeared to be content to settle the matter on its own merits. It seems unlikely that the learned judge and counsel who argued the case were unaware of the *Die Spoorbond* case *supra* and the cautionary remarks contained therein regarding the liability of companies to sue for defamation. An argument based on this case could very likely have defeated the plaintiff's case. However, no reference was made to the Roman-Dutch law on the subject. An explanation for this omission could be that the learned judge

1989 (2) ZLR p130

EBRAHIM J

decided the case on the basis that the test for defamation was a rule of evidence and therefore it was subject to English law: see *Maxwell v White* 1936 SR 59; *Gent v Taylor & Anor* 1972 (2) RLR 336 (AD); Civil Evidence Act [Chapter 41] ss 18, 24, 21, 29, 30, 33 and 34. In this connection I would mention that the real point at issue is whether the plaintiff in such cases must prove special damages (as in South Africa), or whether damages will follow proof of a defamatory statement (as in England). It would seem, therefore, that the substantial issue can be related to an evidential rule and, in this country, consequently, English law ought to be the determining factor.

Notwithstanding the probable validity of this justification of the *Association of Rhodesian Industries* case, I have felt that some investigation of the South African law on this point was required, because of our close affiliation therewith and because of the decisive stance taken by the superior courts since that local decision. I appreciate that the need may be felt in South Africa to maintain the Roman law dichotomy between the *lex Aquilia* and the *actio injuriarum* but I do not think there is any compelling need for us to adopt the same stance if we feel that justice would be better served by dealing with the problem in accordance with other rules of procedure and evidence open to us. Such an approach, in my view, does no violence to our constitutional duty to apply Roman-Dutch law. The South African position protects pure Roman law. Adaptation of this law to suit differing requirements was the constant pre-occupation of the

Dutch jurists. To my knowledge, no Dutch classical writer has been quoted in direct support of the South African position.

In English tort a trading corporation or company "has a trading character, the defamation of which may ruin it". It can maintain an action of libel or slander for any words which are calculated to injure its reputation in the way of its trade or business, and this without alleging or proving special damage: *Gatley on Libel and Slander* 7 ed, para 885, quoting from *South Hetton Coal Co v North-Eastern News Association Ltd & Ors* [1891-4] All ER Rep 548 per KAY LJ at 554A; [1894] 1 QB 133; Halsbury's *Laws of England* 4 ed vol 28 para 25 states:

"A corporate body may maintain an action for libel or slander in the same way as an individual. However, the imputation must reflect upon the company or corporation itself and not upon its members or officials only. Unlike an individual, a company or corporation has no feelings, so the only damage it can suffer is injury to its reputation. A company or corporation cannot sue in respect of an imputation of murder, incest or adultery because it cannot commit those crimes. It has been said that it

1989 (2) ZLR p131

EBRAHIM J

cannot sue in respect of an allegation of bribery and corruption...

A trading company or corporation has a trading reputation and can maintain an action for libel or slander in respect of a statement that injures its trades or business. A trading company or corporation may sue for an imputation of insolvency mismanagement and the improper and dishonest conduct of its affairs. It may sue for an imputation that it conducts its business badly and inefficiently or that it is run by people of questionable honesty and background...

The company is not required to prove that it has suffered special damages such as financial loss; it may recover damages for the injury to its goodwill."

The allegation in the present case involves imputations of corruption. On the face of it the above statement of the law of England would appear to exclude such an allegation from the general proposition that a company may sue for defamation. This, in essence, reverts to the argument already encountered in discussion of the South African position, viz that there are certain wrongs which a company, by its nature, cannot commit. In *Metropolitan Saloon Omnibus Co v Hawkins* [1843-1860] All ER Rep 430 at 431B, POLLOCK CB said:

"It (a corporation) could not sue in respect of an imputation of murder, or incest, or adultery because it could not commit these crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong; and if its property is injured by slander it has no means of redress except by action. Therefore, it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured."

It should be remembered that this case was decided in 1859 at a time when company law in England was still in its infancy and philosophical theories of the corporate entity were probably little known. Despite this, *Hawkins'* case was relied on as a precedent in *The Mayor, Aldermen and Citizens of Manchester v Williams* [1891] 1 QB 94, where bribery and corruption were imputed against the plaintiff. Relief was denied because the judge ruled that a corporation could not be guilty of bribery and corruption.

The *Manchester* case has been criticised and distinguished on many occasions: see eg *Bognor*

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EBRAHIM J

[1972] 2 All ER 61 (QBD); *National Union of General & Municipal Workers v Gillian & Ors* [1945] 2 All ER 593 (KBD); *South Hetton Coal Co v North-Eastern News Association Ltd & Ors supra*; Fraser on Libel and Slander 7 ed art 20; Spencer Bower on *Actionable Defamation* (1908) pp 278-9.

The *South Hetton* case was crucial in this regard. The *ratio decidendi* relating to capacity to bring an action is contained in the first head-note, which is a fair distillation of the contents of the decisions, and is as follows:

"Although a corporation or company cannot maintain an action for libel in respect of anything reflecting on its members personally, yet it can maintain an action for a libel reflecting on the management of its trade or business and injuriously affecting the corporation or company as distinct from the individuals which compose it. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position. To maintain an action the corporation or company need not prove special damage."

The defendant, in one of its newspapers, had published an article describing the appalling conditions in which plaintiff company's employees were housed, such accommodation forming part of the wages of the employees. The company sued for defamation, neither alleging nor proving special damages. The defence of public interest was accepted by both the court of original jurisdiction and the Court of Appeal. Nonetheless the jury found that the article went beyond the realms of fair comment, within which remarks made in the public interest must remain. The jury awarded what must, even at that time, have been nominal damages of £25. The judges of the Court of Appeal (LORD ESHER MR, LOPES and KAY LJ), while disagreeing personally with the verdict, refused to upset it and dismissed the appeal.

It was thus established in English Law that a corporation may sue if it is defamed, without proving special damages. *South Hetton* was a trading corporation. The decision was followed in *D & L Caterers Ltd & Jackson v d'Anjou* [1945] 1 All ER 563 (CA) (also a trading corporation). Non-trading corporations can also sue: *National Union of General & Municipal Workers v Gillian & Ors supra*; *Bognor Regis UDC v Campion supra*; but see *EETPU v Times Newspapers Ltd* [1980] 1 All ER 1097 (QBD). The ability to sue depends on whether the body has a corporate personality, and this depends on whether such a personality has been bestowed on it. See *EETPU* case at 1100b.

EBRAHIM J

I think a word on the consequences of the lack of a jury system in this country on such cases would be useful here. It might seem from a casual reading of the *South Hetton* case that the existence of the jury system in England justifies the lack of the requirement for proof of special damages. In other words, where a case of defamation is judged by twelve impartial fellow citizens, aware of the prevailing socio-economic environment, the monetary worth of a

defamation will be well known or ascertainable to them without it necessarily having to be itemised. This may well have been true in the sedate and less complicated social climate of the late nineteenth century; it certainly is not true in today's complex environment, where the estimation of damages has become a specialised art. In England, cases of defamation are still tried by jury and damages awarded by jury: see *Halsbury* 4 ed vol 28 para 232; *Ward v James* [1965] 1 All ER 563 (CA) at 571. In normal circumstances parties to an action for defamation have an option to be tried by jury or a judge alone for libel: *Halsbury* vol 26 para 618. I do not think the fact that in Zimbabwe there is no jury system is an obstacle to the proposition that a plaintiff company should, in principle, be permitted to sue for defamation without proof of special damages in Zimbabwe. Judges in this country have assumed many of the functions previously exercised by juries. There does not seem to me to be any compelling reason why a judge alone or with assessors should not fix damages in cases such as this in the same way as he would in ordinary defamation cases.

Based on the above investigation into the applicable law on this matter I have reached the following conclusions:

1. The Roman-Dutch law on this point as adumbrated by the South African Appellate Division is, with great respect, unsatisfactory inasmuch as it appears to deny recourse to the courts to a large number of potential litigants simply because they are unable to **prove** patrimonial loss. I shall advert to this below.
2. Although we are bound by the Constitution to follow Roman-Dutch law, this is not necessarily the same as South African law. South African precedent is followed in this country as a matter of convenience for historical reasons, because of the volume of precedent flowing from the superior courts of that country, and certainly not least because of the consistently high standards in jurisprudence which have been upheld over many years by the members of the various Benches. However, this country has for many years been independent of binding South African precedent and our courts have long been influenced by English common

1989 (2) ZLR p134

EBRAHIM J

law to a greater extent than has the South African judiciary. There appears no reason why, if we find the South African system wanting in a particular respect, we should not supplement that deficiency from English practice and precedent if the latter seems suited to our needs. The purpose of law is to serve the equitable demands of society, and not to satisfy academicians' thirst for purity and order.

3. I have been fortified in making the above point by the knowledge that the decision to apply English law in this case is supported by the provisions of the Civil Evidence Act which enjoin the courts of this country to apply the law of the Supreme Court of Judicature in England to matters of evidence. I should mention that the Civil Evidence Act, unlike the Criminal Procedure and Evidence Act [Chapter 59], does not freeze the application of English law at a certain date. Therefore, as far as civil evidence is concerned, it is the current English law of evidence which is to be applied. I am further convinced that my

decision to follow English law, rather than embroil our courts in the complex South African approach, is correct by the precedent set in the *ARNI* and *ACCOR* cases cited above. BECK J (as he then was) approached the matter in what was, if I may say so, a typically English manner, dealing directly with the issues without the regard to old writers which typifies the South African approach. (This observation is comparative, not critical). As I have implied, being aware of the competence and background of that learned judge I do not think his approach to the case was accidental. While the South African law on the subject was not as developed at that time as it is today, the seeds had been sown in the *Die Spoorbond* case and I would respectfully venture to express the opinion that the learned judge purposefully avoided the consequences of that decision.

The present action is an exception to a plea. I have decided that this exception is invalid and that the plaintiff, in our law, does have a cause of action. Having so decided as I am not obliged to resolve the final issue of whether the words published were defamatory (see *Zvobgo v Mutjuwadi & Ors* 1985 (1) ZLR 333 (HC); 1985 (3) SA 1055 (ZH)). Debateably, I am prohibited by a rule of practice from so deciding (see *Basner v Trigger* 1945 AD 22 at 32). In any case, I do not think it would be wise for me to exceed the request for judgment on the exception. It is quite possible, in the circumstances, that the parties may not wish to pursue the matter at this stage.

What I am called on to decide now is whether the words cited as the basis of the complaint "**could**" or "**might**" be regarded as defamatory by a reasonable

1989 (2) ZLR p135

EBRAHIM J

person of normal intelligence who has knowledge of the circumstances (*per* SANDURA JP in *Zvobgo's* case (*supra*) at p 337 of the Zimbabwean report; p 1059D of the SA report). This formulation is largely derived from a test devised by TINDALL JA in *Basner v Trigger supra* loc cit. The definition of a reasonable man (or "person") often gives trouble and, in this context that elusive being has been defined as:

"...a person who gives a reasonable meaning to the words used in the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be ascribed thereto"

(*per* MULLER JA in *Demmers v Wyllie & Ors* 1980 (1) SA 835 (A) at 842H).

In making the imputations alleged, that is to say, in asserting that the plaintiff company was guilty of corrupt practice in attempting to evade the payment of customs duties, the first defendant clearly implied that the company was a commercial entity which would stoop to breaking the law to further its operations. It is necessary to make reasonable extrapolations from this allegation in order to appreciate the ambit of the defamation. If unlawful activities are attributed to a natural person, it is human nature that those who witness such an attribution will be disinclined to trust that person until the allegations have been proved false and even then doubt may linger in the minds of many on the conscious or unconscious application of the adage "there's no smoke without fire". If this is true of natural persons within their relatively small circle of acquaintances and professional or business associates it is equally true - but with greater consequences - of a trading company with a public trading reputation to protect. The

prospective damage may not necessarily be immediately calculable (in fact, it possibly will never be ascertainable in concrete terms), but if a potentially damaging imputation is made by an identifiable person there seems no reason to deny a company recourse to the courts as a way of attempting to clear its name, and deter others from similar defamations.

This case is exacerbated by the office of the person to whom the imputation was addressed. If the imputation had been addressed to a man in the street or a colleague the grounds for complaint would have been minimal. An ordinary person with ordinary contacts could publish the defamation to a limited extent. However, the first defendant made the imputation to the senior trade representative in an extremely important market-place for exports from Zimbabwe. One of the functions of this official is to promote exports, and in doing so, she would doubtless be asked by potential customers

1989 (2) ZLR p136

EBRAHIM J

to recommend potential manufacturers in Zimbabwe. If she had reason to believe that the plaintiff company was dishonest she would be disinclined to recommend it as a trading partner for any potential customer. There is a further, more general, point I would like to make. It is important for Zimbabwe's international trading reputation that allegations of corruption in trade affairs should not be made recklessly. Imputations like those made here can but do great damage to one of this country's most vital activities; earning foreign exchange.

I come to the conclusion that the passages in the first defendant's letter could be taken as defamatory and further, if they were, the plaintiff can sue for defamation without proof of special damages.

The defendants have been unsuccessful in excepting to the plaintiff's plea and must be liable for the costs of the action. As I have found that the second defendant was vicariously responsible for the first respondent's conduct, the former will be solely liable to pay costs.

POST SCRIPTUM

This judgment has been prepared without me having had sight of the recent judgment of the South African Appellate Division in *Dhlomo NO v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A). I am fortified in the view I have reached by the fact that an identical conclusion has been reached by the South African Appellate Division.

Gollop & Blank, plaintiff's legal practitioners

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

1989 (2) ZLR p137

JL & JE WALTER ENTERPRISES (PVT) LTD v KEARNS 1989 (2) ZLR 137 (HC)

Editor's Note:(5)

Court **High Court, Harare**

Smith J

Application on notice of motion

8 April & 5 July 1989

Flynote

Copyright - Copyright Act [Chapter 200] - s 2(1) - works of artistic craftsmanship - meaning of - infringement of copyright - relief available - account of profits - meaning of.

Headnote

The Copyright Act [*Chapter 200*] protects artistic works, which are defined in s 2(1) as meaning *inter alia* works of artistic craftsmanship. Such works are of a character or quality which is so individualistic as to constitute them unsuitable for registration as designs and impossible to protect except as the subject of copyright. The test as to whether a design is "artistic" may be said to be whether the author of the work, in creating the article in question, was cultivating one of the fine arts with the main object of appealing to the aesthetic tastes of those who view it, the expression "fine arts" here being given the wide meaning of any application of skill and taste to the production of articles which are beautiful in themselves or which have an appeal to aesthetic taste. Whether a particular work is one of "artistic craftsmanship" is a matter to be determined in the light of the evidence led. An item of pottery of utilitarian shape, for instance, may be rendered a work of artistic craftsmanship by such features as its colouring, the glazing, the position and colour of the glazing and the use of motifs.

Section 22 of the Copyright Act provides that infringements of copyright shall be actionable at the suit of the owner of the copyright, and such relief is available by way of damages, interdict, accounts or otherwise as is available in any corresponding proceedings in respect of infringements of other proprietary rights. An account of profits is a remedy

1989 (2) ZLR p138

SMITH J

whereby the profits of the infringer are automatically awarded to the plaintiff without the plaintiff having to prove his true damages. This remedy is in all material respects the same as the equitable remedy of an account of profits in English law.

Cases cited:

Cuisenaire v Reed [1963] VR 719

George Hensher Ltd v Restawile Upholstery (Lancs) Ltd [1974] 2 All ER 420 (HL); [1975] RPC 31

Copyright Juta & Co Ltd

Video Parktown v Paramount, Shelburne & Century 1986 (2) SA 623 (T)

M J Gillespie for the plaintiff

D A Matysjak for the defendant

Judgment

Smith J: In March 1988 the applicant purchased from one Frances Marshall a business which operated under the name Ti Potteries. The purchase included all the equipment used to make pottery and the goodwill. After the purchase of Ti Potteries, the applicant operated the business from premises in Chinhoyi, producing a range of pottery which included ashtrays, jugs, goblets and cups. The respondent carries on the business of producing and marketing pottery under the name Simba. The applicant alleged that the range of pottery produced by the respondent was identical to that produced by the applicant, in that the articles were made to a shape and colour identical to those produced by the applicant and on each item there was a painting of a similar bushman design or motif. The respondent admitted that some of the pottery she produced was similar in certain regards to that produced by the applicant but averred that that was only to be expected considering the nature of the items concerned. She further submitted that the works concerned were neither original nor artistic and that the pottery was mass produced and more in the nature of an industrial design than anything else.

The applicant submitted that the reproduction by the respondent of the range of pottery referred to earlier constituted a direct infringement of the copyright held by the applicant. It therefore prayed for an order that the respondent -

- (a) be interdicted from producing and marketing pottery identical in any material form to that produced and marketed by the applicant;
- (b) deliver to the applicant any plates or other instruments used in the design or manufacture of the pottery;
- (c) deliver to the applicant all existing stocks held by her which were identical in any material form to the pottery produced by the applicant.

1989 (2) ZLR p139

SMITH J

- (d) account for all sales of pottery and pay to the applicant all gross profits made in respect of such sales.

The Copyright Act [*Chapter 200*] (hereinafter referred to as "Chapter 200") defines the works which may be the subject of copyright and specifies the persons in whom copyright vests and the rights which accrue by virtue of the ownership of copyright. Section 6 of Chapter 200 provides that copyright shall subsist in any original artistic work which has been published if the work was first published in Zimbabwe or the author of the work was a qualified person at the time it was first published. By virtue of s 7 of Chapter 200, subject to certain exceptions which

are not relevant, such copyright vests initially in the author of the work and, where an artistic work is made by the author in the course of his employment by another person under a contract of service, copyright therein is deemed to have been transferred to that other person, subject to any agreement between the parties excluding or limiting such transfer. In s 2(1) of Chapter 200, the term "artistic work" is defined as meaning, *inter alia*, works of artistic craftsmanship. What is meant by that phrase? In Copeling's *Copyright Law in South Africa* at p 36-37 it is said:

"it would seem that 'works of artistic craftsmanship' must refer to works the character or quality of which is so individualistic as to constitute them:

- (1) unsuitable for registration under the Designs Act, and
- (2) impossible of protection otherwise than as the subject of copyright. Examples of such works would be the works of gold and silversmiths, potters, woodcarvers, hand-embroiderers and so forth."

The question of what is meant by that phrase is also dealt with in *Copinger and Skone James on Copyright* 12 ed para 178. Reference is made therein to the Australian case of *Cuisenaire v Reed* [1963] VR 719 in which at p 730 PAPE J said:

"In my opinion, the words 'artistic' and 'craftsmanship' each refer to some quality in the acts performed by the maker or author of the article in which copyright is alleged to subsist in the course of performing the physical operation of making that article as distinct from the earlier cogitation and thought which produced the idea upon which the work was based. The true test, I think, is whether the author, in making the article in which copyright is alleged to subsist, was applying his skill and taste to its production with the main object of creating an article which,

1989 (2) ZLR p140

SMITH J

even if it be utilitarian, nevertheless will have a substantial appeal to the aesthetic tastes of those who observe it. Put another way, it may be said that the test is whether the author was, in creating the article, cultivating one of the fine arts with the main object of appealing to the aesthetic tastes of those who view it, provided that the expression 'the fine arts' is given the wide meaning of any application of skill and taste to the production of articles which are beautiful in themselves or which have an appeal to aesthetic taste."

In *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1974] 2 All ER 420 (HL); [1975] RPC 31 the House of Lords decided that the question of whether or not a work was one of "artistic craftsmanship" was a matter to be determined in the light of the evidence led. Having looked at the photographs of the range of pottery produced by the applicant and at the specimens that were produced in court, there is no doubt in my mind that the pottery can be regarded as being of "artistic craftsmanship". I accept the validity of the submission by Mr *Matysjak* that the shapes of the articles under consideration are dictated by the use to which they are put. However, the artistic craftsmanship of the articles is evidenced by factors other than shape. In this case, the artistic features of the articles lie in the colour of the unglazed portions of the articles, the glazing thereof, both the colour and the amount and positioning of the glazing, and the bushman motifs which are painted on the articles. Again I accept the validity of the submission by Mr *Matysjak* that in general the bushman motif is not original and is produced on many artifacts. There are, however, many ways in which a bushman motif may be depicted. The bushman motif on the pottery in question covers not only human figures, but also animals and weapons such as bows and arrows and spears and shields. Consequently, the

manner in which the shapes can be depicted and the combinations of human and animal figures, weapons and shields that can be used are legion. Thus, whilst no-one can claim copyright in the "bushman motif" as such, the author of an artistic work on which a "bushman motif" is depicted may claim copyright therein.

The applicant is a company registered in terms of the Companies Act [*Chapter 190*] and is therefore a "qualified person" as defined in s 2(1) of Chapter 200. Furthermore, the pottery produced by the applicant must be taken to have been published because reproductions thereof have been issued to the public - see s 3(1)(c) of Chapter 200. Since the various requirements of s 6(2) of Chapter 200 are satisfied, it follows that copyright subsists in the pottery produced by the applicant. Section 4 of Chapter 200 provides that copyright in an artistic work is infringed by any person who, not being the

1989 (2) ZLR p141

SMITH J

owner of the copyright and without the licence of such owner, does any act which is designated as an act restricted by the copyright therein. One of the acts restricted by copyright in an artistic work is reproducing such work in any material form - see s 6(4) of Chapter 200.

It appears to me that the range of pottery produced by the respondent includes works which are obviously reproductions of the works produced by the applicant. Not only are they almost identical in size and shape, the unglazed portions are of identical colour, the glazing is of the same colour and is of the same amount and in the same position on the various works and the motifs painted on each are very similar. Thus on the ashtray the manner in which the body is depicted and the positions of the arms and legs are identical. The only difference is that in the figure on the work produced by the applicant, the head is in the shape of a straight bar whereas in the work produced by the respondent the head is roughly spherical. In the case of the jugs, there are two figures of bushmen, one on each side of a traditional African shield superimposed over a crossed axe and spear. The similarity even extends to the point that in all the works the axe-head is on the left hand side and the spear-head on the right. In the case of the coffee mugs and the goblets there are paintings depicting a bushman and a horned animal. The only obvious difference between the depictions of the bushman is the shape in which the head is drawn.

In my opinion, there is no doubt that some of the works of pottery produced by the respondent infringe on the copyrights of the applicant. Accordingly the applicant is entitled to some form of relief. Mr *Gillespie* accepts, however, that the relief sought by the applicant in its draft order is much too widely cast. He abandoned the claim for the delivery of any plates and other instruments used in the design or manufacture of pottery. Although he persisted in the claim for delivery to the applicant of all stocks of pottery which are infringing copies, I can see no basis on which I can so order. The applicant is not entitled to claim the ownership thereof. It is only entitled to any gross profits arising from the sale thereof. However, the respondent will be interdicted from marketing or distributing such infringing copies without the licence of the applicant. I would hope that the parties would be able to reach agreement on the terms of any such licence.

Section 22 of Chapter 200 provides that infringements of copyright shall be actionable at the suit of the owner of the copyright and in any action for such infringement all such relief by way of damages, interdict, accounts or otherwise shall be available to the plaintiff as is available in any correspond-

1989 (2) ZLR p142

SMITH J

ing proceedings in respect of infringements of other proprietary rights. According to Copeling's *Copyright Law in South Africa* at p 157, in English law an account of profits is "an equitable remedy incidental to the right to an injunction". It implies an order of court directing an inquiry into the profits which the defendant has received as a consequence of his infringement, which profits are then awarded to the plaintiff. The learned author at p 158 states that there is some doubt whether the reference in the equivalent statutory provision in the South African Copyright Act to "relief by way of accounts" must be taken as incorporating into South African law the English law remedy of an account of profits. He submitted that the Roman-Dutch law knows of no remedy directly corresponding to that of an account of profits in English law. In South African law, so he submits, a claim for an account is in the nature of a procedural remedy, designed merely to assist a plaintiff in proving his damages in cases where the extent of such damages are peculiarly within the knowledge of the defendant. He points out, however, that the provisions in the South African Act, which are identical to subss (6) of (7) of s 24 of Chapter 200, are clear indications that what the Legislature envisaged by "an account of profits" was not merely a procedural remedy but a remedy in terms whereof the profits of the infringer are automatically awarded to the plaintiff. The plaintiff does not have to prove his true damages. I agree with the submission of the learned author that, in our copyright law, an account of profits is a remedy in all material respects the same as an account of profits in English law - see *Video Parktown v Paramount, Shelburne & Century* 1986 (2) SA 623 (T) at 639.

It is ordered that -

- (a) The respondent is interdicted from producing and/or marketing or distributing pottery which constitutes an infringement of the copyright held by the applicant, in the range of terracotta semi-glazed ashtrays, jugs, goblets and cups produced by it, as depicted in the photographs annexed to its founding affidavit (hereinafter referred to as "the copyright works", without the licence of the applicant;
- (b) The respondent accounts to the applicant for all sales by the respondent of pottery produced by her which is substantially similar to the copyright works, that such accounts be debated and that respondent pays to the applicant all gross profits made by the respondent in respect of such sales;
- (c) The respondent pays the costs of the applicant.

1989 (2) ZLR p143

SMITH J

Morris, Beale & Collins, applicant's legal practitioners

DW Aitken & Company, respondent's legal practitioners

1989 (2) ZLR p144

S v CHITIYO 1989 (2) ZLR 144 (SC)

Court **Supreme Court, Harare**

Annotations **[Link to Case Annotations](#)**

Gubbay JA, McNally JA & Korsah JA

Criminal appeal

11 July 1989

Flynote

Criminal procedure - evidence - sexual cases - requirement that complainant be credible and that complainant's evidence be corroborated.

Headnote

The general rule, in sexual cases, is that there is a two-stage test of the complainant's evidence: the complainant must be credible and her evidence must be corroborated. In exceptional cases, corroboration in the strict sense may be absent, but there may be significant factors which rule out the possibility of falsification. In the absence of corroboration, there can usually be no conviction. In the absence of both corroboration and strong supporting factors there can never be a conviction.

Cases cited:

S v Mbanje S-75-89 (not reported)

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

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

E Chatikobo for the appellant

M Jones for the respondent

Judgment

McNally JA: This appeal was very similar on the facts and on the law to the appeal of *S v Mbanje* S-75-89, which we allowed a few days before this appeal was heard. In each case the magistrate claimed to have warned himself of the danger of false incrimination in sexual cases, but then proceeded to convict on the uncorroborated and unsupported evidence of a witness who was not in any event an entirely satisfactory witness, although it was said her demeanour

was good. Accordingly, as in *Mbanje's case supra*,

1989 (2) ZLR p145

McNALLY JA

we allowed the appeal at the hearing and set aside the conviction and sentence. I now set out the reasons for our decision.

The complainant in the present case was a young girl of fourteen when, she says, the appellant prevailed upon her to have sexual intercourse with him at his house on a date when his wife was away in Harare. He was a primary school headmaster. She was a Form 2 pupil at the next door secondary school. She was also a relative of his wife, and used to come to his house on occasion to look after the children.

She claims that as a result of this one act of intercourse she became pregnant, but she told no-one about the incident until her parents noticed her pregnancy shortly before she gave birth. She admitted only after lengthy interrogation by her father, and then said the appellant was the man responsible.

Her father gave evidence confirming this.

There is thus absolutely no corroboration, and nothing which can be said to support her evidence so as to eliminate the danger, which is always inherent in cases such as this, that the wrong man is being identified. The fact that the pregnancy corroborates the allegation that she had had intercourse with some man does not lessen the danger of mis-identification.

In *S v Mupfudza* 1982 (1) ZLR 271 (SC), the so-called two stage test was laid down. The first question to be asked is: "Is the complainant credible?". If that question is answered affirmatively, the next question is: "Is there corroboration or support for her evidence?".

The magistrate found that the complainant was credible but he seems to have reached that finding on the basis of her demeanour alone. There were a number of unsatisfactory features about her evidence which Mr *Jones*, for the State, very fairly conceded.

In the first place, she began by saying that the appellant's wife was, at the time of the incident, away in Harare, having been admitted to the maternity ward of Harare Hospital. When this was shown to be wrong, she said the wife had gone to Harare to pay various bills. The wife herself denies this and said she was at home at the time. Her neighbour confirmed this.

Secondly, the charge clearly alleged that the incident took place between 1 December 1984 and 3 December 1984. Since the complainant said it took

1989 (2) ZLR p146

McNALLY JA

place after school, it must have been on 3 December, which was a Monday. Saturday and Sunday are not school days. Schools closed that year on Friday 7 December, and it was established that the appellant and his wife had gone to Mutare for an extended holiday on 4

December, just before the end of term.

Not only was the complainant very uncertain in her evidence as to what part of December it was when the incident happened, but more significantly, the wife and the neighbour were able to be quite adamant that on the days prior to their going on holiday the wife had been at home packing and preparing to go away.

At the very least this evidence threw some doubt on the credibility of the complainant. At best for the State it meant that her evidence as to identity needed significant corroboration or support. In fact there was no corroboration and no support.

Magistrates are reminded once again that *Mupfudza's case supra* sets out the **rule**, whereas cases such as *S v Santos* S-138-85 set out the **exception**. The general rule is that, in sexual cases, the complainant must be a credible witness **and** her version must be corroborated. In exceptional cases, corroboration in the strict sense may be absent but there may be significant factors which rule out the possibility of falsification. In the absence of corroboration, there can usually be no conviction. In the absence of corroboration and of strong supporting factors there can never be a conviction.

Attention is drawn to the passage in *Mupfudza's case supra*, where BARON JA deals with the tendency of magistrates to pay lip service only to the cautionary rule and the two-stage test. Having noted that the magistrate purported to warn himself, he says, at the top of p 273:

"It is clear, however, from the remainder of the judgment that the magistrate did not find the corroboration he sought; he convicted the appellant because he disbelieved him and believed the complainant..."

This is precisely what happened in the present case, and it is precisely why the appeal had to be allowed.

Finally, it should be noted that in cases under s 3A of the Criminal Law Amendment Act where, as here, the girl consented to the act and made no mention of it for months, there is almost always a danger in relying on her

1989 (2) ZLR p147

McNALLY JA

evidence. Almost always she is faced by angry parents and forced to name the man. Inevitably there is a danger that she may wish to protect the real father, or to protect herself by naming a prominent or wealthy man. She is in a real sense an accomplice. Her evidence suffers from the same weakness as that of an accomplice, which is that she can describe the events in detail and with credibility, while simply switching the identity of the man concerned. In such cases, therefore, the need for corroboration or support is all the greater. Police investigating officers and prosecutors should, as a matter of routine, look for corroborative evidence before bringing such cases to court.

In this case they failed to do so. There was thus no basis upon which the conviction could have been allowed to stand.

Gubbay JA: I agree.

Korsah JA: I agree.

Sawyer & Mkushi, appellant's legal practitioners

1989 (2) ZLR p148

SHERENI v MOYO 1989 (2) ZLR 148 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Korsah JA

Civil appeal

17 July 1989

Flynote

Practice and procedure - motion proceedings - dispute on facts which cannot be resolved on papers - courses open to court - impropriety of deciding case on basis of *onus*.

Headnote

Proceedings on notice of motion are not meant to be used where there are disputes of fact. In such proceedings, where the court cannot resolve a dispute on the papers, it should refuse to decide the issue at all. It will either dismiss the application, as a mark of its disapproval of the procedure chosen, or it will refer the matter to evidence. It may not fall back on *onus* as a basis for deciding the matter. Such an approach could lead to great injustice, because the defendant could, in cases where the *onus* lies on him, lose the case without being given an opportunity to place his evidence before the court.

Cases cited:

Fox & Carney (Pvt) Ltd v Sibindi 1989 (2) ZLR 173 (SC)

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

M J Gillespie for the appellant

R M Fitches for the respondent

Judgment

McNally JA: The respondent ("the buyer") applied before the High Court on notice of motion for relief which amounted to the enforcement of a contract of sale of land. He claimed he had bought a certain property and he wanted the appellant ("the seller") and his relatives evicted so that he could take occupation of what he had bought.

McNALLY JA

The seller's affidavit admitted virtually all the buyer's allegations, but put up the defence that he had changed his mind after the sale and had successfully persuaded the buyer to agree to the cancellation of the sale.

We made an order at the hearing, which I set out below, along with our reasons for coming to the conclusion that we reached.

This is another of the cases in which we have no reasoned judgment from the High Court. We have simply an order in which the learned judge ordered the seller forthwith to deliver vacant possession of the property to the buyer. The CHIEF JUSTICE has already (in *Fox & Carney (Pvt) Ltd v Sibindi* S-71-89, not yet reported ⁽⁶⁾) commented on the problems caused by this practice.

We are informed by counsel that the reasoning behind the order was as follows:

1. The *onus* of proof lay upon the seller because he had admitted the facts upon which the buyer based his claim. The seller thus had to prove his contention that the sale agreement had been cancelled.
2. Since the court was unable to resolve the dispute on the papers, the matter was necessarily to be decided on the basis of the *onus*.
3. Since the seller had not discharged the *onus*, the case had to be decided against him.

If I have not stated accurately the learned judge's reasoning, then that is because he himself has not stated it at all. This court has therefore had to rely upon what counsel say his reasoning was.

Assuming then, as we must, that the reasoning behind the order was as I have expressed it above, the short answer is that that reasoning is faulty. The premise as to the *onus* is correct, but the consequences (2 and 3) do not follow.

One has only to stand back and look at the facts to see the injustice that is likely to follow from such an approach. In this case the seller's defence may be false. But it may just as easily be true. If it is true, a great injustice has been done. He has lost his case without being given an opportunity to place his evidence before the court. And this has happened because his opponent has chosen a particular procedure which is not meant to be used when there are disputes of fact.

McNALLY JA

It is only in action proceedings where all the evidence has been heard that a court which cannot decide between the rival versions will fall back on the *onus*. This must be what the learned judge had in mind. In motion proceedings, where the court cannot decide between rival

versions, it will refuse to decide the issue at all. It will either dismiss the application, as a mark of its disapproval of the procedure chosen, or it will refer the matter to evidence in one or other of the ways mentioned at p 235B-C of *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (HC).

If this were not so, then in every case where the defence is a confession and avoidance, the plaintiff would proceed by motion. He would be bound to win, whatever the merits, if the reasoning used in this case were applied.

In the present case there seems no doubt at all that a binding agreement of sale was entered into. Up to that point the seller had no defence. He says, however, that under pressure from his family he changed his mind. He attempted to cancel the sale. The buyer agreed and cancelled. If he can establish that, he will succeed. What possible reason can there be for denying him the opportunity to establish that defence by way of *viva voce* evidence?

The only question was what order should be made. This is a case where the issue was a simple one. Did the parties enter into a binding agreement cancelling the agreement of sale at the meeting at the offices of Messrs Stumbles and Rowe on 11 March 1988? This issue can only be resolved after the hearing of evidence, treating the existing affidavits as pleadings.

As to costs, it was clear that the appellant should have the costs of appeal since he was the successful party. The award of the costs of the hearing, however, depends on the final outcome. If it transpires that the defence is true then the seller should *prima facie* be awarded the costs of the hearing, because the buyer, knowing of the defence, should never have applied on notice of motion. If, on the other hand, it turns out that the defence is not established, the buyer was *prima facie* justified in applying on notice of motion and he should have the costs. Other considerations may emerge. This is therefore a case where the award of costs in the court *a quo* should be left for decision by the judge who decides finally upon the evidence.

These are the reasons for the order we made at the hearing of the appeal. That order was in the following terms:

- "1. The appeal is allowed with costs.

1989 (2) ZLR p151

McNALLY JA

2. The order of the trial court is set aside. The issue as to whether the agreement of sale of the immoveable property was subsequently cancelled is referred to trial, with the affidavits filed in the notice of motion proceedings to stand as the pleadings.
3. The question as to which of the parties is to bear the costs incurred in the notice of motion proceedings is reserved for the determination of the trial court."

Gubbay JA: I agree.

Korsah JA: I agree.

Stumbles & Rowe, appellant's legal practitioners

CONE TEXTILES (PVT) LTD v COMMERCIAL UNION FIRE, MARINE & GENERAL INSURANCE CO LTD 1989 (2) ZLR 152 (SC)

Court **Supreme Court, Harare**

Annotations [Link to Case Annotations](#)

Gubbay JA, McNally JA & Manyarara JA

Civil appeal

27 June & 18 July 1989

Flynote

Arbitration - arbitrator - misconduct by - failure to consider an issue as opposed to an argument - amounts to misconduct in terms of s 12(2) of the Arbitration Act [Chapter 12] - review of arbitrator's decision - matters which court may have regard to.

Headnote

If an arbitrator overlooks or misconceives a submission, that is an act of misconduct in terms of s 12(2) of the Arbitration Act [*Chapter 12*], allowing a court to intervene. It is not misconduct if he does not deal with every argument advanced before him or even if he misconceives the arguments. The fact that a paragraph of the written submission incorporates an annexure formulating the claim, which formulation was explained in the written argument, does not transform the issue into an argument.

In reviewing the arbitrator's decision, it is proper for the court to have regard, not only to what appears on the face of the award or anything disclosed by some contemporaneous writing, but also to additional comments subsequently made by the arbitrator in consequence of a request by the legal practitioners representing one of the parties

Cases cited:

Cone Textiles (Pvt) Ltd v Redgment & Ors 1983 (1) ZLR 88 (SC)

McKenzie NO v Basha 1951 (3) SA 783 (N)

Rhodesia Electricity Supply Commission v Joelson Bros & Bardone (Pvt) Ltd 1977 (2) RLR 85 (GD); 1977 (4) SA 639 (R)

Macpherson Train & Co Ltd v J Milhem & Sons [1955] 2 Lloyd's Rep 59 (CA)

Oleificio Zucchi SpA v Northern Sales Ltd [1965] 2 Lloyd's Rep 496 (QB)

Holgate v Killick (1861) 7 H&N 418; 158 ER 536

George v Motor Bargains (Pvt) Ltd 1966 RLR 222 (AD); 1966 (3) SA 431 (RA)

May & Ors v Reserve Bank of Zimbabwe 1985 (2) ZLR 358 (SC); 1986 (3) SA 107 (ZS)

M D Kuper SC, with him *J B Colegrave*, for the appellant

A P de Bourbon SC, with him *K D Humphreys*, for the respondent

Judgment

Gubbay JA: The appellant, a large textile manufacturer, insured with the respondent company its plant and machinery, fixtures and fittings, and stocks and materials-in-trade, against destruction or damage by fire. The Fire Policy in question was issued on 6 August 1981 and was still operative on the evening of 7 April 1983, when one of the appellant's warehouses, situated in a twenty-five acre industrial complex at Seke was gutted by fire. Stocks and materials-in-trade were destroyed, the net value of which was agreed by the parties at \$7 185 577. It was further accepted that the value of all property insured at the outbreak of the fire was \$42 907 091, being \$17 908 938 for stocks and materials-in-trade and \$24 998 153 for plant and machinery, thus making the total sum insured, being \$46 320 000, greater than the total value of the property insured.

The respondent acknowledged liability under the policy but, relying on Condition 17 thereof, contended that the appellant was only due an amount of \$5 112 838. Accordingly it paid \$5 000 000 some time before 25 October 1983 and the balance of \$112 838 on 17 December 1984. The appellant disagreed with the respondent's assessment of its liability and the dispute was submitted to arbitration.

Condition 17 of the Policy of Insurance provides:

"If the property covered hereby shall at the commencement of any destruction of or damage to such property by any peril insured against be collectively of greater value than the sum insured thereon, then the insured shall be considered as being his own insurer for the difference and shall bear a rateable share of the loss accordingly. Every item, if more than one, of the Policy, shall be separately subject to this Condition."

1989 (2) ZLR p154

GUBBAY JA

An integral part of the Policy is a Schedule which divides the property covered into fourteen separate categories, termed items, and numbered. Against each item is stated the individual sum insured in respect thereof. Following upon Item 14 is an unnumbered line reading: "On Claims Preparation Costs \$10 000,00". The total of all fifteen Items is \$46 320 000.

Items 4, 12 and 14 read as follows:

"4. On Stocks and Materials-in-Trade of every description \$6 500 000,00

Copyright Juta & Co Ltd

The property described by Item Numbers 1 to 4 hereof is contained in the Buildings built partly of Brick and partly of Asbestos, occupied by the Insured as Spinners of Synthetic and Natural Fibre, Manufacturers of Knitted and Woven Textiles, Dyers and Texturisers, situate Chirozwa Road, Seki Industrial Complex, Seki Township, Harare District, Zimbabwe...

12. On Stocks and Materials-in-Trade of every description \$ 500 000,00 whilst contained in the Building occupied as Warehouse and situate at Seki Township, Harare District, Zimbabwe...
14. On Stocks and Materials-in-Trade of every description \$2 000 000,00 description, not otherwise Insured, whilst contained in any of the within described Buildings and/or whilst in transit thereto and therefrom."

The submission to arbitration required the arbitrator to determine which of four formulations, expressed in the alternative and in descending order of monetary worth, constituted the appellant's entitlement to payment. It was worded thus:

- "1. On a proper construction of the policy, what further payment, if any, Cone Textiles is entitled to from CU Insurance, more particularly, whether Cone Textiles is entitled to payment of -
 - (a) The balance of the full amount of the claim, namely \$2 072 739, as formulated in Annexure '1' to the submission made on behalf of Cone Textiles; or alternatively
 - (b) the sum of \$1 952 252 as formulated in Annexure '2' to the submissions on behalf of Cone Textiles; or alternatively

1989 (2) ZLR p155

GUBBAY JA

- (c) the sum of \$901 578 as formulated in Annexure '3' to the submissions on behalf of Cone Textiles; or alternatively
- (d) whether Cone Textiles is entitled to no further payment save for interest as contended by CU Insurance."

In his written award the arbitrator ruled that the fourth formulation applied.

Being of the opinion that the arbitrator had overlooked or misconceived certain of the issues which he was required by the agreed submission to determine, namely, the formulations in para 1(b) and 1(c), the appellant brought a notice of motion before the High Court, seeking to have the award set aside on the ground of the arbitrator's misconduct of the proceedings, as envisaged under s 12(2) of the Arbitration Act [*Chapter 12*]. That subsection, where relevant, provides:

"Where an arbitrator or umpire has misconducted the proceedings ...the Court may set the award aside and may award costs against such arbitrator or umpire personally."

In alleging misconduct the appellant relied solely upon a claim of technical or legal misconduct, as denoting irregularity and not upon any moral turpitude. The onus of proving this rested with it.

See *Cone Textiles (Pvt) Ltd v Redgment & Ors* 1983 (1) ZLR 88 (SC) at 92B.

It was not in contest, and rightly so, that if what the arbitrator did was to overlook or misconceive a submission he would have misconducted the proceedings within the meaning of s 12(2) of the Arbitration Act, thereby allowing a court to intervene. See *McKenzie NO v Basha* 1951 (3) SA 783 (N) at 787H; *Rhodesia Electricity Supply Commission v Joelson Brothers & Bardone (Pvt) Ltd* 1977 (2) RLR 85 (GD) at 92; 1977 (4) SA 639 (R) at 643D; Jacobs *The Law of Arbitration in South Africa* p 143.

The learned judge *a quo* (BLACKIE J) dismissed the application with costs. He held that:

"...what has happened in this case is, not that the (arbitrator) has misinterpreted the submission to arbitration, but that he has mis-stated an argument submitted to him by the applicant. That, as has already been noted, is not misconduct."

If that is a correct analysis, the appellant has no cause for complaint, for not

1989 (2) ZLR p156

GUBBAY JA

only is it a trite principle that an arbitrator need not deal with every argument advanced before him, but that even a misconception as to an argument will afford no ground for setting aside the award. See *Macpherson Train & Co Ltd v J Milhem & Sons* [1955] 2 Lloyds Rep 59 (CA) at 66; *Oleificio Zucchi SpA v Northern Sales Ltd* [1965] 2 Lloyds Rep 496 (QB) at 521-522; *Russell on Arbitration* 20 p 423.

This the appellant well appreciated. It comes before this court upon a contention that, although the learned judge was correct in perceiving the error which the arbitrator had made, he incorrectly held it to be no more than a mis-statement of an **argument**, when in reality the arbitrator had overlooked an issue. In other words, the learned judge failed to recognise the true nature and significance of the arbitrator's error.

It is convenient at the outset to mention a letter written by the arbitrator subsequent to his award, in response to the suggestion made by the appellant's legal practitioners that he had overlooked one of the issues, namely, the meaning and effect to be given to Item 14 of the Schedule to the Policy in relation to the other Items in the Schedule. In his letter the arbitrator summarised the issue raised by paragraph 1 of the submission in this way:

"What further payment, if any, Cone Textiles is entitled to receive from CU Insurance";

and went on to say that he had dealt with it.

While it is recognised that a court reviewing a decision of an arbitrator upon the matter referred to him will not look at anything save what appears on the face of the award or is disclosed by some contemporaneous writing (see *Holgate v Killick* (1861) 7 H&N 418; 158 ER 536), it was common cause that *in casu* regard was to be had to the arbitrator's additional comments, for they had been made in consequence of the invitation by the appellant's legal practitioners, who had then put the letter before the court *a quo*.

It was Mr Kuper's contention, on behalf of the appellant, that to state the dispute arising under

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para 1 of the submission as baldly as the arbitrator did, would be to fail to delineate the real and meaningful issues between the parties. Counsel drew attention to the express incorporation in subparas (a), (b) and (c) of Annexures 1, 2 and 3 respectively, which Annexures in turn referred to the detailed written argument addressed to the arbitrator. So, for example, Annexure 1 was based upon paras 10, 12 and 13 of the appellant's argument, and Annexure 2 on para 14 thereof.

1989 (2) ZLR p157

GUBBAY JA

There can be no doubt that in relation to the question posed in para 1(a) the arbitrator correctly understood that the answer turned upon an interpretation of Condition 17 of the Policy. He would have looked to paras 10, 12 and 13 of the appellant's argument and to paras 1 to 13 of the respondent's reply, before coming to the conclusion that each Item in the Schedule was to be separately subject to average, as urged by the respondent.

The effect of a "subject to average" clause is that in the event of a partial loss of the subject-matter of insurance, the insured cannot recover the whole amount of his loss within the limits of the policy, but only such proportion of the loss as the amount of the insurance bears to the full value of the subject-matter at the time of the fire. See generally *MacGillivray and Parkington on Insurance Law* 8 ed paras 1731-1733.

Having disposed of the first question, or the highest monetary claim as it were, the second question under para 1(b) fell to be considered. This postulated the rejection of the appellant's contentions in relation to para 1(a) and a ruling in favour of the respondent. That this is so is apparent from the opening words of para 14 of the written argument placed before the arbitrator:

"Even if the insurer's contentions are regarded as correct for the purpose of the argument, it does not follow, it is submitted, that the manner in which the insurer has applied those contentions to the calculation of the loss is also correct."

Put crisply, what was in dispute was whether Item 14 of the Schedule, relating as it did to stocks and materials-in-trade of every description, **not otherwise insured**, provided a net which caught all amounts not taken into account under other Items, because of average under those Items—that is, a net to gather up rejected claims of average—as urged by the appellant. *Per contra* whether the cover afforded by Item 14 was "a floating insurance" or "a floater", which indemnified the appellant (i) in respect of margins left uninsured by other policies in force at the time of the loss; (ii) against fluctuations of the value of the goods at risk at the various locations described in the schedule; and (iii) in respect of goods held in trust which are not insured by the owners of those goods, as argued by the respondent. See *Dictionary of Fire Insurance* p 169; Biggs Porter *The Law of Insurance* 4 ed p 70.

If the appellant's interpretation of the meaning and effect of Item 14 was correct, the consequence, to quote its own words, would be this:

1989 (2) ZLR p158

GUBBAY JA

"...if in the Seke complex the insured held \$12 648 592 of the stock then \$6 500 000 of this stock was insured by item 4 and the balance of \$6 148 592 which was then 'not otherwise insured' was covered by item 14 of the schedule to the policy."

What the appellant was saying to the arbitrator was that, accepting that Condition 17 means that each Item in the Schedule is separately subject to average with the property under each Item being treated collectively in calculating that average, Item 4 and Item 14 cannot be added together and average applied to the overall total as if the sums insured under each of these Items had been one sum insured in a higher figure, because to do so would be contrary to the interpretation of Condition 17, which requires average to be applied to each Item separately.

The gravamen of the arbitrator's reasoning appears from the following passage of the award:

"Thus, it seems to me clear that the meaning of Condition 17 as it applies in this case is, for example - If the property covered by Item 4 of the Schedule shall at the commencement of any destruction of or damage to such property by any peril insured against be collectively of greater value than the sum insured on Item 4, the insured shall be considered as being his own insurer for the difference and shall bear a rateable share of the loss accordingly. If this is a correct interpretation of the Condition, then it seems to me that Cone Textiles is not entitled to have the average calculation made on any more favourable basis than that used by Rennie, Batten and Russell in arriving at the figure of \$5 112 838 and, therefore, that no further capital amount is owing to Cone Textiles."

While the finding contained in the first sentence was fatal to the appellant's claim under para 1(a), it did not dispose of the second formulation under para 1(b). I agree with Mr *Kuper* that the second sentence quoted above upholds the fourth formulation in para 1(d) upon the express basis that if the finding in the first sentence is "a correct interpretation of the Condition", then the calculation which brings no further payment to the appellant must, in consequence, flow.

That this was the arbitrator's approach is underscored in another passage of the award when he said:

"Thus, the nature of these claims raises the issues, firstly, whether, since

1989 (2) ZLR p159

GUBBAY JA

the total sum insured under the Policy exceeds the total agreed value of all property insured at the time of the fire, average should not be applied at all; and, secondly, if average has to be applied, in what manner and taking into account what values and sums insured it should be applied. This clearly involves the determination of what is the proper interpretation of Condition 17."

But whereas Condition 17 was at the heart of para 1(a) of the submission, Item 14 was the crux of para 1(b). To state, as the arbitrator did, that the appellant's claim for \$1 952 252 involved taking into account, in averaging, the sum insured under Item 5 of the Schedule as well as the sums insured under Items 4, 12 and 14, evidences a lack of comprehension of the manner in which that claim was formulated. As already mentioned, the claim was formulated on the basis that Item 14 was broad enough in ambit to catch rejected amounts of average, and so was not to be "lumped together" with Item 4 and average applied to the overall total.

The arbitrator remarked in his letter that an interpretation of Item 14 did not raise an issue which was submitted to him for "decision and award", as it was not mentioned in the submission

to arbitration. If by this he meant that Item 14 was not mentioned expressly in para 1 of the written submission he was, of course, right. However, by analogy, Condition 17 was also not referred to, yet it was properly recognised to be a specific issue under subpara (a).

The learned judge *a quo* expressed the view that para 1(b) of the submission to arbitration represented nothing more than "a conclusion dependent on an argument" put before the arbitrator. And as it emerged from the letter that all the appellant's arguments had been considered, it mattered not that the arbitrator had misconceived or mis-stated one of them; for that fault did not constitute misconduct.

I cannot agree. A careful reading of para 1 of the submission leaves me in no doubt that subpara (b) was an independent and substantive issue for determination. The fact that it incorporated an Annexure formulating the claim, which formulation was explained in the written argument, did not transform the issue into an argument. The issue was a conclusion dependent on that argument only in the sense that every claim is a conclusion valid if the supporting facts and argument are correct. The true consequence is, however, that if the argument is misunderstood the issue in dispute is not correctly perceived, if indeed perceived at all.

1989 (2) ZLR p160

GUBBAY JA

I accept Mr *Kuper's* supposition that if in his letter the arbitrator was seeking to assert that he had considered the issue and arguments **other than** in the manner and to the extent stated in the passages of the award quoted above, (which seems doubtful), it was not open to him to do so. The award document itself proclaims the position. It is definitive of what the arbitrator did.

It necessarily follows from the foregoing that I reject Mr *de Bourbon's* argument that the issue the parties submitted to arbitration was the broad one of what amount, if any, was due to the appellant upon a proper construction of the Policy, with subparas (a) to (c) merely constituting alternative results and contentions.

In the result, the appeal must be allowed with costs, it being unnecessary to make specific provision in relation to the costs of three legal practitioners, although such use was justified. See Rules of the Supreme Court, Third Schedule para 1; *George v Motor Bargains (Pvt) Ltd* 1966 (3) SA 431 (RA) at 435H; *May & Ors v Reserve Bank of Zimbabwe* 1985 (2) ZLR 358 (SC) at 389; 1986 (3) SA 107 (ZS) at 130D-F. The following order is substituted for that of the court *a quo*:

1. The application is allowed with costs.
2. The award of the arbitrator made on 29 October 1985 is hereby set aside.
3. The arbitrator is hereby directed to consider the application of the provisions of Condition 17 of the Fire Policy, namely, that average shall apply to each Item of the Schedule, with the property referred to in each Item being treated collectively for the purpose of assessing such average, to Item 14 of the Schedule, and to consider the meaning and effect to be given to Item 14.

McNally JA: I agree.

Manyarara JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

1989 (2) ZLR p161

S v GUNDU 1989 (2) ZLR 161 (HC)

Court **High Court, Harare**

Smith J

Criminal Review

19 July 1989

Flynote

Criminal procedure - compensation order under s 341 of Criminal Procedure and Evidence Act [Chapter 59] - *audi alteram partem* rule to be followed - need for court to exercise discretion judicially - desirability of advising complainants of their right to apply for compensation - form of order - must sound in money.

Headnote

The *audi alteram partem* principle applies as much to applications for compensation under s 341 of the Criminal Procedure and Evidence Act [Chapter 59] as to any civil suit. The accused, particularly if he is unrepresented, should be told the effect of the application and given the opportunity to put forward any defence he may have as to either his liability for or the *quantum* of damages. If he disputes either of these issues, they must be properly investigated and, if necessary, evidence must be heard. The fact that the accused has been given this opportunity must be properly recorded, as should any defence put forward, no matter how unconvincing it may be.

The magistrate has a discretion whether or not to grant the order. This discretion should be exercised judicially. He should not grant the order if there is any serious dispute on the issues involved or if to adjudicate the claim would cause prejudice to the accused. The applicant should in these circumstances be left to his civil remedy.

In appropriate cases a trial magistrate should advise a complainant of his right to apply for the award of compensation; most members of the public are not aware of their right or that a formal application is necessary.

Awards of compensation should sound in money unless there are very special

1989 (2) ZLR p162

SMITH J

circumstances requiring otherwise. If the parties thereafter agree that one party will accept property in lieu of money, that would be a private agreement entirely separate from the award of compensation by the court.

Cases cited:

R v Bidi 1969 (1) RLR 75 (GD); 1969 (2) SA 55 (R)

R v Ndhlovu & Ors 1969 (2) RLR 517 (GD); 1970 (1) SA 381 (R)

R v Kurayi 1958 R&N 863 (SR); 1959 (2) SA 62 (SR)

R v Khunau 1924 TPD 584

Judgment

Smith J: The two accused were charged with two counts of stock theft. They were charged with stealing two goats, the property of Anastasia Chivanga. The first accused was convicted on both charges and the second accused was acquitted. The evidence showed that in fact the first accused stole only one goat from Anastasia Chivanga. The second goat he stole belonged to Sithembile Zimuto. The charge is accordingly amended to allege that the accused stole one goat from each complainant. The accused was sentenced to 6 months' imprisonment on the first count and 4 months' imprisonment on the second. Of the total of 10 months, 3 months were conditionally suspended for a period of 5 years. Compensation was awarded to Anastasia in the sum of \$30 or a goat of equivalent value.

In terms of s 341 of the Criminal Procedure and Evidence Act [*Chapter 59*], compensation may be awarded if the injured party, or the prosecutor acting on the instructions of such party, applies therefor. There is nothing in the record to indicate that such an application was made. This, however, is not the only defect in the procedure that was followed. A more serious defect is that the first accused was not given an opportunity to put forward any defence either as to his liability for damages or as to the *quantum* thereof. In *R v Bidi* 1969 (1) RLR 75 at 77 (GD); 1969 (2) SA 55, BEADLE CJ said:

"The *audi alteram partem* principle applies as much to applications for compensation under s 386 [of Chapter 31 of 1963] as to any civil suit. This much is implicit from such decisions as *R v Kurayi* 1958 R&N 863. An accused, especially if he is unrepresented, should be told by the judicial officer what the effect of an application under s 386 is, and he should be asked whether he disputes either his liability for damages or the *quantum* of the damages applied for. If he does dispute either of these issues, then they must be properly investigated and, if necessary, evidence must be heard. It must be reiterated here, however, that the

1989 (2) ZLR p163

SMITH J

magistrate has a discretion not to make the order applied for, and he should exercise this discretion against the applicant if there is any serious dispute on the issues involved."

Not only must the accused be given a chance of contesting the application but the fact that he has been given such a chance must be properly recorded as it is an essential feature of the

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record - see *R v Ndhlovu & Ors* 1969 (2) RLR 517 (GD); 1970 (1) SA 381 (R).

In this case the magistrate accepted the value of the goat that was stolen by the first accused as being \$30, because that was what was stated in the outline of the State's case, although the complainant said that the value of her goat was \$40. The accused did not contest her evidence on this point but then, at that stage, he was obviously not aware of the significance thereof because he did not then know that he would be ordered to pay compensation. The goat that was stolen from Anastasia was in fact killed but some of the meat was recovered. It is not clear from the record whether or not the meat was returned to Anastasia. If it was, the value thereof should have been deducted from the value of the goat.

In *R v Kurayi* 1958 R&N 863 (SR); 1959 (2) SA 62, BEADLE J (as he then was) referred with approval to the case of *R v Khunau* 1924 TPD 584, where it was held that the object of the provision in the South African legislation corresponding to s 341 of the Code was to give a complainant an opportunity of obtaining compensation in an inexpensive and expeditious manner. At p 868 (p 65 of the South African Report) the learned judge went on to say:

"It is quite clear from the wording of s 368 [of Chapter 28 of 1938] that the judicial officer has a discretion whether or not to award compensation, even though the act constituting the offence directly caused the damage. This is clear from the use of the word 'may' in subs (1) and from the wording of s 373(2), which reads:

'The Court may in any case refer a party applying for compensation under this Part of the Act to his remedy under the ordinary law.'

This discretion must be exercised judicially; and, if to adjudicate on the claim under the provisions of s 368 would cause prejudice to the accused, the judicial officer should in the exercise of his discretion dismiss the application and refer the applicant to his civil remedy."

I have no doubt that most members of the public are not aware that they may

1989 (2) ZLR p164

SMITH J

apply for compensation in terms of s 341 of the Code and that a formal application is necessary before compensation can be awarded. I would suggest that in appropriate cases the trial magistrate should advise a complainant of his right to apply for the award of compensation in terms of s 341 of the Code. The magistrate should then, if the complainant makes the application, record that it has been made and thereafter afford the accused an opportunity of putting forward his defence. The record must show whether any defence has been put forward, no matter how unconvincing it may be.

The magistrate ordered compensation in the sum of \$30 or a goat of equivalent value. In my view, awards of compensation must sound in money unless there are very special circumstances requiring otherwise. The award of a goat "of equivalent value" immediately introduces the problem of deciding whether the value of the goat is in fact equivalent. Who decides the matter? Is it for the complainant to decide whether the value is equivalent or can the accused make the decision? What happens if there is no agreement and yet the accused insists that he wants to hand over a goat? The order of the magistrate must be for an amount of money specified by him. The parties may of course thereafter agree *inter se* that the complainant will

accept a particular goat in lieu of the money awarded by the court. That, however, would be a private agreement entirely separate from the award of compensation by the court.

The amount involved in this case is trivial and it would be a hardship to expect Anastasia to go to the expense of pursuing her civil remedy. Had she made an application for compensation, I would have followed the procedure adopted by BEADLE CJ in *Ndhlovu's* case *supra*, which was to remit the case to the magistrate to hear the application for compensation in the normal way. However as no such application was made, I am unable to do so.

The convictions and sentences are confirmed but the award of compensation is set aside.

Reynolds J agrees.

1989 (2) ZLR p165

DE AGUIAR v DE ALMEIDA 1989 (2) ZLR 165 (HC)

Court High Court, Bulawayo

Muchechete J

Application for summary judgment

16 June & 21 July 1989

Flynote

Practice and procedure - summary judgment - founding affidavit - what documents may be annexed thereto - unliquidated counterclaim by defendant for amount appreciably less than main claim - no payment into court made - not a bona fide defence for purposes of summary judgment.

Headnote

In an application for summary judgment, it is permissible for the plaintiff to attach to his founding affidavit a copy of the contract on which the application is based and other documents, such as letters, which, though evidential in nature, disprove the defendant's *bona fides*. The plaintiff is also entitled to raise other issues, such as estoppel, failure to report allegations of theft and failure to produce invoices for items claimed and the value of items allegedly removed, and to deal with them in order to prove that the defendant's defence is largely not *bona fide*.

Where the defendant raises a counterclaim which is vague, unsubstantiated and unquantified and which is probably less than the main claim, and where no payment into court of the balance is made, such a "counterclaim" does not disclose a *bona fide* defence for the purpose of defeating an application for summary judgment.

Cases cited:

Beresford Land Plan (Pvt) Ltd v Urquhart 1975 (1) RLR 260 (AD); 1975 (3) SA 619 (RA)

Anglo-African Shipping Co (CA) (Pvt) Ltd v Trinity Engineering (Pvt) Ltd & Anor 1984 (2) ZLR

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MUCHECHETERE J

Trinity Engineering (Pvt) Ltd & Anor v Anglo-African Shipping Co (CA) (Pvt) Ltd 1986 (1) SA 700 (ZS)

Stassen v Stofberg 1973 (3) SA 725 (C)

A H Denbury for the plaintiff

S B A Longhurst for the defendant

Judgment

Muchecheter J: This is an application for a summary judgment and it is opposed by the defendant.

The facts in the matter are that on 22 March 1988 the plaintiff and the defendant entered into a written agreement in terms of which the defendant undertook to pay the plaintiff a sum of \$50 000,00 in consideration for the name and goodwill attaching to the plaintiff's former business, Johns Motor Engineering, and in consideration for an undertaking by the plaintiff in terms of clause 1 of the agreement not to trade in competition within a radius of ten kilometres of the Hwange Post Office for a period of five years. In terms of clause 3 of the Agreement payment of \$20 000,00 was effected on the date of transfer of the land on which the business was situated, namely stand 587, which transfer was registered on 1 July 1988. The remaining terms of the Agreement provided that the balance of \$30 000,00 would be payable with interest at ten per centum in three equal instalments before the 30th, 60th and 90th days, respectively, of the date of transfer, that in the event of the defendant defaulting in the payment of any one instalment the full balance then outstanding would become immediately due and payable, and that, in the event of the plaintiff having to instruct his legal practitioners to recover any sums due, the defendant would be liable for the payment of the legal costs incurred thereby, including costs as between attorney and client and collection commission.

The defendant was, however, granted an extension of time in which to pay the first of the said instalments - from 30 July to 30 August 1988 - and the dates for the remaining instalments were likewise extended to 30 September and 30 October 1988, respectively. A payment of \$10 000,00 was made on 30 August 1988, at which date interest at \$501,36 had accrued on the balance of \$30 000,00. The payment was made by cheque and the bank's commission on it was \$50,00. In terms of clause 3(d) of the agreement such commission was payable by the defendant.

The plaintiff claims that legal fees in connection with the delay in the payment of the first instalment and the subsequent extension of time

MUCHECHETERE J

amounted to \$100,00 and that payment of these is due. This the defendant denies and has refused to pay. The defendant has also since refused to pay the balance of \$20 000,00 and has not paid the \$501,36 interest and the \$50,00 commission.

On 29 August 1988 the parties concluded another agreement of sale in terms of which the defendant purchased from the plaintiff the items of movable property detailed on an invoice. It was agreed and stated on the invoice that, of the total purchase price of \$26 408,94, a sum of \$20 000,00 would be paid on the date of the sale and the balance of \$6 408,94 by 29 September 1988. The defendant has paid the initial amount but has since refused to pay the balance.

The plaintiff alleges that the defendant has refused to pay all the above sums without lawful cause and therefore issued summons against the defendant claiming the same together with interest at the rate of 10% per annum on all the amounts claimed and costs of suit as between attorney and client, inclusive of legal practitioners collection commission. The defendant entered an appearance to defend but before he filed his plea this application was made.

In support of this application, the plaintiff filed a lengthy affidavit within which he anticipated the defendant's possible defence which he stated arose from the correspondence between the parties' respective legal practitioners. He also commented on that defence and attached documents which he alleges show that there was no substance in the defence. The nature of the affidavit was attacked by Mr *Longhurst*, for the defendant, who urged that it should be struck out. He submitted that an affidavit in support of an application for summary judgment should simply verify the facts or elements in the cause of action and not set out evidence and that it is not necessary to repeat the cause of action. In other words, a summary judgment application is not intended to be a trial - Herbstein and Van Winsen's *The Civil Practice of the Superior Courts in South Africa* 3 ed p 302-309.

He further submitted that the plaintiff's affidavit, on the other hand, sought to adduce evidence and to admit documents which are not simply the documents on which his claim is based, but which are, in fact, evidence. He argued that while a deed of sale, as in this case, may be introduced because it is a liquid document the plaintiff should not, however, as was done in this case, commit or arouse evidence thereon. He also submitted that three annexures to the plaintiff's affidavit were letters which were clearly evidence

1989 (2) ZLR p168

MUCHECHETERE J

and that, whilst they were pertinent in a trial, they were not admissible in these proceedings, even though they may set out the defendant's defence to the action. Further, he said, four paragraphs in the plaintiff's affidavit set out what could only be construed as evidence.

Mr *Longhurst* also argued that in anticipating the defendant's defence the plaintiff was endeavouring to circumvent Order 10 of the High Court Rules by seeking in effect to adduce evidence and not simply to verify his causes of action. This, he argued, amounted to an attempt to reply to the defendant's allegations as to his defence and was not permitted in terms of the

Rules.

However, I agree with Mr *Denbury*'s submission that the Rules involve not only the verification of the plaintiff's cause of action, but also a belief that there is no *bona fide* defence to the action. I also agree that it is now accepted that a copy of the contract upon which the action is based can be attached to the plaintiff's affidavit and further that in Zimbabwe it is also permissible to attach other documents, such as letters, to the affidavit which, although evidential, prove or disprove the defendant's *bona fides*. In this connection see *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) RLR 260 at 268-269; 1975 (3) SA 619 (RA) at 624, where MACDONALD ACJ said :

"In a large number of cases it would indeed be sufficient for the plaintiff to do more than refer to the facts alleged in the declaration or particulars of to the summons (this will often be the position where the declaration or particulars to the summons have been amplified by further particulars). But it is possible to think of cases where it is most desirable for the plaintiff, in his pursuit of summary judgment, to swear to the truth of facts other than those alleged in the declaration or particulars of summons. A simple example which occurs commonly in practice will illustrate this: The plaintiff in his declaration may, for example, rely upon a written contract and may or may not annex a copy of it to his declaration. Whether or not he does so, he is unquestionably entitled, in verifying his cause of action, to annex to his affidavit an original contract ...

There is certainly nothing in the wording of the Rule which suggests that the best method of verifying is prohibited on pain of having the annexure struck out with costs. Nor is it possible to think of any reason why the Rule should contain such a prohibition."

In the same judgment MACDONALD ACJ also stressed the need for the courts to ensure that the utility of the Order relating to applications for summary

1989 (2) ZLR p169

MUCHECHETERE J

judgment should not be impaired and that rigid rules which lead inevitably and swiftly to formalism and technicality in legal process are to be deprecated. He also stated that it is the substance rather than the form of the affidavit which was important.

I also agree that the plaintiff's affidavit in this case is similar to the founding affidavit in the *Beresford* case *supra*, in that, in both cases the defendant's defences were anticipated and dealt with. The plaintiffs in both cases had been made aware of the natures of the defendants' defences in the nature of counterclaims by way of the letters which were annexed to the affidavits. In the *Beresford* case it was held that the plaintiff was entitled to attach those letters. I also similarly consider that the plaintiff is entitled to attach the letters and, as far as possible prove, that the counterclaim is not *bona fide*. I further agree that the plaintiff was entitled to raise other issues, such as estoppel, failure to report allegations of theft, failure to produce invoices of items claimed and the values of items allegedly removed and to deal with them in order to prove that the defendant's defence was largely not *bona fide*. In conclusion, I am, therefore, of the view that the plaintiff's affidavit is acceptable in the form it is. It is therefore admitted.

On the merits Mr *Denbury* submitted that the plaintiff's total claim was \$29 981,63. He also submitted that the defendant admits liability for all except the claim of \$100,00 in respect of the said legal fees. He also stated that on the other hand the defendant's only specific claims were \$733,50 in respect of the alleged removal of rubbish from the said premises and a sum in

excess of \$500,00 concerning the alleged charges for transporting the Volvo. In this connection, he stated that there was no invoice in respect of the removal charge and nothing at all to substantiate the transport charge. He further stated that, as for the alleged damages claim, there was absolutely nothing to substantiate it under its various heads and that little or no attempt had been made by the defendant to quantify the damages he allegedly sustained. He also argued that some values placed by the defendant upon assets in the counterclaim should be reduced substantially. In this connection, Mr *Denbury* went through the items which he argued should be substantially reduced and gave reasons why. All these matters are also fully dealt with in the applicant's affidavit.

In conclusion, he submitted that overall the defendant's alleged counterclaim was vague, unsubstantiated and lacking in quantification and that in the circumstances it should not be allowed to defeat the plaintiff's application for summary judgment. He further added that even if a portion of the counter-

1989 (2) ZLR p170

MUCHECHETERE J

claim were to be held to be *bona fide* the amount thereof will be considerably less than the plaintiff's claim and that for this reason too the plaintiff should not be denied his application for judgment. In this connection see *Anglo-African Shipping Company (CA) (Pvt) Ltd v Trinity Engineering (Pvt) Ltd & Anor* 1984 (2) ZLR 199 (HC) at 206 where SMITH J quoted with approval the decision of CORBETT J (as he then was) in *Stassen v Stofberg* 1973 (3) SA 725 (C) as follows:

"Where a defendant has raised a claim in reconvention and the claim is unliquidated, the law to be applied has been stated by CORBETT J (as he then was) in *Stassen v Stofberg* 1973 (3) SA 725 (C) at 728-9. I quote from the official English translation of the Law Reports as follows:

'If it is accepted therefore that defendant can hold plaintiff liable for damages in respect of the alleged defects in the house, the question arises whether defendant's affidavit discloses a valid defence on this ground. Defendant alleges that he is entitled to a "substantial counterclaim" against plaintiff for damages caused by the latter's "defective work". Although the various defects are fully described, the quantum of this alleged counterclaim is not fully set out. Indeed there is no indication whatsoever of eg to what extent the value of the property was reduced by the defects or of how much it would cost to repair them. Whatever the amount may be, it is probably less than the balance of the purchase price and the other amounts claimed by plaintiff. I will accept that in terms of the Uniform Rule of Court - particularly Rule 22(4) - a defendant who admits the main claim is entitled to raise an unliquidated counterclaim as a defence; that if the counterclaim exceeds the main claim, it constitutes a valid defence in respect of the whole of the claim (see *Spilhous & Co Ltd v Coreejees* 1966 (1) SA 525 (C)); and if the counterclaim is less than the main claim, the defendant may pay the balance into court and in this way raise a valid defence to the whole main claim (see *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C). On the other hand, if a defendant raises an unliquidated counterclaim without in any way establishing its *quantum* - or indeed making an effort to establish it - and where it appears that, in all probability, the counterclaim will be appreciably less than the main claim, and no payment into court was made, such "counterclaim" in my opinion does not disclose a *bona fide* defence for the purpose of summary judgment.'

Although the Supreme Court reversed the decision in *Anglo-African Ship-*

MUCHECHETERE J

ping Co supra *(7) it did not reject the principle enunciated in *Stassen's case supra*; in fact it impliedly approved of it. In the Supreme Court BECK ACJ said at pp 704F and 705A :

"...It was presumably their omission to do so that led the learned Judge *a quo* to characterise their allegations that usurious interest had been paid under the earlier transactions as 'vague', and thus to conclude that no *prima facie* defence based on their earlier transactions had been disclosed. In taking that view the learned Judge was influenced by the approach taken in *Stassen v Stofberg* 1973 (3) SA 725 (C) at 728H-729C...

In my view therefore this is not such a case as is envisaged in the decision in *Stassen v Stofberg (supra)* . The appellants may be able to establish that they have **a very extensive right of set-off arising from the earlier transactions, one that is not appreciably less than the main claim against them**, and I adhere to the view I expressed in *Wilson v Hoffman & Anor* 1975 (1) RLR 3 at 5; 1974 (2) SA 44(R) at 45H where I declined to subject defendants ...to the restriction of a summary judgment against them when they **have made averments which I regard as sufficient to entitle them to plead a counterclaim as a partial defence** to the magnitude of the claim, and to seek to protect their position with regard to costs, if so advised, by making an appropriate payment into court" (the emphasis is mine).

While I agree with Mr *Longhurst* that an application for summary judgment is an extraordinary application and that it should not be granted where a defendant has shown that there is a triable issue or plausible case in his defence, I do not agree that that is so in this case. I agree with Mr *Denbury's* submission that the plaintiff in this case has successfully shown that the defendant's counterclaim is vague, unsubstantiated and lacking in quantification. I further agree that even if a portion of the counterclaim were *bona fide*, the amount would be considerably less than the plaintiff's claim. This, in my view, is a case in which the principle enunciated in *Stassen v Stofberg supra* would apply.

In the circumstances there will be judgment for the plaintiff in terms of the summons.

MUCHECHETERE J

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

Ben Baron & Partners, defendant's legal practitioners.

FOX & CARNEY (PVT) LTD v SIBINDI 1989 (2) ZLR 173 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, McNally JA & Manyarara JA

Civil appeal

1 June & 24 July 1989

Flynote

Appeal - contested civil matter - need for court to give written judgment - duty on appellant's legal practitioner to request judge a *quo* to prepare judgment.

Practice and procedure - summons - service of by officer of court - onus on recipient of summons to show service defective.

Headnote

In a contested civil matter in which issues, facts and the law are disputed, there must be a judicial decision on some question of fact or law in dispute. Such a decision should be in writing, with the merits and demerits of each party's case stated, so that the parties understand how the disputed matters were determined. A written judgment is the foundation on which a litigant builds or loses his hopes of succeeding on appeal. Unless there is a written judgment, it is impossible for the parties to formulate grounds of appeal or for the appeal court to know why the court a *quo* made the decision it did. Once leave to appeal has been granted, the appellant's legal practitioner should, if there is no written judgment, request the judge to prepare one.

Service of a summons by an officer of the court, be he Deputy Sheriff or Messenger, will not lightly be declared invalid upon the mere say-so of the alleged recipient, who normally has a strong motive to claim that proper service did not take place. Where service is *prima facie* regular, there is an *onus* upon the party disputing the matter to show that service was defective.

1989 (2) ZLR p174

McNALLY JA

Cases cited:

Gundani v Kanyemba 1988 (1) ZLR 226 (SC)

Dick v Gwelspec (Pvt) Ltd S-105-88 (not reported)

Salisbury Municipality v Le Roux & Ors 1974 (1) RLR 10 (GD); 1974 (2) SA 185 (R)

Federated Insurance Co Ltd v Malawana 1986 (1) SA 751 (A)

Barclays Bank of Zimbabwe v CC International (Pvt) Ltd & Anor S-16-86 (not reported)

Muller v Braes S-51-86 (not reported)

Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (SC)

Cohn v Rand Rietfontein Estates Ltd 1939 TPD 319

A N H Eastwood for the appellant

The respondent in person

Judgment

McNally JA: The appellant bought a photocopier from the respondent on 30 July 1986 and sought to cancel the sale on the grounds that the photocopier was not new as had been alleged. Summons and declaration were served together on 2 October 1987. The return of service reads as follows:

"Service of this summons was effected on the 2nd day of October 1987 by SL Bruce, Deputy Sheriff of Harare, in the following manner:

By handing a copy thereof, together with a copy of the Plaintiff's Declaration to Miss L Dube, a responsible person and Secretary at the place of business of KVM Trading (Pvt) Ltd, being the co-tenant at the place of business of the within-named Defendant, Martin Sibindi, trading as Just Mart Office Systems, 151A Victoria Street, Harare, who accepted service on behalf of the said Defendant, and by exhibiting ..."

Thereafter, on 15 October 1987, the appellant lodged an application for default judgment, which was granted on 10 December 1987. Subsequently a writ of execution was issued and a vehicle was attached on 26 January 1988. The vehicle later proved to be valueless.

The attachment prompted action on the part of the respondent. His attorneys wrote on 29 January 1988 saying they were instructed to apply for rescission of judgment. On 4 February 1988 they were sent copies of the declaration and return of service.

It was only late in June 1988, after the appellant had discovered that the

1989 (2) ZLR p175

McNALLY JA

respondent owned immovable property, and attached it, that the respondent instituted proceedings to have the default judgment rescinded. Rescission was granted on 21 July 1988 and leave to appeal against that order was granted on 5 September 1988. There was no response from the respondent, but he appeared in person at the hearing of the appeal on 1 June 1989.

We were to a considerable degree hampered in our consideration of the matter by the absence of any reasons for judgment in the High Court. Indeed, the appellant has also had difficulty in formulating its application for leave to appeal and its grounds of appeal. It has had to base its submissions on the attitude adopted by the learned judge during the hearing, in the absence of any written reasons supporting the judgment.

The first allegation was that the learned judge erred in deciding the matter on the basis that service of the summons and declaration was irregular.

If this was the basis of his decision it is necessary to consider the facts and allegations. The service was *prima facie* regular in terms of Order 5 Rule 37(2)(b) of the High Court Rules. The rule provides for service by delivery of a copy of the summons "at his residence or place of business or employment to some responsible person". The respondent's allegation was "Those premises were occupied by numerous persons and businesses. I did not share offices with KVM Trading (Pvt) Ltd and Miss L Dube had no right to receive process on my behalf. At no stage

did I even receive it".

This court has said on several occasions that service by an officer of the court, be he Deputy Sheriff or Messenger, will not lightly be declared invalid upon the mere say-so of the alleged recipient, who of course normally has a strong motive to dispute the allegation that proper service has taken place. See *Gundani v Kanyemba* 1988 (1) ZLR 226 (SC) and *Dick v Gwelspec (Pvt) Ltd* S-105-88 (not reported).

In this case, given the vague and unspecific and unsupported allegations made by the respondent, and bearing in mind the *onus* upon him to show the defect in a service which was *prima facie* regular, I do not accept that he has shown that service was irregular in terms of the Rules.

The respondent, appearing before us in person, explained that the address given was a private house being used as offices and that he occupied the former servant's quarters which were to one side of the main building. He has not chosen to explain his relationship with the occupants of the main

1989 (2) ZLR p176

McNALLY JA

house or to file a supporting affidavit from Miss L Dube. One wonders what would happen to letters addressed to him at that address. He must have had some working arrangement with the occupants of the main house.

I do not consider, in the circumstances, that service on Miss L Dube, employed at the address where he works, has been shown to be improper service. I note that in terms of the equivalent but more detailed South African Rule the service would not have been proper. See *Uniform Rules of Court* 3 ed by Nathan, Barnett and Brink at pp 22 and 24 and *The Civil Practice of the Superior Courts in South Africa* 3 ed by Herbstein and van Winsen, at pp 208-9. I am not, however, prepared to say that on the wording of our Rule the service was improper. Compare *Salisbury Municipality v Le Roux & Ors* 1974 (1) RLR 10; 1974 (2) SA 185.

Even if I am wrong in this regard, it seems to me that the problem can be disposed of on another basis. The respondent did not make an application to court for an order setting aside the service of the summons as irregular. Compare *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (A). Indeed, in seeking and obtaining an order that he file his plea within fourteen days, he implicitly accepted the validity of the service. The appellant's attention was thus not drawn to the allegation, and it was prejudiced in not being able to deal with the matter in its affidavits. In my view, therefore, the question of the validity of the service should not have been considered.

The only question was whether he had personally received it. He says he did not receive it. Assuming that to be so, the procedure which he had to follow is well charted in our decisions. He was required to proceed in terms of Order 9 Rule 63 of the High Court Rules to have the default judgment set aside. He had to establish "good and sufficient cause": *Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd & Anor* S-16-86 (not reported); *Muller v Braes*

S-51-86 (not reported); *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (SC).

It thus becomes necessary to consider the respondent's explanation for his default, and his prospects of success.

As to his default, he says only, and without elaboration, that he was not able to place his attorney in funds (despite his owning fixed property worth \$150 000). The fact is that by 29 January 1988 he knew that default judgment had been taken against him and he did nothing until 21 June 1988. He did not even communicate with the appellant's lawyers. He simply waited until his

1989 (2) ZLR p177

McNALLY JA

immovable properties were attached. Such conduct may be understandable, but it is not reasonable and it is not acceptable.

His prospects of success in defending the claim are in my estimation remote. A firm specialising in repairing photocopiers advised the appellant that major parts of the machine were not new. Another firm, Masose Agencies and Distributors (Pvt) Ltd, which was obviously closely associated with the respondent, since it was he who insisted that the appellant sign a maintenance agreement with that firm, is alleged to have confirmed this orally, though in its letter it was more cautious, merely indicating that a new drum was required.

When he appeared before us in person the respondent raised a further defence. He said it was not he who sold the photocopier to the appellant, but a company with which he was associated. This is a patent falsehood. In his affidavit he uses words inconsistent with that claim time and again:

"I sold a new Copyrite copier to Respondent"... "I sold the machine to Respondent"... "I was justifiably annoyed that whilst the machine had been under guarantee by myself ..."

All these phrases indicate an acceptance of the fact that he was the seller. Never once did he say that a company was the seller. Yet now he draws our attention to various documents in which reference is made to a company. These documents, taken by themselves, might suggest that initially the appellant thought it was dealing with a company. Yet the invoice written out by the respondent himself describes the seller as "Martin Sibindi of Sibindi Estate Co Pvt Ltd". Taking that with his positive assertions in his own affidavit and his statements before us that he imported the machine "under an NCI Licence in my name using my funds abroad", it is clear that this so called defence is simply an attempt further to confuse the issue. This is a highly relevant consideration when one bears in mind that an application for rescission of judgment must be *bona fide*.

All in all I am entirely satisfied that the application for rescission of judgment should not have been granted. I would therefore allow the appeal with costs and alter the judgment of the court *quo* dated 21 July 1988 to read:

"The application is dismissed with costs."

DUBMUTSHENA CJ

Dumbutshena CJ: I have had the advantage of reading in draft the judgment of my learned brother, McNALLY. I agree with it and for the reasons he states I too would allow the appeal.

I would, however, like to add a few words of my own on a matter that gave us a great deal of concern. There was no judgment in the record. Yet the learned judge *a quo* knew that there was going to be an appeal to this court. The appellant applied for leave to appeal against his order. Leave was granted on 5 September 1988. With that knowledge the learned judge ought to have written his judgment. He did not do it. It was not the learned judge's fault alone. The appellant's legal practitioner should have requested the judge *a quo* to prepare a judgment after leave to appeal was granted. He also did nothing about it. It became difficult for us to follow the appellant's attack on a judgment that did not exist. In order to come to a decision, this court had to do the work that should have been done by the court *a quo*. We did not know why the learned judge *a quo* granted the respondent, the applicant in the court below, an order for the rescission of the judgment.

It also appeared that counsel for the appellant was unable to attack properly the learned judge's order because there was no judgment. In his written heads of argument, Mr *Eastwood*, for the appellant, contended that the learned judge's approach was not correct, in that the respondent had not applied to set aside the return of service but had applied for a rescission of judgment on the ground that he had a *bona fide* defence and an explanation for the delay in entering an appearance to defend. He argued that under the common law an application to set aside an irregular service of the summons requires the exercise of a judicial discretion. It is difficult to say whether the learned judge exercised his discretion or not because there is no written judgment in the record. There is no indication that the learned judge rescinded the default judgment because the respondent had a *bona fide* defence and had given a reasonable explanation for the delay in entering an appearance to defend. It is difficult to say whether the learned judge considered the allegation of irregular service made by the respondent in the court below.

It was difficult for the appellant or, for that matter, the respondent to argue an appeal for or against a terse order which is silent on the reasons that influenced the court to arrive at its decision. The order granted reads:

"That judgment granted in Case No. HC 3172/87 be and is hereby rescinded.

DUBMUTSHENA CJ

That the applicant file his plea within 14 days hereof.

That costs be costs in the cause."

As I mentioned before, this was a contested matter. It should have been clear to the court that one or other of the parties would be dissatisfied with the court's order and would appeal.

It appears to me that in contested matters of this nature reasons for rescinding judgments are a compulsive necessity. The parties must know why they succeeded or failed. It is to be expected that they should want to know the reasons that led to their success or failure. After all, they had each sworn affidavits. They must be given reasons why their evidence was rejected. In my opinion it is proper for the appellant or the respondent to expect to be informed by the court why the judgment was rescinded or the application for rescission dismissed.

The Rules of the Supreme Court require that there be a judgment appealed against. Rule 19 reads as follows:

"29. (1) Every civil appeal shall be instituted in the form of a notice of appeal signed by the appellant or his legal representative, which shall state -

- (a) the date on which, and the court by which, the judgment appealed against was given;
- (b) if leave to appeal was granted, the date of such grant;
- (c) whether the whole or part only of the judgment is appealed against;
- (d) the grounds of appeal in accordance with the provisions of rule 32;
- (e) the exact nature of the relief which is sought; ..."

By this Rule the appellant is required to state in his notice of appeal whether he or she is appealing against "the whole or part only of a judgment". How does one state that without a written judgment? How will the appellate court know that which is being appealed against?

In a contested matter in which issues, facts and the law are disputed, there must be a judicial decision or determination on some question of law or fact in dispute. The merits and demerits of each party's case must be stated, so that the parties understand how the disputed issues or questions were determined.

1989 (2) ZLR p180

DUBMUTSHENA CJ

A written judgment is the foundation upon which a litigant builds his hopes for success on appeal or loses hope of succeeding on appeal.

In *Cohn v Rand Rietfontein Estates Ltd* 1939 TPD 319 GRINDLEY-FERRIS J, when referring to what Spencer Bower wrote in art 23 of *Res Judicata*, stated at 324:

"The learned author goes on to say (art 23) that there must have been a judicial decision or determination or adjudication on some question of law or fact 'whether such decision takes the form of an express judicial declaration or is necessarily involved in the command or prohibition which constitutes the judgment or judicial act in its coercive or operative aspect'. In dealing with the position where an action is dismissed, *Spencer Bower* says that the answer to the question whether anything can be said to have been decided, so as to conclude the [dispute between the] parties, beyond the actual fact of the dismissal 'depends upon whether, on reference to the record and other such materials as may be properly resorted to, the dismissal itself is seen to have necessarily involved a determination of any particular issue or question of facts or law, in which case there is an adjudication on that question or issue; if otherwise, the dismissal decides nothing, except that in fact the party has been refused the relief which he sought'."

This passage makes it clear that when there is a trial there must be a decision which, when reference is made to it, relates to the question in issue. It is only just and fair that in a disputed and contested matter brought to the court by notice of motion an adjudication must be made by the court. The facts and the law upon which the decision is based can only be reflected in a written judgment.

I have already stated above that the judge's reasons for granting or refusing the relief sought must be stated in the judgment. Such a judgment enables an appellant to comply with the provisions of Rule 29(1)(c) of the Supreme Court Rules. The appellant complies with the provisions of Rule 29(1)(c) by setting out concisely grounds of appeal as is required by Rule 32(1).

In my judgment, it is undesirable for the trial judge to be asked to provide reasons for judgment a year or so after delivering an oral judgment because one of the parties filed a notice of appeal. Justice can only be seen to be done to both the appellant and the respondent when an appeal is allowed or dismissed on sound grounds based on the reasons given by the trial judge as

1989 (2) ZLR p181

DUMBUTSHENA CJ

reflected in a written judgment. In the absence of such a judgment it would be proper, in my view, to allow the appeal.

Manyarara JA: I agree.

Kantor & Immerman, appellant's legal practitioners

1989 (2) ZLR p182

MUDZINGWA v MUDZINGWA 1989 (2) ZLR 182 (SC)

Court **Supreme Court, Harare**

Gubbay JA, Manyarara JA & Korsah JA

Civil appeal

10 & 25 July 1989

Flynote

Family law - bigamous marriage - effect of - maintenance order made in favour of innocent spouse - whether guilty spouse may apply for discharge of order - maintenance court - whether it may inquire into validity of bigamous marriage - maintenance - unregistered customary marriage - power of community court to award maintenance - maintenance order - discharge of - date from which discharge to be effective.

Headnote

The appellant had been ordered by a magistrates court, sitting as a maintenance court, to pay maintenance to the respondent. He applied for the discharge of the order on the grounds that when, some two years earlier, he had purported to enter into a marriage with the respondent in terms of the Marriage Act [Chapter 37], his marriage to another woman, also solemnised under the Act, still subsisted. He argued that, the second marriage being bigamous, the respondent was not a "dependant" within the meaning of s 2 of the Maintenance Act [Chapter 35] and thus he was not liable to maintain her.

The maintenance court rejected the application on the grounds that the issue of the validity of the two marriages was determinable only by the High Court. Alternatively, the court held that, although he initially believed the second marriage to be valid, the appellant was disentitled to relief because he was seeking to take advantage of his own wrongdoing.

On appeal, it was argued for the respondent that the appellant was liable under customary law to maintain the respondent. He had two children by her and had been associating with her for several years.

1989 (2) ZLR p183

Held, that the maintenance court erred in denying jurisdiction. It was not being asked to decide the validity of either marriage, the second being indisputably bigamous. The question for it to decide was whether there were no longer any reasons for the maintenance order remaining in force. In terms of s 15 of the Magistrates Court Act [Chapter 18], it could in deciding this question determine upon or in regard to the fact of marriage.

Held, further, that even if the appellant knew the second "marriage" to be unlawful from the outset, this would not preclude him from suing for an order declaring the marriage to be null and void. Neither the clean hands doctrine nor the principle of estoppel precluded a guilty party to a bigamous marriage from obtaining at his instance a declaration of nullity.

Held, further, that a bigamous marriage produced none of the incidents of a valid marriage. The parties are not husband and wife to each other. The "wife" does not acquire the "husband's" domicile. There are no rights and duties of support. The children of the union are illegitimate unless one of the parties was ignorant of the impediment to the marriage and *bona fide* believed the marriage to be valid. In the eyes of the law, the parties are no more than man and mistress.

Held, further, that a man who is a party to an unregistered customary union is not legally liable to maintain his customary law wife, except in terms of the Customary Law and Primary Court Act 1981. Under that Act only a community court is empowered to regard a customary law husband as being responsible for the maintenance of his customary law wife. Such a matter would not have been within the jurisdiction of a magistrates court, sitting as a maintenance court.

Held, further, that although the maintenance court should have granted the application for

discharge of the order, it was not open to the appellant to claim that the order be discharged from the date of inception. The wording of s 8(5)(a) of the Maintenance Act indicated that the discharge could only operate *ex nunc*, that is, from the date on which it was granted; but even if the maintenance court had the power to discharge a maintenance order *ab initio*, this was not a case in which it should have done so.

Cases cited:

Ngobeni v Gibitwayo 1946 (2) PH B58 (W)

Locke v Locke 1951 (1) SA 132 (N)

Vlook v Vlook 1953 (1) SA 485 (W)

Russell v Hattingh 1947 (1) PH B40 (C)

Morrison v Morrison 1972 (3) SA 185 (C)

1989 (2) ZLR p184

GUBBAY JA

Chard v Chard [1955] 3 All ER 721 (P)

Daniels v Daniels 1958 (1) SA 513 (A)

H v C 1929 TPD 992

Karambakuwa v Mabaya S-158-87 (not reported)

Childerley Estate Stores v Standard Bank of SA Ltd 1924 OPD 163

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

de Wet & Ors v Western Bank Ltd 1979 (2) SA 1031 (A)

Groenewald v Gracia (Edms) Bpk 1985 (3) SA 968 (T)

L Gurure for the appellant

DP Carter for the respondent

Judgment

Gubbay JA: On 3 February 1988 the appellant applied under s 8(1) of the Maintenance Act [Chapter 35] for the discharge of an order, made by a magistrate's court sitting as a maintenance court, rendering him liable to maintain the respondent as his dependant in an amount of \$90 per month. The ground upon which the relief was sought, as revealed in the affidavit filed in support of the application, was that on 10 January 1986 the appellant had

purported to enter into a marriage with the respondent under the Marriage Act [Chapter 37] at a time when, unbeknown to the respondent, his marriage to one Taremeredzwa Joy Munhenga, solemnised under the same Act, still subsisted. Expressed in another way, the contention was that, as the purported marriage to the respondent was void *ab initio*, the respondent was not, in relation to him, a "dependant" within the definition of that word as set out in s 2 of the Maintenance Act. Accordingly, neither at the date of the grant of the order, nor when the application for its discharge was moved, was he legally liable to maintain her.

In a reserved judgment delivered on 9 March 1988, the maintenance court rejected the application. It considered, in the main, that the issue of which of the two marriages was valid was determinable only by the High Court.

I am left in no doubt that the maintenance court erred in denying jurisdiction in the matter. It was not being asked to decide which marriage was valid, for it was not in dispute that the second marriage was bigamous. What it was called upon to decide was whether, since there was no lawful marriage in existence, there were, to use the language of s 8(5)(a) of the Maintenance Act, "no longer any reasons for the ...order remaining in force."

That the maintenance court enjoyed jurisdiction in the inquiry before it is

1989 (2) ZLR p185

GUBBAY JA

plain from proviso (i)(c) to s 15 of the Magistrates Court Act [Chapter 18], which, where relevant, reads:

- " (i) any court may -
- (c) in the course of any inquiry held under the provisions of the Maintenance Act [Chapter 35], determine upon or in regard to the fact of marriage ...

so far as may be necessary for the decision of any such ...inquiry, without thereby binding or being deemed or taken to bind rights in future..."

As an alternative basis for declining to interfere with its order, the maintenance court held that, notwithstanding the appellant's deposition that initially he genuinely and honestly believed that the second marriage was for all intents and purposes valid, he was disentitled to relief because he was seeking to take advantage of his own wrongdoing.

I am prepared to accept for the purposes of this appeal that the appellant induced the respondent to enter into a marriage with him which he knew (but she did not) to be unlawful on the ground of bigamy. Nonetheless he would not be precluded, in my opinion, from suing for an order declaring the marriage to be null and void.

The only *dictum* contrary to this proposition is that of BLACKWELL J in *Ngobeni v Gibitwayo* 1946 (2) PH B58 (W), in which the learned judge refused to grant a declaration of nullity to a "spouse" who had knowingly contracted a bigamous marriage, because he had not come to court with clean hands.

On the other hand, in *Locke v Locke* 1951 (1) SA 132 (N), HOLMES AJ (as he then was),

finding that there was no *mala fides* on the part of the plaintiff, left open the question whether the doctrine that a man may not take advantage of his own wrong has any application in an action for a declaration of nullity where the marriage is bigamous (see at 133B).

In *Vlook v Vlook* 1953 (1) SA 485 (W) a declaration of nullity was granted to a man who had knowingly contracted a bigamous marriage. No reasons for that decision were given, reliance being placed on the order made in the identical matter of *Russell v Hattingh* 1947 (1) PH B40 (C).

Finally, there is the case of *Morrison v Morrison* 1972 (3) SA 185 (C), where

1989 (2) ZLR p186

GUBBAY JA

VOS AJ (as he then was), in a closely reasoned judgment, held that neither the clean hands doctrine nor the principle of estoppel precluded a guilty party to a bigamous marriage from obtaining at his instance a declaration of nullity (see at 186B-D and 187A).

Hahlo *The South African Law of Husband and Wife* 5 ed at p 107 succinctly summarises the law on this topic in these words:

"Once it is accepted that a marriage that is null and void *ab initio* is a non-existing marriage, which does not require a formal act of annulment to deprive it of effect, it is difficult to see why the guilty party should be precluded from having this proclaimed by the court. On the contrary, it is clearly in the public interest that the question whether or not there is a marriage should be settled once for all, never mind at whose instance. Status is, by its very nature, indivisible: there either is a marriage or there is not. The application of estoppel to a void marriage would lead to the absurd result that a marriage could be both existent and non-existent: existent as far as those are concerned who are estopped from asserting its invalidity; non-existent as against the world."

English law is to much the same effect. Relief is not withheld from a guilty plaintiff. See *Chard v Chard* [1955] 3 All ER 721 (P) at 729F; *Latey on Divorce* 14 ed at para 375; *Rayden and Jackson on Divorce* Vol I 15 ed at para 5 n8.

By parity of reasoning, it seems to me that neither the clean hands doctrine nor the principle of estoppel had any relevance to the application before the maintenance court.

The inroads made upon the former doctrine by the historic decision of *Daniels v Daniels* 1958 (1) SA 513 (A) are notorious. If, in a claim for restitution of conjugal rights, a court can grant relief to a plaintiff guilty of adultery, I do not see why the appellant's guilt in entering into a bigamous marriage should deprive him from seeking relief from the maintenance court. And if the principle of estoppel were to be afforded recognition, it would lead to the untenable consequence that for the purposes of the Maintenance Act the bigamous marriage is to be regarded as an existing marriage, with the respondent accorded the status of a dependant wife; whereas for all other purposes the bigamous marriage is to be taken as void *ab initio*.

More importantly, it is apparent from the provisions of s 8(5) of the

1989 (2) ZLR p187

GUBBAY JA

Maintenance Act that it is always open to a maintenance court to discharge or vary a maintenance order made against the responsible person. It cannot bar him from seeking that relief. His success will depend on the merits of the case.

The crisp point to decide, therefore, is whether, faced with the reality that there was no marriage in existence, the maintenance court had no option but to discharge the order, just as the High Court would have to grant a declaration of nullity in the event of the appellant claiming that relief.

It is of assistance to a resolution of this question to take account of the effect of a bigamous marriage. It produces none of the incidents of the valid marriage. No lapse of time operates as a ratification. The "husband" is no husband at all and the "wife" no wife at all. The "wife" does not acquire the domicile of the "husband" but retains her own domicile. There are no reciprocal rights and duties of support. The parties do not succeed to one another *ab intestato*. And children born to the parties are illegitimate, save where one of the parties was ignorant of the impediment to the marriage and *bona fide* believed it to be lawful - as in the present case. See *H (wrongly called C) v C* 1929 TPD 992. Either party may enter into a lawful marriage with someone else. Sexual relations with another person do not constitute adultery. If a divorced wife has secured an order for the payment of maintenance "until death or re-marriage", a subsequent bigamous marriage does not put an end to the order. See *Halo op cit* at p 371. Nor does it affect the right of a widow to receive an income under a will or trust deed until "death or re-marriage". In short, in the eyes of the law the parties to a bigamous marriage are no more than man and mistress.

Furthermore, it is not within the powers of the court granting a declaration of nullity in respect of a bigamous marriage to award maintenance to either party. It is only where a marriage is by law voidable - where the parties remain validly married unless and until the court grants a decree of nullity - that a court may order the payment of maintenance, for one of the circumstances to which the law-giver enjoins the court to have regard is "the duration of the marriage". See s 7(1)(b), as read with ss 7(3)(g) and 13(2) of the Matrimonial Causes Act 1985.

I think it beyond contention that if, prior to 5 August 1987, on which date the order for the payment of maintenance was made, the appellant, at his own instance, had been granted a declaration of nullity he would not have been ordered by the High Court to maintain the respondent.

1989 (2) ZLR p188

GUBBAY JA

Similarly, if the appellant had raised as a defence to the respondent's application before the maintenance court the fact of their bigamous marriage, it would have been held that she was not entitled to maintenance.

In support of the maintenance order, Mr *Carter* advanced an ingenious argument, which turned on the impact of customary law upon the relationship of the parties. Counsel emphasised that the association between the parties had commenced prior to the appellant's marriage to

Taremeredzwa Joy Munhenga and had continued until some time after they had entered into a bigamous marriage. Two children had been born to them, one before the purported marriage and the other after. Placing reliance on the nature of the relationship, it was urged that the appellant was legally liable to maintain the respondent by virtue of the provisions of s 12(4)(a) of the Customary Law and Primary Courts Act 1981; thus at all relevant times the respondent remained a "dependant", as defined in s 2 of the Maintenance Act. Accordingly, so the contention went, there are "reasons for the ...order remaining in force" under s 8(5)(a) of the Maintenance Act, although the maintenance court did not advert to them.

I am unable to agree. The order for maintenance was granted upon the understanding that the respondent was a dependent wife, validly married to the appellant under the general law. However, as an unregistered customary law union is not recognised as a valid marriage in our law (see s 3 of the African Marriages Act [*Chapter 238*], a man who is a party to such a union is not legally liable to maintain his customary law wife, except in terms of ss 12(3) and (4)(a) of the Customary Law and Primary Courts Act, which provide:

"(3) Without derogation from its powers to make any other order for maintenance, a community court may make an order for maintenance in accordance with the provisions of the Maintenance Act [*Chapter 35*].

(4) For the purposes of an order for maintenance in terms of subsection (3) a community court shall, notwithstanding anything to the contrary contained in customary law, regard -

- (a) the person who, according to customary law, is the husband of a woman as being primarily responsible for the maintenance of that woman during the marriage and, after the dissolution of their marriage, until her remarriage..."

1989 (2) ZLR p189

GUBBAY JA

Clearly it is only a community court which, when making an order for maintenance in accordance with the provisions of the Maintenance Act, is empowered to regard a customary law husband as being responsible for the maintenance of his customary law wife.

To allow the maintenance order in the present case to stand, on the ground that the respondent is a dependant in terms of s 12(4)(a) of the Customary Law and Primary Courts Act, would be to sanction the continuance of an order that only a community court has the power to make. The proposition may be tested in this way: If in 1983 the respondent relying on s 12(4)(a) of the Customary Law and Primary Courts Act, had sought an order for maintenance from a magistrate's court sitting as a maintenance court, her application would have been rejected. She would have been advised to approach the community court for relief. See the definition of "appropriate maintenance court" in s 3 of the Maintenance Act.

In any event, despite the length of the association and the birth of two children, it emerges from the appellant's affidavit that the parties never lived together as husband and wife. That averment was not contravened by the respondent. Consequently the evidence on record precludes the drawing of an inference in the respondent's favour that she and the appellant associated with each other in a customary union and not in one of concubinage. See *Karambakuwa v Mabaya* S-158-87 (unreported).

For the avoidance of doubt, it is as well that I express the view that, although the maintenance order was made under the material mistake of fact that the appellant, as a "husband", owed the respondent, as a "wife", a duty of support, it was not open to the appellant to claim that the maintenance court discharge the order with effect from the date of inception. The remedy of rescission was not available.

It is apparent from the wording of s 8(5)(a) of the Maintenance Act that a discharge of an order made by the maintenance court is to operate only *ex nunc*, that is to say, from the date the discharge is granted.

Furthermore, it is firmly established that a judgment can only be rescinded under the common law on one of the grounds upon which *restitutio in integrum* would be granted, such as fraud or some other just cause, including *justus error*. See *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at 166; *Vista Estates (Pvt) Ltd v Animal Breeders Co-op Co Ltd* 1975 (1) SA 193 (R) at 195H-196A; 1974 (2) RLR 147 (GD); *de Wet & Ors*

1989 (2) ZLR p190

GUBBAY JA

v Western Bank Ltd 1979 (2) SA 1031 (A) at 1043A. Certainly a litigant who is himself negligent and the author of his own misfortune will fail in his request for rescission. See *Voet* 2.4.14; *Groenewald v Gracia (Edms) Bpk* 1985 (3) SA 968 (T) at 972C-D and G-H.

The appellant is not "free from all blame whatsoever". He omitted to alert the maintenance court to the existence of his civil law marriage.

Assuming, therefore, that a magistrate's court sitting as a maintenance court has the power to discharge a maintenance order from the date of its inception (a point which it is unnecessary to decide), I am satisfied that it would not make such an order in this case.

Be this as it may, in my judgment the maintenance court ought to have found that there were "no longer any reasons for the ... order remaining in force" and ought to have discharged the order.

In the result, the appeal must be allowed and the order of the maintenance court discharged with effect from 9 March 1988. The costs of the appeal were not prayed for, and no order is made in respect thereof.

Whether the appellant's deceit was such as to make him liable in damages is a question upon which the respondent should seek professional advice. (See *Hahlo op cit* at pp 107 and 116).

The Registrar is directed to serve a copy of this judgment and the record of the proceedings in the maintenance court upon the Attorney-General.

Manyarara JA: I agree.

Korsah JA: I agree.

Chirunda, Chihambakwe & Partners, appellant's legal practitioners

Pro Deo for the respondent

1989 (2) ZLR p191

EX PARTE MUSHAMBI 1989 (2) ZLR 191 (HC)

Court **High Court, Harare**

Greenland J

Application for order for committal to prison

15 June & 26 July 1989

Flynote

Courts - contempt of court - husband harassing wife in wilful defiance of court order - appropriate punishment.

Headnote

The respondent had been interdicted from assaulting, harassing or otherwise interfering with his wife, the petitioner. He disobeyed the interdict by going to her house one evening, assaulting a visitor to the house, slashing the tyres of the visitor's car, smashing a window, threatening the petitioner, frightening her children, firing shots at her and forcing her to have intercourse with him. The court found that his actions were wilful and his moral blameworthiness extreme. His contempt was grave and could not be tolerated. Accordingly, he was committed to prison for 30 days.

Cases cited:

Tsangacos v Anthias & Anthias GS-337-81 (not reported)

Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech 1987 (2) ZLR 338 (SC)

Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd 1984 (3) SA 202 (T)

Sabawu v Harare West Rural Council 1989 (1) ZLR 47 (HC).

D A Matyszak for the petitioner

R M Fitches for the respondent

Judgment

Greenland J: On 15 June 1989 this court committed the respondent to gaol for 30 days for contempt of this court and granted other ancillary relief. These are the reasons for that order.

1989 (2) ZLR p192

GREENLAND J

On 2 February 1989 this court granted an order which provided, *inter alia*:

"That pending the outcome of the aforesaid divorce action the respondent [the petitioner in this action] be and is hereby permitted to reside in the cottage adjoining the aforesaid matrimonial home. That the respondent be and is hereby interdicted from assaulting, harassing or in any way interfering with the applicant."

The gravamen of the allegations in the present matter is that respondent breached the interdict, in that in the early evening of 6 May 1989 the respondent

- (a) assaulted a person lawfully present at the petitioner's residence and slashed four tyres of this person's vehicle;
- (b) smashed the window of the petitioner's bedroom;
- (c) verbally harassed and threatened the petitioner;
- (d) generally behaved in a violent and aggressive manner, thereby frightening the petitioner's minor children;
- (e) fired two shots at the petitioner; and
- (f) forced the petitioner to have sexual intercourse with him.

As is common in such matters the court is faced with what is almost "a positively intractable log jam of disputed facts on the papers" (*per* SQUIRES J in *Tsangacos v Anthias & Anthias* GS-337-81 at p 3).

However, in my view, the court is able to say with reasonable certainty that the truth of the matter is with the petitioner. This is on accepting the robust approach now the policy of this court. See GUBBAY JA in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (SC) at p 339C:

"It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute ...without hearing evidence. It must take a robust and common sense approach and not an overly fastidious one; ..."

Very simply put, the probabilities of the matter are with the petitioner. The facts of her version are largely not disputed. What the respondent attempts to do is to rationalize, explain away, confess and avoid the inculpatory nature and complexion of these facts. For instance he is forced to admit that the

1989 (2) ZLR p193

GREENLAND J

police attended and that he was subsequently subjected to criminal charges based on his alleged misbehaviour. He admits he was present that evening. He admits an altercation with the visitor but claims that the fault was with the latter, etc, etc.

However, the insurmountable hurdle he has is that his credibility is destroyed by his explanation

for the shots being fired. I quote:

"That Respondent admits having entered the house and after an initial inspection, decided to clear his firearm first and whilst in the act of doing so two shots went off accidentally."

As conceded by Mr *Fitches*, the pistol in question requires a separate pull of the trigger for each shot. There can be no question of the weapon going off accidentally **twice**. The shots were therefore fired purposefully. No doubt the intention was to terrorize the petitioner. Doubtlessly he succeeded. He succeeded also in terrifying the children.

The respondent is without credibility. The overall circumstances and probabilities support the petitioner. She is also supported by the evidence of the domestic worker's affidavit even though it was submitted in answer to the respondent's denials. Compare *Shepherd v Mitchell Cotts (SA) (Pty) Ltd* 1984 (3) SA 202.

On the accepted version, the respondent was in absolute breach of the High Court interdict. His actions were wilful, his moral blameworthiness extreme. He is therefore in grave contempt of court.

Mr *Fitches* pleaded eloquently for mercy and cited authority in support. I am unable to accede. This court will not tolerate such blatantly contemptuous disregard of its lawful orders. Not only was the respondent in deliberate disobedience of the interdict, but in that disobedience he subjected the petitioner and her minor children to a terrifying ordeal. The court is the upper guardian of children. The petitioner, being a woman, is in no position to defend herself and requires the court's protection. As elaborated in *Sabawu v Harare West Rural Council* 1989 (1) ZLR 47 (HC) the interests of justice are not served by a court compromising in such circumstances.

The court therefore intends to proceed in a meaningful way. That is the purpose and intention behind the order.

1989 (2) ZLR p194

GREENLAND J

This completes the reasons.

DW Aitken & Co, petitioner's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

1989 (2) ZLR p195

WASHAYA v WASHAYA 1989 (2) ZLR 195 (HC)

Court High Court, Harare

Greenland J

Application for rescission of judgment

27 July 1989

Flynote

Practice and procedure - judgment by consent - requirements for - rescission of - what must be shown - legal practitioner erroneously consenting on behalf of client - effect of.

Costs - *de bonis propriis* - legal practitioner erroneously consenting to judgment on behalf of client - costs of proceedings to set aside judgment awarded *de bonis propriis*.

Headnote

For a judgment by consent to have any validity, the essential ingredient of consent must be present and the court must be satisfied as to the presence of consent. Order 8 Rule 54 of the High Court Rules prescribes in clear and peremptory terms the form a consent to judgment must take. If those provisions are not complied with, a party seeking to have the judgment set aside is not required to prove anything other than that he did not in fact consent. He need not show "good and sufficient" cause for rescission. Where, however, the court is satisfied that a legal practitioner has the authority of his client to consent to judgment, the client will be bound by such consent and the court will visit on the client a heavy *onus* before rescinding the judgment.

Costs *de bonis propriis* are not lightly awarded. However, where a legal practitioner negligently consents to judgment, erroneously assuming that his client will later ratify his actions, thereby misleading the court and subsequently neither explaining his actions nor apologising, it is right, proper and just that the practitioner should bear the costs of his negligence.

1989 (2) ZLR p196

GREENLAND J

Cases cited:

de Vos v Calitz & de Villiers 1916 CPD 465

Jenkins v FJJ de Souza & Co (Pvt) Ltd 1968 (2) RLR 403 (GD); 1968 (4) SA 559 (R)

Mostert v SA Association (1868) Buch 286

Royce Kincaid (Pty) Ltd v Wyfred Gardens (Pty) Ltd & Anor 1974 (2) SA 554 (D)

Claassen v Igesund & Anor 1970 (4) SA 41 (D)

Sunset Investments (Pty) Ltd v Bramdaw & Ors 1973 (2) SA 415 (D)

Ras v Liquor Licensing Board, Area No 11, Kimberley 1966 (2) SA 232 (C)

Ex p Jooste en 'n Ander 1968 (4) SA 437 (O)

Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co 1977 (1) SA 64 (N)

Roland & Anor v McDonnell 1986 (2) ZLR 216 (SC)

Zimbabwe Bonded Fibreglass v Peech S-20-87 (not reported)

Estate Garlick v Commissioner of Inland Revenue 1934 AD 499

Firestone SA (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A).

G Masimirembwa, for the applicant

J P Mutizwa for the respondent

Judgment

Greenland J: In these proceedings the applicant seeks rescission of a judgment granted by this court on 3 November 1988.

On that date the parties were locked in dispute over the dissolution of their partnership. Their respective legal practitioners appeared to argue the matter in motion court. The applicant was then represented by Mr B Mugabe of Mugabe, Mutezo and Partners. At the hearing, his counsel read out and dictated the terms of a settlement "apparently" agreed to by the parties and requested the court to enter judgment in accordance therewith. As is the practice in this and other courts, the presiding judge accepted the word of both counsel that the dispute had been settled and incorporated what was dictated in a judgment which takes the form of an order. The wording of the order provides for dissolution of the partnership on certain terms and conditions. That wording is prefixed by the words:

"IT IS ORDERED **BY CONSENT**" (my emphasis).

As will be appreciated the order therefore purports to be what is commonly termed a "judgment by consent". See Order 8 of the High Court of Zimbabwe

1989 (2) ZLR p197

GREENLAND J

Rules 1971 for a statutory example of such a judgment and refer to *de Vos v Calitz & de Villiers* 1916 CPD 465 for a common law example.

It is stating the obvious, but it does require stating, that for such a judgment to have any validity the essential ingredient of consent must be present. What is more, the court must be satisfied as to the presence of consent. It is for this reason that both in South Africa and Zimbabwe the governing rules prescribe in clear and peremptory terms the form a consent to judgment must take. Order 8 prescribes:

"54. A consent to judgment shall be in writing and be signed by the defendant personally or by an attorney who has entered appearance on his behalf. The defendant's signature shall be verified by an affidavit made by someone other than himself, or by the signature of an attorney acting for him and not for the opposite party.

55.

56. A judgment given by consent under these rules may be set aside by the court and leave may be given to the defendant to defend, or to the plaintiff to prosecute his action. Such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court deems just."

Mr *Mutizwa* relies heavily on Rule 56 *supra* and invites this court to visit on the applicant the *onus* of proving "good and sufficient cause" for setting aside the judgment. Counsel's approach is steeped in what appears in *Jenkins v FJJ de Souza & Co (Pvt) Ltd* 1968 (2) RLR 402 (GD); 1968 (4) SA 559 (R) at 564B:

"Order 7 Rule 11 is as follows:

'In all cases where judgment has been given by consent or in default under the Rules of this Order, such judgment may be set aside by the Court and leave given to the defendant to defend or to the plaintiff to prosecute his action. Such leave shall only be given on good and sufficient cause, and upon such terms as to costs and otherwise as the Court deems just.'

In *du Preez v Hughes* NO 1957 R&N 706, when dealing with an application under Order 7 Rule 11, BEADLE J (as he then was) pointed out that the South African Rule relating to reopening of default judgments is similar to the Rhodesian Rule, and that from South African precedents three broad considerations emerge which are always taken into account

1989 (2) ZLR p198

GREENLAND J

by the Courts. The learned Judge then stated these considerations as follows:

- (1) the explanation given by the applicant for his default;
- (2) the *bona fides* of the application to rescind the judgment;
- (3) the *bona fides* of the merits on the defence.

But His Lordship stated that these considerations are not necessarily exhaustive or decisive, and he directed attention to the remarks of INNES JA and SOLOMON JA in *Cairns & Executors v Gaarn* 1912 AD at 181 and 189, to the effect that in deciding what would constitute 'sufficient cause' the Judge has a wide discretion, the exercise of which should not be abridged or hampered by framing exhaustive definitions. It is clear from the further remarks of BEADLE J at p 709, that, in testing the *bona fides* of the merits on the defence, the Court is entitled to consider the strength or weakness of the applicant's case on the merits as revealed in the papers in the application. On the other hand, at p 710, his Lordship quoted with approval from a judgment of QUENET J (as he then was), in *Hay-Buchanan v Dairy Marketing Board* 1955 Rhodesia (unreported), the statement that the applicant must show a *bona fide* defence but need not establish a balance of probability in his favour. However, BEADLE J states that in *Hay-Buchanan's* case relief was refused on the ground that the defence on the merits was weak and in Court considered that the defendant was merely playing for time. In *du Preez's* case it was found that the applicant had a strong case on the merits and the principal difficulty lay in the fact that the applicant's default lay in his own very great negligence."

With respect, I am unable to agree that the applicant is required to prove anything other than that he did not, in fact, consent to the judgment. Mr *Mutizwa's* whole approach erroneously rests on the premise that Rule 56 *supra* is to be invoked. The plain wording of that Rule indicates beyond doubt that it is concerned with a judgment consented to in terms of Rule 54 *supra*, ie consent in writing and properly signed. So, too, is *Jenkins' case supra* concerned with a judgment either consented to in terms of the Rules or entered because a party is in default of compliance therewith.

That is not the position in the present case. It is common cause that the applicant neither consented in terms of Order 8 Rule 54 *supra*, nor was he in default. In so far as Mr *Mutizwa* relies on the Rules the law is against him. As stated by Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at p 373:

1989 (2) ZLR p199

GREENLAND J

"But if there is any irregularity in the consent to judgment, the judgment obtained thereon will be set aside".

See *Mostert v SA Association* (1968) Buch 286; *Royce Kincaid (Pty) Ltd v Wylfred Gardens (Pty) Ltd & Anor* 1974 (2) SA 554 (D). Compare *Claassen v Igesund & Anor* 1970 (4) SA 41 (D). The position is put very clearly by VAN HEERDEN J (as he then was) in *Sunset Investments (Pty) Ltd v Bramdaw & Ors* 1973 (2) SA 415 (D) at 418C:

"The requirements of the Rule as regards the mode of execution are, in my view, peremptory. That this is the intention of the Rule flows, I think, firstly from the use of the word 'shall' in regard to the signing of the confession by the defendant personally and the witnessing thereof by an attorney or the verifying by affidavit. Such use is, generally speaking, a useful guide that a provision is peremptory rather than directory. See eg *Sutter v Scheepers* 1932 AD 165 at p 173. A second and, I think, more important indication that these requirements are peremptory flows from the wide powers under the Rule and the possible evil which the requirements are designed to guard against. See eg *Leibbrandt v South African Railways* 1941 AD 9 at p 12. The Rule not only provides for the giving of judgment against a defendant on a confession but it furthermore provides that such judgment may be applied for and given without any notice to the defendant. The requirements, I think, are intended as a safeguard against possible danger that the Rule may be wrongly invoked or applied. I am accordingly of the view that, upon a proper construction of Rule 31(1), the requirements that a confession has to be signed by a defendant personally and that it has to be witnessed or verified in the manner stated are peremptory and not only directory. Indeed, neither counsel contended otherwise."

There having been no consent to judgment in terms of the Rules, was there consent at common law? Put differently, did Mr Mugabe have his client's authority to so consent? In my view, such consent is recognisable and would bind the applicant. To my mind, this is implicit in *De Vos supra*; *Ras v Liquor Licensing Board, Area No 11, Kimberley* 1966 (2) SA 232 (C); *Ex p Jooste en 'n Ander* 1968 (4) SA 437 (O); *Moshal Gevisser (Trademark) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N).

The matter is put in perspective by HEFER J (as he then was) in *Moshal's case supra* at p 68D:

1989 (2) ZLR p200

GREENLAND J

"The submission that a consent to judgment may arbitrarily be withdrawn, is, for obvious reasons, without substance. The signing of such a consent by a defendant is a formal step in the proceedings and to allow him to withdraw it at any stage for no rhyme or reason, would make a mockery of Rule 31(1). I was referred to the decision in *De Vos v Calitz & De Villiers* 1916 CPD 465, where DE VILLIERS AJ, in an appeal against a judgment granted by consent in the magistrate's court, remarked at p 470:

'In this case, however, it seems to me that judgment should never have been given at all, for two reasons. In the first place, Mrs De Vos repudiated the agreement to consent to judgment before the judgment was

given, indeed before the court sat ...'

This passage certainly creates the impression that judgment should not have been granted because of the repudiation by the defendant of the consent to judgment. An analysis of the facts appearing from the judgment, however, shows that the repudiation of the consent in that case was for good and valid reason (the attorney who consented to the judgment never had the defendant's authority to do so) and the decision cannot, therefore, be used as authority for the proposition that a consent to judgment may be arbitrarily repudiated or withdrawn. Mr *Schutte* very properly directed my attention to the decision in *Harvey v Croyden Union Rural Sanitary Authority* (1884) 26 ChD 249, where COTTON LJ, sitting in the Court of Appeal, pertinently remarked (at p 255):

'If a consent is given through error or mistake, there can be no doubt that the Court will allow it to be withdrawn if the order has not been drawn up. But the question is very different whether when counsel, being duly authorised, have given a consent, there being no mistake or surprise in the case, the party can arbitrarily withdraw that consent, ...there being, however, no authority which is binding on us to the contrary, we must decide according to what we think the right course, and it must be understood henceforth to be the rule that a consent given by the authority of the client cannot be arbitrarily withdrawn.'

It seems to me that where the court is satisfied that a legal practitioner has the authority of his client to consent to judgment, the client will be bound by such consent and the court will visit on the client a heavy *onus* before rescinding the judgment. See *Moshal supra*, and *Roland & Anor v McDonnell* 1986 (2) ZLR 216 (SC).

Indeed Mr *Mutizwa* has argued strenuously that the court should find as a

1989 (2) ZLR p201

GREENLAND J

matter of sheer probability that Mr Mugabe had authority to consent. This submission is understandable. The evidence reveals that aspects of the matter incorporated in the consent had been expressly raised much earlier in correspondence. It seems unlikely that Mr Mugabe would not have taken instructions thereon. There are probabilities which favour the submission.

However, against that I have the express evidence, on oath, of the applicant and Mr Mugabe that no instructions to settle were given. Mr Mugabe claims that, on his own initiative, he settled the matter, erroneously assuming his client would ratify his actions later. To my mind, this claim may appear improbable, but it is not so inconceivable as to be susceptible to summary rejection in the absence of contraverting evidence. A court should be loath to find that a legal practitioner (and as such an officer of this court) has perjured himself and has wilfully misled the court. The robust approach to resolving motion court disputes set out by GUBBAY JA in *Zimbabwe Bonded Fibreglass v Peech* 1987 (2) ZLR 338 (SC) cannot be invoked in such circumstances, especially as the Rules *loc cit* give the clear message that proof of consent be tangible. It is in the spirit of the will of the legislature as evidenced in the Rules that the issue must be approached. In the result, I find that Mr Mugabe had no authority to consent to judgment.

To my mind that ends the matter. See *De Vos, Ras, Jooste* and *Moshal supra*. It is clear, in terms of these precedents, common sense and justice, that once a court is not satisfied that a party consented to judgment then that party is entitled to *restitutio in integrum*. Put differently, had the court granting the judgment been aware that the party had not consented it would not have acceded to the request that it enter judgment. The judgment must, therefore, be set aside. This court is not concerned with the other merits of the application and precedents such as

Jenkins, Moshal and Moore supra must be distinguished.

As regards costs, both counsel have requested that the wasted costs be borne by Mr Mugabe. It is trite that costs *de bonis propriis* are not lightly awarded. However, by any test, Mr Mugabe acted in an irresponsible and grossly negligent or reckless manner. It is clear from the papers that the dispute was bitter and acrimonious. He had obtained no instructions from his client on these important and contentious issues. There was no basis on which he could reasonably have expected ratification of his action of unilaterally consenting to judgment. Simply put, he took a chance. In doing so, he misled this court. To date he has neither explained his actions to the Honourable Judge concerned, nor apologised. The court's time was needlessly wasted and is

1989 (2) ZLR p202

GREENLAND J

still being wasted. There is prejudice to the respondent, who has traded on his own account since November 1988, only to now find that the issue is still wide open. The notion of finality of court disputes expressed as *interest republicae ut sit finis litium* has been subverted. It is right, proper and just that Mr Mugabe be made to bear the costs of his negligence. It is true he is not before me to dispute the matter. However, to postpone the matter will cause further protraction of the proceedings and escalate costs. It is better that the order regarding costs be made and he be afforded the right to review. See *Estate Garlick v Commissioner of Inland Revenue* 1934 AD 499 and *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 308G.

There will therefore be an order in the following terms:

It is ordered:

That the application succeeds, in that the judgment issued out by this Honourable Court on 3 November 1988 be and is hereby set aside.

That leave be and is hereby granted to the parties to set down the issue of dissolution of the partnership on the same papers with such additions as may be necessary.

That Mr Mugabe of Messrs Mugabe, Mutezo and Partners bear the costs of both the hearing on 3 November 1988 and of this application *de bonis propriis*.

That leave be and is hereby granted to Mr Mugabe to set down the question of costs before Mr Justice Greenland on notice to the parties.

The above completes the reasons for the *ex tempore* order granted on 27 July 1989.

Chirunda, Chihambakwe & Partners, applicant's legal practitioners

Mugabe, Mutezo & Partners, respondent's legal practitioners

1989 (2) ZLR p203

S v ZINYANDO 1989 (2) ZLR 203 (SC)

Court Supreme Court, Harare

Manyarara JA & Korsah JA

Criminal appeal

23 June & 1 August 1989

Flynote

Evidence - witness - sexual case - need for court to be convinced that evidence of juvenile complainant and supporting juvenile witnesses is truthful and credible - need to consider whether witnesses who are friends might have collaborated to concoct a story.

Headnote

In cases of alleged sexual assaults on young persons, the trial court must warn itself that there is a risk in acting on the uncorroborated evidence of people of tender years and must only proceed to convict if convinced that the witness is truthful and credible. A similar warning should be given where a young person is called to corroborate the evidence of another juvenile. Where the juveniles are friends, the court should make sure that they have not collaborated to give false evidence to serve some purpose of their own. If there is any real chance of this having occurred the evidence must be excluded. Unless the evidence of the juveniles is corroborated in a material particular implicating the accused or confirming disputed items, it would be unsafe to convict.

Cases cited:

R v Campbell (1956) 40 Cr App R 95

DPP v Hester (1972) 57 Cr App R 212

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

Boardman v DPP [1974] 3 All ER 887 (HL)

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

E Chatikobo for the appellant

Mrs J Zindi for the respondent

1989 (2) ZLR p204

KORSAH JA

Judgment

Korsah JA: The appellant pleaded not guilty to a count charging him with sodomy. He tried and convicted of that offence and sentenced to a term of twelve months' imprisonment with labour,

of which three months' imprisonment with labour was suspended on condition of future good behaviour. He appealed against both conviction and sentence.

The State's case was that around 9 pm on Monday 5 October 1987 the complainant P and his friend, D, both aged about 12 years, were observed by one Gondo removing two tail-light bulbs from the Alfasud car of the appellant which was parked outside Chikomo Beerhall. Gondo effected a citizen's arrest of the complainant and D and handed them over to the appellant when he came out of the Beerhall.

The State outline alleges that the appellant pushed P and D into his motor vehicle and told them that he was taking them to the Police Station. Instead of taking them to the Police Station, the appellant drove past the Station down to Mayamabara, where he ordered D to move into the front passenger seat while he, the appellant, went to the back where the complainant was seated and sodomised him thrice, as D watched from the front seat.

The essential facts upon which both P and D were in agreement were that they were apprehended by Gondo and handed over to the appellant. The appellant drove them in his car to Mayamabara where he sodomised P three times on the back seat of the car, while D watched from the front seat, and then drove them to Unit A, Seke, where he dropped the two youths. Apart from the above facts the two youths contradicted each other on all the surrounding circumstances and denounced each other as being untruthful.

[The learned JUDGE OF APPEAL reviewed the evidence and continued:]

It was contended by Mrs *Zindi*, on behalf of the State, that although discrepancies exist in the testimonies of P and D those "discrepancies were not material to the main issue and were understandable in view of the ages of the witnesses and the circumstances leading up to the commission of the offence".

With this submission I most respectfully disagree. In my view, in cases of alleged sexual assaults on young persons, though the sworn evidence of a juvenile need not as a matter of law be corroborated (see s 253 of the Criminal Procedure and Evidence Act [*Chapter 59*]), the trial court must warn itself that there is a risk in acting on the uncorroborated evidence of people of

1989 (2) ZLR p205

KORSAH JA

tender years and only proceed to convict if convinced that the witness is truthful and credible. For reasons which I shall later advance, a similar warning should also be given where a young boy or girl is called to corroborate the evidence of another juvenile witness. See the *dictum* of LORD GODDARD CJ in *R v Campbell* (1956) 40 Cr App R 95 at 102, affirmed in *DPP v Hester* (1972) 57 Cr App R 212 at 227.

It cannot be doubted that the trial court must be able to determine from his evidence that the complainant in such cases is a credible witness. To do so it must scrutinise the whole of his testimony before concluding that he is worthy of belief. It is not only his bare assertion that he was sodomised three times on the back seat of the appellant's car that must be examined, but also the whole of the surrounding circumstances. As MACDONALD AJP (as he then was)

observed in *R v Judson* 1965 RLR 501 at 503; 1966 (1) SA 88 (SRAD) at 89C:

"The surrounding circumstances, even when they do not afford evidence of the commission of the offences or of the identity of the perpetrator, frequently afford valuable evidence in regard to the merits of the evidence of the respective witnesses."

In the instant case P and D were apprehended in the process of committing the crime of stealing the tail-light bulbs of the appellant's vehicle. There was suggestion that they had been organised by some adult to commit such crimes. At least P, after concocting some story about making a torch-light with the bulbs, eventually agreed that he had been sent by a stranger, whom he refused or was unwilling to indicate, to steal the bulbs. This was denied by D, but Gondo, who apprehended the two youths, said they acted together in stealing the bulbs. The two youths were at variance with each other on all the surrounding circumstances leading to the alleged sodomisation of P. The improbability of the appellant sodomising P in the presence of D, so that D could report the incident to whomsoever he pleased, also borders on the macabre.

Account must necessarily be taken of the fact that P and D were very close friends, they attended the same school and were apprehended together in the act of removing the tail-light bulbs of the appellant's vehicle. There is always a real possibility, as the appellant alleged, that P and D, being friends who had been caught committing an offence, had conspired to falsely accuse him of the alleged offence. There is thus the need for the court, in such cases as the present, to make sure that P and D had not collaborated to give false evidence

1989 (2) ZLR p206

KORSAH JA

to serve some purpose of their own. Before accepting D's testimony as corroborative of P's there must be proof that the two had not collaborated to give false evidence. As LORD WILBERFORCE observed in *Boardman v DPP* [1974] 3 All ER 887 (HL) at 897h:

"I use the words 'a cause common to the witnesses' to include not only (as in *R v Sims*) the possibility that the witnesses may have invented a story in concert but also that a similar story may have arisen by a process of infection from media of publicity or simply from fashion. In the sexual field, and in others, this may be a real possibility; something much more than mere similarity **and absence of proved conspiracy is needed if this evidence is to be allowed**. This is well illustrated by *Kilbourne's* case where the judge excluded 'intra group' evidence because of the possibility, as it appeared to him, of collaboration between boys who knew each other well. This is, in my respectful opinion, the right course, rather than to admit the evidence unless a case of collaboration or concoction is made out."

LORD CROSS OF CHELSEA spoke to the same effect at p 910d-g of the report as follows:

"In such cases as *R v Sims* [1946] 1 All ER or this case, on the other hand, there is, it is true, some direct evidence that the offence was committed by the accused but he says that that evidence is false and the similar fact evidence - which he says is also false - is sought to be let in in order to strengthen the case for saying his denials are untrue. In such circumstances the first question which arises is obviously whether his accusers may not have put their heads together to concoct false evidence and if there is any real chance of this having occurred the similar fact evidence must be excluded. In *Kilbourne* it was only allowed to be given by boys of a different group from the boy an alleged offence against whom was being considered. But even if corroboration is out of the way it remains possible that the charge made by the complainant is false."

I am appreciative of the fact that the evidence of D is not similar fact evidence. It is supposed to be direct evidence of what he witnessed, and it is corroborative of P's testimony, but, having regard to the circumstances of this case and the closeness of the relationship between P and D, the trial court should have warned itself of the possibility of collaboration between the two. This it failed to do.

1989 (2) ZLR p207

KORSAH JA

It is true that the evidence of one competent witness is enough to support a verdict in criminal proceedings. But in certain classes of cases, of which cases of sexual assault form a part, a court must warn itself that it is dangerous to found a conviction on the evidence of particular witnesses or classes of witnesses unless that evidence is corroborated in a material particular implicating the accused, or confirming the disputed items in the case. Here, apart from the testimonies of P and D there was no evidence which tended to support the allegations made against the complainant. See *S v Mupfudza* 1982 (1) ZLR 271 (SC).

For the above reasons I was of the opinion that it would be unsafe to uphold the conviction. I would, therefore, quash the conviction and set aside the sentence imposed.

Manyarara JA: I agree.

Muvingi & Machaya, appellant's legal practitioners

1989 (2) ZLR p208

MINISTER OF LABOUR, MANPOWER PLANNING & SOCIAL WELFARE v LERROS MOTORS (PVT) LTD 1989 (2) ZLR 208 (HC)

Editor's Note:(8)

Court **High Court, Harare**

Smith J

Application for order of ejectment

5 July & 2 August 1989

Flynote

Constitutional law - statutes - State - applicability of statute to - statutory corporation - when may be regarded as an organ or agent of the State.

Headnote

The respondent company was lessee of two premises, both of which were registered in the name of the Workmen's Compensation Insurance Fund. After the expiry of the lease, the respondent sought to remain in the premises, claiming that it was a "statutory tenant" in terms

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of the Commercial Premises (Rent) Regulations 1983. Section 2(2) of the Regulations provides that the Regulations do not apply to the letting of commercial premises by the State. The issue was whether the Fund could be regarded as the State.

The Fund was established by s 89 of the Workmen's Compensation Act [*Chapter 269*] and vested in the applicant Minister who had sole management thereof. The Workmen's Compensation Commissioner and his staff were officers in the Public Service and they were remunerated from the Consolidated Revenue Fund.

Held, that the tests to be applied when determining whether the relationship between the Government and a statutory body is such as to make the body a Government instrumentality are:

- (a) whether the body has any discretion of its own and, if it has, the degree of control by the Executive over that discretion;
- (b) whether the property vested in the corporation is held by it for and on behalf of the Government;

1989 (2) ZLR p209

SMITH J

- (c) whether the corporation has financial autonomy;
- (d) whether the corporation's functions are governmental functions.

Of these, the first is the most important factor.

Held, further, that, in the case of the Fund, complete control vests in the Minister and, under him, the Commissioner, who is a member of the Public Service. Where the Commissioner exercises a discretion, he acts in accordance with Government policy. The Fund has no function other than the payment of compensation to workers or their dependants in accordance with the Act. Its activities are carried out by members of the public service. Accordingly, it is an organ of Government and must be regarded as "the State" for the purposes of the Regulations.

Cases cited:

Mersey Docks & Harbour Board v Cameron [1861-73] All ER Rep 78; (1864) 11 ER 1405

Gilbert & Anor v The Corporation of Trinity House (1886) 17 QBD 795

Fox & Ors v Government of Newfoundland [1898] AC 667

Metropolitan Meat Industry Board v Sheedy & Ors [1927] AC 899

Banco de Mocambique v Inter-Science Research & Development Services (Pty) Ltd 1982 (3) SA 330 (T)

A G Matika for the applicant

E Chatikobo for the respondent

Judgment

Smith J: The respondent is the lessee of two separate premises situated just outside Harare. One is described in the lease as "superette together with garage/workshop" and the other as "superette residential house". Both properties are registered in the name of the Workmen's Compensation Insurance Fund (hereinafter referred to as "the Fund"). The lease of the superette premises, which was for a period of one year, expired on 31 May 1989 and the lease of the residential house, which was on a monthly basis, was terminated by the lessor on 31 May 1989. The applicant has applied for an order of ejectment. The respondent has submitted that it is a statutory tenant in terms of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) (hereinafter referred to as "the Rent Regulations") and is entitled to remain in occupation of the premises.

The facts in this case are common cause and there is only one issue to be resolved. Both parties agree that the leases entered into for the premises have terminated. Occupation of the residential house is conditional upon the lessee having occupation of the superette premises. The superette premises

1989 (2) ZLR p210

SMITH J

are commercial premises as defined in the Rent Regulations. Section 2(2) of the Rent Regulations provides that the regulations shall not apply to the letting of commercial premises by the State. The issue that has to be resolved in this case is whether the Fund can be regarded as the State. If it can be, then the Rent Regulations do not apply to the letting of the superette premises and the ejectment of the respondent may be granted. If, however, the Fund cannot be regarded as the State, then the respondent is entitled to the protection afforded by s 22 of the Rent Regulations.

The Fund is established by s 89 of the Workmen's Compensation Act [Chapter 269] (hereinafter referred to as "Chapter 269"). That section specifies what the Fund shall consist of and s 90 provides for the application of the Fund. Items for which moneys of the Fund may be applied are the payment of compensation to workmen or their dependants (para (a)), the repayment of advances from the Consolidated Revenue Fund in respect of remuneration paid to officers and their pension contributions (para (d) and (e)) and expenses incurred by the Comptroller and Auditor-General in auditing the accounts of the Fund. In terms of s 89(1) of Chapter 269, the Fund is vested in the Minister of Labour, Manpower Planning and Social Welfare (hereinafter referred to as "the Minister") and, subject to the provisions of Chapter 269, he has the sole management thereof. Section 27 of Chapter 269 provides that the Minister shall appoint an officer in the Public Service to be the Workmen's Compensation Commissioner and such other persons as are necessary to enable the Commissioner to administer the Act. The remuneration of persons so appointed is paid out of the Consolidated Revenue Fund which is reimbursed from the Fund.

The modern case law on the position of statutory corporations vis-a-vis the Crown stems

ultimately from the *locus classicus* which is *Mersey Docks and Harbour Board v Cameron* [1861-73] All ER Rep 78; (1864) 11 ER 1405. In that case, the House of Lords held that the Mersey Docks and Harbour Board was not entitled to the immunities of the Crown. MR JUSTICE BLACKBURN in a judgment which canvassed thoroughly the various authorities on the matter pointed out that the immunity of the Crown from the poor rate extended not only to buildings in the occupation of the Crown but "it carried a good deal farther, and applied to cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation". However, after a lengthy examination of the authorities, BLACKBURN J came to the conclusion that the weight of authority was against granting the Board the immunities of the Crown. He then continued at p 1418 (p 90 of the All England Report Reprint):

1989 (2) ZLR p211

SMITH J

"And if we view the case on principal, without regard to the decisions either way, it seems to us clear that the Mersey Docks and Harbour Board ought to be rated.

The Counsel referred to many expressions in the local Acts showing that the Mersey Docks were thought likely to confer great public benefit to the commerce of this country; and there is no doubt that that expectation has been realised, and that these docks are of great public benefit; but not more so than the docks on the River Thames, all of which are in the hands of private companies, and are undoubtedly rateable.

The rate is to be withheld, not in respect of the value of the benefit conferred on the public, or on that portion of it which uses the dock, but is to be imposed on the occupiers of the docks in respect of the value to them derived from the payments taken for that use. And we think it impossible to point out any real distinction in this respect between the occupation of a dock formed by a company under an Act of Parliament incorporating 'The Companies Clauses Act', and 'The Harbours, Docks and Piers Clauses Act, 1847,' and the occupation of the Mersey Docks by the Mersey Docks and Harbour Board.

A company forming docks under an Act of Parliament incorporating these Acts is bound to maintain the docks, and keep harbour-masters and other officers there, and to allow the public to use the docks on payment of the rates, and to allow Her Majesty's vessels to use them without making any payment; and by these means they confer a benefit on the public; the company, by virtue of its occupation, receives the rates on shipping using the docks, and the amount thus received is applicable to keeping up the docks, and then to paying interest on the loans, the amount of which is limited, and then in paying dividends on the share capital; and it is common to have a maximum limit put on the rate of the dividend; when the maximum dividend is reached, the rate must be lowered. It is indisputable that a company thus occupying a dock is an occupier, and rateable as such. Now if, without in any way altering the mode in which the docks are enjoyed by the public, or altering the rates leviable, or changing the harbour - masters and others who manage it, we change the name of the body which occupies it from that of 'the Company' to that of 'the Board'; and if, instead of 'the Company' paying to its shareholders a maximum dividend on their capital, 'the Board' must pay to the same individuals identical sums, but call them 'interest on bonds' instead of 'maximum dividend on share capital', what difference does this make?"

1989 (2) ZLR p212

SMITH J

In the case of *Gilbert & Anor v The Corporation of Trinity House* (1886) 17 QBD 795 the Queen's Bench held that the Corporation of Trinity House, a body which is responsible for the superintendence and management of all lighthouses and beacons in England, could not claim the immunities of the Crown. The court in this case relied on the *Mersey Docks* case and also looked to the history of Trinity House, which had grown up gradually with the amalgamation of

lights or beacons which were at one time private property. It considered that the Corporation was in no sense an emanation of the Crown. Perhaps the most important point made in this case is in the judgment of WILLS J, where he stressed that a statutory corporation cannot possibly have a "duplicate capacity" and be regarded in certain aspects as a private corporation and in other aspects as a great Department of State.

In *Fox & Ors v The Government of Newfoundland* [1898] AC 667 the Privy Council held that various boards of education in Newfoundland were not agents of the Government and were not, therefore, entitled to the priority which the Crown had in the case of the liquidation of a company, SIR RICHARD COUCH remarked in this connection:

"The appointment of boards for each of the three religious denominations, and the constitution of the board, indicate that it is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it - a power which is independent of the Government."

A rather similar decision to that in *Fox's* case is *Metropolitan Meat Industry Board v Sheedy & Ors* [1927] AC 899, in which the Privy Council held that a debt due to the Board was not a debt due to the Crown and that a claim to priority in the liquidation of a debtor company could not be supported. Here again, the fact that the Board had an independent discretion weighed heavily with the court. To quote from the judgment of VISCOUNT HALDANE at pp 905-6:

"Their Lordships agree with the view taken by the learned judge in the Court below that no more are the appellant Board constituted under the Act of 1915 servants of the Crown to such an extent as to bring them within the principle of the prerogative. They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions,

1989 (2) ZLR p213

SMITH J

even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund. Under these circumstances their Lordships think that it ought not to be held that the appellant Board are acting mainly, if at all, as servants of the Crown acting in its service."

In *Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T) the court had to decide whether the applicant was an organ or department of the Government of Mocambique or a corporation separate and distinct from the Government. At p 333 GOLDSTONE J referred to a "most useful article" by Mr V K Moorthy in (1980) 30 *International and Comparative Law Quarterly* 638 entitled "The Malaysian National Oil Corporation - Is it a Government Instrumentality?" With reference to decisions in England, Australia, New Zealand and Canada the author states at pp 640-1:

"The Courts have evaluated the relationship between the Government and a statutory corporation for the purpose

of determining whether or not the corporation is a Government instrumentality by the application of various tests.

The tests are as follows: -

- (1) Whether the body has any discretion of its own; if it has, what is the degree of control by the Executive over the exercise of that discretion;
- (2) whether the property vested in the corporation is held by it for and on behalf of the Government;
- (3) whether the corporation has any financial autonomy;
- (4) whether the functions of the corporation are Governmental functions."

After referring to the above-cited extract, Goldstone J said at p 334:

"The conclusion expressed by the learned author is that the most important factor is that of control and that, if there is significant control, the functional test is of little or no importance (at 641). This approach finds support in the speeches of the majority of the Law Lords in *BankVoor*

1989 (2) ZLR p214

SMITH J

Handel en Scheepvaart NV v Administrator of Hungarian Property [1954] AC 584. The question which fell to be decided by the House of Lords was whether the Custodian of Enemy Property was a servant of the Crown and, as such, exempt from payment of income tax. In the course of his speech LORD REID said the following at 616 -

'In my judgment the question whether the custodian is a servant of the Crown depends on the degree of control which the Crown through its Ministers can exercise over him in the performance of his duties. The fact that a statute has authorised his appointment is, I think, immaterial, but the definition in the statute of his rights, duties and obligations is highly important. In the ordinary way, a civil servant's duties are not prescribed, though his salary may be fixed in Parliament, and I have no doubt that he is a servant of the Crown. But when a statute creates an office it may give to the holder more or less independence from ministerial control so that the officer has to a greater or less extent a discretion which he alone can exercise, and it may be that the grant of any substantial independent discretion takes the officer out of the category of servants of the Crown for the present purpose.'

And Mr Moorthy cites a recent Australian High Court case, *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 53 ALJR 614 in which AICKIN J said:

'Of all the kinds of provision that may be relevant to the determination of whether a statutory body (whether corporate or not) is the Crown, the capacity of the executive government to control its operations (whether directly by instruction or direction or indirectly by power to remove...those in control of its operations), and the nature of its functions are the most important.'

In the same case STEPHEN J said:

'No doubt in practice a statutory corporation will seldom be either a mere passive instrument or wholly autonomous. If the former its creation would scarcely be worthwhile: departmental officers could serve the purpose just as well. If the latter it would savour of Frankenstein's monster, hence the usual retention of some control, even if it be no more than some power of appointment and removal of the members of its governing body, perhaps the existence of an obligation to make periodic reports to Parliament or in particular, if public funds are in question, the imposition of audit and financial reporting procedures.'"

SMITH J

At p 339 GOLDSTONE J went on to say:

"In *Metropolitan Meat Industry Board v Sheedy* [1927] AC 899 (PC) LORD HALDANE regarded the discretionary powers of the board inconsistent with its being an organ of Government. At p 905 he is reported to have said the following:

'Their Lordships agree with the view taken by the learned Judge in the Court below that no more are the appellant board constituted under the Act of 1915 servants of the Crown to such an extent as to bring them within the principle of the prerogative. They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs ... It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown.'

That approach of the Privy Council found approval in the speech of LORD REID in *Bank Voor Handel en Scheepvaart NV v Administrator of Hungarian Property* (*supra* at 617-8)."

With regard to the Fund, it is a separate juristic entity which possesses its own assets. However, it does not have an independent board of management which has any discretion. The Fund vests in the Minister and the management and administration of the Fund vests in the Commissioner who is a member of the Public Service of Zimbabwe. The Fund does not employ staff to administer its affairs. All members of staff are also members of the Public Service and subject to the directions of the Minister. Thus the Minister has effective control over the administration of the Fund. The salaries of the members of staff are paid from the Consolidated Revenue Fund but are reimbursed from the Fund. That, however, is obviously required to ensure that the costs of operating the Fund are covered by the levies paid into the Fund by employers. It is for that reason that the costs incurred by the Comptroller and Auditor-General in auditing the accounts of the Fund are also recouped from the Fund.

I agree with the views expressed above that, in determining whether or not a statutory corporation is an organ or an agent of the State, the most important factor is that of control. In the case of the Fund, complete control vests in the

SMITH J

Minister and, under him, in the Commissioner who is a member of the Public Service. In carrying out his duties, the Commissioner must comply with the requirements of Chapter 269 but where he is entitled to exercise his discretion he would obviously have to act in accordance with Government policy on the issue. Thus the Minister has full control over the exercise of such discretion. The Fund does not have any functions other than the payment of compensation to workers or their dependants in accordance with the provisions of Chapter 269. Its day-to-day activities are conducted by persons who are members of the Public Service. In my opinion, it is an organ of Government and therefore must be regarded as "the State" for the purposes of the Rent Regulations. Both counsel have agreed that if the Fund is "the State" for the purposes of

the Regulations then the respondent is not entitled to remain in occupation of the superette premises or the residential premises which are the subject of this application. Accordingly it is ordered -

1. That the respondent give to the applicant, not later than 31 August 1989, vacant possession of the premises described as superette together with garage/workshop at the Harare Motel/Arlac and superette residential house at the Snake Park premises/Arlac failing which the Deputy Sheriff be and is hereby directed and authorized to evict the respondent from the said premises.
2. That the respondent pay damages for holding over at the rate of \$850,00 per month or part thereof of the superette together with garage/workshop at the Harare Motel and \$350,00 per month or part thereof for the superette residential house Snake Park premises/Arlac, calculated from 1 June 1989.
3. That the respondent pay the costs of this application.

Scanlen & Holderness, applicant's legal practitioners

Gill Godlonton & Gerrans, respondent's legal practitioners

1989 (2) ZLR p217

S v MUTUMBUKA & ANOR 1989 (2) ZLR 217 (HC)

Editor's Note:(9)

Court **High Court, Harare**

Adam J

Criminal trial

24-27 July & 3 August 1989

Flynote

Criminal procedure (sentence) - Control of Goods (Price Control) Regulations 1954 - s 18 - selling commodity for price exceeding maximum allowed under price control order - accused liable to fine not exceeding "value" of the commodity - meaning of "value".

Headnote

In terms of s 18(3) of the Control of Goods (Price Control) Regulations 1954 (FGN 255 of 1954), a person who sells a commodity at a price in excess of the maximum price fixed for that commodity by a price control order is liable to a fine not exceeding "the value" of the commodity or \$5000, whichever is the higher. The meaning of "value" is not defined in the enactment. It does not necessarily mean the "market value", nor is it to be restricted to the maximum lawful selling price, as provided in the price control order, unless there is evidence to show that that price can be held to be the "market price". In the context of these regulations, it means the monetary worth of the commodity, being the actual amount paid to the seller in contravention of

the legislation, without reference to the "market value".

Judgment of SMITH J in *S v Levy* 1989 (2) ZLR 12 (HC) not followed.

Cases cited:

S v Universal Auto Parts & Accessories (Pvt) Ltd CRB 20602, 1989 High Court, Harare (unreported)

S v Levy supra

van der Merwe NO v van der Merwe 1973 (1) SA 436 (C)

Pietermaritzburg Corporation v SA Breweries Ltd 1911 AD 501

1989 (2) ZLR p218

ADAM J

SA Railways v Theron 1917 TPD 65

S v Shava 1989 (2) ZLR 107 (HC)

W Dunn & Co v Estate Smith 1932 NPD 395

Minister of Water Affairs v Mostert & Ors 1966 (4) SA 690 (A)

Estate Marks v Pretoria City Council 1969 (3) SA 227 (A)

May & Ors v Reserve Bank of Zimbabwe 1985 (2) ZLR 358 (SC); 1986 (3) SA 107 (ZS)

S v dos Ramos 1978 RLR 297 (AD); 1978 (4) SA 318 (RA)

Gordon & Rennie NO v Standard Merchant Bank & Ors 1984 (2) SA 519 (C)

S v Mapheele 1963 (2) SA 651 (A)

A Chikumira for the State

A P de Bourbon SC for the accused

Judgment

Adam J: The first accused was convicted on his plea of guilty of the contravention of s 18 of the Control of Goods (Price Control) Regulations 1954 (FGN 255 of 1954 as amended) ("the Price Control Regulations") in that on or about 10 September 1987 he sold a Peugeot 504 sedan motor vehicle for \$40 000, which was in excess of the price of \$9 338 specified as the permissible selling price under s 3(1) of the Control of Goods (Sale of Motor-vehicles) Order 1981 (SI 578 of 1981 as amended) ("the Price Control Order"). Also, the first accused was jointly charged with the second accused with contravening s 18 of the Price Control Regulations, in that on or about 3 August 1988 they sold a Toyota Cressida motor vehicle for \$110 000, which was in excess of the price of \$27 432 specified as the permissible selling price

under s 3(1) of the Price Control Order. To this charge the first accused pleaded not guilty, while the second accused pleaded guilty, conceding the amount involved as being \$55 000. Convictions were entered against both accused, the State having failed to adduce either direct testimony or circumstantial evidence to establish that the Toyota Cressida was sold by them for \$220 000.

The penalty provisions of s 18(3) of the Price Control Regulations read as follows:

"18. (3) Any person who contravenes any provision of these regulations shall be guilty of an offence, and liable -

- (a) in the case of an offence which involves any commodity, to a fine of an amount not exceeding the value of such commodity or five thousand dollars, whichever is the greater; or

1989 (2) ZLR p219

ADAM J

- (b) in any other case, to a fine not exceeding five thousand dollars; or to imprisonment for a period of five years, or to both such fine and such imprisonment."

These Price Control Regulations were repealed by the Control of Goods (Price Control) Regulations 1989 (SI 153B of 1989) but s 38(3) of the new Regulations has been similarly worded.

In this case, a commodity of over \$5 000 being involved the maximum penalty is a fine in the amount in excess of \$5 000, up to the value of such commodity, together with imprisonment for 5 years. This legislation has prescribed the seriousness of the offence. Accordingly it is incumbent on this court to ascertain what is the "value" of the Peugeot 504 sedan and the Toyota Cressida.

The word "value" is not defined in the Price Control Regulations. It was the contention on behalf of the two accused that "value" should be construed for purposes of the penalty as being the controlled permissible selling price under the Price Control Order. On the other hand, the State's argument is that "value" should be held to be the actual amount paid by the purchasers to both the accused, as being the market value.

In *S v Universal Auto Parts and Accessories (Pvt) Ltd* CRB 20602 (1989) - unreported - the accused company was charged with the contravention of s 18 of the Price Control Regulations in that the accused, as an importer of motor vehicle hub seals, failed to submit for the Minister's approval, pursuant to s 8(3) of the Control of Goods (Price Control) Order 1982 (SI 263 of 1982) the accused company's method, including mark-up, profits and discount structures, of arriving at its selling price. In that case, the statement of agreed facts indicated that the accused company had imported, in early May 1987, 19097 pieces of hub seals from Japan. The FOB Osaka Japan price was Zimbabwe \$23 127,97 and the CIF Harare (landed cost) was Zimbabwe \$25 440,76. The controlled maximum permissible selling price, including sales tax, was \$120 379,41. The accused company's retail outlet was its subsidiary, Rutima Distributors (Pvt) Ltd trading as Uniparts. The accused company did not submit to the Minister its method of arriving

at a selling price for the Minister's approval and in fact sold the hub seals to Uniparts at a nominal mark up. Uniparts sold 9000 hub seals to the CMED for \$64 1250. The maximum controlled permissible selling price including sales tax for 9000 hub seals was \$119 075,81. It was argued on behalf of the State that since the offence charge involved a commodity the "value" could

1989 (2) ZLR p220

ADAM J

be determined in four ways - the FOB price; the CIF (landed cost); the maximum controlled permissible selling price; or the actual amount paid by CMED. The State suggested that the market price was the maximum controlled permissible selling price which was the "value". Further, the State indicated that if the court found ambiguity in the wording of the legislation the court should follow an interpretation favourable to the accused. The accused company's contention was that the offence charged concerned a failure to submit its method of arriving at a selling price and as such this could not be said to involve a commodity. Alternatively, it was suggested on behalf of the accused company that there was in the legislation an ambiguity and so the penalty should be imposed under s 18(3)(b) of the Price Control Regulations. It was also urged by the legal practitioner for the accused company that if the court was inclined to the view that the offence concerned involved a commodity, the amount of \$119 095,81 was not the "value" of the hub seals, since it was merely the maximum controlled permissible selling price and nor could the "value" be said to be \$641 250 paid by CMED to Uniparts since this was a secondary market price or an inflated price. MTAMBANENGWE J having concluded that there was an ambiguity in the legislation imposed a fine of \$2 500, pursuant to the provisions of s 18(3)(b), without dealing with the issue of the "value" of the hub seals.

I should state that I am in full agreement with the submissions advanced on behalf of the accused company that "value" was not the same thing as the maximum controlled permissible selling price. To do so would be for the court to hold that any amount received which was twice the maximum controlled permissible selling price could, after payment of the penalty fine, be kept legitimately by the culprit. The court would be condoning the culprit's conduct even though he had paid the penalty suggested. Surely that could not have been the intention of the maker of the legislation.

In *S v Levy* 1989 (2) ZLR 12 (HC), where a Toyota Cressida had been purchased for \$29 821,58 in October 1987 and sold to an insurance company on 23 September 1988 for \$105 000, SMITH J, after referring to *van der Merwe NO v van der Merwe* 1973 (1) SA 436 (C) at 438; *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 at 522; *South African Railways v Theron* 1917 TPD 67; Stroud's *Judicial Dictionary and Words and Phrases Legally Defined* observed as follows at p 14H:

"...the term 'value' ordinarily means 'market value' or 'exchange value' ie what would a person desiring to buy the commodity have had to pay for it to a seller willing to sell it for a fair price. Reference was made

1989 (2) ZLR p221

ADAM J

... to \$105 000 being the black market price. That may be so. However, in my view, that was in fact the value of the Toyota Cressida. In the statement of agreed facts it is clearly said that the official of the purchasing company suggested the figure 'as being the appropriate market value of the vehicle'.

If the maximum penalty is accepted as being the black market price that does not mean that the court is condoning or in any way legitimating the sale of motor vehicles at prices in excess of the controlled price. The court is merely accepting the current situation. In fact, invariably price controls are instituted because the value of the commodities concerned increases too rapidly and the Government wants to place some curb on the price ...

A further argument in favour of accepting that the value of the commodity, for the purposes of the Price Control Regulations, is the black market price is that such a proposition, in the my view, accords with justice and common sense. Where a person sells a commodity at a price which greatly exceeds the controlled price and thereby makes a substantial profit, surely the intention of the Legislature must be that the fine imposed on the offender should be greater than his unlawful profit ...

And further at p 18A:

It seems to me to be wrong that in a case such as this, where a buyer voluntarily approaches the owner of the car and tempts him by offering a price more than four times higher than the controlled price, the buyer should be able to get a refund of the excess. Although in terms of s 16 of the Price Control Regulations the Minister of Trade and Commerce may order a refund of a sum not exceeding twice the amount of the excess, it seems to me that such an order should not be made in cases where the purchaser has sought out the seller and freely and voluntarily offered a price in excess of the controlled price."

SMITH J initially seems to hold that "value" here was the market value or exchange value for the vehicle, since the insurance company regarded the price as being the appropriate market value for the vehicle, However, later on he indicates that he saw nothing wrong in accepting "value" for purposes of the Price Control Regulations as being the "black" market price actually paid by each purchaser.

In *S v Shava* 1989 (2) ZLR 107 (HC) SMITH J held (where the accused, through a friend as agent, had sold some motor vehicles) that such sales could be

1989 (2) ZLR p222

ADAM J

accepted as having been conducted on a willing buyer/willing seller basis, and that since the buyers had no special relationship with the accused they must be deemed to have paid what the buyers considered to be the going rate. But it does not follow that just because a purchaser has paid the price asked by the seller that the purchaser must be deemed to have paid the going rate without any evidence that was the position. It seems to me that Smith J was not correct when he concluded here that it could safely be held that "market prices" were being paid. His conclusion did not accord with the ordinary usage of "value" as meaning "market value" or "exchange value" described in the cases cited by him.

When dealing with the question of the vagaries of the market in the determination of the selling price SMITH J at pp 110A went on to state:

"I agree that the price of a vehicle may vary, depending upon how desperate the situation of the buyer is. However, in each case the seller decides, either personally or through his agent, what price he will accept for the vehicle. Therefore, as far as he is concerned, he is being paid a price which he accepts as being the value of the vehicle as between himself and the buyer. I can see nothing wrong in principle in accepting that price as being the

criterion for determining the fine that should be imposed. That is, after all, the actual amount of money received by the offender."

In the above passage SMITH J has here again departed from the ordinary usage of "market value" and has adopted once more the construction for "value" as being the actual amount paid by the purchasers of the vehicle, it seems without reference to or irrespective of its "market value".

In *van der Merwe NO v van der Merwe supra* at 438 CORBETT J said:

"It seems to me that the question really turns upon what is meant by the word "value" ... If one refers generally to the case law one finds the word 'value', in its ordinary parlance, is interpreted to mean 'the market value' of the property concerned".

For this he relied on *Pietermaritzburg Corporation v South African Breweries Ltd supra*, where the court dealt with the issue of the valuation of property. INNES JA at 515-517 stated:

"The authority given to the Council under s 106 of the Act to make and

1989 (2) ZLR p223

ADAM J

levy rates and assessments upon immovable property in such manner as it might determine, did not, I think, include an authority to fix the principles upon which such property should be valued. Nor has the council purported to do so. It became the duty of those entrusted ...to ascertain the true value for rating purposes of each particular holding. And the proper standard to adopt was, in my opinion, the market value at the time. The principle that the value of an article is, as a general rule, what it will fetch is well recognised (see *Elstow v Rose* (1868) LR 4 QB 4). And it is the principle which should operate here. So that in assessing property for rating purposes, the aim should be to estimate what could be obtained for it, not what it cost or what its utility to the owner would be worth. Moreover, market value is the most uniform test, and the one easiest of practical application. ...

It may not be always possible to fix the market value by reference to concrete examples. There may be cases where, owing to the nature of the property, or to the absence of transactions suitable for comparison, the valuator's difficulties are much increased. His duty then would be to take into consideration every circumstance likely to influence the mind of a purchaser, the present cost of erecting the property, the uses to which it is capable of being put, its business facilities as affording an opportunity for profit, its situation and surroundings, and so on. There being no concrete illustration ready to hand of the operation of all these considerations upon the mind of the actual buyer, he would have to employ his skill and experience in deciding what a purchaser, if one were to appear, would be likely to give. And in that way he would to the best of his ability be fixing the exchange value of the property."

The approach of DE VILLIERS JP at 522-524 was:

"The word 'value', as pointed out by writers on Political Economy, has two meanings. It sometimes expresses the utility of some particular object (which is called value in use) and sometimes the power of purchasing other goods which is its value of exchange ...When the Legislature prescribes that the value of the property has to be determined, it refers to the exchange value of the property, in other words, the amount of money for which the property can be exchanged or sold. It remains to consider whether this exchange value is the temporary or market value of the property, or whether it is what has been called its permanent or natural value, to which the market value after every variation tends to return. In the absence of any provision to the contrary, I am of opinion, we must take the word 'value' in its more ordinary meaning of temporary

1989 (2) ZLR p224

ADAM J

or market value. To give the other meaning would perhaps be more satisfactory from an assessment point of view, in a country where fluctuations in the market value of property are considerable and frequent this would certainly make for uniformity. The method of arriving at the value adopted by the valuers ... would seem to approximate more nearly to the permanent value. On the other hand, the law makes no provision for it, and was never understood to refer to the permanent value of the property...

We can only come to the conclusion, therefore, that whatever methods may have been adopted in Natal in the past in valuing property for assessment purposes, the object as laid down in the decisions, was always only to ascertain the actual market value of the property at the date of the assessment. What that is is in each case a question of fact. As was urged by Counsel for the respondent, there can be only one market value on a given date. At the same time the law does not require the actual sale of the property; the rate is levied upon what is in the opinion of the valuers or in the last resort of the Court the present market value of the property. And being a matter of opinion, it is not remarkable that there should be differences. In the absence of the power to ascertain the value by an actual sale, only approximate results can be expected. Many factors would be taken into account by an experienced valuator. He will give due weight to all considerations which would likely operate on the minds of intending purchasers, and to arrive at a valuation accordingly. For the Court to attempt to lay down what considerations should influence a valuator would be impossible. The valuator has to bear in mind that it is not for him to give effect to any particular theory of valuation. The actual market value of the immovable property at the date of assessment is what has to be determined."

In *W Dunn & Co v Estate Smith* 1932 NP 395 at 401-403 FEETHAM JP considered what DE VILLIERS JP had indicated, and said:

"But the exposition ... of the meaning of the term 'value' is of great assistance in this case. It distinguishes between the two different meanings of the word 'value', (1) value in use and (2) value in exchange, and further between two different meanings which may be given to the expression 'value in exchange', namely, temporary or market value on the one hand and permanent or natural value on the other. It seems to me that we have here to deal with the question of value in exchange, and that the two meanings which have to be considered are therefore ... (1) temporary or market value, and (2) permanent or natural value. He

1989 (2) ZLR p225

ADAM J

points out a possible objection to the acceptance of market value as a basis of valuation owing to the fluctuations in market value, and indicates that on abstract grounds there might be cases where there would be good reason for accepting as a basis of valuation for rating purposes the permanent value. But in the result he rejects that basis and accepts market value ... One argument which suggests itself is that 'market value' is perhaps the more ordinary meaning of 'value'. I think there is a statement to that effect in the case ... But the fact that it is the more ordinary meaning of the term 'value', where the question at issue is the value of a particular property, does not mean that any other meaning is necessarily excluded ... It seems to me therefore that 'value' does not necessarily mean market value."

In *Minister of Water Affairs v Mostert & Ors* 1966 (4) SA 690 (A) at 723, where the issue related to the several amounts of compensation paid for expropriated land, WESSELS JA observed:

"Both the seller and the purchaser will exercise an intelligent judgment in deciding upon the purchase price and will thus be guided by the evidence as to a fair market price ... Comparable transactions, particularly where the sales are concluded after objections and impersonal bargaining, afford the most satisfactory evidence of a fair market value because it demonstrates how circumstances have affected the minds of purchasers and sellers ... Where such evidence is not available or not satisfactory, the valuer would normally have regard to evidence which indicates what the fair market value probably would be ..."

Similarly in *Estate Marks v Pretoria City Council* 1969(3) SA 227 (A) at 253-254 OGILVIE

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THOMPSON JA (as he then was) stated:

"It is, I think, well established that comparable transactions afford the most satisfactory guide in determining market value ...

'The prices paid for comparable property in the neighbourhood are the usual evidence as to the market value'

The difficulty, of course, often is to find transactions which are truly comparable. Ordinarily speaking, an expropriation price hardly fits the concept ... of a sale 'in the open market by a willing seller to a willing buyer.'"

MASON J in *South African Railways v Theron supra* at 71 said:

1989 (2) ZLR p226

ADAM J

"I use the words 'current value', instead of 'market value', because the words 'market value' are sometimes interpreted to mean solely the value at the municipal market or the particular public market of the neighbourhood. That is not correct. When the phrase 'market value' is used in connection with damages, what it means is the general selling price in that particular neighbourhood, and that general selling price is determined not only by the price at the public market but also by the general prices throughout the district among people who deal in that particular commodity."

It was argued on behalf of the accused persons that, in ascertaining the "market value", the "premium" would have to be disregarded (in this case that would mean the excess amount over the permissible controlled selling price), reliance having been placed on *May & Ors v Reserve Bank of Zimbabwe* 1985 (2) ZLR 358 (SC) at 375-7; 1986 (3) SA 107 (ZS) at 120-121 where DUMBUTSHENA CJ stated:

"It may be timely to look at the meaning of market value. In *Gibson v Norfolk County Council* [1941] 1 KB 191 at 195; [1941] 1 All ER 252 at 255 HUMPHREYS J defined 'market value' as follows:

'[The phrase] "market value" assumes that the thing which has the market value is something which somebody will buy ...It is assumed that there is a market in which that thing can be sold ...and [that] what they will pay for it on the average is what would be the market value.'

The expression 'market value' is not defined in the Regulations. The Indian Supreme Court has given a meaning to market value in statutes where it is not defined by looking to its meaning under other statutes and adopting the meanings of the expression as defined in those statutes. The court defined market value in the Income-Tax Act by comparing its definition under the Land Acquisition Act 1894. In *Raghubans Narain Singh v Uttar Pradesh Government* AIR 1967 SC 465 the Indian Supreme Court said:

' "market value" means the price that a willing purchaser would pay to a willing seller for a property having due regard to its existing condition, with all its existing advantages, and its potential possibilities when looked at in its most advantageous manner, excluding any advantages due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired.'

In my judgment, the words used in subs (6) of s 12A of the regulations

1989 (2) ZLR p227

ADAM J

bear an ordinary meaning and the term 'market value' means the best price which can be reasonably obtained on the open market. In this case the best price was ascertained by basing the assessment of compensation on the

prices prevailing on the Johannesburg Stock Exchange at the date when the respondent gave notice of its intention to acquire the shares. There was no need for the willing purchaser and the willing seller to interact in order to get the right price. The price of the shares on the Johannesburg Stock Exchange was fixed, having regard to the market forces and other extraneous circumstances prevailing at the time the shares were acquired by the respondent ... That price was the value of the shares to the appellants. Had they converted them on the foreign market, the only market still existing since the government had abolished the Zimbabwe market, they would have received no less and no more than the respondent paid ...

In my opinion, the real value of what was acquired was the price of the shares unencumbered by the premium price in order to obtain foreign currency with which to buy the shares. The assets acquired by the respondent were the shares and nothing more."

It was also the submission by the accused's legal practitioner that a court should follow the principle that the law should be certain and predictable and this could be achieved, in the case of the penal provisions here, by construing "value" as meaning the permissible controlled selling price. But this principle, as far as a statute is concerned, can be satisfied by the court construing it by giving effect to what the words of the enactment would reasonably be understood to mean. Further, it was the accused's legal practitioner's contention that since the provision was punitive it should be strictly construed, in favour of the accused. However, in *S v Dos Ramos* 1978 RLR 297 (AD) at 304; 1978 (4) SA 318 at 324 (RA) LEWIS JP succinctly stated:

"Although penal provisions must be strictly construed, they should not be construed so strictly as to result in the creation of absurdity. The general rule requiring a strict construction is always subject to the limitation that it must also be a common sense construction."

In *Gordon & Rennie NO v Standard Merchant Bank & Ors* 1984 (2) SA 519 (C) DE KOCK J at 527-528 observed most correctly:

"This shows, I think, that the provisions ... are intended to provide a meaningful remedy against the abuses contemplated by the Legislature

1989 (2) ZLR p228

ADAM J

and the Court should, I consider, give the words of the section their full breath. In *Re Cyona Distributors Ltd* [1967] 1 All ER 281 at 284 LORD DENNING MR expressed himself thus ...

'In my judgment, that section is deliberately phrased in wide terms so as to enable the Court to bring fraudulent persons to book ... In short, I think that the words of the section are to be given their full width'

...

As for counsel's argument that a penal section must be restrictively interpreted, it must be borne in mind, firstly, that the rule only applies where the language used is obscure or ambiguous, which I do not think is the case here, and, secondly, that the rule has in any event today lost much of its force. It now appears to be recognized that the paramount duty of judicial interpreters is to put upon the language of the legislator, honestly and faithfully, its plain and rational meaning and to promote its object ... I do not consider that the rule of construction, that a penal section must be restrictively interpreted, is of any real assistance in this case."

The accused's legal practitioner cited *S v Mapheele* 1963 (2) SA (A) 651 at 655 where BOTHA JA said:

"It is a recognised canon of construction of statutes that any reference in any law to any action or conduct, is

presumed, unless the contrary intention appears from the statute itself, to be a reference to a lawful or valid action or conduct ...

The Legislature has not, in terms, restricted residence with another for the purpose of s 10(1)(c) to lawful residence, as it has restricted continuous residence for the purpose of s 10(1)(b). That is some indication of an intention on the part of the Legislature not to restrict residence together for the purpose of s 10(1)(c) to lawful residence. There are, however, in my judgment, other considerations indicative of an intention to exclude, for the purpose of that section, residence which is unlawful and terminable at any moment."

It was the contention of the accused's counsel that the amounts received by the accused for purposes of "value" had to be reckoned on that prescribed by the permissible controlled selling price which was lawful. As clearly indicated by BOTHA JA, the presumption recognised is subject to contrary indication of the legislature's intention. In this case there is a contrary intention from what I state hereafter.

1989 (2) ZLR p229

ADAM J

The Shorter Oxford English Dictionary 3 ed gives as the definitions of the word "value",

"amount of some commodity ... which is considered to be equivalent of something else; a fair or adequate equivalent or return; ... material or monetary worth of a thing."

It states that, although derived from Old French, the word "value" was a regular phonetic descendant of the Latin word *valere* meaning "be strong, be worth".

It is clear from the foregoing that the word "value" has more than one meaning and, as stated by FEETHAM JP, that just because the more ordinary meaning of "value" in relation to a commodity is "market value" does not mean that any other meaning is necessarily excluded. In my view, the use of the word "value" in s 18(3)(a) (and in s 38(3)(a) in the new regulations) does not necessarily mean "market value". Nor can it be maintained that "value" was to be defined by the permissible controlled selling price as being the "market value", since a commodity whose controlled selling price was set at five thousand dollars or less, when sold in excess of such controlled price, attracted a penalty fine not tied to what can be described as the "lawful" controlled price, but one which could be to an amount up to five thousand dollars; and this without reference to the transaction having taken place in an "illicit" or "black market", particularly as by the very nature of these dealings, not having taken place in a "lawful" or "open market", the value arrived at cannot be said to be the general selling price not only at the public market but also throughout the district where the commodity was being sold. The controlled selling price, in appropriate cases, where evidence is led pertaining to the sale of such a commodity that substantiates this, can be held to be the "market value" of such a commodity. I am inclined to the view that, for purposes of s 18(3)(a) (and for s 38(3)(a) of the new regulations), "value", as it solely pertains to s 3(1) of the Price Control Order, means the monetary worth of the commodity and is the actual amount paid to the seller in contravention of the legislation without reference to "market value". The clear intention of the legislator was to prohibit the sale of commodities above the controlled price, with penal sanction. It cannot be said that the intention of the legislator was to permit the culprit to retain any amount obtained by him in excess of the permissible controlled selling price, less payment of a penalty fine up to the

amount of the controlled selling price above five thousand dollars.

Further, there is no evidence before this court as to "market value" of the

1989 (2) ZLR p230

ADAM J

motor vehicles in question and this court cannot come to the conclusion, as suggested by the accused's legal practitioner, that the "market value" was the prescribed permissible controlled selling price. Certainly it could not be suggested that the court take judicial notice of this.

It is with the foregoing approach in mind that I have carefully considered the submissions in mitigation made on behalf of both the accused. It is true that both the accused could have sold the Toyota Cressida when they acquired it on 2 October 1987 until 17 March 1988 for the amount received, but that is not a mitigating factor, but this court will take into account, unlike in the situation in *S v Shava supra*, that the motor vehicles in question were not acquired with the intention of re-sale as soon as possible. In addition, this court takes cognizance of the publicity in the media received by the accused, coupled with the loss of position by the first accused. As against this, there are certain aggravating features, such as the first accused's position as a Government Minister, which required him to lead by example; that he committed one offence in September 1987 and was involved in another offence in August 1988; and that these vehicles were deliberately sold with a vast profit in mind. I have given due weight to the pleas of guilty, where applicable, and carefully considered the moral blameworthiness of the accused, particularly the conduct of the first accused in having transgressed on two separate occasions. I should indicate that in *S v Levy supra* SMITH J said that the State was correct in not seeking a custodial sentence and in *S v Shava* he agreed that ordinarily such offences did not warrant a custodial sentence; but he said that if contravention persisted in deliberate and open defiance of the regulations the position would have to be reviewed. It seems to me that SMITH J, when alluding to "custodial sentence", was obviously referring to an effective term of imprisonment and could not be said to have ruled out a suspended term of imprisonment. In my view, in accordance with sound sentencing principles, in the particular circumstances of each case a suspended sentence as a personal deterrent should be available to a sentencing court.

In all the circumstances, the first accused is sentenced :

- 1 on the offence relating to the Peugeot 504 Sedan, to a fine of \$40 000 or, in default of payment, 8 months' imprisonment with labour.
- 2 on the offence relating to the Toyota Cressida, to a fine of \$15 000 or, in default of payment, 2 months' imprisonment with labour, of which \$10 000 or 1 month's imprisonment is suspended for 3 years on

1989 (2) ZLR p231

ADAM J

condition that he does not during that period commit any offence in contravention of SI

153B of 1989 and for which he is sentenced to imprisonment or a fine of not less than \$50.

The second accused is sentenced on the offence relating to the Toyota Cressida to a fine of \$50 000 or, in default of payment, 9 months' imprisonment with labour.

Sawyer & Mkushi, accuseds' legal practitioners

1989 (2) ZLR p232

S v NCUBE (2) 1989 (2) ZLR 232 (HC)

Court **High Court, Bulawayo**

Sansole J

Criminal review

4 August 1989

Flynote

Criminal law - assault with intent to do grievous bodily harm - what accused must intend to do.

Criminal procedure - plea - of guilty - explanation of elements of offence - need for magistrate to ensure that accused fully understands elements of offence.

Criminal procedure (sentence) - fine - desirability of imposing unless inappropriate -- quantum of fine - manner of assessing.

Headnote

Assault with intent to do grievous bodily harm is a serious offence and, like all serious offences, deserves serious care and consideration. If an accused person pleads guilty to such an offence, there is no room for a cursory treatment of the matter, for this may lead to a grave miscarriage of justice. The court must be satisfied, before convicting, that the accused fully understands the essential elements of the offence. In this case, the magistrate is obliged to make plain to the accused the difference between common assault and assault with intent to do grievous bodily harm. The vital question of intent should be put along the following lines:

"Did you intend to injure the complainant to such an extent as would seriously interfere with his bodily health?"

or, more simply:

"Did you intend to injure the complainant really seriously?"

The medical evidence may be essential not only to help resolve the issue of intent but also to help the court to determine a just and proper sentence.

1989 (2) ZLR p233

SANSOLE J

Wherever possible, and more particularly where the imposition of a fine is a permissible penalty, a fine should be considered before imprisonment. Only when the facts are such that a fine is inappropriate should imprisonment be considered. First offenders, in particular, should be kept out of prison as much as possible. This principle is of general application, and is not confined to crimes of dishonesty.

Computing the *quantum* of a fine is not a matter of guesswork. The fine must bear a realistic relationship to both the accused's means and the gravity of the offence. Any alternative period of imprisonment should be equally realistic and relate fairly to the fine.

Cases cited:

S v Murimwa HH-8-83 (not reported);

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

S v Chavirima HH-345-83 (not reported);

S v Mayo HH-468-86 (not reported)

R v Ashman (1858) 1 F&F 88

R v Matsukis 1940 SR 76

R v Edwards 1957 R&N 107 (SR)

S v Collett (1) 1978 RLR 205; 1978 (3) SA 206 (RA)

DPP v Smith [1960] 3 All ER 161 (HL)

S v Madzinga & Anor HH-372-86 (not reported)

S v Matengambiri HH-316-85 (not reported)

S v Kaipa HH-314-85 (not reported)

S v Mbelu 1966 (1) PH H176 (N)

S v Sibanda AD-10-72 (not reported)

S v Anock 1973 (1) RLR 154 (AD); 1973 (3) SA 128 (RA)

R v Sibanda 1969 (2) RLR 137 (GD)

S v Gwarada 1981 ZLR 17 (AD); 1981 (2) SA 531 (ZA)

S v Julius GS-269-80 (not reported)

S v Manwere 1972 (2) RLR 139 (AD); 1972 (4) SA 425

S v Nyati 1972 (2) RLR 215 (GD); 1973 (1) SA 553 (R)

S v Sailas 1978 RLR 400 (GD)

S v Jackson HH-268-82 (not reported)

Judgment

Sansole J: The accused was charged with and pleaded guilty to committing an assault upon the complainant, with intent to cause grievous bodily harm. He was duly convicted. He was sentenced to four months' imprisonment with labour, of which two months' imprisonment with labour were suspended for three years upon certain conditions. The accused was not represented at his trial.

1989 (2) ZLR p234

SANSOLE J

The facts, as they appear in the record, are these.

The accused was employed as a security guard by True Store Meat Supplies, situate in Entumbane Township, Bulawayo. He observed a four-year-old child enter the shop and steal a piece of meat from the refrigerator. He observed the child until it left the shop. And then he caught her.

As a result of questioning her, she revealed that she had been sent to steal by the complainant, who was the little child's neighbour. Indeed, the little child led the accused to the complainant. The accused then apprehended the complainant and then took her to the shop. There he took the complainant into a spare room in the shop. Then and there he commenced to assault the complainant on her buttocks and arms, demanding a confession from her.

It was claimed that the complainant lost consciousness as a result of the assault to the extent that it became necessary to pour some water over her, with a view to resuscitating her. Later on she was conveyed to hospital where she was detained for a day whilst receiving treatment. The medical report describes the injuries observed as:

"Painful swollen right and left forearms.

Painful right and left buttocks."

And the nature of the injuries received was described as "not severe". The evidence reveals that the accused used a piece of hosepipe to administer the assault. The accused said that he had not intended to cause complainant serious injuries, though he had foreseen the possibility of serious injury being caused to the complainant. He conceded that he had not taken any precautions to protect her from receiving serious injury. But his aim was to discipline her and nothing more.

In mitigation he said that he was single. He was in gainful employment and was in receipt of \$250 per month. He had no savings.

Soon after conviction and sentence the accused received the services of a legal practitioner, who immediately applied for his admission to bail pending an appeal. This was refused by the

trial magistrate and he stated his reasons for refusal as follows :

"CONVICTION

The defence has attacked the conviction on the following grounds :

1989 (2) ZLR p235

SANSOLE J

- (i) Accused did not formulate to requisite *mens rea (sic)* - the intention to do grievous bodily harm. They say that the accused gave a clear "No" to the question "Did you intend to cause serious injuries?" A perusal of the record will show that accused did agree that a reasonable person would have foreseen the possibility that the complainant would be seriously injured if assaulted in that manner. Accused said that there were steps he could have taken to avoid serious injuries resulting and that the only step he took was to hit the 16 year old girl on the buttocks which was not enough. It is trite law that accused's guilt may be based on either *dolus directus* or *dolus eventualis*.

Accused said he actually foresaw the possibility of the serious injuries resulting.

- (ii) The defence say that serious injuries did not result and the proper verdict should have been common assault. The most I can agree with them is that medical evidence is brief. This should influence a court to return a verdict of common assault. See *S v Mlilo* HB-33-89 and *S v Sibanda*.

The crime charged is one of intention. I agree that the injuries should also be serious for the verdict to be assault GBH. I do submit however that the fact that the girl lost consciousness during the assault (a fact that the defence now say is contested) suggests that the assault was 'not severe' as deposed to by the doctor.

I saw the hosepipe that was used - a black rubber-like pipe 1/2 an inch in diameter and about 70 cm long.

ON SENTENCE:

The defence say that accused should have been given the option of paying a fine. I considered it and felt the option of paying a fine was not suitable.

The cases referred to - *S v Gwarada* and *S v Julius* - were really crimes of dishonesty. The general principle (Yes!) is that first offenders should be kept out of jail.

In *Attorney-General v Mantwana* S-20-80 it was held that the above stated principle should not be taken too far. But there are certain offences in regard to which these principles do not apply, and these include crimes which, by reason of their magnitude or nature necessitate the imposition of a custodial sentence.

I am of the firmly held view that this was such a case, as in *S v Kawana & Ors* and *S v Mhuri* HH-457-88.

The application for bail pending review cannot succeed."

1989 (2) ZLR p236

SANSOLE J

However, the long and short of this saga was that the matter was referred to me for review. And Mr Hooper for the State agreed to bail pending review, he being of the view that, on the facts of this case, a custodial sentence was inappropriate.

In consequence, the accused's legal practitioners filed a written submission, whose gist is as

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follows:

1. The trial magistrate was wrong in proceeding with the matter as charged, since the accused had denied harbouring the specific intent.
2. The accused beat the complainant on her buttocks on top of her dress, but in the process the complainant covered her buttocks with her hands to protect them and in the process her arms and hands got struck by the blows.
3. The trial magistrate misdirected himself by attaching insufficient weight to the medical report, which in turn was brief and clear. It described the injuries caused to complainant as "not serious".
4. The complainant did not faint as a result of the assault. The accused poured water on her not because she had fainted but merely as part of the punishment.
5. If the trial magistrate was mindful of his responsibility under s 255(2)(b) of the Criminal Code, he should have entered a plea of not guilty. And thus the proceedings were not in accordance with real and substantial justice.
6. The record is not complete, in that what the accused had said was that, from the mezzanine floor, he had observed the complainant enter the shop in the company of a young child. The complainant then picked up a pre-packed piece of meat from a fridge and handed this to the young child. And then she picked up another piece, which she paid for. The young child then left the shop and was quickly followed by the complainant.

The accused followed the young child outside and questioned her. The young child became frightened. And at that juncture the accused observed the complainant disappear into the crowd. As a result of further investigations the complainant was indicated. He apprehended her and took her back to the shop where he punished her by assaulting her.

This matter, in my view, raises two issues of importance relating to procedure in regard to:

1989 (2) ZLR p237

SANSOLE J

- (a) conviction and
- (b) sentence.

There appears to exist some confusion in the minds of certain magistrates regarding the correct approach. And this confusion has revealed itself more frequently in, for instance, trials relating to the crime of assault with intent to cause grievous bodily harm. The trial magistrate's attitude in this matter is rather typical of the attitude to which I refer.

A. CONVICTION

Assault with intent to do grievous bodily harm is a serious offence and, like all serious offences,

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deserves serious care and consideration. In the result, once an accused person has tendered a plea of guilty, the trial magistrate should proceed in terms of s 255(2)(b) of the Criminal Procedure and Evidence Act [Chapter 59]. Thus the court should satisfy itself that the accused fully "understands the charge and the essential elements of the offence and the acts or omissions on which the offence is based", etc.

Clearly there is no room for a cursory treatment of the matter, for that may lead to a grave miscarriage of justice. Thus the practice of "cursorily putting down one-sentence entries in the record proclaiming compliance with the requirements of subs (2)(b) and (3) of s 255 cannot be condoned. This creates doubts in the mind of the reviewing court as to whether the accused understood the particulars, acts or omissions and elements of the offence": *per* DUMBUTSHENA AJP (as he then was) in *S v Murimwa* HH-8-83. See also *S v Mutadza* 1983 (1) ZLR 123 (HC) and *S v Chavirima* HH 345-83 where the conviction and sentence were set aside. And yet some magistrates, including the one in the instant case, fall foul of this obligation quite often. As EBRAHIM J put it in *S v Mayo* HH-468-86, many an accused person would not know the difference between:

"admitting to 'an intent to assault' on the one hand and to 'an intent to do grievous bodily harm' unless it were made clear to him that the latter involves the intended consequence of serious injury such as to impair bodily health."

Therefore, it is the obligation of the trial magistrate to make this difference to an accused quite plain. Later on in the judgment, the learned Judge ventured a suggestion regarding how to convey this difference. He said this:

"Where an accused is charged with assault with intent to do grievous bodily harm, the vital question of intent should be put along the lines of

1989 (2) ZLR p238

SANSOLE J

one or other of the following forms:

either

"Did you intend to injure the complainant to such an extent as would seriously interfere with his bodily health?"

(See *R v Ashman* (1858) 1 F&F 88; *R v Matzukis* 1940 SR 76; *R v Edwards* 1957 R&N 107.)

The alternative, and perhaps simpler, form of the question would be :

"Did you intend to injure the complainant really seriously?"

See *S v Collett* (1) 1978 RLR 205; 1978 (3) SA 206 (RA), which followed the interpretation of the necessary intent laid down in *DPP v Smith* [1960] 3 All ER 161 (HL).

And also see *S v Madzinga & Anor* HH-372-86; *S v Matengambiri* HH-316-85; *S v Kaipa* HH-314-85.

Instead, in my view, the common feature of this confusion is a patent inability or failure to draw

this distinction crisply to the accused. The tendency is to adopt a liberal interpretation of legal intent, such as was the case *in casu*.

The way to resolve this problem has been stated in many a case.

See *S v Mbelu* 1966 (1) PH H176 (N); *S v Sibanda* AD-10-72; *S v Anock* 1973 (1) RLR 154 (AD); 1973(3) SA 128 (RA).

And, in drawing such a distinction, medical evidence is essential for two reasons, *viz*:

"Firstly, to resolve the issue of the seriousness of the assault. Secondly, to assist the court in determining a just and proper sentence".

See *S v Matengambiri* HH-316-85; *S v Kaipa* HH-314-85; *R v Sibanda* 1969 (2) RLR 137 (GD).

Thus, in my view, on the basis of the medical report in this case, there was no justification for holding that injuries which were clearly "not severe" could found a conviction for assault with intent to do grievous bodily harm. In the result, I set aside that conviction and substitute in its place a conviction for common assault.

1989 (2) ZLR p239

SANSOLE J

B. SENTENCE

In this connection the magistrate's explanation for not applying the principle in *S v Gwarada* 1981 ZLR 17 (AD) and *S v Julius* GS-269-80 is as unconvincing as it is surprising. The reasoning behind those authorities is simply this :

1. Wherever possible, and more particularly where the imposition of a fine is a permissible penalty, a fine should be considered first. Only when the facts are such that a fine is inappropriate may imprisonment be considered next. This approach is particularly desirable where it involves first offenders. The tendency nowadays is to try and keep such offenders out of prison as much as is possible.

The applicability and the appropriateness of imposing a fine is not confined to crimes of dishonesty. The principle is of general application.

2. In computing the *quantum* of a fine, it is not guess work. The manner of going about it is set out more fully in *S v Manwere* 1972 (2) RLR 139 (AD); 1972 (4) SA 425. In this connection the following considerations are pertinent and important, *viz*:

- (a) the fine imposed or to be imposed must bear a realistic relationship to both the accused's means and the gravity of the offence: *S v Nyati* 1972 (2) RLR 215 (GD); 1973 (1) SA 553 (R); *S v Sailas* 1978 RLR 400 (GD).
- (b) the alternative period of imprisonment should equally be realistic and relate fairly to the fine imposed or to be imposed:

"Otherwise, if he cannot pay the fine, he will suffer disproportionate punishment" (*per* McNALLY J (as he then

was) in *S v Jackson* HH-268-82).

Thus, applying these principles to the facts of the instant case and bearing in mind that the accused honestly believed that he was administering corrective punishment, the accused is sentenced as follows:

To pay a fine of \$100 or, in default of payment, one month's imprisonment with labour.

Blackie J agrees.

1989 (2) ZLR p240

BISHI v SECRETARY FOR EDUCATION 1989 (2) ZLR 240 (HC)

Court **High Court, Harare**

Chidyausiku J

Application for review of proceedings of inferior tribunal

8 June & 9 August 1989

Flynote

Administrative law - punishment imposed by administrative tribunal - failure to hear accused in mitigation - no specific requirement to do so - imposed by regulations - tribunal nevertheless obliged to hear accused.

Constitution of Zimbabwe 1980 - s 18(9) - right to fair hearing - includes right to be heard in mitigation before punishment.

Practice and procedure - review - late noting of application for - extension of time - principles - dilatoriness of legal practitioner - extent to which may excuse delay.

Headnote

The applicant, a teacher, had been found guilty by a disciplinary committee of misconduct in terms of the African Education (Unified Teaching Service) Regulations 1975. Without the applicant being given an opportunity to say anything in mitigation of punishment, the committee recommended that he be dismissed from the Service, which recommendation was put into effect by the respondent.

The decision to dismiss the applicant was notified to him in July 1987, but the application for review of the committee's proceedings was not launched until January 1989. A period of eight weeks is provided by O 33 R 256 of the Rules of the High Court for the initiation of review proceedings. The reason for the delay beyond that period was the dilatoriness of the legal practitioner briefed to draft the application. The practitioner accepted responsibility and asked the court for condonation of the delay.

1989 (2) ZLR p241

Held, that the factors to be taken into account in considering whether good cause has been

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shown to justify the court granting condonation include:

- (a) the degree of non-compliance with the rules;
- (b) the explanation therefor;
- (c) the prospects of success on the merits;
- (d) the importance of the case
- (e) the convenience of the court;
- (f) the avoidance of unnecessary delay in the administration of justice.

Held, further, that while the courts are very reluctant to visit the client with the sins of his legal practitioner, there has to be a limit beyond which the courts will not go. To grant condonation in the circumstances of this case would create a dangerous precedent. It is easy for practitioners to plead pressure of work to cover up for negligence and lack of diligence. A clear disdain for the Rules had been shown, and the explanation for the delay was insufficient.

Held, further, that while the applicant's prospects of success on the merits were poor, there was a serious irregularity in the proceedings, in that the committee had not given the applicant an opportunity to say anything in mitigation of penalty. The absence of a specific provision in the Regulations requiring that he should be heard did not oust the *audi alteram partem* rule. Even if the Regulations had clearly and expressly deprived persons in the applicant's position of the opportunity to mitigate their punishment, such a provision would run the risk of contravening the provisions of s 18(9) of the Constitution, which confer on every person the right to a fair hearing.

Cases cited:

United Plant Hire (Pty) Ltd v Hills & Ors 1976 (1) SA 717 (A)

Hermannsburg Mission & Anor v Sugar Industry Central Board & Anor 1981 (4) SA 278 (N)

Vereeniging van Bo-Grondse Mynampthenare van Suid-Afrika v President of the Industrial Court & Ors 1983 (1) SA 1143 (T)

S v McNab 1986 (2) ZLR 280 (SC)

Saloojee & Anor NO v Minister of Community Development 1965 (2) SA 135 (A)

Fisher v Keane [1878] 11 ChD 353

Ridge v Baldwin [1963] 2 All ER 66 (HL)

D P Carter for the applicant

E Chatikobo for the respondent

CHIDYAUSIKU J

Judgment

Chidyausiku J: This is an application for review of the disciplinary proceedings which led to the dismissal of the applicant by the respondent from the teaching service. The applicant is seeking an order setting aside the respondent's decision to dismiss the applicant. The applicant also seeks an order directing the respondent to hold an inquiry into the alleged misconduct of the respondent in terms of ss 76(2) and 78 of the African Education (Unified Teaching Service) Regulations RGN 1178/75.

This application for review is made in terms of Order 33 Rule 256 of the Rules of the High Court. Rule 256 provides that an application for review has to be made within eight weeks of the termination of the proceedings sought to be reviewed. The decision complained of in this case was communicated to the applicant in July 1987. This application was launched some 18 months later, in January 1989. It is common cause, therefore, that this application has been brought out of time. The applicant seeks condonation.

Rule 259 provides that the court may extend the time for bringing an application for review if good cause is shown. The first issue that falls for decision is, therefore, whether good cause has been shown to justify the court in extending the time or condone the delay in bringing this application. The principles that guide the court in an application for condonation were set out in the case of *United Plant Hire (Pty) Ltd v Hills & Ors* 1976 (1) SA 717 (A). In that case HOLMES JA had this to say at p 720F-G:

"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefor, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."

In support of the above proposition the learned judge of appeal cited several authorities. HOLMES JA's approach has been approved and followed in a

1989 (2) ZLR p243

CHIDYAUSIKU J

number of subsequent cases. Among these cases are *Hermannsburg Mission & Anor v Sugar Industry Central Board & Anor* 1981(4) SA 278 (N) and *Vereniging van Bo-Grondse Mynampptenare van Suid-Afrika v President of the Industrial Court & Ors* 1983(1) SA 1143 (T). These authorities establish that the following are the factors to be taken into account in considering whether good cause has been shown:

- (a) the degree of non-compliance with the rules;

- (b) the explanation therefor;
- (c) the prospects of success on the merits;
- (d) the importance of the case;
- (e) the convenience of the court;
- (f) the avoidance of unnecessary delay in the administration of justice.

The degree of non-compliance with the requirements of the rule in this case is considerable. A review has to be commenced within 8 weeks. In the present case about 18 months elapsed after the review should have been launched. A delay of 18 months is clearly inordinate.

The reason advanced for the delay is that the legal practitioner who was briefed to prepare the application was very busy and was unable to attend to the case timeously. It would appear on the papers that the applicant was advised of the remedy of review within the 8 weeks and he instructed a Mr Bridges to institute review proceedings. Mr Bridges in turn briefed Mr Mutzuris to prepare an opinion on the prospects of success and to draft the application. The brief was sent to Mr Mutzuris on 25 September 1987. Despite telephone reminders to Mr Mutzuris he did not return the brief to Mr Bridges until 27 October 1988, a little over a year since he was briefed. In November 1988 Mr Mutzuris was once again briefed to prepare the petition and appear on behalf of the applicant. Mr Mutzuris drafted the application and returned it to Mr Bridges on the 19 December 1988. Mr Mutzuris could not appear for the applicant as he was a deponent to an affidavit in this matter. In that affidavit, he accepts full responsibility for the delay and asks the court for condonation. As I said earlier the application was eventually launched in January of 1989.

Considering the above, can it be said there is a good explanation or reason for the inordinate delay in this case? The delay was almost entirely caused by the applicant's legal practitioner. Courts are very reluctant to visit the client with the sins of his legal practitioner but there has to be a limit beyond which the court will not go. This was the view expressed by no lesser authority than our Supreme Court in the not so recent case of *S v McNab* 1986 (2) ZLR 280

1989 (2) ZLR p244

CHIDYAUSIKU J

(SC). In that case DUMBUTSHENA CJ, at p 284B, quotes with approval the following remarks of STEYN CJ in *Saloojee & Anor NNO v Minister of Community Development* 1965 (2) SA 135(A) at 141C-E:

"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf *Hepworths Ltd v*

The learned CHIEF JUSTICE, after quoting the above passage, went on to say at p 284E:

"I have dwelt at length on this point because it is my opinion that laxity on the part of the Court in dealing with non-observance of the Rules will encourage some legal practitioners to disregard the Rules of Court to the detriment of the good administration of justice."

In the present case the legal practitioners involved were aware of the *dies induciae*. For over a year and a half after *dies induciae* they did not launch this application. The reason advanced for this delay is that Mr Mutzuris was too busy to attend to the application. In my view, to grant condonation in the circumstances of this case would be creating a dangerous precedent. It is easy for a legal practitioner to plead pressure of work to cover up for lack of diligence and negligence. In the present case, both legal practitioners exhibit a clear disdain for the rules. I am satisfied that the explanation advanced for the inordinate delay in this case is insufficient.

I now turn to the question of prospects of success on the merits. The applicant seeks to have the respondent's decision set aside mainly on three grounds. These are, firstly, the applicant avers that he was denied an opportunity to

1989 (2) ZLR p245

CHIDYAUSIKU J

answer all the allegations against him. Put differently, he alleges a violation of the *audi alteram partem* rule. The second ground of attack was that there were disputes of facts which could only be satisfactorily resolved during an enquiry and such an enquiry should have been conducted. Thirdly, the applicant alleges that certain peremptory provisions of the regulations were not complied with thus rendering the proceedings a nullity. The respondent found proved three acts of misconduct. These are that applicant received or authorised the receipt of certain monies from students without the issue to the students of proper receipts; that the applicant made unauthorized loans to certain employees or staff of the school without proper documentation; and that the applicant purchased books for the school directly from bookshops without going through the centralized system. The money collected from the students was recorded in an exercise book against the name of each student who had paid in the money. This money was not banked and it would appear that some of this money was in fact stolen by the clerk who received and kept the money. The applicant was also initially charged with stealing some of this money but those charges were withdrawn and misappropriation of money was not one of the proven acts of misconduct.

This conduct of the applicant, which he admits, was held by the respondent to constitute negligence in the performance of his duties and/or failure to comply with an instruction properly given to applicant by a person having authority to give such an instruction. Negligence in the performance of one's duties and failure to comply with a proper instruction are acts of misconduct in terms of the Regulations.

The applicant admitted that money was received from students and no official receipts were issued. Applicant also admits that he made loans to employees of the school and members of staff but explained why he did so. He however denied that there was an instruction from his

employer which forbade the making of such loans. The applicant also admits that he purchased books directly from the bookshops without going through the centralized system. He denies that there was an instruction prohibiting him from doing this and also gives his reasons for doing so. The applicant gave a detailed account justifying his conduct. From the nature of the reply to the charges given by the applicant it is quite obvious that he fully understood the allegations against him. His reply to the charges was quite comprehensive and he answered every allegation made against him. His response was what one may call confession and avoidance.

In the light of the above, there is very little prospect of success for a challenge

1989 (2) ZLR p246

CHIDYAUSIKU J

to the proceedings on the basis that applicant was not given adequate opportunity to answer all the allegations against him.

I also see very little prospect of a successful challenge to the proceedings on the basis that the Committee should have directed that an enquiry be held in terms of s 75(d), 76 and 78 of the regulations. As I have already said, the applicant admits collecting money from students without issuing official receipts. The applicant admits making out loans to employees and members of staff and records of such loans were not on official vouchers but on scraps of paper inscribed "I owe you". It is also common cause that the applicant purchased books directly from the bookshops as alleged without going through the centralized system. The only dispute appears to be whether the applicant by so doing was disobeying a lawful instruction. The applicant, I might add, gave a very plausible explanation for his actions. The employer produced circulars and minutes of meetings circulated to principals of schools with the relevant instructions. Section 75(d) of the regulations requires the committee to refer a matter to an inquiry if it appears to the committee that it would be in the interests of justice so to do. This section gives the committee a fairly wide discretion. The regulations under which this matter was dealt with, namely RGN 1178/75, have since been superceded by another set of regulations, SI 139/89. Section 42(c) of SI 139/89 enjoins the committee to refer a matter to an enquiry if there is a material dispute of fact which it is unable to resolve on the papers before it. It would appear to me that the former regulations conferred a wider discretion on the committee than the later regulations. The challenge to proceedings based on the committee's failure to refer the matter to an inquiry has very little prospect of success as it cannot be said that no reasonable tribunal applying its mind properly to the facts before it could have come to the conclusion reached in this case, namely, that there was no need to refer the matter to an enquiry.

I am also satisfied that the submission by the applicant that the respondent failed to comply with the provisions of ss 70 and 73 of the regulations in RGN 1178/75 have no substance and cannot form the basis of a successful challenge of the proceedings in this matter. It was also submitted by the applicant that the respondent had no jurisdiction in this matter. The basis of this submission was that s 50(1) of the Education Act No. 5 of 1987 transferred the applicant to the Public Service with effect from three months from the fixed date. The fixed date was 8 June 1987; the effective date was therefore 8 September 1987. The applicant was dismissed on the 29 June 1987. Although the dismissal was after the fixed date, it was before the

CHIDYAUSIKU J

effective date and because of that this submission is bound to fail.

In the result, I am satisfied that the delay in bringing this application was inordinate, the explanation for the delay is inadequate and the prospects of successfully challenging the proceedings leading to applicant's conviction of misconduct are poor. I accordingly decline to condone the delay and extend the time.

There is, however, a serious irregularity that is apparent on the papers regarding the procedure followed in imposing the penalty on the appellant. It is quite apparent on the papers that upon finding appellant guilty of misconduct he was not given an opportunity to say anything in mitigation of sentence. In my view this is a very serious irregularity and a challenge to the punishment imposed, a discharge from the service, has very good prospects of success. For that reason I will grant condonation in respect of the limited issue of punishment. I now proceed to consider that issue.

As I have already said, the accused was not given an opportunity to mitigate his punishment upon his conviction for misconduct. In my view the *audi alteram partem* rule requires that a man be heard before sentence or punishment is passed on him. The following remarks of JESSEL MR in the case of *Fisher v Keane* (1878) 11 ChD 353 at 362 and 363, which were quoted with approval by LORD REID in *Ridge v Baldwin* [1963] 2 All ER 66 at 75 are apposite:

"They (the committee) ought not, as I understand it according to the ordinary rules by which justice should be administered by committees of clubs or by any other body of persons who decide upon the conduct of others, to blast a man's reputation for ever - perhaps ruin his prospects of life without giving him an opportunity of either defending or **palliating his conduct**." (The emphasis is mine.)

In the present case, the respondent deprived the applicant of his means of livelihood and possibly his pension benefits without hearing him in mitigation or giving him an opportunity to palliate his conduct. Even justice administered under a palm tree demands that a man be heard in mitigation before you blow up his means of living. There is no provision in the African Education (Unified African Teaching Service) Regulations RGN 1178/75 specifically requiring the committee to hear the applicant before considering punishment. As I have already said, these regulations have since been superceded by the Education (Former Unified Teaching Service)

CHIDYAUSIKU J

(Conditions of Service) Regulations SI 139/89, whose s 46(1) provides as follows:

"46. (1) On finding a charge of misconduct proved against a teacher, the committee -

- (a) shall notify the teacher of the finding that has been made; and
- (b) call upon the teacher to make written representations to it within seven days concerning any penalty

which may be imposed on him; and

- (c) upon consideration of the representations made by the teacher, impose any one or more of the following penalties ..."

The absence of a provision similar to s 46(1) of SI 139/89 in the former regulations (RGN 1178/75) does not oust the requirement to observe the *audi alteram partem* rule in respect of the imposition of punishment. I do not think that by omitting in the old regulations a provision similar to s 46(1) of the new regulations it was intended to deprive a person in the position of the applicant of an opportunity to mitigate punishment. If this was the intention, clear and express language to that effect would have been used. Even if such language were used, regulations carrying a provision denying a person an opportunity to mitigate would run the risk of falling foul of s 18(9) of the Constitution of Zimbabwe which confers on every person the right to a fair hearing. A fair hearing, in my view, includes being heard in mitigation before punishment. It is not necessary for me to decide on the constitutionality or otherwise of regulations that deprive a person the right to mitigate punishment and I leave that question open.

One gets the clear impression that the Committee, in recommending the dismissal of the applicant was not fully cognisant of and therefore did not take into account all the mitigatory features in this case. In particular, the fact that the applicant has 30 years service ten of which as principal of this school does not appear to have been taken into account by the Committee before it made its recommendation. I have come to this conclusion because the punishment imposed in this case, namely dismissal, is completely out of proportion to the misconduct proved. If the applicant had converted the money collected from students to his own use the punishment would be entirely appropriate but he was found not guilty of misconduct on that count. One cannot resist the feeling that the applicant was or is being punished for an act of misconduct for which he was found not guilty. All that the proven misconduct amounts to is that the applicant collected or authorised to be collected money from students without using official receipt book. The money collected from the

1989 (2) ZLR p249

CHIDYAUSIKU J

students was, however, recorded in an exercise book against the name of each contributor. The applicant also lent small sums of money and bought books directly from book shops contrary to instructions from his employer. His explanation of his conduct is plausible. He was clearly motivated in all this conduct by the best of intentions namely to ensure that students had the books that they required.

It is true that compliance with an employer's instructions is essential for discipline and good administration. It is equally true that sometimes bureaucracy and red tape can be very negative and frustrating. Applicant appears to have been desirous of avoiding the negative effects of bureaucracy and red tape in doing what he did. His conduct was at worst negligent and not dishonest. His negligence led to loss of a considerable sum of money. Even allowing for this the punishment meted to the applicant bears no relationship to the misconduct. I must mention, however, that the question of an appropriate punishment is no business of this court. Indeed the same punishment may still be imposed on the applicant after hearing him in mitigation. It is just

that the severity of the punishment made comment irresistible.

As I have set aside the punishment of dismissal imposed on the applicant it follows that the applicant became a member of and is a member of the Public Service with effect from the 8 September 1987. In the light of the above it is the Public Service Commission that should proceed to impose the punishment in terms of s 20 of the Public Service (Officers) (Misconduct and Discharge) Regulations 161 of 1986. As I have already said, the applicant should be afforded an opportunity to mitigate before punishment. This right still exists for the applicant despite the repeal of s 19(3) of SI 161/86 by s 5 of SI 111/88.

I accordingly make the following order:

- (a) Application for condonation to review the respondent's finding of the applicant guilty of misconduct is refused.
- (b) The punishment imposed on the applicant is set aside and the matter is remitted to the Public Service Commission for passing of punishment afresh after affording applicant an opportunity to mitigate his punishment.
- (c) Both parties have been partially successful therefore there will be no order as to costs.

1989 (2) ZLR p250

CHIDYAUSIKU J

Danziger & Partners, applicant's legal practitioners

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

1989 (2) ZLR p251

McKELVEY v ABRAHAMS & ANOR 1989 (2) ZLR 251 (SC)

Court **Supreme Court, Harare**

Annotations [Link to Case Annotations](#)

Gubbay JA, McNally JA & Korsah JA

Civil Appeal

18 July & 10 August 1989

Flynote

Arbitration - arbitrator - distinction between arbitrator and valuator - misconduct by arbitrator - what is - bona fide mistake of fact or law - whether constitutes misconduct - gross mistake as evidence of misconduct.

Headnote

It is sometimes difficult for a court to determine whether the parties to an arbitration intended an

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arbitration or a valuation. Referring to the person named in the instrument as "arbitrator" is not determinative. If it is the intention of the parties that the person should hold an inquiry in the nature of a judicial inquiry, hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of arbitration. If, on the other hand, he is appointed to ascertain some matter to prevent differences arising rather than to settle differences which have arisen, the case is one of valuation. An arbitrator acts in a quasi-judicial capacity, whereas a valuator, without taking evidence or hearing argument, makes a valuation according to his own skill, knowledge and experience.

An arbitrator's award is not subject to appeal, but may be set aside on any of the following grounds:

- (a) that it was not made in terms of the submission;
- (b) that the arbitrator has misconducted the proceedings;
- (c) that it was improperly procured;
- (d) that the arbitrator made a mistake that was so gross or manifest that it could not have been made without some degree of misconduct.

A *bona fide* mistake made by an arbitrator, whether of fact or law, and whether he admits to it or not, affords no grounds for a court to set aside

1989 (2) ZLR p252

his award. Such a mistake cannot be construed as "misconduct". But if the mistake is so gross or obvious that it could not have been made without some degree of misconduct, the award may be set aside, not on the ground of mistake, but on the ground of misconduct - the mistake merely amounting to evidence of the misconduct.

Quaere, whether the admission by an arbitrator of a mistake would justify a court in exercising its statutory power of remittal.

Cases cited:

Maceys Consolidated (Pvt) Ltd & Anor v TA Holdings Ltd 1986 (2) ZLR 331 (SC); 1987 (1) SA 173 (ZS)

In re Carus-Wilson & Greene (1887) 18 QBD 7

Re Hopper (1866-7) LR 2 QB 367

Estate Milne v Donohoe Investments (Pty) Ltd & Ors 1967 (2) SA 359 (A)

Stein v Otto 1917 WLD 2

Heymann's Estate v Featherstone 1930 EDL 105

Sachs v Gillibrand & Ors 1959 (2) SA 233 (W)

Iscor Pension Fund v Balbern Holdings (Pty) Ltd 1973 (4) SA 515 (T)

Table Bay Harbour Board v Metropolitan & Suburban Railway Co (1892) 9 SC 437

Dutch Reformed Church v Town Council of Cape Town (1898) 15 SC 14

In re The Aachen and Munich Insurance Co (1908) 29 NLR 481

Pretoria City Council v Buchanan & Anor 1952 (1) SA 236 (T)

Dickenson & Brown v Fisher's Executors 1915 AD 166

Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk 1968 (1) SA 7 (C)

Cone Textiles (Pvt) Ltd v Redgment & Ors 1983 (1) ZLR 88 (SC)

McKenzie NO v Basha 1951 (3) SA 783 (N)

Tedder & Anor v Greig & Anor 1912 AD 73

A N H Eastwood, for the appellant. Abrahams' duties were more of a valuer than an arbitrator. As a valuator, his decision was not to be upset save for fraud, collusion or caprice. The parties had to abide any errors. It was incorrect for the trial judge to arrive at a conclusion as to the existence of any errors without a full record of the proceedings before Abrahams. In this regard, Abrahams' application to have the award set aside was akin to a review of his own proceedings; and in review proceedings, the person who has conducted the review is obliged to furnish a record of the proceedings before him: Rule 260(1) of the Rules of the High Court; *Art Printers Ltd v*

1989 (2) ZLR p253

Regional Hearing Officer & Anor HH-168-87; *Landrey v Ministry of Natural Resources & Tourism* HH-675-87; *Government of the Republic of South Africa v Midkon (Pty) Ltd & Anor* 1984 (3) SA 552 (T). The grounds on which an arbitration award may be set aside are set out in s 12 of the Arbitration Act [Chapter 12]. The earliest Arbitration Act in England was apparently passed in 1698, but the first modern act was in 1889, and was largely a consolidation of earlier statutes and of commercial and conveyancing practice. This legislation was consolidated in the Arbitration Act of 1950. Section 23 of that Act contains the same provision for setting aside an award for misconduct as appears in s 12 of our Act. In interpreting the meaning of "misconduct", the English courts developed a doctrine that awards containing admitted errors of fact or law on the face of the award could be set aside. FIELDSEND CJ in *Cone Textiles (Pvt) Ltd v Redgment supra* described this doctrine as anomalous and unknown to Roman-Dutch law. Indeed the doctrine was almost unique to English law; there it fell into disfavour and as a result the English Act was amended by the Arbitration Act 1979, s 1(1) of which specifically provided that the High Court should not have jurisdiction to set aside or remit an arbitrator's award on the grounds of errors of fact or law on the face of the award. Instead an appeal lies on any question of law (s 1(2)). It is apparently not definite that the 1979 Act has also ended the doctrine as to admitted errors, though *Russell on Arbitration* 20 ed p 401 states that it "almost certainly" has. However, the kind of error to which the rule as to admitted error was applied before 1979 in England was

limited to the situation where the arbitrator, intending to award in one way, by mistake awards in another; in other words, he has not expressed his true intentions. There is a general trend to limit the grounds on which an award may be set aside for any kind of error. See the change in attitude of LORD DENNING between *Dean v Prince & Ors* [1954] 1 All ER 749 (CA) and *Campbell v Edwards* [1976] 1 All ER 785 (CA) (quoted and approved in *Maceys Consolidated (Pvt) Ltd v TA Holdings Ltd supra*). For an account of the history of the Roman-Dutch law on errors by an arbitrator and some of the differences from English law, see *Dutch Reformed Church v Cape Town Council supra* at pp 20-23. As to the kind of mistake and the requirement that it be "on the face of the award", see Russell op cit p 401; JAMES LJ in *Greenwood & Co v Brownhill & Co* (1881) 44 LT 47; *Cone Textiles (Pvt) Ltd v Redgment & Ors supra* at 92-3; *Cone Textiles (Pvt) Ltd v Ayres & Anor* 1980 ZLR 347 (AD); *Clan Transport Co (Pvt) Ltd v Swift Transport Services (Pvt) Ltd* 1956 R&N 135; 1956 (3) SA 480 (FSC); *Table Bay Harbour Board supra*; *Phillips v Phillips* 1930 NPD 246 at 252; *Schneier & London Ltd v Gluckmann* (1) 1925 WLD 42 at 51; *Halsbury's Laws of England* 4 ed vol 2 para 622 (3) (published before the English Act of 1979); Russell op cit p 405.

1989 (2) ZLR p254

GUBBAY JA

[Counsel then proceeded to deal with the facts.]

No appearance for the respondent

A P de Bourbon SC for the intervener

Judgment

Gubbay JA: The appellant is the owner of a farm, Theydon Estate, situated in the district of Marondera. On 16 October 1986 he entered into a written agreement of lease with Derbyshire Stone (Pvt) Ltd (hereinafter called "Derbyshire"), a company which carries on business as a supplier of crushed stone and gravel. The lease grants Derbyshire the right to quarry and extract stone, including fines, from a twelve hectare quarry-site on Theydon Estate, for a period of five years with effect from 1 January 1986, with an option to renew for a further four years and eleven months. Clause 3 provides that:

"In consideration of the rights conferred upon it in terms of this Agreement Derbyshire shall pay to the Owner the remuneration determined by the Arbitrator in terms of the Submission to Arbitration signed by the parties and annexed hereto, upon the dates stipulated in Clause 2(c) of the annexed Submission to Arbitration. The said remuneration shall be accompanied by a statement showing the quantities of stone and fines to which such payment relates."

The afore-mentioned Submission to Arbitration recites in the final two preambles that, as the parties to the lease were unable to reach agreement on the consideration to be paid by Derbyshire in respect of the right to quarry and extract stone, the matter is to be determined by a single arbitrator upon the terms and conditions set forth therein. Clause 1 names the respondent, Basil George Abrahams, a chartered surveyor, as the arbitrator chosen by the parties, and Clause 2 stipulates that he is to determine the amount of remuneration to be paid by Derbyshire by means of one of three formulations, namely:

- "(a) percentage on the price charged by Derbyshire to the purchasers of stone of whatever dimensions (including fines) extracted or removed from the site and sold or otherwise alienated or disposed of by Derbyshire; or
- (b) a royalty per cubic metre of stone of whatever dimensions (including fines) extracted or removed from the site and sold or otherwise alienated or disposed of by Derbyshire; or

1989 (2) ZLR p255

GUBBAY JA

- (c) a flat sum payable monthly by Derbyshire to McKelvey for the right by Derbyshire to extract or remove from the site and sell or otherwise alienate or dispose of stone of whatever dimensions (including fines)."

After deliberating on the matter for many months, the respondent signed his award on 29 December 1987. The penultimate paragraph of the eleven-page document reads:

"Now having carefully considered the Submissions by both parties, their replies thereto and all follow up letters, together with the evidence adduced from all sources, I am of the opinion that Derbyshire Stone (Private) Limited should pay Kenneth McKelvey 3% (three percent) per annum on the total price charged by Derbyshire Stone for all stone of whatever size, and dust (fines) extracted, removed, sold or otherwise alienated or disposed of to the National Railways of Zimbabwe, or any other organisation, person or persons."

On 2 February 1988 a member of the firm of legal practitioners who acted for Derbyshire informed the respondent telephonically that the remuneration awarded was excessive and that, in the opinion of his client, the respondent had been biased on account of his friendship with the appellant's wife. The respondent strongly denied that he had been influenced in any way in making the award by a past friendship with Mrs McKelvey, which had ended in January 1979.

A few days later the respondent wrote to the appellant's legal practitioners as follows:

"I understand that action may be taken to set aside my award on the grounds that it is excessive, due to bias, inasmuch as I had been acquainted with Mrs McKelvey for some years, that is when she was Mrs Quirk. Of course, the other side may not proceed.

I do not know what the position is, but I feel it might be wise if I returned your cheque for \$778,67 (being the appellant's share of the fee charged) and this I do. I trust that you will not resent this."

Thereafter, on 18 February 1988, and without any warning to the appellant, the respondent applied on notice of motion to the High Court for an order that the whole of his award be set aside. In the event, the relief sought was supported by Derbyshire and resisted by the appellant.

1989 (2) ZLR p256

GUBBAY JA

REYNOLDS J, who heard the application, granted the order, with costs to be paid by the respondent. He held that, as the respondent had been incapacitated by illness and stress at the time of making his final assessment and since, on his own admission, it contained several significant errors, he could not have given "fair consideration to the matter submitted to him", as he would not have been able to apply his mind properly to it; accordingly, he had committed an act of misconduct justifying intervention. An additional ground which, in the view of the learned

judge, required the award to be set aside, was that the respondent had made a substantial mistake in the proceedings which had caused him to express the award in a way he did not intend.

It is against this decision that the appeal is now brought. In noting it, the appellant cited Abrahams only as the respondent. In consequence Derbyshire applied for, and was allowed, leave to intervene as a party to the appeal. Obviously it has a vital interest in the outcome of this litigation. The respondent, on the other hand, has now advised that, to minimise costs, he does not wish to appear in this court, and abides its judgment. In these circumstances, it was properly accepted by counsel that, were the appeal to succeed, Derbyshire and not the respondent should be ordered to pay the costs thereof; but not the costs in the court *a quo*, against which order the respondent has not cross-appealed.

The first point taken by Mr *Eastwood* for the appellant was that, upon a proper construction of the Submission to Arbitration, the function the respondent was to perform, and which he did perform, was that of a valuer and not an arbitrator. The importance of this distinction is that if the respondent's true capacity was that of a valuer then, in the absence of any allegation of fraud, collusion or caprice (which was not made), the parties are bound by the award, notwithstanding the existence of any error in the making thereof. See *Maceys Consolidated (Pvt) Ltd & Anor v TA Holdings Ltd* 1987 (1) SA 173 (ZS) at 180A-E; 1986 (2) ZLR 331 (SC).

It is sometimes a difficult task for a court to determine whether the parties intended an arbitration or a valuation. Each case will depend on its own special facts, and seldom will any single fact or circumstance prove to be conclusive. Certainly, the calling of the person named in the instrument as "arbitrator" is not determinative.

The most authoritative and helpful test in distinguishing between an arbitration and a valuation is to be found in the judgment of LORD ESHER MR in *In re Carus-Wilson and Greene* (1887) 18 QBD 7, where at 9 it is said:

1989 (2) ZLR p257

GUBBAY J

"If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes, that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances."

And LINDLEY LJ at 10 underscored the essential difference in these words:

"A valuer may be, in one sense, called an arbitrator, but not in the proper legal sense of the term. In the ordinary cases of arbitration there is a dispute which is referred. The object of the valuation, on the other hand, is to avoid disputes. There is nothing in the nature of a dispute when the valuer is appointed."

These *dicta* conform with the earlier remarks of COCKBURN CJ in *Re Hopper* (1866-7) LR 2 QB 367 at 373:

"If it be the intention of the parties that their respective cases shall be heard, and a decision arrived at upon the evidence which they have adduced before the arbitrator, it would be taking too narrow a view of the subject to say that, because the object to be arrived at was the ascertaining of the value of property or the amount of compensation to be paid, the matter was not properly to be considered as one of arbitration."

Roman-Dutch law also differentiates the functions of an arbitrator from that of a valuer - the former acting in a quasi-judicial capacity. See *Estate Milne v Donohoe Investments (Pty) Ltd & Ors* 1967 (2) SA 359 (A) at 373H-374A. In many cases the clear distinction drawn in *In re Carus-Wilson and Greene supra* is approved. See, for example, *Stein v Otto* 1917 WLD 2 at 6; *Heymann's Estate v Featherstone* 1930 EDL 105 at 108; *Sachs v Gillibrand & Ors* 1959 (2) SA 233 (W) at 235G-236A; *Iscor Pension Fund v Balbern*

1989 (2) ZLR p258

GUBBAY JA

Holdings (Pty) Ltd 1973 (4) SA 515 (T) at 521D-522A.

Plainly, the most critical factor in the determination is whether it was intended that the person appointed in the deed of submission is to hold a judicial hearing; whether he is called upon to settle judicially a matter in controversy between the parties - not merely that without taking evidence or hearing argument, he is to make his valuation according to his own skill, knowledge and experience.

In advancing the contention that, upon a proper construction of the Submission to Arbitration, the respondent is revealed as a valuer required simply to determine the "rent" payable by Derbyshire to the appellant, Mr *Eastwood* relied strongly on Clause 14, which reads:

"Notwithstanding anything to the contrary in this Submission contained, and notwithstanding the use of any terminology including the word 'Arbitrator' and 'Award' the parties hereby express the intention that the arbitrator's function shall be to give a final decision in the matter referred to him and that his function shall be essentially that of a valuer whose valuation shall be final and binding and not subject to any challenge by either of the parties thereto."

I agree that the respondent was mandated to fix the "rent" payable; but there are strong indications from the procedure to be adopted by him, as laid down in the deed of submission, that the parties intended an arbitration.

The respondent was to receive written arguments from each party, and had the right to consider not only the rival contentions made therein but any other matter deemed relevant. He had the option to hold a hearing, in which event the parties and their witnesses were to give evidence on oath and be subject to cross-examination. He had the right to make independent investigations. He had the power to call for the production of books or documents in the possession of either party. He was not obliged to rely solely on his own experience, being permitted to consult with persons of expert knowledge or skill on any question, and to obtain legal advice and act thereon.

The use of the expression "award", and the provision making it final and not subject to appeal

or review, also tend to show that the parties looked upon the respondent as an arbitrator.

Finally, it is significant that a preamble to the Submission to Arbitration

1989 (2) ZLR p259

GUBBAY JA

specifically states that the parties had "not reached agreement on the consideration to be paid by Derbyshire". An averment to the same effect in the respondent's founding affidavit went undenied by the appellant.

The clear implication from all this is that the parties were at arm's length as to what constituted a fair rental. The respondent was appointed to resolve their differences by having recourse to a quasi-judicial enquiry. He was to hear and determine the dispute.

It necessarily follows that, in my opinion, the respondent was an arbitrator and not a valuer, albeit his function was to place an annual value upon the right to quarry and extract stone and fines from the site.

Substantial reliance was placed by the respondent in his founding affidavit upon what he regarded to be certain errors of fact made by him in calculating, in accordance with the first formula, that the appellant was to be remunerated by Derbyshire at the rate of three percent per annum of its sale proceeds. The particular errors adverted to are that:

- (a) he omitted to give "proper or full consideration" to the price paid by the appellant for the property, namely \$45 000;
- (b) he did not appreciate that three percent of the sale proceeds would produce a 72% return to the appellant, making the award far too high;
- (c) he took into account a figure of \$71 000, representing his estimate of the value of the land and the replacement cost of the buildings in 1987, without having regard to the depreciation of the buildings which, had he done so, would have reduced his estimate to \$53 500;
- (d) subsequent to publishing his award, he was informed that certain quarry buildings, which at the time he believed were owned by Derbyshire, in reality belonged to the appellant; this factor would tend to increase the award; and
- (e) he failed to give full consideration to the fact that in the mining industry the usual return is five percent of the sale proceeds.

The learned judge *a quo* held that the cumulative effect of these admitted errors was such as to justify him in setting aside the award. He reasoned in this way:

1989 (2) ZLR p260

GUBBAY JA

"The general principle that a *bona fide* mistake made by the arbitrator does not form a ground for the intervention

of the Court is well established ...It is often stated, however, that an exception to this general proposition occurs when the mistake made is admitted by the arbitrator. It is difficult to trace the basis of this concept, and the only cogent explanation that may be extracted from the cases which commends itself to me is that in making the mistake in question the arbitrator has not given effect to his true intentions. In other words, he has not made the award he intended to make ... It is obvious that only the arbitrator himself will have knowledge of his actual intentions, and if the type of mistake made is consistent with his allegation that his true decision was not given, the way is then open for the Court to intervene."

Mr *de Bourbon*, who appeared for Derbyshire, supported the finding that by virtue of the errors the award made did not reflect the respondent's true intention. He also expressed approval of the view that the law recognises as a ground for setting aside an award the admitted error of an arbitrator, where such error was not so gross as to amount to misconduct. Mr *Eastwood*, on the other hand, disputed both contentions.

Two cases were relied on by Mr *de Bourbon*. In that of *Table Bay Harbour Board v Metropolitan and Suburban Railway Company* (1892) 9 SC 437, DE VILLIERS CJ commented obiter at 439C that:

"If the arbitrator admits that he has made a mistake of law or of fact, and is prepared on that ground to review his own decision, the Court would refer the award back to him."

The second case is *Dutch Reformed Church v Town Council of Cape Town* (1898) 15 SC 14, in which the same learned CHIEF JUSTICE said at 23:

"Other cases might be stated in which the Court would exercise the power (to refer back an award), as, for instance, where new evidence has been discovered since the publication of the award, **or where a material mistake is admitted by the arbitrator**. Upon the main issue, in the present case, ...the arbitrators do not admit any mistake ..." (my emphasis).

This *dictum*, too, is clearly *obiter*, but it was approved of by BEAUMONT J in *In re The Aachen and Munich Insurance Co* (1908) 29 NLR 481 at 484 *in fine*.

1989 (2) ZLR p261

GUBBAY JA

It is to be noted, however, that these three decisions were concerned with applications, not to set aside the awards, but to remit them to the arbitrators for reconsideration. The remarks made must, therefore, be viewed against the nature of that relief. In this case, on the other hand, the respondent refrained from requesting the court to exercise its discretion under s 19(1) of the Arbitration Act and remit the matter for his reconsideration. He declined to have anything more to do with it.

Reference should also be made to *Pretoria City Council v Buchanan & Anor* 1952 (1) SA 236 (T), not cited by counsel. It was there submitted that the award should be set aside because *ex facie* the report and the award the arbitrator had made a mistake. The court found it unnecessary to decide whether or not it could interfere with an award on the ground of mistake. It assumed in the appellant's favour that it could do so, but held that since the mistake had been made in the report and not the award, the application to set aside the award was to be refused.

Mr *Eastwood* argued that, whatever the position may have been in the past with regard to an admitted *bona fide* mistake by an arbitrator, either of law or fact, it had been resolved by the

South African Appellate Division in *Dickenson & Brown v Fisher's Executors* 1915 AD 166. In a landmark judgment, concurred in by the four other members of the court, SOLOMON JA said at 176-177:

"Now if the word misconduct is to be construed in its ordinary sense it seems to me impossible to hold that a *bona fide* mistake either of law or of fact made by an arbitrator can be characterised as misconduct, any more than that a Judge can be said to have misconducted himself if he has given an erroneous decision on a point of law. Nor can I conceive of a Court removing an arbitrator for misconduct merely because he has made a mistake whether of law or fact. Cases may no doubt arise where, as was said by the late CHIEF JUSTICE in the case of *Landeshut v Koenig* 20 SC 33 at 34 'the mistake is so gross or manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator'. But in such cases the mistake would merely be evidence to show that there had been misconduct and if an award were set aside in such circumstances it would be really on the ground of misconduct and not of mistake. It may be also that an arbitrator has been guilty of the grossest carelessness and that in consequence he had come to a wrong conclusion on a question of fact or of law, and in such a case I am not prepared to say that a Court might not properly find that there

1989 (2) ZLR p262

GUBBAY JA

had been misconduct on his part. But in ordinary circumstances, where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a *bona fide* mistake either of law or of fact.

Can it make any difference then that the mistake appears on the face of the award? It is impossible on principle to see how it can. **The mistake is the same whether it is disclosed by the arbitrator or not.** How then can it be misconduct in the one case but not in the other? And how can it be suggested that a comparatively slight mistake appearing on the face of the award is misconduct, whereas a gross one which does not appear, is not? In truth, if the word 'misconduct' is to be construed in s 18 in its ordinary sense it is in my opinion impossible to hold that an arbitrator is guilty thereof merely because he has made a mistake of law that appears on the face of his award" (my emphasis).

I consider this judgment to be express authority for the proposition that a *bona fide* mistake made by an arbitrator, whether of fact or law, and whether he admits to it or not, affords no ground for a court to set aside his award. Such a mistake cannot be construed as "misconduct". But if the mistake is so gross or obvious that it could not have been made without some degree of misconduct, the award may be set aside, not on the ground of mistake, but on the ground of misconduct - the mistake merely amounting to evidence of the misconduct. See *Allied Mineral Development Corporation (Pty) Ltd v Gemsbokvlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7 (C) at 16H.

I agree entirely with the treatment of the matter in *The Law of Building Contracts and Arbitration in South Africa* 3 ed at pp 158-159, where the learned author McKenzie writes:

"In some of the earlier South African cases it was suggested that a court would set aside an award where an arbitrator had made a 'gross error' or a mistake of law or of fact apparent on the face of the award or admitted by the arbitrators. However, in the case of *Dickenson and Brown v Fisher's Executors*, the Appellate Division decided that 'a mistake not amounting to misconduct appearing on the face of an award was, in the Roman-Dutch law, of no more consequence than one not so appearing, and would not justify the setting aside of an award, although in English law an award might be set aside if a mistake of law appeared on its face, even when it did not amount to misconduct'."

1989 (2) ZLR p263

GUBBAY JA

Christie, in both *Rhodesian Commercial Law* at p 246 and *Business Law in Zimbabwe* at p 476, shares the same view.

I entertain no reservations, therefore, as to the correctness of the observation of FIELDSEND CJ in *Cone Textiles (Pvt) Ltd v Redgment & Ors* 1983 (1) ZLR 88 (SC) at 92F that:

"Although *Russell (on Arbitration* 20 ed at p 394) indicates that the term 'misconduct' in the section would appear to be used in its widest sense, the discussion which follows shows that, **with limited exceptions peculiar to English law such as an admitted mistake of law or fact by the arbitrator and an error of law on the face of the award**, the courts in England do not follow a very different line to the courts in South Africa" (my emphasis).

Interestingly enough, since the coming into operation in England and Wales of the Arbitration Act 1979, on 1 August 1979, the inherent power of the High Court to set aside or remit an award on the ground of errors of fact or law on the face of the award was abolished. Instead, an appeal lies on any ground of law (see s 1(2)). And, in the opinion of *Russell on Arbitration* 20 ed at p 401, the effect of the Act has "almost certainly" been to deprive the court of the power to remit an award where there has been an admitted mistake.

The position, then, in this appeal is that, even if it be assumed in the respondent's favour that objectively considered the errors to which he admitted are material and *bona fide* errors of fact which caused him to express his award in a way he did not intend, they do not provide a foundation for a court to set aside the award. That doctrine has no part in our law. But I leave open the question of whether their admission would justify a court in exercising its statutory power of remittal. See Jacobs *The Law of Arbitration in South Africa* p 149 para (12).

This view makes it unnecessary for me to deal in any detail with Mr *Eastwood's* alternative argument, that the errors adverted to by the respondent were at best errors of assessment which went to the weight of the various factors he was taking into account, and were not errors which caused him to express his award in a manner contrary to his true intention. Attention was directed to paras 14 and 15 of the founding affidavit, in which the respondent refers in effect to errors in assessment which he says can operate so as to increase his award on the one hand or to decrease it on the other. Suffice it to say that I find the argument attractive.

1989 (2) ZLR p264

GUBBAY JA

The distinct impression I derive from a close reading of all the affidavits and from an examination of the deed of submission, which is a coherent and detailed document, is that the award the respondent made was the one he intended to make at the time. It seems to that when the award was challenged as excessive and his integrity impugned, the respondent then began to have doubts about it, and does not now wish it to stand. Although he has not stated what the correct award should have been, he presently believes that he ought to have given different weight to the factors he took into account.

The object of arbitration, as expressed in para 13 of the Schedule to the Act, is to arrive at an award that is final and binding on the parties. Thus an award is not subject to appeal. It may be set aside on any of four grounds. First, that it does not fall under para 13 as not being "made in

terms of the Submission". Second, if the arbitrator has misconducted the proceedings, as envisaged in s 12(2) of the Act. Third, where it has been improperly procured (*vide* the same subsection). Fourth, where the arbitrator's mistake is so gross and manifest that it could not have been made without some degree of misconduct. See generally *McKenzie NO v Basha* 1951 (3) SA 783 (N) at 786A-B.

At one point in the argument I understood Mr *de Bourbon* to suggest that the award was so extreme as not to make the implementation of the lease by Derbyshire a financially viable exercise. If by this it was meant to convey that the extreme amount of the award was to be taken as proof of misconduct on the respondent's part, I must disagree. Although high on the face of it, I am by no means satisfied that the award can be described as manifestly too large. Without sight of the written arguments presented by the parties to the respondent and the mass of correspondence written to him, all of which were not put before the court *a quo* by the respondent, I find it impossible to come to any more definite conclusion. It is also to be noted that the appellant has indicated his preparedness to release Derbyshire from the lease, which offer has not been accepted. Surely it would have been if the consequence of the award was to render the operation non-viable? Furthermore, it is not in dispute that Derbyshire has been achieving a nett return of something slightly in excess of 20% on its production.

But even if the award was excessive, a court will not intervene in the absence of proof of irregularity or partiality (both of which are not forthcoming in this case). See *Tedder & Anor v Greig & Anor* 1912 AD 73 at 91.

It remains to consider whether the learned judge was correct in holding that

1989 (2) ZLR p265

GUBBAY JA

the award also fell to be set aside on the ground that the respondent was ill and under stress when he made it.

Mr *Eastwood* acknowledged that if at the critical time the respondent was so incapacitated mentally or physically as to be disabled from applying his mind to the matter and so from giving to it "fair consideration", he would in consequence have "misconducted the proceedings".

The issue before the court *a quo* was a purely factual one, with the *onus* of proof resting upon the respondent. Its resolution necessitated a careful analysis of the evidence revealed in the affidavits and the probabilities arising therefrom. But the learned judge, with due respect to him, appears to have had regard solely to the respondent's *ipse dixit* that he was incapacitated.

In his founding affidavit the respondent deposed on this aspect as follows:

"At the time I made my final assessment I was extremely unwell and subject to heavy work pressures. As a result, I failed to apply my mind properly to the facts put before me. I am not able at this stage to resolve the difficulties arising from the errors I have mentioned."

To this bald pronouncement, the appellant expressed scepticism. In his replying affidavit, he pointed out that neither Derbyshire nor he had put any pressure on the respondent to produce his award by the end of 1987 or at any other particular date; that he failed to understand what

the respondent meant by saying that he had not applied his mind properly to the facts before him, for he showed every sign in the correspondence of having done so, and the content of the award document itself revealed that he had given full and careful consideration to all the matters before him; that the respondent had not drawn any state of ill-health to his notice, and had not produced any medical evidence in support of it.

The respondent's brief answer was as follows:

"It was over the weekend 13th/14th December 1987 that I decided on the actual percentage to be paid. I had a very bad attack of gout from 12th to 14th December. I could hardly walk and felt very ill. I did not consult my doctor because I knew that the medication I possessed would cure it."

Pressure of work was no longer advanced as a reason. If it were a factor of any real relevance, I would have expected the respondent to have given some

1989 (2) ZLR p266

GUBBAY JA

particularity of the workload to which he was subjected at the time. Certainly, he did not dispute the appellant's averment that the parties had not put him under any pressure.

This leaves the severe pain the respondent suffered over the week-end, which required no treatment by a medical practitioner. Such temporary disability is not, I think, the kind of incapacity that would have affected his mental processes.

Moreover, the award was published two weeks after the attack of gout and the respondent has not suggested that throughout the whole of the intervening period he remained ill. If he had felt that at the time he arrived at his calculation of three percent he had not applied his mind properly, he had ample opportunity to correct it before signing the deed of submission on 29 December 1987.

A reading of that document shows that it was fully prepared. Its length and clarity do not accord with an inability by the author to apply his mind. To the contrary, it indicates that all the relevant factors were weighed up conscientiously.

There are other features which, in my view, tend to show that the reliance on the attack of gout and pressure of work was an afterthought. Nothing was done by the respondent about his award until on 2 February 1988 he was accused of bias. Only then did he react. The next day he consulted his legal practitioner and informed him that his integrity had been impugned and that, in his opinion, the award was excessive. There is no suggestion that there and then he blamed the fault upon ill-health and pressure of work. And his letter of 5 February 1988 to the appellant's legal practitioners does not even contain an admission that he considered the award to be excessive, let alone that he had been incapacitated from properly applying his mind to the matter.

In my opinion, what really motivated the respondent to apply to set aside the award was a sense of outrage at having been unjustly accused of bias. Indeed, he admits that he was bent on the vindication of his reputation and that, but for the imputation, he would "probably never have brought the application". It was the attack upon him that set in motion the whole train of events.

It caused him to have second thoughts as to whether he had properly determined the remuneration due to the appellant and, coming to the conclusion that Derbyshire's legal practitioner was correct in branding the award as excessive, it seems to me that then, and only then, did the respondent

1989 (2) ZLR p267

GUBBAY JA

rationalise that the "mistake" was due to ill-health and pressure of work.

It is for the reasons mentioned that I find myself in respectful disagreement with the conclusions reached by the learned judge. I would accordingly allow the appeal with costs against Derbyshire, and alter the order of the court *a quo* to read:

"The application is dismissed with costs".

McNally JA: I agree.

Korsah JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

1989 (2) ZLR p268

SHINGA v GENERAL ACCIDENT INSURANCE CO (ZIMBABWE) LTD 1989 (2) ZLR 268 (HC)

Court High Court, Harare

Adam J

Special plea in abatement

17 July & 23 August 1989

Flynote

Prescription - claim against insurers under Road Traffic Act 1976 - interruption and calculation of prescriptive period - whether issue of summons sufficient to interrupt prescription.

Headnote

On 3 August 1986 a driver insured by the defendant was involved in a motor vehicle accident with the plaintiff. On 3 August 1988 the plaintiff's summons was issued, but it was not served until 20 October 1988. The defendant raised a special plea in abatement that the plaintiff's right to proceed directly against it was prescribed by proviso (ii) to s 25(1) of the Road Traffic Act 1976, which provides that the plaintiff's right in this regard is prescribed upon the expiry of a period of two years from the date on which the claim arose.

The plaintiff claimed that the issue of a summons, as opposed to its service, ordinarily constituted the commencement of proceedings.

Held, that while under s 15(1) of the Prescription Act 1975 prescription begins to run as soon as a debt is due, this had to be read in conjunction with s 25(1) of the Road Traffic Act, which provides that prescription runs from the date on which the claim arose, that is, the date of the accident.

Held, further, that computing the two-year period prescribed by the Road Traffic Act, the date on which the accident occurred, 3 August 1986, was, by virtue of s 28 (3) of the Interpretation Act [Chapter 1], not included in the period, which would expire on 3 August 1988.

Held, further, that both at common law and under s 18(1) of the Prescription

1989 (2) ZLR p269

ADAM J

Act, the service, not merely the issue, of summons is essential to put an end to the running of prescription and under s 18(1) of the Prescription Act No. 31 of 1975 service of process is required. The plaintiff's summons was not served until 20 October and his claim was accordingly prescribed.

Cases cited:

van Schalkwyk v Hugo & Anor (1880) Foord 89

Tarvey v Leach (1901) 16 EDC 6

Hartley v Umkanganyeki (1889) 10 NLR 49

Union Government v Willemse 1922 OPD 14

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

Nxumalo v Minister of Justice & Anor 1961 (3) SA 663 (W)

Glen v Glen 1971 (1) RLR 196 (GD)

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

Sadomba v Farayi Uzumba (Pvt) Ltd & Anor 1982 (3) SA 558 (ZH)

Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A)

Pickering v Syfin Holdings Ltd 1981 ZLR 344 (HC); 1981 (4) SA 467 (Z)

Syfin Holdings Ltd v Pickering 1982 (1) ZLR 10 (SC); 1982 (2) SA 225 (ZS)

Grant v Eagle Insurance Co Ltd 1989 (1) ZLR 19 (HC)

Mrs B Mtetwa for the plaintiff

A P de Bourbon SC for the defendant

Judgment

Adam J: The defendant's special plea in abatement provides that in terms of proviso (ii) of s 25(1) of the Road Traffic Act 1976, the plaintiff's right to proceed directly against the defendant is prescribed. The plaintiff's summons was issued on 3 August 1988 and served on 20 October 1988. The particulars of claim filed with the summons allege that on or about 3 August 1986, Isaac Chibanda, insured by the defendant, was involved in a motor vehicle accident with the plaintiff.

Section 25(1) of the Road Traffic Act 1976 provides as follows:

"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

1989 (2) ZLR p270

ADAM J

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."

It was submitted on behalf of the defendant that the issue, as far as the prescriptive period was concerned, was whether the mere issue of summons was sufficient to interrupt prescription or whether service of the summons was required. It was the contention of the defendant's legal practitioner that s 18(1) of the Prescription Act No 31 of 1975, which indicates that the running of prescription shall be interrupted by service of any process, was declaratory of the common law and was to be applied in this case.

In *van Schalkwyk v Hugo & Anor* (1880) Foord 89 at 92 DE VILLIERS CJ stated:

"...a creditor can only prevent the term of prescription from running against him by means of judicial interpellation against the debtor. For that purpose a summons to appear in a Court having jurisdiction would be sufficient. Upon these matters I need only refer to Voet (41.3.20) and Act No. 6 of 1861 (s 7)."

Section 7 of the Prescription Amendment Act 6 of 1861 of the Cape of Good Hope provided as follows:

"7. Nothing in this Act contained shall extend to alter the existing law relative to the effect of a judicial interpellation by the creditor of his debtor in staying or interrupting the course of any incompleted term or period of prescription

, which law shall apply in all respects to any term of prescription by this Act established precisely as if such term were the term now by law established."

In *Tarvey v Leach* (1901) 16 EDC 6 MACGREGOR AJ referred to Voet 21.4.20 (misquoting 41.3.20) and held (where a summons was taken out but only

1989 (2) ZLR p271

ADAM J

served a day or two afterwards) that the taking out of a summons logically served as an interruption of prescription.

But in *Hartley v Umkanganyeki* (1889) 10 NLR 49 at 51 CONNER CJ observed:

"The Natal Law, No. 14 of 1861, was, I believe, substantially copied from an earlier Cape prescription statute. Section 6 of our Law is not, perhaps, very clearly worded ...However, two matters are expressed clearly; the interpellation is to be judicial; and it is to be by the creditor of his debtor ...It may, perhaps have to be admitted that for an interpellation to have constituted by Roman-Dutch law an interruption of the course of prescription an actual *litis contestatio* between the parties was not requisite, but that a legal summoning was sufficient - an *in jus vocatio* (Voet 41.3.20 & 5.1.49), and as the object of this is, we are told, that no one should be condemned unheard (Voet 2.4.1 citing Dig 2.4.14,15), and that that is not a *vocatio in jus*, which only consists in presenting to the authorities a claim (*libellum*) against another (Pothier *Ad Pandectas* 2.4.19), service on the defendant seems to me to have been necessary. The alternative was, apparently, a proceeding through edictal citation (Zoes Dg 2.4.11), though, of course, that might require the attachment of property, here, of the defendant.

I have, therefore, no hesitation in stating it as my opinion that an unserved summons is not a judicial interpellation within s 6 of the prescription law."

Also, in *Union Government v Willemse* 1922 OPD 14 at 17 WARD J stated:

"Now, Art 5 of the Law provides ...as follows: 'The period of prescription of any claim shall be interrupted by ...judicial demand or summons'. Now, in the present case, as already stated, summons was taken out on May 28th, but it was not served until July 29th, and it is upon the latter date that, in my opinion, the judicial demand was made upon the defendant.

A demand cannot be considered to be made until it is communicated to the person who is required to comply with it. Nor can any summons have any effect as a summons until it is served on the party who is called upon to obey it."

The South African Appellate Division in *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A) while considering s 11(2) of the Motor Vehicle

1989 (2) ZLR p272

ADAM J

Insurance Act No. 29 of 1942 (which provided for the right to claim compensation from a registered company that became prescribed upon the expiration of a period of two years as from the date upon which the claim arose) held that the mere issue of a summons did not end the running of prescription. SCHREINER ACJ at 549 said:

"In regard to the appellant's contention that the issue, as opposed to the service, of the summons put an end to the running of prescription, I do not find the wording of s 11(2) of the Act 29 of 1942 of assistance. The words 'The right to claim compensation' ...seems to me to be only a way of referring to the right of action given by subs (1),

and I do not find that they bear upon the question whether the issue of summons, without service, ends the running of prescription. But I agree with Steyn JA that, apart from the wording of subs (2), the mere issue of a summons has no effect on prescription. Sometimes the word 'issue' is used loosely when there is no necessity to distinguish it from service ...The only case, so far as I know, in which issue as opposed to service has been held to end the running of prescription is *Tarvey v Leach* (1901) 16 EDC 6, and I agree that that case was wrongly decided."

It was submitted on behalf of the plaintiff that the issue of summons, as opposed to its service, ordinarily constituted the commencement of proceedings. Here process by way of the issue of summons on 3 August 1988 meant that the right of recovery directly from the defendant had not expired, reliance being placed on *Nxumalo v Minister of Justice & Ors* 1961 (3) SA 663 (W). In that case the court had to interpret s 32 of the South African Police Act No 7 of 1958, which was as follows:

"32. Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action has arisen."

KUPER J at 664-667 observed:

"It was apparent that in so far as the second and third defendants were concerned all the prerequisites of the section has been complied with, but in the case of the Minister the question to be determined is whether the section requires the summons to be served before it can be said that the action against him has been commenced.

The position in regard to the interruption of prescription under the common law, which was a matter of some debate in the different Courts

1989 (2) ZLR p273

ADAM J

in the Union, has now been authoritatively settled by the Appellate Division in the case of *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A). At p 551 His Lordship Mr Justice Steyn (as he then was) considered the common law authorities and came to the conclusion that an interruption of prescription by way of action only starts to run from the time when the summons was served upon the defendant. It was at this stage that a claim was made upon the defendant and it was at the stage of service when the prescription was suspended.

Mr Muller, who appeared for the Minister, contended that as the section of the Police Act, to which I referred, was essentially a provision relating to prescription, the common law provision in regard to interruption of the period of prescription should be impliedly incorporated in s 32 unless there was something in the section which clearly debarred such construction from operating. It is quite clear that one would in the ordinary way construe a section of a Statute so as to be in conformity with the provisions of the common law. But such an approach must always give way to the ordinary meaning of the words which indicate the intention of the Legislature in passing the particular provisions ...The question then that I have to consider is not what the common law is in regard to the question of interruption of prescription but what is the meaning to be given to the words 'the commencement of a civil action', for if the action commences at the time that the summons is issued, then the terms of the section itself will prevail and the common law cannot be imported therein.

... I would refer in this regard to the case of *Caldwell v Prinsloo* 1932 TPD 5. The full Court of the Transvaal in that case ... was considering the question whether the issue of a summons against a debtor, which was subsequently withdrawn, was or was not an interruption of prescription either under the common law or under the provisions of s 12(2) of Act 26 of 1908, and the Court came to the conclusion that the summons which the plaintiff had issued and which the plaintiff had withdrawn, did not operate as an interruption of prescription ... So it is quite clear that in 1943, at any rate, the Legislature decided to end any question of uncertainty that existed at that time in the different courts in the Union by indicating that there would be no interruption of prescription until the summons

was actually served on the debtor ...

Now, under the similar sections of Prescription Acts in other provinces it has been held that service of the summons is a necessary prerequisite before there can be an interruption of prescription, and the reason for that has been that on the wording of the Statutes in the provinces involved

1989 (2) ZLR p274

ADAM J

there to be a claim made upon the debtor, or so the Courts have construed the particular provisions, and it is only necessary to refer to cases such as *Union Government v Willemse* ...and to the case of *Hartley v Umkanganyeki*.

So much for the provisions in the Statutes relating to prescription, but as I say it is quite clear that, if the provisions of s 32 are plain, the Court has to apply those provisions. Now, when is it that an action is commenced? It is quite clear in my view that, once a summons has been issued, ie once it has been signed by the Registrar of this Court and handed to the plaintiff's attorney ...the litigation has commenced and that such a summons has certain consequences. It cannot, for example, be amended by the plaintiff's attorney without obtaining the Registrar's signature to that amendment, and if a summons is so amended the summons itself has no longer any force or effect ...

That being so, it seems to me to be clear that an action is commenced by the issue of summons. It is taken a stage further when the summons is served."

In *Glen v Glen* 1971 (1) RLR 196 (GD) at 200; 1971 (3) SA 238 at 241 (R) BECK J (as he then was) cited that case with approval and held that an action is commenced when the summons is issued. However, proviso (ii) of s 25(1) of the Road Traffic Act makes no reference to commencement of proceedings and merely provides a two year prescriptive period. It is clear that at common law the running of prescription was put to an end only by the service of the summons.

It was also the contention of the plaintiff that proviso (i) to s 25(1) of the Road Traffic Act was subject to the provisions of s 15(3) of the Prescription Act. The Prescription Act provides in s 2(1), 12(1), 15 and 18(1) as follows:

"2. (1) In this Act, 'debt', without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.

12. (1) The provisions of this Part shall, save in so far as they are inconsistent with the provisions of any enactment which -

- (a) provides for a specified period within which -
 - (i) a claim is to be made; or
 - (ii) an action is to be instituted, in respect of a debt; or
- (b) imposes condition on the institution of an action for the recovery of a debt;

1989 (2) ZLR p275

ADAM J

apply to any debt arising on or after 1st January 1976 ...

15. (1) Subject to the provisions of subsections (2) and (3) prescription shall commence to run as soon as a debt

is due.

(2) If a debtor wilfully prevents his creditor from becoming aware of the existence of a debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises:

Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care.

18. (1) The running of prescription shall ... be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

In *Apalamah v Santam Insurance Co Ltd & Anor* 1975 (2) SA 229 (D) the court dealt with the provisions of the South African Prescription Act and Compulsory Motor Vehicle Insurance Act, MILLER J stated at 232-233 as follows:

"Section 16(1) clearly renders inapplicable the provisions of Chapter III of the Act (under which chapter s 12(3) falls) where they are inconsistent with the provisions of any Act of Parliament which (i) prescribes a specified period within which a claim is to be made or action is to be instituted in respect of a debt or (ii) imposes conditions 'on the institution of an action for the recovery of a debt'. Not only does s 24(1) of the Compulsory Motor Vehicle Insurance Act prescribe a specified period within which a claim under the Act is to be made but s 25 also imposes conditions on the institution of action in respect thereof, viz that prior notice of the claim in a prescribed form must be given to the insurer and that action to enforce such claim cannot be instituted before the expiration of a specified period as from the date when the prescribed notice was given. In point of detail and conceptually the provisions of the Compulsory Motor Vehicle Insurance Act relating to the time within which a claim may be enforced are inconsistent with the provisions of s 12 of the Prescription Act. Although it is true that in many cases the date upon which a debt 'becomes due' might also be the date upon which it 'arose', that is obviously not true of all cases. There is a vital difference in

1989 (2) ZLR p276

ADAM J

concept between the coming into existence of a debt and the recoverability thereof. There can be little doubt, if any, that the purpose of the Legislature in enacting s 12(1) of the new Prescription Act was to crystallize that difference; thenceforth prescription in terms of that Act began to run, not necessarily when the debt arose, but only when it became due. But so far as the Act relating to third party insurance is concerned, the moment when time begins to run is the moment when the debt arises, regardless of whether it is then due and payable ...The circumstances in which completion of prescription may be delayed or prescription may be interrupted are described in ss 13, 14 and 15 of the [Prescription] Act and are not alleged to be present in this case. Despite the reference in s 12(3) to a factor in respect of which s 24(1) of Act 56 of 1972 [Compulsory Motor Vehicle Insurance Act] is silent (viz the position of one who, despite the exercise of reasonable care, does not have knowledge of the necessary facts) it is clear that that factor serves only to qualify the particular provision relating to the commencement of the running of prescription in s 12(1); in other words, ...prescription runs against them as from the time when the debt becomes due (and not from the time when the debt arises, as in the Motor Vehicle Insurance Act) but if they justifiably did not know the necessary facts the debt will 'not be deemed to be due' until they do. The language of the subsection is designed to show very clearly the interdependence of the knowledge factor and the time when the debt may be said to be due for purposes of subs (1); the whole of subs (3) relates, not in general terms to the commencement of the running of prescription, but specifically to the determination of the time when a debt becomes due. Indeed, it is difficult to conceive of any manner in which subs (3), as it is worded, may be applied or invoked in respect of another statute on which the criterion for commencement of the running of prescription is not the time when the debt becomes due but some other specified criterion. These considerations lend emphasis to the incompatibility of s 12 of the Prescription Act with s 24(1) of Act 56 of 1972. Because the two sections contain different and conflicting provisions regarding the same subject-matter (viz the

commencement of the running of prescription), they cannot co-exist - one must yield to the other and it appears to me that s 16 of the Prescription Act tells us which is to yield."

The reasoning in this case was justifiably approved by WADDINGTON J in *Sadomba v Farayi Uzumba (Pvt) Ltd & Anor* 1982 (3) SA 558 (ZH) at 561, when he said:

1989 (2) ZLR p277

ADAM J

"As indicated by MILLER J in the *Apalamah* case, which concerned the interpretation of provisions identical in substance and very similar in form to those now under review, these considerations lend emphasis to the incompatibility of s 15(3) of the Prescription Act with proviso (ii) to s 81 of Chapter 263 and s 25 of Act 48 of 1976. With respect, I agree with the reasoning of and the conclusion reached by the learned Judge in that case that, because the two sections contain different and conflicting provisions regarding the same subject matter - namely commencement of the running of prescription - they cannot coincide; one must yield to the other. Having regard to s 12 of the Prescription Act and the above-mentioned inconsistencies, I must come to the conclusion that the provisions of s 15 of the Prescription Act must yield to the provisions contained in proviso (ii)."

This meant that according to the proviso (ii) of s 25(1) of the Road Traffic Act the right of recovery directly from the defendant, for the commencement of the running of prescription, was to be from the date on which the claim arose. For this purpose s 15(3) of the Prescription Act could not be invoked by the plaintiff since that sub-section was specifically meant for the ascertainment of when the debt was due.

Here we are not concerned with when the debt was due but with when the claim arose. In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) TROLLIP JA at 825 observed:

"I prefer to use the term 'right of action' to 'cause of action' because, I think, the former is strictly and technically more legally correct ... 'Cause of action' is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the defendant's 'debt', the word used in the Prescription Act. The term 'cause of action', is commonly used in relation to pleadings or in statutes relating to jurisdiction or requiring prior written notification of a claim before action thereon is commenced."

CORBETT JA said at 838-839:

"The meaning of the expression 'cause of action', as used in various statutes defining the jurisdiction of courts or providing for the limitation of actions and in other contexts, has often been considered by the Courts. In *McKenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16 this Court held that, in relation to a statutory provision defining the geographical limits of the jurisdiction of a magistrate's court, 'cause of action' meant -

1989 (2) ZLR p278

ADAM J

'... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

(per MAASDORP JA at 23.) And in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626, a case concerning the prescription of a claim against the Railways Administration, which turned on the question as to when the plaintiff's cause of action arose, WATERMEYER J stated:

'The proper legal meaning of the expression "cause of action" is the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in

his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action...'

(See also *Coetzee v SA Railways & Harbours* 1933 CPD 565 at 570-1; *Slomowitz v Vereeniging Town Council* 1966(3) SA 317 at 330).

In the case of an Aquilian action for damages for bodily injury (and here I use the term Aquilian in an extended sense to include the *solatium* awarded for pain and suffering, loss of life, etc...) the basic ingredients of the plaintiff's cause of action are (a) a wrongful act by the defendant causing bodily injury (b) accompanied by fault, in the sense of *culpa* or *dolus*, on the part of the defendant, and (c) *damnum*, ie loss to plaintiff's patrimony, caused by the bodily injury. The material facts which must be proved in order to enable the plaintiff to sue (or *facta probanda*) would relate to these three basic ingredients and upon the concurrence of these facts the cause of action arises. In the usual case of bodily injury arising from a motor accident this concurrence would take place at the time of the accident."

(See also *Pickering v Syfin Holdings Ltd* 1981 ZLR 344 (HC) at 347; 1981 (4) SA 467 (Z) and *Syfin Holdings v Pickering* 1982 (1) ZLR 10 (SC) at 19-20; 1982 (2) SA 225 (ZS).

Now, in this case, which according to the particulars of claim is one concerned with bodily injury arising from a motor accident, the concurrence would have taken place at the time of the accident on 3 August 1986. So for the running of the prescription the commencement would be 3 August 1986, in terms of proviso (ii) of s 25(1) of the Road Traffic Act. The method of computing the two year period prescribed in s 25(1) of the Road Traffic Act was to apply the provisions of s 28 of the Interpretation Act - *Grant v Eagle Insurance Co Ltd* 1989 (1) ZLR 19 (HC) at 27D. In reckoning two years from

1989 (2) ZLR p279

ADAM J

3 August 1986, according to s 28(2) of the Interpretation Act, 3 August 1986 is not to be included and so it would commence from 4 August 1986 and, pursuant to the provisions of s 28(3) of that Act, would end on 3 August 1988, and so 3 August 1988 must be included. Under proviso (ii) of s 25(1) of the Road Traffic Act the period of prescription accordingly would expire on midnight 3-4 August 1988. By that time, in this case the summons had been issued commencing the proceedings. But the return of service filed of record disclosed that it was only served on 20 October 1988. At common law, service of the summons was essential to put an end to the running of prescription, while service of process was required under s 18(1) of the Prescription Act to interrupt the running of prescription. But since service was effected on 20 October 1988 the plaintiff's right of recovery directly from the defendant was therefore prescribed. The defendant succeeds in his special plea in abatement.

Accordingly, the plaintiff's claim is dismissed and judgment is entered in favour of the defendant, together with costs of suit.

Hove, Mutasa & Associates, plaintiff's legal practitioners

Honey & Blanckenberg, defendant's legal practitioners

1989 (2) ZLR p280

DUBE v MEDICAL SERVICES INTERNATIONAL LTD 1989 (2) ZLR 280 (SC)

Court Supreme Court, Harare

McNally JA, Manyarara JA & Korsah JA

Civil appeal

25 July & 25 August 1989

Flynote

Practice and procedure - summary judgment - when may be granted.

Headnote

It is only when all the proposed defences to the plaintiff's claim, both in fact and in law, are clearly unarguable that the drastic relief of summary judgment will be afforded to a plaintiff.

Even where the defendant in an application for summary judgment has not defined the nature of his defence with precision, if, on all the material that is before it, the court sees a reasonable possibility that an injustice may be done if summary judgment is granted, summary judgment should not be granted. This applies even if the defendant's affidavit is balder than it should be.

Summary judgment should not be granted where any difficulty as to matters of law arises, but if the point of law, no matter how difficult, is unarguable, judgment may be granted.

Cases cited:

Webb v Shell Zimbabwe (Pvt) Ltd 1982 (1) ZLR 102 (SC); 1982 (2) SA 763 (ZS)

Mbayiwa v Eastern Highlands Motel (Pvt) Ltd S-139-86 (not reported)

Tanhira v Makoni S-18-88 (not reported)

Shingadia v Shingadia 1966 RLR 285 (GD); 1966 (3) SA 24 (R)

Rheeder v Spence 1977 (2) RLR 263 (GD); 1978 (1) SA 1041 (R)

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

D P Carter for the appellant: The procedure of summary judgment

1989 (2) ZLR p281

McNALLY JA

constitutes an extraordinary and very stringent remedy. It permits a final judgment to be given against a defendant without a trial. It is designed to prevent a plaintiff having to suffer the delay and additional expense of the trial procedure where the defendant's case is bogus or bad in law or is raised merely for the purpose of delay. In achieving this, the remedy makes drastic inroads

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upon the normal right of a defendant to present his case to the court: *Herbstein and van Winsen Civil Practice of the Superior Courts in South Africa* 3 ed pp 307-8; *Arend & Anor v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C). The appellant meets the requirements of Rule 66(b) of the Rules of the High Court and the court *a quo* should have been satisfied that she has a good *prima facie* defence to the action. Hers was not a mere bald assertion of "I do not owe". Her obligations in regard to Rule 66(b) are set out in *Mbayiwa v Eastern Highlands Motel (vt) Ltd supra*. While the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and the material facts on which it is based with sufficient clarity and completeness to enable the court to decide whether the affidavit disclosed a *bona fide* defence: *Maharaj v Barclays National Bank* 1976 (1) SA 418 (A); *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (D) at 228; *District Bank Ltd v Hoosain & Ors* 1984 (4) SA 544 (C). The appellant's defence that the debt was not hers but that of the estate is not simply an abuse of the legal process in order to frustrate a just claim.

M R D Stonier for the defendant.

Judgment

McNally JA: The appellant's late husband was on his way by air from Zimbabwe to the United States for medical treatment when he became so seriously ill that he was removed from the aeroplane in London and taken to a hospital. From that hospital he was rushed to the Cromwell Hospital on 12 September 1985.

On arrival at the Cromwell Hospital his wife, the appellant, who was accompanying him, was asked to complete a Registration form. She signed this form. Over her signature were printed the following words:

"In consideration of the Hospital accepting the patient for treatment I/We undertake to pay for all services rendered and items supplied to the patient in accordance with the charges applicable at that time."

Dr Dube, the patient, remained in the hospital for 62 days before he was discharged, running up an account of £34 389,81. He subsequently died in

1989 (2) ZLR p282

McNALLY JA

America. The hospital sued the appellant for payment, relying on her signature on the registration form as an acceptance of personal liability.

Before I deal with the further events which led up to the appeal I think it necessary to make a comment on the appeal record placed before us. There are two criticisms to be made.

First, I think it was unnecessary to have all 48 pages of the hospital account included in the record. The *quantum* is not in issue. Expense and bulk could have been avoided by agreement between attorneys. Secondly, the summons and the "judgment notes" should have been included in the record. It is only from the summons that one learns of the connection between the respondent and the Cromwell Hospital (the former owns the latter).

What happened after the issue and service of summons was this:

1. The appellant entered appearance to defend.
2. The respondent applied for summary judgment, relying on five documents, namely:
 - a. The account abovementioned;
 - b. the registration form abovementioned;
 - c. a letter from the appellant dated 16 January 1986;
 - d. a medical aid form, being a claim by the appellant on her medical aid society, CIMAS, dated 29 November 1985;
 - e. a letter from the appellant dated 22 July 1987 to Messrs Stephenson Harwood, who appear to be the respondent's solicitors.
3. The appellant resisted the application and filed an affidavit in support of her opposition.
4. The High Court granted the application for summary judgment, and recorded its judgment in the form of brief "judgment notes".
5. The appellant appealed.

The issue raised by the appellant has at no time been the *quantum* of the account. She does not dispute that. All that she contends is that she does not owe the money personally. Her husband's estate owes it.

I examine first the documents upon which the respondent relied.

1989 (2) ZLR p283

McNALLY JA

The first of these is the account. The amount claimed is not, as I have already indicated, in dispute. For what it is worth, I note that her name does not appear on it. The names of the patient and his doctor are shown. As "garantor" (the American spelling is used) the name and address of Mr K Dube, CIMAS House, Corner of Stanley Avenue and Salisbury Street, P O Box 1243, Harare, Zimbabwe, appear. The name Dube seems coincidental. He is presumably an official of the Commercial and Industrial Medical Aid Society of Zimbabwe (CIMAS). It is common cause that CIMAS is the appellant's medical aid society with whom, apparently, Dr Dube was registered as her dependant. One does not know how much of the account would be met by CIMAS, but it is safe to assume that there would be a considerable shortfall. The next document is the registration form. I shall return later to consider the legal effect of her signature.

The third document is the appellant's letter of 16 January 1986. The letter is essentially an apology "for the delay in paying the account". It does not throw any light on the important question as to who is to pay the account. It shows simply that the appellant was making

arrangements to pay the account but was experiencing difficulties.

The fourth document is the medical aid form which she says she completed while she was in England and forwarded to CIMAS. The form has not been completed by the Society. It proves only what is in any event admitted, namely that she is a member of the Society and proposed to claim what she could in respect of her husband who, being ill and unemployed, was accepted as her dependant.

The fifth and final document is her letter of 22 July 1987. In that letter she makes it clear that the account is to be paid from the proceeds of the sale of a Mercedes Benz and a number of houses. She says in the letter that the vehicle has been sold and the money "will soon be released and sent to you as soon as possible". "The balance will follow", she says, "when houses are sold by the Estate". It is clear from the reference to "the Estate" that at least that part of the funds was to come from her late husband's estate. She explains in her affidavit that the Mercedes Benz was also his, and that, in consequence of his death, the car and the houses were under the control of his executors, Syfrets Trust.

The respondent's particulars of claim rely exclusively on her signature on the registration form as proof of her acceptance of personal liability. Paragraph 4 of the particulars reads as follows:

1989 (2) ZLR p284

McNALLY JA

"The defendant signed the Registration Form and undertook thereby to pay for all services rendered and items supplied to her husband in accordance with the charges applicable at that time."

It does not seem to me that the other documents help at all in resolving the central issue in favour of the respondent. One is thrown back to reliance on the registration form.

In her opposing affidavit the appellant makes the following averments relevant to this issue:

"I admit I signed Annexure B (the Registration Form). At the time I signed it to the best of my recollection it was in blank, but it was signed prior to final financial arrangements having been made for the payment of Plaintiff's account. The purpose of signing Annexure B was to register my late husband in the hospital, as at the time he was critically ill and unable to sign documents."

After his admission to the hospital and my signing Annexure B, my late husband, Dr Michael Weston, the Superintendent of the hospital, and myself agreed that I would return to Zimbabwe immediately and sell four houses, which were registered in my husband's name, together with his Mercedes motor vehicle, which was in Harare at the time, and with the proceeds the hospital account would be paid. I say further that the plaintiff and Dr Weston were fully aware that neither my late husband nor I had any funds in England with which to pay the account and that the sources of the funds for payment would be from Zimbabwe."

She then went on to explain how certain legal difficulties had prevented the realisation of these funds and continued:

"The amount due to the Plaintiff is acknowledged as being a debt due by the estate."

It must be stated that the appellant's affidavit is an inadequate one from a legal point of view.

To say, for example, that "at the time I signed it (the Registration form) to the best of my recollection it was in blank", is unhelpful, because the critical words above her signature are printed words. She does not say directly why she avers that she is not bound personally by her signature to pay the expenses of her husband. It is evident that she had not, prior to drawing the affidavit, been advised as to the law relating to

1989 (2) ZLR p285

McNALLY JA

standard form contracts, or the law relating to the signing of a contract without reading it. She does not say specifically whether or not she was aware of the words above her signature, or if she was, how she understood them. She says she signed it "to register my late husband in the hospital", from which one may infer that she understood it to be simply an admission formality. She says she signed it "as at the time he was critically ill and unable to sign documents" from which one may infer that she was signing it as his agent. But whether these are necessary inferences or merely possible inferences is another matter.

It seems to me that, on analysis, the appellant's affidavit raises three separate defences -

1. that there was no contract at all in relation to payment because her signature was intended simply as a formality to allow her husband to be admitted to the hospital;
2. that if her signature is to be held to be contractually binding regardless of her subjective intention, then it is binding not upon her personally but upon her husband for whom she signed as agent. It therefore binds his estate. See generally *Chitty on Contracts* 25 ed para 2238.
3. that in any event the contract was subsequently novated and the later contract is the relevant one. Thus the respondent is not entitled to rely on the contract (if such it was) contained in the registration form.

Underlying these three points is a fourth one which, because it is a question of law rather than fact, has to be considered even though not specifically raised. It relates to the question whether, without evidence, it is possible to be certain as to the meaning of the alleged contract. This question arises because of the fact that the words "I/We" were left unamended in the printed form. Is one to assume that she is bound personally because of her signature, or that the husband was bound because she was signing as his agent, or that both were bound? And if both were bound, were they bound jointly and severally or merely jointly? It is arguable that she should be held bound to the extent that her medical aid society would pay, and that he (or now, his estate) should be bound for the balance

It seems to me that there are two principles relative to summary judgment which are relevant to the facts of the present case. In the first place I rely upon the following words of BECK JA in *Webb v Shell Zimbabwe (Pvt) Ltd* 1982

1989 (2) ZLR p286

McNALLY JA

(1) ZLR 102 (SC) at 106B; 1982 (2) SA 763 (ZS) at 767:

"...the appellant has not defined with precision the nature of his defence. Nevertheless, if on all the material that is properly before it, the Court sees a reasonable possibility that an injustice may be done if summary judgment is granted, it ought not to grant it, even if the defendant's affidavit is balder than it should be."

See also *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* S-139-86 (not reported), and *Tanhira v Makoni* S-18-88 (not reported).

Secondly, I am conscious of the point made by GOLDIN J (as he then was) in *Shingadia v Shingadia* 1966 RLR 285 at 288A-B; 1966 (3) SA 24 (R) at 25-26:

"Accordingly, summary judgment should not be granted when any real difficulty as to matters of law arises, but it has been held that, however difficult the point of law is, once the court is satisfied that it is really unarguable, judgment will be granted."

This passage was cited with approval in *Rheeder v Spence* 1977 (2) RLR 263 at 266G; 1978 (1) SA 1041 (R) at 1043. In *Chrismar (Pvt) Ltd v Stutchbury* 1973 (1) RLR 277 (GD), BECK J said at 279D:

"...it is well established that it is only when all the proposed defences to the plaintiff's claim are clearly unarguable, both in fact and in law, that this drastic relief will be afforded to a plaintiff"

and then went on to cite *Shingadia*.

The learned judge in the court *a quo*, in his very brief judgment notes, dismissed the appellant's case in three short paragraphs, as follows:

"3. Respondent concedes sum is due to plaintiff, but appears to raise various defences:

- (a) I signed form in blank and only to admit patient (this appears to be allegation of error?);
- (b) I agreed to pay by selling four houses and a car but these are now the subject of litigation;
- (c) my letter of 16 January 1986 written to give Reserve Bank the plaintiff's bank account number (contains apology for late payment); and

1989 (2) ZLR p287

McNALLY JA

- (d) I am not liable personally, the estate is liable.

4. Respondent's actions appear to me to admit liability from the outset, and this is confirmed by her later acts.

5. I do not consider the first defence, (a) above - if this is a defence - *bona fide*, and I do not consider the remaining three disclose any defence at all".

Accordingly he granted summary judgment.

I recognise the difficulty under which the judges of the High Court work, and I appreciate that these are only judgment notes. Nevertheless it seems to me that while the learned judge may well be right about the problems inherent in establishing what he called "the first defence"

(though I hesitate to call it unarguable) he did not give proper consideration to what might be called "the agency defence" and he did not give any consideration at all to what I would call "the novation defence" and the "ambiguity defence".

In general, given the situation in which the appellant found herself on arrival at the Cromwell Hospital, I have little difficulty in accepting (as a reasonable possibility and subject to the evidence to be led) that she may well have had it in mind that her husband's hospital expenses would be met partly by her medical aid and as to the shortfall by the sale of her husband's property. Given the added complication of Exchange Control, I do not find it improbable that more detailed discussions took place subsequent to the date of admission, in which it was agreed that payment would be made from the proceeds of the sale of her husband's assets. And it would normally be assumed to follow from that that it was her husband who gave that undertaking. One would not expect her to bind herself personally to pay for his treatment by the sale of his assets. To the extent that she spoke of herself as the person who would make the arrangements it is easy to understand that with him mortally ill she would see herself as his agent. In short, and without in any way prejudging the case before evidence, I do not find it possible to say she does not have a good *prima facie* defence.

It will be apparent, therefore, that in my view summary judgment should not have been granted. In the circumstances I accept Mr *Carter's* submissions on behalf of the appellant that condonation should be granted in respect of the appellant's breach of Rules 34(1) and 46(5). The appeal is reinstated and the respondent's application for the dismissal of the appeal is itself dismissed.

1989 (2) ZLR p288

McNALLY JA

However, as Mr *Stonier* for the respondent properly proposed, the costs of these two applications should be borne by the appellant.

The question of the costs in the court *a quo* then arises. These costs are in the discretion of the court (Order 10 Rule 72 of the High Court Rules). Mr *Stonier* asked that they be reserved. In view of the inadequacy of the appellant's affidavit I am inclined to agree with that proposal, and I did not understand Mr *Carter* to oppose it.

Before concluding it may not be amiss to remark that there was no discussion as to the proper law of the alleged contract. I do not think that at this stage anything turns on the question. I have assumed that the proper law is English law. It may be important when the facts are analysed in detail and the law applied to those facts.

In the result the appeal is allowed with costs save that the costs of the two applications in this court are to be borne by the appellant. The order of the court *a quo* in case HC 2414/88, dated 7 July 1988, is altered to read:

- "1. The application for summary judgment is dismissed;
2. The defendant is granted leave to defend;

3. The question of costs is reserved."

Manyarara JA: I agree.

Korsah JA: I agree.

Byron Venturas & Partners, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

1989 (2) ZLR p289

S v MUSABAEKA 1989 (2) ZLR 289 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Criminal appeal

29 June & 25 August 1989

Flynote

Evidence - admissions - consent to admission of affidavit - not necessarily an admission of facts stated in affidavit.

Headnote

Affidavits cannot simply be produced in a criminal trial as proof of their contents, unless they fall under the provisions of ss 260 to 264 of the Criminal Procedure and Evidence Act [*Chapter 59*]. If the prosecutor wishes to produce affidavits not covered by those sections, it is not enough for him to ask counsel for the defence to agree to their production. He should ask for an admission that the contents of the affidavits are true and defence counsel should formally make such an admission if so instructed. If the accused is unrepresented, the prosecutor should be prepared to call the makers of the affidavits unless the accused, being advised of his rights, makes an appropriate admission. Any such admissions by the accused should be carefully and accurately recorded by the magistrate in the exact words in which they are expressed.

Cases cited:

S v Mkandla S-9-84 (not reported)

Weintraub v Oxford Brick Works (Pty) Ltd 1948 (1) SA 1090 (T)

G S Wernberg for the appellant

M Jones for the respondent

Judgment

McNally JA: The appellant was employed as a counter clerk at the Mount Pleasant Post Office in Harare, with special responsibility for registered mail.

1989 (2) ZLR p290

McNALLY JA

On 29 October 1987 a person to whom a registered article had been addressed complained that it had been tampered with. Investigations revealed another twelve registered envelopes which had been interfered with, and the appellant was prosecuted and convicted on thirteen counts of contravening s 48 of the Posts and Telecommunications Services Act [*Chapter 250*]. Nine counts involved the actual theft of money and were thus under s 48(b), while four counts did not involve money and were thus charged under s 48(f). He was sentenced on 23 December 1988 to two years' imprisonment with labour, all counts being taken as one for sentence. Nine months of the twenty-four were suspended on the usual conditions. The amount of money involved was \$190.

The State produced, as evidence of the fact that money was missing in respect of the first nine counts, nine "Sender's Declaration as to Non-Receipt" Forms duly completed by the appropriate people and sworn before Commissioners of Oaths. The appellant's legal representative is recorded as saying: "I agree to their production".

Magistrates, prosecutors and defence counsel should note that affidavits of this nature cannot be simply produced as proof of their contents. They do not fall under the provisions of ss 260 to 264 of the Criminal Procedure and Evidence Act. See *S v Mkandla* S-9-84 (not reported); and *Weintraub v Oxford Brick Works (Pty) Ltd* 1948 (1) SA 1090 (T) at 1093.

Thus to "agree to their production" is not the point. The prosecutor should formally ask for an admission that the contents of the affidavits are true, and defence counsel should formally make the admission if so instructed. Provision for this procedure is to be found in s 291 of the Act.

In the present case, since the appellant was legally represented, and because later remarks by the appellant's counsel show that he intended to make the admission, we are prepared to assume that the admission was made. Had the appellant not been represented our attitude would have been different. Prosecutors in these circumstances should therefore be prepared to call the makers of the affidavits unless the accused person, being advised of his rights, makes an appropriate admission. Such admissions should be carefully and accurately recorded by the magistrate in the exact words in which they are expressed.

In the present case, the magistrate should not have allowed the prosecutor and the defence counsel to speak about producing documents if he thought they

1989 (2) ZLR p291

McNALLY JA

meant to speak about admitting facts. He should have insisted on clarification.

All this, however, becomes irrelevant because of another procedural irregularity which is fatal to the State's case. Chapter 250 is one of those unfortunately drafted Acts which require the prosecutor to read more extensively than he might think necessary. A conviction under s 48 of the Act involves a penalty of imprisonment without a fine. If, then, one reads s 42 of the Act, one finds that the Attorney-General's or Director of Public Prosecution's authority for the prosecution is required. No such authority was obtained. Therefore the proceedings are a nullity. They are not saved by s 169A of the Criminal Procedure and Evidence Act, which deals with the prosecutor's general title to prosecute. See Lansdown and Campbell *SA Criminal Law and Procedure* Vol V p 452.

This point was not raised on appeal, and only came to light subsequently. Mr Jones, for the State, having been given an opportunity to make further representations, has conceded that he has no answer to the point. I may say that it is not at all clear to me why it should be thought necessary to have s 42 in the Act. That, however, is another matter.

Accordingly the proceedings were a nullity and the conviction and sentence must be set aside. The State is free to institute further proceedings if it so wishes. It is so ordered.

Gubbay JA: I agree.

Manyarara JA: I agree.

A J A Peck, appellant's legal practitioners

1989 (2) ZLR p292

GRAPHICS AFRICA (ZIMBABWE) (PVT) LTD v RANK XEROX LTD 1989 (2) ZLR 292 (HC)

Court High Court, Harare

Adam J

Exception

17 July & 30 August 1989

Flynote

Contract - stipulatio alteri - communication to and acceptance of by third party - manner of.

Headnote

The plaintiff company brought an action against the defendant, relying on a pre-incorporation contract entered into in circumstances where it was not able to allege compliance with s 32 of the Companies Act [*Chapter 190*]. The company had been incorporated after an agreement had been reached between Graphics Africa Ltd, a company registered in Zambia, and the defendant, in terms of which Graphics Africa Ltd would cause the incorporation of the plaintiff in Zimbabwe and thereafter the plaintiff would act as the defendant's agent to sell office machinery and equipment in Zimbabwe. It had also been agreed between the representative of Graphics

Africa Ltd and the defendant that until the incorporation of the plaintiff he would perform work for the defendant and that the plaintiff would, on incorporation, accept the benefit of that work. Before incorporation, the representative marketed some £77 000 worth of the defendant's goods and, after incorporation, the plaintiff marketed and sold over £660 000 worth. The plaintiff's action was to claim the 6% commission allegedly due to it under the contract.

The plaintiff claimed that it had expressly or impliedly ratified and implemented the agreement between Graphics Africa and the defendant and had done so by accepting the benefit of the work done by Graphics Africa Ltd's representative before incorporation and by performing work in accordance with the agreement. It accepted that there was no written record of such ratification.

1989 (2) ZLR p293

The defendant argued that if the contract was one for the benefit of a third party, the necessary averments had not been made and in any case the plaintiff had not communicated its acceptance of the contract.

Held, that in contracts for the benefit of a third party, once the third party has in some manner displayed to the two principals his knowledge of the contract, he acquires an absolute right under the contract, which can only be altered or extinguished with his consent.

Held, further, that in such contracts there was no formalistic requirement of acceptance of the benefit. The manifest intent of the third party should be considered to ascertain whether it did indeed accept the benefit or not. Slight evidence only is required of ratification. In the present case, the plaintiff must have indicated to the defendant that it was well aware of the contract by the time it performed the work it did. In any case, by selling the defendant's machinery and equipment and subsequently demanding payment for doing so, the plaintiff could be said to have accepted the contract and the benefits thereunder.

Cases cited:

Sentrale Kunsmis Korporasie (Edms) Bpk v N K P Kunsmisverspreiders (Edms) Bpk 1970 (3) SA 367 (A)

Melpark Bottle Store & Anor v Brand & Ors 1970 (3) SA 119 (T)

Semer v Retief & Berman 1948 (1) SA 182 (C)

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

Crookes NO & Anor v Watson & Ors 1956 (1) SA 277 (A)

Gilchrist & Cooksey Ltd v Smith 1948 SR 69

Martian Entertainments (Pty) Ltd v Berger 1949 (4) SA 583 (E)

Natal Land Colonization Co Ltd v Pauline Colliery & Development Syndicate Ltd [1904] AC 120 (PC)

McCullogh v Fernwood Estate Ltd 1920 AD 204

S A Railways & Harbours v National Bank of SA Ltd 1924 AD 704

Avondson Trust (Pty) Ltd v Wouda 1975 (2) SA 444 (T)

Kynochs Ltd v Transvaal Silver & Base Metals Ltd 1922 WLD 71

Stephens v de Wet 1920 AD 279

Golding v Torch Printing & Publishing Co (Pty) Ltd & Ors 1948 (3) SA 1067 (C)

Anderson & Anor v Port Elizabeth Municipality 1954 (2) SA 299 (E)

E Chatikobo for the plaintiff

A P de Bourbon SC for the defendant

1989 (2) ZLR p294

ADAM J

Judgment

Adam J: The defendant excepts to the plaintiff's claim, as set out in its declaration filed on 28 October 1988, as being bad in law and unenforceable, in that the plaintiff relied on a pre-incorporation contract but was not able to allege compliance with s 32 of the Companies Act [Chapter 190]. The defendant also applies to strike out para 7 of the plaintiff's declaration as being vague and embarrassing and unrelated to the cause of action, in that the plaintiff in para 7 pleads work done by a third party, without specifying the basis upon which it is entitled to the commission claimed by the plaintiff for the work done by the third party.

It was agreed that the plaintiff must plead facts that either would bring the matter under s 32 of the Companies Act or show that it constituted a *stipulatio alteri*. The plaintiff's declaration states that around January 1984, Graphics Africa Ltd of Zambia, represented by one Valfoulaye Diallo, concluded an oral agreement with the defendant in terms of which (a) Graphics Africa Ltd of Zambia, through Diallo, would cause the incorporation of the plaintiff in Zimbabwe; (b) thereafter the plaintiff would act as an agent of the defendant to sell office machines and equipment in Zimbabwe; and (c) prior to incorporation Diallo would perform work for the defendant, and the plaintiff would, on incorporation, accept the benefit of such work. Also, it was an express term of that oral agreement that the plaintiff would receive a commission calculated at the rate of 6% of total sales effected or, alternatively, it was an implied term that the plaintiff would be paid by the defendant a fair and reasonable remuneration for services such implication arising from previous business dealings in Zambia and that 6% of total sales constituted a fair and reasonable remuneration. In concluding the oral agreement, it was intended by Diallo, as agent of Graphics Africa Ltd of Zambia, and it was understood and accepted by the defendant, that when incorporated the plaintiff would ratify and implement the agreement. The plaintiff was incorporated in May 1984. Diallo performed the work by marketing and selling the defendant's office machines valued at £76 952,35. The plaintiff ratified the agreement and implemented it, in that from May 1984 to March 1986, it, acting as the

defendant's agent and in performance of the agreement, marketed and sold office machinery and equipment valued at £663 244,30.

The plaintiff, in response to the defendant's request for further particulars, stated that the understanding concerning the plaintiff's ratification and implementing of the agreement was express, alternatively it was an implied term of the agreement, such implication arising from the fact that it was known by both Diallo and the servants of the defendant that in carrying out the work in Zimbabwe, Graphics Africa Ltd of Zambia would operate

1989 (2) ZLR p295

ADAM J

through the medium of a limited liability company. Also, in answer to the question that sought full particulars about the manner of ratification, the plaintiff indicated that it ratified the agreement by accepting the benefit of the work done by Diallo prior to its incorporation and by performing work in accordance with the terms of the agreement; and it accepted that there was no written record of such ratification. The plaintiff further alleged in the declaration that, despite demand, the defendant refused to pay £44 411,79.

It was agreed that the provisions of the Companies Act were not being relied upon by the plaintiff. It was argued on behalf of the defendant that if the contract was one for the benefit of a third party then the necessary averments had not been made, since the plaintiff had not alleged that it accepted any benefit under the contract but had merely alleged that it accepted the benefit of the work carried out by Diallo prior to its incorporation and that the statement that plaintiff adopted the agreement was not sufficient for this purpose. Further, it was not alleged that the plaintiff had communicated such acceptance nor was reliance being placed on cession in the plaintiff's declaration.

The parties are generally referred to A as the promisor, B as the promisee and C as the *tertius* or third party. The juristic nature of such relationship has been considered by different writers and certain theories put forward. George W Keeton in *Alteri Stipulari Nemo Potest* (1929) 46 SALJ 164 at 169 said:

"The relation created, however, is not a trust, and since ratification by the third party is always a condition precedent to suing on the contract, it would appear that the effect of the ratification is to create a three-cornered contract, in which one party is usually bound to the other two, both of whom may enforce the obligation, but only one of whom takes the benefit. It is obvious, however, that the latter may also be bound to do something (eg pay the price in a sale) after he has ratified; from which it would appear that his rights and liabilities are exclusively contractual."

R G McKerron in *The Juristic Nature of Contracts for the Benefit of Third Persons* (1929) 46 SALJ 387 at 395-396 stated:

"It is submitted that where B contracts, as a principal, in favour of C, he in reality secures for C the option of entering into a contract with A. A is bound to keep an offer open for acceptance by C for a stipulated period or if no period is stipulated then for a reasonable time. C, by notifying A of his acceptance of the offer, exercises the option which B has secured

1989 (2) ZLR p296

ADAM J

for him; with the result that B drops out and a binding contract is established between A and C. The peculiarity of the *stipulatio alteri* lies in the fact that B, the grantee of the option, although he can hold A to his undertaking to keep the offer open pending C's decision to accept or reject it, is not by the terms of the agreement entitled himself to exercise the option, while C, although by the terms of the agreement entitled to exercise the option, as he himself has not secured it, has no cause of action against A, if before he has notified A of his acceptance of the offer, A and B have mutually agreed to cancel the contract.

... In the Reports C is frequently spoken of as notifying his acceptance of the contract or of the benefit of the contract, and these expressions have been adopted in this article. But such expressions are juristically anomalous, as also are the commonly used expressions 'adopt the contract' or 'ratify the contract' ... An offer may be accepted by the person to whom it is made, but it is difficult to understand in what sense a third party can properly be said to accept a contract or the benefit of a contract."

M de Villiers in *The Maxim* : *Alteri stipulari nemo potest* (1930) 47 SALJ 206 at 207-208 observed:

"And why should notice be given at all to the promisor? When the third party enforces or merely otherwise presses his claim against the promisor that surely is a sufficient notice to the promisor, if notice is required. The result, however ... has been the adoption in subservient cases of the notion that by a notification of this kind a *vinculum juris* (by which seemingly is here meant a right of action) is established between the third party and the bound party. It seems a mystery how this can be; for in truth the only case where a *vinculum juris* is here established is where the proceedings between the two amount to a fresh contract in conformity with, but independent of, the original contract.

The adoption of this notion leads to anomalies and contradictory conclusions, at least, so it would appear if the decisions of the Courts which are mentioned ...are correctly referred to.

Perhaps no case can better show that express notification of adoption and ratification is unnecessary and useless than that of *van den Plank NO v Otto* 1912 AD 329 ... it would appear that the promisor A cannot revoke his promise to the promisee B before the third party who is to be benefitted, C, has notified his acceptance of the contract. But, as he cannot revoke after such acceptance either it would be sufficient to say

1989 (2) ZLR p297

ADAM J

that A cannot revoke his promise. According to this ... the Courts have held that where the contract is exclusively for the benefit of C, B cannot sue A for the simple reason that A's promise is a promise to render performance not to A but to C. But, since C before acceptance, cannot sue A either, it does not appear how A is to be prevented from revoking. Furthermore ... upon C having notified his acceptance of the benefit of the contract, B drops out altogether and ceases thenceforward to have any rights or liabilities under the contract. Results like these would appear to be somewhat surprising."

On the other hand I B Behrmann, in *The Rights of Parties under a Contract for the Benefit of a Third Person* (1936) 53 SALJ 279 at 284 and 285-286 criticized both Keeton and McKerron, and submitted that, when this happens, normally C would sue for specific performance but that C could not claim damages since there was no contract existing between A and B for breach of which the court would award damages to C. He asserted that Keeton was not correct in stating that C incurred liability since, according to him, C never incurs any liability on such a contract between A and B even after acceptance. He said that McKerron was in error when he maintained that after C's acceptance B drops out, as there could be instances where this would not happen. He also points out that when an analysis of the relationship between the three is

carried out, this would show in fact that there is only one contract, between A and B, and that there is no contract between A and C who, in many cases, have no intention of ever entering into a contract. He observes that the

"... relation between A and C is an anomalous one. It has been given the appearance of a contract by reason of the fact that C has to signify his acceptance of the benefit. But no offer is made to B and if what has been said above is correct, no damages can be obtained by C, if A refuses to carry out what he has undertaken. This alone is sufficient to show that it does not fall within the category of contract, for every breach of contract entitles the injured party to damages.

... It partakes of the nature of contract in that specific performance may be sought and granted and there is a *vinculum juris* of sorts between A and C but the relationship is *sui generis*."

R W Lee *An Introduction to Roman-Dutch Law* 5 ed p 439 observes:

"If in consequence of a transaction between A and B, rights and duties run through A and vest in C, so as to establish a contractual relation between

1989 (2) ZLR p298

ADAM J

C and B (A falling out of the contract altogether - *McCullogh v Fernwood Estate Ltd* 1920 AD 204 at 217), call it what you will, it is agency and nothing else. The *stipulatio alteri* is a triangle. It cannot by any manipulation be transformed into a straight line."

L Getz in *Contracts for the Benefit of Third Parties* 1962 *Acta Juridica* 38 at 42 and 44 had this to say:

"It is this act of 'acceptance' which is the key to the entire concept, since not only does it perfect the arrangement so far as the third party is concerned, but it also determines the juristic nature and foundation of his right. What is meant by saying that the third party must 'accept'? More precisely, what is it that he accepts?

... in *McCullogh v Fernwood Estate Ltd* where CHIEF JUSTICE INNES asserted that the third party 'on accepting the stipulation might enforce his rights *by action upon the contract itself*'. MR JUSTICE JE DE VILLIERS, in the same case, unequivocally placed his argument on the basis of offer and acceptance, using the word 'pending the incorporation of the company [ie the third person in this case] and acceptance by it of the offer'...

Other courts have spoken of the third party as accepting 'the benefits' of the contract...

The difficulty with the view of the third party's right as based upon 'acceptance' is that it is not made precisely clear what is accepted. To talk of accepting an 'offer' ... is, in this context plainly inaccurate. The only relevant offer is made to the promisee, and not to the third party. Doubtless one could regard the contract between *stipulans* and *promittens* as itself constituting a collective or joint offer by them to the third party. But such construction converts the triangle into a straight line ...

Acceptance by the beneficiary thus creates a *vinculum juris* between himself and the *promittens*. But if this analysis be correct, one has arrived at a conclusion which directly contradicts the premise. We start with the assumption that there is something called a contract for the benefit of a third person. This is apparently divided into two stages. In the first, prior to acceptance by the third person, it consists in a binding contract between the *stipulans* and the *promittens*, there being no connection between them and the third person. After acceptance - the second stage - a *vinculum juris* is created between the third party and the *promittens*. The *stipulans* has disappeared from the picture. We have, in effect, flattened the triangle ...

1989 (2) ZLR p299

ADAM J

When A enters into an ordinary bilateral contract with B, each party binds himself to make some performance towards the other. The right of each to demand performance from the other arises immediately upon the conclusion of the contract ... There is no inherent reason why the parties should not agree that performance should be made to some third person ...

This, then, is the true third party beneficiary contract - where A and B, acting as principals, make an agreement providing for performance towards a third party, C, who acquires an immediate and original right under that contract. Although only A and B are contracting parties, this should not obscure the fact that they intend that C should acquire an original right under their contract. They manifestly do not intend that C's right should be derivative in character - acquired as a successor to A. On the contrary, both A and C immediately acquire a right against B, who is immediately bound to both of them. C's right is, therefore, independent and arises directly from the contract between A and B. It is upon this contract that he founds his action.

But this is not the end of the analysis, for the character of C's right has yet to be determined. Is it an absolute right, complete upon creation and not liable to extinction except with his consent, or is it merely inchoate, liable to be defeated by action taken by A and B? If the latter is the true explanation, what must C do in order to render it immune from alteration or extinction? ...

So far as concerns modern South African law as expounded in the courts ... it is regarded as essential to the validity of a *stipulatio alteri* that there be an acceptance duly communicated to the *promittens*. It follows from this, and it has been so held, that once acceptance has been communicated, the third party's right is fixed and irrevocable; prior to acceptance, however, A and B can revoke the contract. ...

There are two possible solutions to this problem. On the one hand, one might hold that the third person's right arises and is irrevocable immediately upon the conclusion of the contract. Alternatively, one could take the position that while the third person's right arises immediately, it only becomes irrevocable upon his becoming aware of the contract made for his benefit. Both are tenable positions ... In the last analysis the issue resolves itself into one of judgment and policy rather than of doctrine.

There is nothing particularly startling about the first view. If two parties deliberately enter into a contract ... they are mutually bound, and the contract cannot be altered except with the consent of both. Why should

1989 (2) ZLR p300

ADAM J

it make any difference that one of them owes duties under that contract to a third person, in addition to those owed to the other? The theory that contractual arrangements seriously entered into should bind the parties thereto (must be) adhered to...

What of the argument that giving a third party an immediate irrevocable right deprives the promisor and promisee of the power to control their contract? ...

The rationale of the rule of irrevocability of rights in the case of ordinary bilateral contracts is that one or other party, being aware of the mutual rights and obligations arising under them, might change his position ... The law accordingly protects him by declaring that, in general, the contract may only be annulled or modified by the joint act of A and B. The essential condition for the operation of the rule of irrevocability is a mutual awareness among the parties of one another's rights and obligations, and the consequent prospect that they might change their positions injuriously. This condition is not necessarily fulfilled, in the case of the third person, at the conclusion of the contract. ...

For so long as he is ignorant of the contract, the third person cannot be affected by it. Certainly, he will not change his position in reliance upon it. It is only when he becomes aware of the contract that he is liable to change his position, and it is only at this point, therefore, that he requires the protection of the law. There is thus no compelling practical necessity for the law to protect the third person at any time earlier than the moment at which

he becomes aware of the fact that a contract has been made for his benefit. At the same time, and for very similar reasons, there is no sound policy which favours depriving the contracting parties of the power to change their minds and cancel the contract [before the third person becomes aware] ...

... a contract for the benefit of a third person is a single contract in terms of which the beneficiary acquires a direct and immediate right. This right remains inchoate, however, in the sense that it is liable to be extinguished or modified by the two contracting parties, unless the beneficiary has in some manner communicated his awareness of its existence to them. From that moment, it vests in him absolutely, and is immune from alteration or extinction except with his concurrence."

AJ Kerr in *The Juristic Nature of Trusts inter Vivos* (1958) 75 SALJ 84 at 87 explained the two contract theory as follows:

"This is an ordinary contract for the benefit of a third person; a contract

1989 (2) ZLR p301

ADAM J

between A (the trustee) and B (the settlor) to keep an offer open for acceptance by C (the beneficiary).

Such a contract may be made in express terms, but if not it may be argued that in most cases the circumstances themselves give rise to a strong inference that the contract is to be implied.

'The offer as well as the acceptance may be either express or tacit ... Both may be evinced by words or conduct. It is for the court to judge from all the circumstances whether an offer or acceptance has in reality taken place. An offer or an acceptance which is implied from circumstances is as truly an offer or acceptance as one which has been made in express terms.'

(Wessels *Law of Contract in South Africa* 2nd ed sec 89).

When C accepts the offer he brings into being a contract between himself and A, and B drops out. B in the contract under discussion is the settlor but it is important to note that the two main contracts referred to in the preceding paragraph remain. The first, the contract between the settlor and the trustee setting up the trust, is independent of the contract securing an option for the beneficiary and may continue in being. When the second main contract, that between the trustee and the beneficiary, comes into being, the contract by which the option was secured is discharged and requires no further mention."

RH Christie *The Law of Contract in South Africa* 1981 p 258 maintains that the courts have "wisely avoided committing themselves to any theory of the juridical nature of contracts for the benefit of a third party".

At common law, it is clear that the promoters of a company prior to incorporation could individually enter into a contract for the benefit of such company to be formed and on its incorporation the newly formed company could adopt the contract - *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 384 G

In *Melpark Bottle Store & Anor v Brand & Ors* 1970 (3) SA 119 (T) at 125-126 VILJOEN J stated:

"In my view the lease is a contract whereby Western Province Cellars Ltd, as the stipulator, stipulated for a prestation from the promissor, the lessor Rusthill Investments (Pty) Ltd, for the benefit of Western Province Cellars Ltd, itself or for somebody else, namely, any other subsidiary company of the Oude Meester Cellars Group of companies. The person

ADAM J

to receive the benefit is, therefore, either the lessee or any other company in the Group ... This is not the type of contract for the benefit of a third party where the stipulator drops out of the contract upon the acceptance of the contract by the third party. The fact that the third person incurs no obligation under the contract, does not, in my view, affect the third person's right as against the promisor, provided the stipulator, on whom the obligations under the contract rest, performs in terms of the contract. No particular difficulty arises in regard to ratification by the third party because the party to benefit is stated in the alternative, the agreement is entered into for a fixed period and, whether the third party accepts or not, the lessee remains liable. As far as the promisor is concerned, it is immaterial to him whether the lessee itself or any other company referred to in clause 4 of the lease occupies the property. Whichever subsidiary company ... be found in possession, it would have a right as against the lessor to remain in possession provided there is proper performance by the lessee of its obligations. *A fortiori*, any company properly qualified as the third person would be entitled, in my view, to enforce compliance by the lessor as the promisor ...

If any ratification be required, this may be inferred from the circumstances, for instance, the fact that any particular company qualified in terms of clause 4 ... applied for a removal of its liquor licence to the leased premises, if the lessor is aware of such application, or simply by reason of the fact that any qualified company entered into occupation and started trading there. In this regard I adopt, with respect, a passage from an article written by Professor J Kerr Wylie in (1943) 7 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* p 115:

'But is it necessary that Titius' ratification be brought to the notice of me the stipulator? Naturally Titius, if he is wise, will take care that his ratification is actually brought to my notice as well as to yours, but there seems no authority for holding that it must be so brought in order that he may acquire a right against you. In point of fact the sound view seems to be that the efficacy of the ratification is independent of its communication to any particular person, and furthermore that it (the ratification) need not be manifested expressly but on the contrary that its existence may be inferred from the circumstances of the given case. The sole requirement is that the court must be satisfied that Titius did actually make up his mind to accept the benefit which the contract conferred upon him, and ordinarily there will be no difficulty in presuming him to have done so, provided, of course, he was aware of the existence of the contract.'

ADAM J

...

The conclusion to which I have come is that any company qualified as required by clause 4 has an enforceable right as against the promisor, the lessor Rusthill Investments (Pty) Ltd."

Also of importance is what was said by OGILVIE THOMPSON AJ (as he then was) in *Semer v Retief & Berman* 1948 (1) SA 182 (C) at 193-194:

"In the course of his judgment in *McCulloch v Fernwood Estates* [1920 AD 204] at 207 INNES CJ described as 'exhaustive and founded on principle' Grotius' division of all unauthorised agreements for the benefit of third persons into two classes, viz

'those made with principals in favour of third persons, and those made with agents purporting to act on behalf of third persons.'

The contract there at issue was between McCulloch and Joseph Apsey 'acting as trustee for and on behalf of a limited liability company in the course of formation' and in that capacity styled the purchaser. Referring thereto INNES CJ said:

'The term "trustee" comes from the English law; I do not propose to attempt a definition; but clearly it is not identical with "agent". Speaking generally it implies that the person described is the *dominus* of the relative subject-matter which the term "agent" does not imply. It is therefore appropriate to a case where the person described acts in his own name and on his own responsibility though for the benefit of another.'

This same concept was expressed in very similar language by MILLIN J in *Ackerman NO v Burland and Milansky* 1944 WLD 172 at 175 when he said:

'The consequence of making a contract for a company about to be formed is that the so-called trustee is acting as principal ...if he wants to bring an action on the contract, he must do it as principal and not in his capacity as trustee for someone else '

Once it be conceded that to contract as trustee in circumstances like these is to contract *qua* principal, it, in my view, follows that - subject always to the particular terms of the contract in question - the trustee will in his personal capacity have rights and be subject to obligations in regard to that contract. INNES CJ indeed in terms indicates this in using the phrase 'on his own responsibility' in the above cited passage: and it is implicit in the reasoning in *Ackerman's* case (*supra*) that the trustee has in his personal capacity a right of action before adoption of the contract by the

1989 (2) ZLR p304

ADAM J

contemplated company. I may also refer to the decision in *African Universal Stores v Dean* 1926 CPD 390 which decided that the stipulator (trustee) was entitled to hold the promisor to his agreement pending the decision of the third party for whose benefit the contract was made ...I do not feel called upon, in these proceedings, to enter upon any attempt at a precise definition of the exact juristic position of a trustee in circumstances like this, or to determine exactly at what point of time his personal liability may be enforced: I incline to the view that, in the absence of any stated time limit, the vendor must allow a reasonable time to elapse to enable the projected company to adopt the contract; and that, on failure of such adoption, the vendor can sue the trustee in his personal capacity".

Further, as correctly observed by CORBETT JA (as he then was) in *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 172A-E:

"With regard to the contract for the benefit of a third party or *stipulatio alteri* as it is sometimes known, it was stated by SCHREINER JA in *Crookes NO & Anor v Watson & Ors* 1956 (1) SA 277 (A) at 291B-F:

'...in the legal sense, which alone is here relevant, what is not very appropriately styled a contract for the benefit of a third person is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two (of *Jankelow v Binder, Gering & Co* 1927 TPD 364) ...'

Although this was a minority judgment (concurrent in by FAGAN JA), there is nothing inconsistent therewith in the majority judgments and it has generally been regarded as an authoritative statement of the law (see eg *George Ruggier & Co v Brook* 1966 (1) SA 17 (N) at 23...). Further, as was pointed out in the *George Ruggier* case *supra* at 23H: '

'It is entirely a question whether there is an intention that the third party can, by adoption of the promise, become a party to the contract in which it is embodied'."

The position under South African law, according to CENTLIVRES CJ in *Crookes NO & Anor v Watson and Ors* 1956 (1) SA 277 (A) at 286-287 was as follows:

"Dr de Wet in his learned thesis on 'Die Ontwikkeling van die ooreenkoms ten behoeve van 'n derde'; discusses the authorities at

ADAM J

length and on p 141 says that there were three theories which I gather to be as follows : (1) as soon as the agreement is executed between the settlor and the trustees (for convenience sake I am using the terms I have used in this judgment) the beneficiary obtains an irrevocable right. (2) The beneficiary obtains no right on the mere execution of the agreement between the settlor and the trustees. The agreement constitutes an offer of a donation by the settlor to the beneficiary through acceptance of which the beneficiary obtains a *jus perfectum* against the trustees. (3) The beneficiary does obtain a right on the mere execution of the agreement between the settlor and the trustees, but his right is dependent on the will of the settlor who can before the beneficiary accepts discharge the trustees ... Dr de Wet favours the third theory which he says is that of the majority of the commentators. The learned writer criticises the decisions of this Court in *van der Plank NO v Otto* 1912 AD 353 and *McCulloch v Fernwood Estate Ltd* 1920 AD 204, in which the second theory was adopted.

... the second ... was deliberately chosen by this Court and it seems to me that it is now too late to ask this Court to depart from its previous decisions. If it is considered desirable to do so, it is for Parliament and not this Court to alter the law."

It was submitted on behalf of the defendant that nowhere has it been pleaded that the contract was one for acceptance by the plaintiff and that thereby the plaintiff became a party to the contract. Nor does the plaintiff allege that it accepted the contract and notified such acceptance to the defendant - *Gilchrist & Cooksey Ltd v Smith* 1948 SR 69 at 71.

It was argued on behalf of the defendant that on the facts pleaded Graphics Africa Ltd of Zambia was not the principal or trustee in entering into the contract but merely an agent for the company to be formed and that it should be noted that the plaintiff did not plead the capacity in which Graphics Africa Ltd of Zambia made the agreement, which means that surrounding circumstances must be examined. In *Martian Entertainments (Pty) Ltd v Berger* 1949 (4) SA 583 (E) at 590-591 LEWIS J said:

"In *Ex p Vickerman & Ors* 1935 CPD 429, WATERMEYER J held that s 71 of the Act was an enabling section, that it was not intended thereby to curtail the right of the company to adopt a contract made for its benefit prior to its incorporation by a person acting individually and not as the agent of the company, as in the *Fernwood Estate* case (*supra*), but that it was intended to extend that right ... In that case the purchasers were

ADAM J

described in the heading of the contract as purchasers 'for and on behalf of a limited liability company to be formed'. 'That', said the learned Judge, '*prima facie* looks as if they were acting as agents of the company about to be formed'...

But notwithstanding this description of the purchasers in the ... contract ... it was held that on the facts proved these so-called agents were in fact acting not merely as agents but as principals and incurring liabilities as principals under the contract, and that s 71 of the Act was not applicable ... But in *Ex p Elands Properties (Pty) Ltd* 1945 TPD 37 the same reasoning was applied to the case of a person who was described in the contract as 'acting in his capacity as trustee for a company in the course of registration' ... But SOLOMON AJP applied the principle of the *Vickerman* judgment ... I am of the opinion that the decisions in the cases of *Vickerman* and *Elands Properties* were correct ... though on the face of it the one contracting party purported or professed to act as agent or trustee for a company still to be formed, should be regarded as falling within the ambit of s 71 of the Act if on examination of the features of the transaction, the terms of the contract, and in light of such evidence as was admissible of the surrounding circumstances, it appeared that this contracting party acted as a principal. We

must therefore look to the features of the contract as a whole and not regard ourselves bound by what is said in the heading or preamble of the contract only. And in this connection I regard the history of the transaction as of importance."

Applying the foregoing to this case, it cannot be maintained that Graphics Africa Ltd of Zambia was acting as an agent of the plaintiff and not in the capacity of a principal, particularly when one looks at the contract as a whole as outlined in the declaration, including the history of the transaction as far as it is disclosed in the papers filed of record. The terms of the agreement require Graphics Africa Ltd of Zambia to perform through Diallo from January 1984 and thereafter the plaintiff, after incorporation, was to implement the contract. An agent cannot contract on behalf of a non-existent person - *Natal Land Colonization Co Ltd v Pauline Colliery & Development Syndicate Ltd* [1904] AC 120 (PC). This means that Diallo, in carrying out the contract as from January 1984, could only have done so in his capacity as a servant of Graphics Africa Ltd of Zambia, who must have been the principal. Further, a court should incline to a construction which render a transaction operative rather than inoperative - *McCullogh v Fernwood Estate Ltd supra* at 209.

In South African Railways and Harbours v National Bank of South Africa Ltd

1989 (2) ZLR p307

ADAM J

1924 AD 704 at 715-716 WESSELS JA aptly stated:

"The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, ... the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract."

Further, in *Avondson Trust (Pty) Ltd v Wouda* 1975 (2) SA 444 (T) at 447 STEYN J correctly observed:

"The requirement that a third party has to adopt the benefit conferred upon it by others certainly does not contain any formalistic requirement of acceptance of the benefit and, even in a legal person where the normal pressures of motivation, intent and action cannot be unravelled as in a natural person, the manifest intent of its officials and directors, its resolutions and subsequent actions should be jointly considered to ascertain whether the company did indeed accept a benefit or not."

As was stated by WARD J in *Kynochs Ltd v Transvaal Silver and Base Metals Ltd* 1922 WLD 71 at 80:

"... a company when formed may claim a benefit which someone has promised to a third party to give it ... Slight evidence only is required of ratification of a contract; the principal in fact has merely to accept or claim the benefit and he immediately becomes bound by the contract with him."

In this case a demand was made, according to the declaration, for the total remuneration of £44 411,79, being the commission calculated at 6% of total sales. This amount was, in terms of para 7, for commission earned through Diallo in the sum of £4 617,14 and, in terms of para 8, for the plaintiff's commission earned in the sum of £39 794,16. This demand, which the defendant refused to pay, must have been made prior to issue and service of the declaration. It seems

that, firstly, the plaintiff claimed for the benefit of the work done by Graphics Africa Ltd of Zambia through Diallo, and secondly, it claimed for what it did.

1989 (2) ZLR p308

ADAM J

It is true that the maxim *res inter alios acta aliis non nocet* (a transaction between two parties ought not to operate to the disadvantage of a third person) relates to the situation where A makes a contract with B by which A seeks to impose a duty or liability on an independent third party C; the contract, being made without C's knowledge and assent, has no legal validity as far as C is concerned. But once C becomes aware of and discharges the duty or obligation imposed on him in terms of the contract with the knowledge of the other party, surely C is bound and the contract is valid.

In this case we are concerned with a contract entered into by Graphics Africa Ltd of Zambia and the defendant, which contract the plaintiff asserts was designed to enable it to come in as a party to the contract. The only basis upon which the plaintiff's claim in para 8 could be explained was that it implemented the terms of the contract entered into on its behalf by Graphics Africa Ltd of Zambia.

It is significant that as far as pre-incorporation contracts are concerned under the Companies Act [Chapter 233] s 33 provides that any contract made in writing by a trustee acting on behalf of a company to be incorporated can be ratified or adopted by or otherwise made binding upon and enforceable by such a company after incorporation when the provisions of that section pertaining to the memorandum of association and the delivery of the contract to the Registrar have been satisfied. The Companies Act does not require as far as the pre-incorporation contract is concerned that the newly formed company "accept" or communicate its "acceptance".

I am inclined to accept what *Getz loc cit* states, that such transactions involving principals are a single contract, whereby A seriously agrees with B that each discharge their respective obligations in accordance with the terms thereof not only involving A and B but also C, which requires A's performance to be made to C in addition. Under this, C acquires an immediate and direct but an inchoate right which can be extinguished or modified by A and B, unless C has in some manner displayed to A and B of his knowledge of the contract. At that moment C has an absolute right which can only be altered or extinguished with C's consent.

This would mean that the plaintiff in this case must have indicated to the defendant that it was well aware of the contract entered into by Graphics Africa Ltd of Zambia by the time it performed and then made the demand for payment of the total remuneration in the amount of £44 411,79 by the time it issued and served its declaration.

1989 (2) ZLR p309

ADAM J

On the otherhand, if I am wrong on this, I am satisfied on the papers before me that the plaintiff, by the sale of the defendant's office machines and equipment from May 1984 onwards and by

its subsequent demand for payment, had "accepted" the benefit of the contract which must, initially, have been brought to the defendant's attention when the plaintiff first marketed or sold the defendant's office machines and subsequently when the plaintiff's demand for payment was made. This demand also covered the work done by Diallo and thus the "benefit accepted".

Turning to the defendant's application to strike out para 7 of the declaration, the contention on its behalf is that no basis was set out for the commission earned through Diallo, since the *stipulatio alteri* permits one to be a party to an existing contract and to obtain a benefit. But this does permit the third person to recover that which had already fallen due under the contract unless the claim had been ceded and in this case cession has not expressly been pleaded.

Clearly, parties are free to enter into a contract whereby payment of commission earned currently by a party acting as a trustee or principal for another may be paid at some future time, or on the happening of an event, to a third person for whom the trustee or principal was acting. Certainly, if the plaintiff had been relying on the provisions of the Companies Act for a pre-incorporation contract that provided for the sale of the defendant's merchandise, prior to incorporation, by a principal or trustee acting for the company to be formed and any commission earned during that period to be paid after incorporation to the newly formed company, then ratification or adoption by such newly formed company would have entitled it to enforce payment from the defendant on the strength of the pre-incorporation contract and without anything more.

As for the application to strike out, this court, in deciding whether or not this should be done, has to determine whether para 7 is relevant to an issue in the action - *Stephens v de Wet* 1920 AD 279 at 282. In this regard para 7 has to be looked at with the other particulars pleaded in the declaration.

As correctly pointed out by OGILVIE THOMPSON J (as he then was) in *Golding v Torch Printing & Publishing Co (Pty) Ltd & Ors* 1948 (3) SA 1067 (C) at 1090:

"A decisive test is whether evidence could at the trial be led on the allegations now challenged in the plea. If evidence on certain facts

1989 (2) ZLR p310

ADAM J

would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded.

...The difficulty, however, lies in applying this test to any given set of facts. I regard the present case as somewhat near the borderline, and I agree with WARD J in *Harding and Parker v John Pierce & Co* 1919 OPD 113 at 122 that in case of doubt the paragraph should be allowed to stand."

Further, this procedure was never meant to be used to raise technical objections - *Anderson & Anor v Port Elizabeth Municipality* 1954 (2) SA 299 (E) at 309. In light of the finding on the exception pertaining to the commission earned through Diallo, it cannot be said that the averments in para 7 are not relevant. In case of doubt the paragraph should be permitted to stand.

Accordingly, it is ordered that the defendant's exception and application to strike out are

dismissed with costs.

Mapfumo & Associates, plaintiff's legal practitioners

Coghlan, Welsh & Guest, defendant's legal practitioners

1989 (2) ZLR p311

MINISTER OF PUBLIC CONSTRUCTION & NATIONAL HOUSING v ZESCON (PVT) LTD 1989 (2) ZLR 311 (SC)

Court **Supreme Court, Harare**

Gubbay JA, Manyarara JA & Korsah JA

Civil appeal

1 August & 7 September 1989

Flynote

Contract - building contracts - breach of - whether injured party may claim specific performance - termination of contract - procedures for - parties bound by procedures specified in contract - effect of failure to comply with.

Headnote

Under the Roman-Dutch law, the injured party in a building contract has a choice either to claim specific performance of the contract or to claim damages for breach of contract. If he elects to enforce the agreement by claiming specific performance, it is in the discretion of the court either to grant or to refuse it, but the right to specific performance cannot be withheld arbitrarily or capriciously. The court's discretion must be exercised judicially. This discretion, however, is not confined to specific types of cases nor is it circumscribed by rigid rules; each case must be judged in the light of its own circumstances.

Where the parties to a contract have agreed upon procedures for terminating an agreement, they are bound by the provisions spelling out those procedures as if they had been imposed on them by law. A departure from the agreed procedures will not result in an effective termination of the contract.

Cases cited:

Beetge v Drenka Investments (Isando)(Pty) Ltd 1964 (4) SA 62 (W)

Ranch International Pipelines (Tvl)(Pty) Ltd v L M G Construction (City)(Pty) Ltd 1984 (3) SA 861 (W)

1989 (2) ZLR p312

KORSAH JA

Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A)

Commercial Careers College (1980) (Pvt) Ltd v Jarvis 1989 (1) ZLR 344 (SC)

G S Wernberg for the appellant

R M Fitches for the respondent

Judgment

Korsah JA: The appellant was the respondent in the proceedings in the High Court. He appeals against the confirmation by the High Court of a rule *nisi* which:

- (a) interdicted the appellant from entering upon and carrying out any work on certain sites referred to in contract numbers 8668 and 8669 entered into between the appellant and the respondent; or authorising or permitting any of his officials, agents, sub-contractors or anyone else from so entering such sites;
- (b) permitted the respondent herein to complete its contractual obligations in terms of the aforesaid contract numbers as soon as reasonably practicable;
- (c) directed the appellant to immediately conduct inspections for progress payments and immediately pay to the respondent whatever amount is thus determined to be due as at the 9 October 1987 in respect of both contracts, together with the payment for the additional work carried out as extras by the respondent on both contracts; and

ordered that the appellant was to pay the costs of the petition.

Two main submissions were made by Mr *Wernberg* on behalf of the appellant. The first was that the learned trial judge erred in finding that the appellant was not entitled to determine the contract between the parties. The second was that the respondent was not entitled to the particular relief granted.

The dispute between the parties arose out of two contracts entered into by the parties in August 1986 for the construction of sixty-eight houses by the respondent. In one, the respondent was to build thirty-one houses at Bindura, for which the appellant undertook to pay the respondent the sum of \$763 644,50. In the other, the respondent was required to build thirty-seven houses at Marondera for a remuneration of \$729 485,30 to be paid by the appellant. In both contracts it was stipulated in the "Appendix" that the time for completion of each contract was nine months. However, clause 19 in both contracts provided for extension of this period in the event of delays which were not of the respondent's making.

1989 (2) ZLR p313

KORSAH JA

It is evident from subsistence of the contracts on 5 October 1987 that clause 19 of the

contracts had been invoked by the parties from time to time to extend the period of completion of the contracts; were it not so, the contracts should have been concluded by June 1987.

Clause 20 of the contracts also laid down the procedures to be followed if the appellant wanted to terminate the contract. Since this clause is the central issue in this dispute, it is set out fully hereunder. Clause 20 provides as follows:

"Determination of Contract by Government

20. (a) DEFAULT. If the contractor shall make default in any of the following respects, viz: -

- (1) If without reasonable cause he wholly suspends the Works before completion;
- (2) If he fails to proceed with the Works with reasonable diligence;
- (3) If he refuses or persistently neglects to comply with a notice, in writing, from the Architect requiring him to remove defective work or improper materials and by such refusal or neglect the Works are materially affected;

and if he shall continue with such default for fourteen days after notice specifying the default has been given to him by the Architect, the Government may, without prejudice to any other rights or remedies, thereupon by notice served by hand or by registered post determine the employment of the Contractor under this Contract;

Provided that notice in pursuance of this Clause shall not be given unreasonably or vexatiously and shall be void if the Government is at the time of the notice in breach of this Contract."

The issue before the trial court was whether or not the purported termination of the contracts was invalid, as the appellant did not comply with the procedure set out in clause 20(a) of the contract.

What transpired was that, shortly after the signing of the agreements, difficulties arising from the performance of the contracts by the respondent provoked the appellant on 17 October 1986 to write in this vein:

1989 (2) ZLR p314

KORSAH JA

"Dear Sir,

CONTRACT 8668 - CIVIL SERVICE HOUSING - BINDURA

The sites for the above mentioned contract were handed over to you on 9th September 1986.

Since that date the site has been visited several times by the Clerk of Works and there is little sign that much progress is being made nor is there a competent General Foreman on the site.

Several attempts have been made to contact you on the telephone without success.

There is no alternative but to draw your attention to clause 6, clause 17 and clause 20(a)(2) of the Articles of Agreement and Conditions of Contract and to say that you are required to show cause why the Contract should not be determined."

There was no immediate follow-up to this invitation to the respondent to show cause why the Bindura contract should not be determined. But subsequently another letter dated 22 April 1987

was addressed to the respondent. The letter recites:

"Dear Sir,

CONTRACT 86697 AND 8668: 15 x E21 AND 16 x F14/2 HOUSES AT BINDURA

You were served with a notice on 17 October, 1986 to show cause why your contract should not be terminated under clause No. 20(a)(2).

It has been observed that you are failing to complete these houses within the scheduled period of time.

I have no alternative but to inform you that your contract is terminated with effect from today and the Chief Quantity Surveyor and the Clerk of Works will be on site to assess the work done on 28th April 1987 and you are requested to be present on the site at 10 am that day."

Considering these two letters in the light of clause 20 of the contracts, in both letters only the houses at Bindura are specified, although two contract numbers are cited in the second of the two letters. Clause 20 requires that firstly notice specifying the default complained of be given to the respondent by the architect.

1989 (2) ZLR p315

KORSAH JA

Both letters emanated from the office of the Secretary for Public Construction and National Housing and were signed on his behalf. Under the agreements, the term "the architect" is defined as meaning the Secretary for Public Construction and National Housing, or any person duly authorised to act for him as the architect for the purposes of the contracts, and so there is nothing irregular or remiss about the source of the letters.

However, the letter of 17 October 1986 merely states that not much progress is being made by the respondent and that there is not a competent General Foreman on the site. It then went on to draw his attention to clauses 6, 17 and 20(a)(2) of the Articles of Agreement. In terms of clause 20(a) what was required of the appellant was a notice to the respondent that it was not proceeding with the works with reasonable diligence. If for fourteen days thereafter the respondent failed to take remedial action, then, and then only, could the appellant terminate the contract by means of a written notice served by hand or registered post. So the letter of 17 October 1986, if it was meant as a notice of termination of the Bindura contract, did not comply with the provisions of clause 20(a)(2).

If, on the other hand, the letter of 17 October 1986 was merely meant to notify the respondent that the works were not being carried out with due diligence and that the contract would be terminated if within fourteen days the situation did not improve, then the only inference to be drawn from the fact that the contract was not determined after the lapse of fourteen days, or within a reasonable time thereafter, is that the respondent took the necessary remedial action within the stipulated period of time, and the right to terminate the contract upon that notice fell away. That letter could not serve both as a notice to remedy a default and as a notice of termination.

The letter of 22 April 1987, although referring to a notice given on 17 October 1986, therefore stands or falls by itself as a letter of termination of the contracts. As this letter was not preceded

by the required notification of the default which the contractor was required to remedy, it, too, does not comply with the provisions of clause 20(a) of the Conditions of Contract.

In any case, a letter dated 5 October 1987 makes it quite clear that the purported cancellation of the agreement by the letter dated 22 April 1987 was withdrawn by the Ministry. That letter reads:

"Dear Sirs,

You were served with a notice on the 17th October 1986 to show cause

1989 (2) ZLR p316

KORSAH JA

why your Contract should not be terminated under Clause 27 and Clause 20(a)(2) of the Articles of Agreement and Conditions of Contract.

It was observed that you were failing to complete these houses within the schedule period of time in both Contracts and so you were served with a notice of termination of Contract on the 22nd April 1987.

However, I believe, after discussing your problems with this Ministry's officials, the notice was withdrawn. Now three months after the supposed completion date, the houses are still incomplete and worse still the work done so far is full of defects.

The delay in the completion of these houses and your performance as contractors has [sic] seriously embarrassed this Ministry, especially when user Ministries can no longer programme themselves for the use of this accommodation.

We have no option but to inform you that your Contracts are both terminated with immediate effect as a matter of urgency.

It is in your interests to present yourselves on site at Bindura on the 8th October and Marondera on the 9th October to note your assets and [sic] liabilities in this project."

This letter, like its fore-runners, was not written subsequent to a prior notification of a default on the part of the respondent. The respondent was deprived of the grace period of fourteen days, stipulated in clause 20(a) of the contracts, within which to remedy the default. The termination of the contracts was thus not in compliance with clause 20(a) of the agreements and conditions of contract.

In the penultimate paragraph of the judgment the learned trial judge said:

"My view of this matter, therefore, is that the petitioner [now the respondent] must succeed because the purported termination of the contracts is invalid as the respondent [now the appellant] did not comply with the procedure set out in Clause 20(a) of the contract. ...There is, of course, nothing to prevent the respondent [now the appellant] from terminating the contracts in terms of Clause 20(a) if such termination is justified."

I do not understand the above quotation to mean that the appellant was not entitled to terminate the contracts. The appellant may well have been entitled to do so, but where parties to a contract have agreed upon procedures for

1989 (2) ZLR p317

KORSAH J

terminating an agreement, they are bound by the provisions spelling out those procedures as if they had been imposed upon them by law, and a departure from the agreement procedures will not result in an effective termination of the contract. All that was required of the appellant was, if there was justification for terminating the contracts, to terminate them in compliance with the procedures spelt out in clause 20(a).

It was submitted, in the alternative, that even if the agreement were not lawfully determined, the respondent was not entitled to the relief granted because paras 1(a) and (b) of the order granted by the trial court savoured of the equitable relief of specific performance. While conceding that the respondent's entitlement to such an interdict is subject only to the court's discretion, it was contended that the court will usually not exercise its discretion in favour of a grant of specific performance in building contracts, other than in those pursuant to a lease agreement, because damages will generally provide an adequate remedy and the court will not be able to supervise the performance of the contract.

The *dictum* by LUDORF J in *Beetge v Drenka Investments (Isando) (Pty) Ltd* 1964 (4) SA 62 (W) at p 66, that "whether the contract was wrongly or rightly terminated, his (the builder's) only remedy was an action for damages", received criticism from COETZEE J in *Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 (3) SA 861 (W). Of the unilateral right of stoppage by the owner, the learned judge said the following at p 873F:

"I have consulted all the South African text-books which might have something to say on the subject and also the more well-known Roman-Dutch law writers such as Voet, Van Leeuwen, De Groot, Van der Kessel, Huber and Van der Linden. Nowhere could I find a trace of a suggestion of a unilateral right of stoppage. The one exception is Maasdorp to which I have already referred, who, with respect, read more into *Power's* case than is warranted."

If there is no unilateral right of stoppage by the employer then the builder is entitled to be put back in possession if he is unlawfully dispossessed.

It is true that an applicant who seeks an interdict to prohibit a breach of contract is in reality asking for specific performance in an indirect way; for in this type of case, as with the case of an employee who has been wrongly dismissed and seeks reinstatement, the relief sought is an interdict requiring

1989 (2) ZLR p318

KORSAH JA

the employer to co-operate in the performance of the contract. Indirectly, this amounts to a requirement that the employer renders specific performance. Accordingly, the general principles of the law relating to specific performance apply. ". (W)here the builder claims his right to perform and seeks only the employer's co-operation to make this possible, in the sense of allowing him to perform, the interdict which enforces this duty is negative in form as it simply prohibits the employer from interfering with the employee." See the *Ranch* case *supra* at 881E.

But as DE VILLIERS AJA stated in *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378D:

"It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*. The discretion which a Court enjoys, although it must be exercised judicially, is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances."

See also *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (SC).

It is clear to me that, under the Roman-Dutch law, the respondent herein had a choice either to claim specific performance of the contracts or to claim damages for their breach. If he elects to enforce the agreement by claiming specific performance, it is in the discretion of the court either to grant or to refuse it. I am fortified in taking this view by what COETZEE J said in the *Ranch* case *supra*. Quoting with approval the paragraph above from the judgment of DE VILLIERS AJA in the *Haynes* case *supra* COETZEE J added at 879F-I:

"I accept that the foregoing exposition of the law by [AJ] de Villiers [in his thesis] (also that of de Wet and Yeats) accurately reflects our law..."

The law is clear. This is a remedy to which a party is entitled as of right. It cannot be withheld arbitrarily or capriciously. This is another of the important differences between our law and English law which starts off on the premise that a building contract is not specifically enforceable unless the three conditions mentioned by MAHON J *supra* are satisfied. The right of an ordinary servant who had been dismissed to enforce his contract was in issue

1989 (2) ZLR p319

KORSAH JA

in the *National Union Textile Workers* case 1982 (4) SA 151 (T). The contention that the court would not order the reinstatement of the servant as this would amount to an order of specific performance of an employment contract involving the rendering of personal services was rejected."

It seems to me that, unless the appellant can show that the learned trial judge's discretion was not judicially exercised in the granting of the order for specific performance, he must fail. No attack was levelled against the exercise of his discretion by the learned trial judge and, indeed, none could.

In the premises the appellant also fails on his alternative submission.

Except for para 1(c) of the order, which appeared to us to be superfluous and was not insisted upon by Mr *Fitches*, for the respondent, the appeal is accordingly dismissed with costs.

Gubbay JA: I agree.

Manyarara JA: I agree

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

DW Aitken & Company, respondent's legal practitioners

BAXTER v CHIEF IMMIGRATION OFFICER 1989 (2) ZLR 320 (SC)

Court **Supreme Court, Harare**

Korsah JA (in Chambers, in terms of s 21(4) of the Immigration Act 1979)

Question of law reserved

15 September 1989

Flynote

Conflict of laws - domicile - loss of - requirements for - Immigration Act 1979 - s 4.

Headnote

The appellant entered Zimbabwe in 1968, when he immigrated to the country as a child of six with his parents. He was issued with a residence permit. In 1984 he left for the United Kingdom to undergo training as a wood carver. When he left, he held a British passport which was endorsed "Resident in Rhodesia". This passport expired while he was away and he was issued a new one. The new passport was not endorsed with the appellant's country of residence. The appellant returned in 1989 to resume residence and was required to complete an form applying for permission to resume residence. The respondent refused the application. The appellant appealed.

Held, that the appellant was domiciled in Zimbabwe in 1984 and had no intention of abandoning his permanent residence in Zimbabwe. He went to the United Kingdom only to further his study. A new domicile is not acquired until there is a fixed intention of establishing permanent residence in some other country and this intention has been carried out by actual residence there. Residence in the other country without the intention to remain there permanently is insufficient to lose domicile in Zimbabwe. Nor had the appellant been abroad for a continuous period of seven years, as required by s 4(a)(ii) of the Immigration Act. Accordingly, he was entitled to remain in Zimbabwe.

KORSAH JA

Judgment

Korsah JA: In this matter the issue of domicile was rightly reserved by the learned trial magistrate for the determination of this court as a question of law.

As the Chief Immigration Officer was not represented at the trial, even though three separate notices of set down were served on him, the Registrar of this court, at my instance, invited him to indicate whether he wished to make any oral or written representation. This invitation was spurned; and so I referred the matter to the Attorney-General for his comment. The

Attorney-General's response has been prompt and the view expressed therein is most helpful and one with which I am in complete agreement.

The appellant's parents migrated to Rhodesia in 1968, with the appellant, who was then six years of age. In June of the same year the appellant was issued with a residence permit. He lived with his parents in Rhodesia/Zimbabwe until 1984, when he left for the United Kingdom to train as a woodcarver so as to acquire greater skills for the benefit of the family business in Mutare.

At the time of his departure in 1984 he held a British passport endorsed "Resident in Rhodesia". That passport expired while the appellant was abroad and a new one was issued to him in the United Kingdom. The new passport did not contain the endorsement declaring the appellant's country of residence. This is understandable because, Zimbabwe being a sovereign state, the issuing authority in the United Kingdom could not make a declaration which was the right of the Government of Zimbabwe alone to make.

In 1986 the appellant returned to Zimbabwe on holiday. On arrival, he filled out a form applicable to returning residents. This is an indication that the appellant, at that time, had no intention of abandoning his permanent residence in Zimbabwe and that Zimbabwe was his domicile of choice. After all, the appellant only went to the United Kingdom for the purpose of furthering his education in a particular field, and a new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there. Residence in the United Kingdom without the intention to remain there permanently is insufficient to lose the appellant his domicile in Zimbabwe. See Dicey and Morris *The Conflict of Laws* 11 ed Vol 1 p 133 (9).

1989 (2) ZLR p322

KORSAH JA

However, the immigration officer to whom the appellant gave the returning resident's form destroyed the form and demanded that the appellant fill in a form applicable to tourists as he was not a resident of this country. This the appellant did under protest.

Having completed his training in the United Kingdom, the appellant returned to Zimbabwe on 1 April 1989, to resume residence. On arrival, he was required to fill out a "Resumption of Residence" form. That application to resume residence was refused. As a result the Chief Immigration Officer has refused to allow the appellant to remain in Zimbabwe. It is against this decision that the appellant appealed.

It is evident (see s 3 of the Immigration Act) that the appellant was domiciled in Zimbabwe at the time of his departure for the United Kingdom in 1984. I agree with the Attorney-General that:

"There is no evidence that he has lost that domicile by voluntarily departing from Zimbabwe and residing outside Zimbabwe with the intention of making his home outside Zimbabwe (s 4(a)(i)); nor has he been abroad for a continuous period of seven years (s 4(a)(ii)). Accordingly, unless the Chief Immigration Officer can show otherwise, the appellant is entitled to remain in Zimbabwe."

In the result, the appeal succeeds, and it is ordered:

- (1) that the appellant continues to be a person with permanent residence in Zimbabwe;
and
- (2) that his passport be endorsed with such certificate forthwith.

Manyarara JA agrees with this judgment.

1989 (2) ZLR p323

GUTHRIE CORPORATION PLC v MATRAC (PVT) LTD 1989 (2) ZLR 323 (HC)

Court High Court, Harare

Adam J

Exception

10 August & 13 September 1989

Flynote

Contract - fictional fulfilment - contract requiring party to apply for a permit, the issue of which was in the discretion of a third part - failure to apply for permit - what party relying on fictional fulfilment must prove.

Headnote

The plaintiff sued the defendant for breach of a contract which contained a suspensive condition requiring the defendant to apply to the Exchange Control authorities for written permission to make payment to the plaintiff. The defendant did not apply for permission and the plaintiff was therefore not paid. The plaintiff claimed that the defendant thereby intentionally prevented fulfilment of the suspensive condition, which should be held to have been fictionally fulfilled as against the defendant. The defendant excepted to the plaintiff's claim on the ground that the doctrine of fictional fulfilment did not apply when it was not within the defendant's power to grant the approval. It also claimed that the plaintiff's pleadings were defective, in that they did not allege that, if the application had been made, the required approval would have been forthcoming.

Held, that in such cases the plaintiff has to prove (a) non-fulfilment of the condition and (b) the defendant's breach of his duty, with intent to frustrate the condition. It is not necessary for him to prove a causal link between the two or that but for the defendant's breach the condition would have been fulfilled. Once the plaintiff has proved (a) and (b) the onus shifts to the defendant to show that in spite of his breach the condition would not have been fulfilled.

1989 (2) ZLR p324

ADAM J

Cases cited:

George Municipality v Freyson NO 1976 (2) SA 945 (A)

Dirk Fourie Trust v Gerber 1986 (1) SA 763 (A)

Palley v Holmes 1975 (1) RLR 181 (GD)

Flashco (Pvt) Ltd v Fox & Carney (Pvt) Ltd 1979 RLR 407 (AD); 1980 (1) SA 235 (ZA)

Scott & Anor v Poupard & Anor 1971 (2) SA 373 (A)

A P de Bourbon SC for the excipient (defendant)

J S Sayce for the respondent (plaintiff)

Judgment

Adam J: The defendant's exception is that the plaintiff's particulars of claim do not disclose a valid claim and are bad in law. The plaintiff accepts that the contract on which it sues the defendant contained a suspensive condition requiring the written approval of the Zimbabwe Exchange Control Authorities for payment to the plaintiff by no later than 31 December 1988 and that the plaintiff concedes that no such approval was forthcoming by that date. The defendant states that the contract failed and was of no force and effect as a result of the non-fulfilment of the suspensive condition. Further, the defendant maintains that the plaintiff was not entitled to allege or rely on the failure of the defendant to make an application for such written approval by 31 October 1988, as the grant of such written approval was not within the power of the defendant. The defendant also states that the particulars of claim were defective in that the plaintiff does not allege, as it is required by law, that had such application been made by the defendant the written approval would have been forthcoming by 31 December 1988.

The plaintiff does not concede that the contract has failed by reason of non-fulfilment of the suspensive condition and asserts that the defendant designedly prevented fulfilment of the condition by intentionally refraining from making application for written approval to the Zimbabwe Exchange Control Authorities. This condition was therefore deemed in law to have been fulfilled against the Defendant.

It was submitted on behalf of the defendant that the doctrine of fictional fulfilment did not apply when it was not within the defendant's power to grant written approval. Authorities cited were *George Municipality v Freyson NO* 1976 (2) SA 945 (A) at 958-960 and *Dirk Fourie Trust v Gerber* 1986 (1) SA 763 (A).

The plaintiff's contention was that the doctrine of fictional fulfilment formed

1989 (2) ZLR p325

ADAM J

part of our law: *Palley v Holmes* 1975 (1) RLR 181 (GD) and *Flashco (Pvt) Ltd v Fox and Carney (Pvt) Ltd* 1979 RLR 407 (AD); 1980 (1) SA 235 (ZA).

Joubert *General Principles of the Law of Contract* (1987) at 175-176 states:

"The law, however, makes use of a fiction called fictional fulfilment of the condition in order to treat the case as one where the condition has been fulfilled, where justice requires this. According to this doctrine, the condition will be regarded as fulfilled even though it has not been fulfilled and may be incapable of fulfilment, if a party who would have been a debtor had it been fulfilled has designedly prevented its fulfilment contrary to the intention of the parties.

The first requirement is that the act in question must have been contrary to the intention of the parties. Sometimes the law imposes a duty to act, such as where the one party has to apply for some permit or indulgences and in such a case refraining from doing that act will bring the fiction into play...

The act must, in the second place, succeed in preventing the fulfilment of the condition...

The third requirement is that the act must have been intentional, ie done with the object of frustrating the fulfilment of the condition."

The defendant indicated that, for present purposes only, the plaintiff's allegation in the particulars of claim that the defendant did in fact make the condition impossible of fulfilment was accepted by it.

It is clear that the written agreement, whereby the plaintiff was to be compensated, required the defendant to make application for the necessary written approval by 31 October 1988 and was conditional upon such written approval being granted not later than 31 December 1988. However, the defendant has here deliberately and intentionally not made the application, in breach of contract, and has thereby prevented the fulfilment of the condition. The defendant's argument was that since it has no control over whether such approval would be granted or not, the doctrine of fictional fulfilment cannot be invoked against it.

In *Palley v Holmes supra*, a case relied on by the plaintiff, Holmes, who had contracted to purchase a property, had agreed that this was subject to a condition precedent that he apply to a building society for a loan to be secured by a mortgage bond over the property. Holmes did not make his application.

1989 (2) ZLR p326

ADAM J

MACAULAY J held that the probabilities were that the application would have been approved and that it was not because Holmes did not want the loan to be given to him, his intention being to frustrate the fulfilment of the condition and therefore refrained from his duty to assist by proving his income to the building society. MACAULAY J said at 187:

"It is clear from *Koenig v Johnson & Co Ltd* 1935 AD 262 that the *bona fides* of a refusal to assist in the fulfilment of a condition in a contract is irrelevant where the refusal is made with an intention to defeat fulfilment. In the words of WESSELS CJ at p 272 ...'if it is the **fault** (my emphasis) of the person in whose favour the condition is inserted that the condition cannot be fulfilled or if he intended to prevent the condition from being fulfilled, the law considers the condition to have been fulfilled as against him'. It is only in this sense, namely, a deliberate breach of contractual duty, that the authorities refer to *dolus* in connexion with this type of the case."

As for the defendant's submission that the particulars of claim did not allege that had the application been made by the defendant written approval would have been forthcoming by the fixed date, in *Scott & Anor v Poupard & Anor* 1971 (2) SA 373 (A) HOLMES JA at 378-379 dealt

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with this aspect by stating:

"In essence it is an equitable doctrine, based on the rule that a party cannot take advantage of his own default, to the loss or injury of another. The principle may be stated thus: where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him ... Furthermore, what must a plaintiff prove when invoking the doctrine? Must he prove (a) non-fulfilment of the condition, (b) the defendant's breach of his duty with intention to frustrate the fulfilment, and (c) a causal link between (a) and (b)? Does (c) involve proof by the plaintiff that, but for (b), the condition would probably have been fulfilled? Or is the position that fulfilment is deemed if the plaintiff proves (a) and (b)? This would obviate any assessment as part of his case, of imponderables, such as might arise under (c). Indeed, to insist on his proof of (c) might emasculate the remedy. On the other hand, to dispense with (c) might render the plaintiff's position more advantageous than it would be when claiming damages for breach of a contractual term. Would that be inequitable, seeing that the benefits of the deeming, like an estoppel, may be said to be due to a defendant's own fault?

1989 (2) ZLR p327

ADAM J

Or is the practical solution that it is sufficient for a plaintiff to prove (a) and (b), with the *onus* on the defendant to prove that, in spite of (b), the condition would not have been fulfilled. Even if this offends against exquisite logic, one is here dealing with an equitable remedy ...

However, in the circumstances of this case and on the pleadings and arguments, it is not necessary to decide the foregoing points."

The defendant's argument was that there must be a causal link between the non-fulfilment of the condition and its duty and maintained that the view expressed by Christie was incorrect. Christie in *The Law of Contract in South Africa* (1981) at 139-140 maintains that once the plaintiff proved (a) and (b), it was for the defendant to show, if he could, that the condition would not in any event have been fulfilled. This view accords with what Ellison Kahn said in *The MacDuff Rule in Reverse* (1959) 76 SALJ 247 at 251:

"It appears that in continental legal systems the person whose conduct is impugned may escape the consequences of his actions by proving that even if he had not interfered none the less the condition would not have been fulfilled ... or (presumably) fulfilled, as the case may be. The rule seems a sound one."

I concur with HOLMES JA that where one is dealing with an equitable remedy to require proof of (c) from the plaintiff would negate the remedy. The plaintiff, when relying on fictional fulfilment, must prove (a) and (b), and thereafter the onus passes to the defendant.

As regards the defendant's reliance on *George Municipality v Freyson NO supra* at 958-960 and *Dirk Fourie Trust v Gerber supra*, in both cases fictional fulfilment was not properly before the courts. In the former cases MULLER JA at 959-960 pointed out, firstly, that on the papers it could not be said that the executrix dative had deliberately prevented the fulfilment of the condition and secondly, the respondent could not be expected to anticipate that the appellant, at the appeal stage, would raise fictional fulfilment without laying the proper foundation for this in the papers filed of record. In the latter case, JANSEN JA at 775 agreed with GROBLER J in the court *a quo* that all the relevant facts had not been fully canvassed on the papers and that, by the first respondent not raising fictional fulfilment as a defence on the papers, this denied the applicant an opportunity of replying. Further, GROBLER J held that the first respondent had

failed to satisfy the *onus* placed on him that the suspensive condition had been fictionally fulfilled against the applicant. The plaintiff's legal practitioner correctly submitted that the South African

1989 (2) ZLR p328

ADAM J

Appellate Division did not come to any conclusion on this point.

The plaintiff claims payment of the sum of \$500 000, alternatively, an order declaring that the defendant is indebted to the plaintiff in the sum of \$500 000. In essence, what the plaintiff seeks as specific performance, alternatively a declaratory order. But if it was the defendant's contention that fictional fulfilment could not be invoked as this would violate Exchange Control Regulations, surely this court is empowered to order payment by the defendant subject to the necessary Exchange Control approval being obtained. Also, the defendant has not shown that there were obstacles which prevented this court from making a declaratory order sought by the plaintiff.

Accordingly, the defendant's exception is dismissed with costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Coghlan, Welsh & Guest, defendant's legal practitioners

1989 (2) ZLR p329

S v SIBANDA 1989 (2) ZLR 329 (SC)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ & Manyarara JA

Criminal appeal

18 September 1989

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - right of access to legal advisers - denial of to detained person - effect of.

Criminal procedure - plea - of guilty - procedure to be followed - Criminal Procedure and Evidence Act [Chapter 59] - s 255 (3) - failure by magistrate to explain elements of offence to accused - effect of.

Criminal law - Criminal Procedure and Evidence Act [Chapter 59] - s 48(1) - escaping from lawful custody - accused in custody for more than maximum period prescribed by Act - custody no longer lawful.

Headnote

Detained persons have a constitutional right of access to their legal advisers. Denial of such

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access means that such persons, if charged with an offence, are prejudiced in their defence and do not receive a fair trial. In such cases, the prosecution must fail. The provisions of s 255(3) of the Criminal Procedure and Evidence Act [Chapter 59], which set out the procedure to be followed where the accused pleads guilty and the magistrate proceeds in terms of s 255(2)(b), are mandatory. The magistrate must, *inter alia*, explain the essential elements of the offence to the accused, particularly those aspects of essential elements which involve concepts of law. Failure to do so is fatal to the prosecution case and may result in the injustice of a guilty man being acquitted because the magistrate failed to follow the requirements of the subsection.

1989 (2) ZLR p330

DUMBUTSHENA CJ

For the State to succeed on a charge of escaping from lawful custody, in contravention of s 48 (1) of the Criminal Procedure and Evidence Act, it must be shown that the accused was in lawful custody when he escaped. Where the accused has been in custody for more than the minimum period prescribed by the Act without being brought before a magistrate and without a warrant for his further detention being obtained, the custody is no longer lawful and he commits no offence by escaping.

Cases cited:

S v Zvinjenje & Ors 1987 (2) ZLR 42 (SC)

R v Saineti & Dzongonayi 1950 SR 82

R v Mtungwa 1931 TPD 466

S v Titos; S v Alberto HH-128-86

S v Slatter & Ors 1983 (2) ZLR 144 (HC)

Attorney-General v Slatter & Ors 1984 (1) ZLR 306 (SC); 1984 (3) SA 798 (ZS)

S Ndhlovu for the appellant

C T Mantsebo for the respondent

Judgment

Dumbutshena CJ: The appellant was charged with contravention of s 3(1) of the Emergency Powers (Possession of Camouflage Uniform) Prohibition Order SI 696 of 1982. Subsection (1) reads:

"No person other than an authorised person shall possess any camouflage uniform."

In the second count he was charged with contravening s 48(1) of the Criminal Procedure and Evidence Act [Chapter 59].

The State alleged in the first count that on 24 July 1987 the appellant wrongfully and unlawfully had in his possession, without lawful authority or reasonable excuse, one pair of camouflage

trousers, one camouflage shirt, one camouflage hat, one pair of boots and one webbing belt. In the second count the State alleged that the appellant escaped from lawful custody on 28 July 1987.

The appellant pleaded guilty to both offences. He was sentenced in the first count to a fine of \$50 or, in default of payment, one month's imprisonment with labour and on the second count he was sentenced to five months' imprisonment with labour.

1989 (2) ZLR p331

DUMBUTSHENA CJ

He has now appealed against both conviction and sentence. The Attorney-General does not support the conviction and has asked the court to proceed in terms of s 9A of the Supreme Court of Zimbabwe Act No. 28 of 1981.

When he pleaded guilty the magistrate proceeded in terms of s 255(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*]. He put to the appellant a few questions in order to establish the essential elements of the two offences. I shall refer to that later. The Statement of Agreed Facts was not read to the appellant. In that statement, the appellant stated that the camouflage uniform belonged to his brother, who is a member of the Zimbabwe National Army and who was attached to 3.3 Infantry Battalion. The contents of the charge were not explained to the appellant. In the second count the magistrate did not explain to the appellant the meaning of "lawful custody". It is inconceivable that the appellant understood in the first count the meaning of possessing the camouflage uniform "wrongfully and unlawfully and without lawful authority or reasonable excuse, the proof whereby lies on him". These are admissions of law which the appellant was not qualified to make. See *S v Zvinyenge & Ors* 1987 (2) ZLR 42 (SC).

It would have been proper, had the magistrate examined the circumstances of appellant's arrest on 24 July 1987 and his alleged escape on 28 July, to find out whether the custody was on 28 July a lawful one. Was his detention legal?

The appellant was in custody for more than 96 hours and certainly for a period in excess of the 48 hours prescribed in s 36(2)(b) of the Code. He was arrested on 24 July 1987. He escaped from custody on 28 July 1987. In *R v Saineti & Dzongonayi* 1950 SR 82 the accused were arrested and detained for more than 48 hours after their arrest. Without warrant for their further detention having been obtained, they escaped from custody. They were convicted and sentenced for escaping from lawful custody in contravention of s 51(1) of the Criminal Procedure and Evidence Act [*Chapter 28 of 1939*]

On review it was held that in terms of s 38(1) they were no longer in lawful custody at the time of their escape and the convictions and sentences were set aside. See *R v Mtungwa* 1931 TPD 466.

That is what happened in this case. The appellant spent more than 48 hours from his arrest. He was in custody. He was not brought before a magistrate or a judge nor was a warrant for his further detention issued in terms of s 37 of the Code. There was nothing on the record to warrant the extension of the detention in terms of subs (2) of s 36. It seems there was no lawful

reason for his continued detention.

1989 (2) ZLR p332

DUMBUTSHENA CJ

The fact that the appellant pleaded guilty and on being questioned by the magistrate admitted that he was in lawful custody was meaningless. The law was not a matter within the knowledge of the appellant. The magistrate should have explained the meaning of the phrase to him.

The record of proceedings shows that the magistrate only asked the following questions after the appellant had pleaded guilty to the two counts:

"On or about the 24th July 1987 did you possess or wear military camouflage ie trousers, shirt, hat and pair of boots, and a webbing belt?

- Yes.

Any lawful right? - No.

What was your intention when you wore this camouflage? - I was taking the kit to Bulawayo.

COUNT 2:

On the 28th July 1987 were you arrested by the ZRP and lodged in the cells at Stops Camp? - Yes.

Did you thereafter escape from lawful custody? - Yes.

Any lawful right? - No.

Any excuse for your conduct? - Nothing to say."

In Count 1 the appellant replied when asked what his intention was: "I was taking the kit to Bulawayo". The appellant should have been asked why he was taking the kit to Bulawayo. In the Statement of Agreed Facts the appellant said the camouflage uniform belonged to his brother. There was sufficient indication that the proper plea was that of not guilty. It seems to me that the magistrate did not pay attention to the matters before him. This, plus the failure to explain phrases such as "without lawful authority or reasonable excuse the proof whereof lies on him", result in my view in a failure of justice. The same can be said of Count 2. There the appellant was asked: "Did you thereafter escape from lawful custody?". He replied: "Yes". I have already stated that the magistrate should have explained the meaning of lawful custody. He did not. The appellant was unrepresented. It was the duty of the magistrate to explain to him these aspects of the essentials of the offence which involved concepts of the law.

Where a judge of the Supreme Court is seized with deciding an appeal brought before him in terms of s 9A of the Supreme Court of Zimbabwe Act, he has a discretion to remit the case to the magistrate's court for rehearing or to allow the appeal and set aside the conviction.

1989 (2) ZLR p333

DUMBUTSHENA CJ

In the exercise of my discretion in this matter, I have paid special regard to the provisions of

subs (3) of s 255. The subsection provides that where a magistrate proceeds in terms of para (b) of subs (2) of s 255, he shall record the following: the explanation of the charge and the essential elements of the offence; the statement of the acts or omissions on which the charge is based; the reply by the accused to any questions put to him by the magistrate on the statement or omissions made by him; and any statement made to the court by the accused. The provisions contained in subs (3) are mandatory. They cannot and should not be ignored. To ignore them is fatal to the prosecution case and may result in an injustice in that a guilty man may be acquitted because the magistrate has failed to follow the requirements of those provisions. In *S v Titos*; *S v Alberto* HH-128-86 Smith J was at pains to spell out the requirements of subs (3). He emphasised what the magistrate is required to do. The learned judge said at 2 of the cyclostyled judgment:

"Both the Supreme Court and this Court have set aside convictions on the ground that the magistrate had not adequately explained the essential elements of the offence to the accused and so had erred in finding that the accused had thoroughly understood the charge and admitted all the essential elements. See *S v Lambat* S-102-83, *S v Murivani* HB-26-83 and *S v Mhiza* GS-278-80."

In the instant case the magistrate did not comply with the provisions of subs (3).

The appellant was arrested on 24 July 1987. He was convicted and sentenced on 24 August 1987. His appeal was heard on 18 September 1989, a little more than two years after conviction. In my view it would not be proper in the face of the irregularities pointed out above to remit the case to the magistrate's court for a re-hearing *de novo*. Remitting the case to the magistrates court for a re-hearing would result in further delay. Courts in this country have allowed appeals and quashed convictions in cases where there has been a failure to comply with the provisions of s 255(2)(b) of the Code. In my judgment this is such a case.

There is yet another matter that I find worrying. It is the fact that the appellant was refused by the police access to his lawyer. His sister, as appears from affidavits sworn by the appellant and his legal practitioner, instructed a lawyer to defend him. The lawyer attempted to see his client. He was, through one device or another, put off by the police. When the lawyer telephoned the police station, the officer he wanted to speak to was always said to be away. He was also told he could not see his client in security cells.

1989 (2) ZLR p334

DUMBUTSHENA CJ

At one time he was asked to speak to Detective Patrol Officer Chinyane. When he sought to speak to him Chinyane was out. He asked to speak to Inspector Jambawu. Inspector Jambawu told him he was not conversant with the full facts of the matter. It was at this time that the lawyer asked to interview his client in security cells. Inspector Jambawu told him that lawyers were not allowed to interview detainees at the security cells. He was promised that the appellant would be made available to him at another place. He made another attempt to speak to DPO Chinyane. The receptionist told him she was putting him through to DPO Chinyane. Nothing happened. The legal practitioner asked to be informed when the appellant would be taken to court. He was not informed. The legal practitioner kept on telephoning the police without any positive results. DPO Chinyane was always said to be out. Then the receptionist at the police station drew the attention of the legal practitioner to an item in the Chronicle. There was an

article in the Chronicle to the effect that the appellant had appeared in court and had been convicted and sentenced. They had taken him to court without informing his lawyer. It was an improper thing to do. The police knew he had engaged the service of a legal practitioner. It seems they did not care. The appellant was prejudiced in his defence. Justice was denied him by the police. They won at the expense of justice. He was convicted. But were they right to deny him access to his lawyer? It was a wrong thing to do. In *S v Slatter & Ors* 1983 (2) ZLR 144 (HC) I spelt out in clear words the constitutional right of detained persons to have access to their lawyers. If they are denied legal access to their lawyers, as in this case, the prosecution case must fail. The Constitution is the supreme law of Zimbabwe. There is no other law which is above it. All other laws must, to be lawful, be consistent with the provisions of the Constitution. In this case the appellant was denied access to his lawyer. He was prejudiced in his defence. He did not, as pointed out above, receive a fair trial. See what I said in *S v Slatter & Ors supra* on denial of access to lawyers at 152-155. See also *Attorney-General Slatter & Ors* 1984 (1) ZLR 306 (SC); 1984 (3) SA 798 (ZS).

The above-mentioned affidavits form part of the record on appeal. I can only guess that the State did not attempt to reply to allegations in them on account of the fact that the Attorney-General does not, for good reason, support the conviction. In my view, for the police to refuse a detained person access to his legal adviser infringes his rights under the Constitution and is contrary to our concept of justice.

I am therefore strengthened in my opinion that the Attorney-General was right, for the reasons he gave in his notice, in advising this court that he did

1989 (2) ZLR p335

DUMBUTSHENA CJ

not support the conviction in this case and in addition there are fatal irregularities warranting a verdict other than that entered by the trial magistrate.

Accordingly both the conviction and sentence are set aside.

Manyarara JA: I agree with this judgment.

Coghlan & Welsh, appellant's legal practitioners

1989 (2) ZLR p336

MILLS v FARMERY 1989 (2) ZLR 336 (HC)

Court High Court, Harare

Greenland J

Civil trial

21 June & 20 September 1989

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Flynote

Delict - negligence - liability for - liability of owner of undeveloped and unoccupied land in urban residential area for fire spreading from his land to neighbour's land and causing damage there.

Headnote

The plaintiff lived in a house on a suburban stand in Harare. Next to his stand was the defendant's stand, which was undeveloped. The defendant's stand was in an unkempt state and overgrown with high grass which had neither been slashed nor subjected to controlled burning. By the end of the dry season the grass was tinder-dry. The plaintiff recognised the danger to his property of fire from the defendant's land and cut a fire-break on the defendant's side of the boundary. A fire indeed started on the defendant's stand and, aided by the prevailing wind, spread quickly towards the plaintiff's stand. It crossed the fire-break and spread onto the plaintiff's stand, destroying a motor vehicle and a caravan. The cause of the fire was unknown, but unauthorised persons had easy access to the defendant's stand. The plaintiff claimed damages from the defendant for the loss occasioned by the defendant's negligence. The defendant applied for discharge at the end of plaintiff's case on the basis that the fact disclosed no cause of action.

Held, that liability can be founded on an act of omission and so a person may be held liable for damage caused by a fire which originated on his property. The mere fact that such a fire starts, however, is not *per se* proof of negligence, assuming that his land is kept in its ordinary and natural state and nothing of an unreasonably inflammatory nature is brought onto it. Where, on the other hand, the defendant is in possession

1989 (2) ZLR p337

of property which he unreasonably permits to constitute a fire hazard if the danger materialises in a way which the defendant could reasonably have foreseen, even if he neither started the fire nor had control over it, delictual liability will be fixed. In considering the degree of foreseeability required, the court must consider: (1) how real the risk is of the harm eventuating; (2) if the harm does eventuate, the likely extent of the damage; and (3) the cost or difficulty of guarding against the risk.

Held, further, that the defendant's stand constituted a fire hazard and the risk of fire was great because of the volume of combustible material and because the stand was accessible to the public. This situation had developed over a period of many months, which represented a grossly unreasonable use of the property.

Held, further, that the danger of a huge and uncontrolled fire was perfectly foreseeable, being a common experience and within common knowledge.

Held, further, that in view of the amount of combustible material and the likelihood of uncontrolled ignition, the resulting fire was likely to be of impressive proportions and thus likely to jump fire-guards. In view of the location of the combustible material, the risk of injury, loss, damage or even death was foreseeable.

Held, further, that a reasonable man would have taken the relatively simple and inexpensive

precaution of slashing or cutting the grass to a point where it would be harmless.

Held, further, that the plaintiff had made out a cause of action for damages in delict and the defendant should be put on his defence.

Cases cited:

Porritt v Molefe 1982 (3) SA 76 (A)

Halliwell v Johannesburg Municipal Council 1912 AD 659

Cape Town Municipality v Paine 1923 AD 207 SA

Railways v Estate Saunders 1931 AD 276

Colman v Dunbar 1933 AD 141

Silva's Fishing Corporation v Maweza 1957 (2) SA 256 (A)

Cambridge Municipality v Millard 1916 CPD 724

van der Byl v de Smidt (1869) Buch 183

Lotter v Rhodes (1902) 19 SC 122

Appollis v Jarom (1898) 12 EDC 187

Glass v Graham's Town Municipality (1904) 18 EDC 244

Union Government v Ocean Accident Guarantee Corporation 1956 (1) SA 577 (A)

van Wyk v Hermanus Municipality 1963 (4) SA 285 (C)

1989 (2) ZLR p338

GREENLAND J

Lomagundi Sheetmetal & Engineering (Pvt) Ltd v Basson 1973 (1) RLR 356 (AD); 1973 (4) SA 523 (RA)

Ministry of Forestry v Quathlamba (Pty) Ltd 1973 (3) SA 69 (A)

S v Burger 1975 (4) SA 877 (A)

Minister van Vervoer v Bekker 1975 (3) SA 128 (O)

D P Carter for the plaintiff

M R D Stonier for the defendant

Judgment

Greenland J: In this case the court is concerned, at this stage, with an application for dismissal

of the plaintiff's action at the close of his case. The application is really in the nature of an exception which may be framed thus: accepting the plaintiff's case as pleaded and proved, it discloses no cause of action in law. As the issue raised thereby is one of law it is necessary to resolve the matter comprehensively.

The evidence led and which must be accepted for the purposes of this ruling may be summarized as follows:

1. The plaintiff lived with his family at No. 2 Northolt Drive, Bluff Hill, Harare since April 1985. This property consists of a suburban stand, improved by a brick under tile residence.
2. Exhibit 1, a map of the relevant area, shows the whole area to be divided into residential stands which adjoin each other and are separated by boundaries and access roads. Also, the evidence is that the surrounding area, not depicted on the map, is similarly divided into occupied residential stands. The court therefore is concerned with a residential area in which property is utilized exclusively for the purpose of residence.
3. The court has also been furnished with survey maps of Stands 177 and 176, which belong to the plaintiff and the defendant respectively. The properties adjoin each other and are separated by a boundary measuring 235 cape feet. The plaintiff's stand is 1.1146 acres in area. The defendant's stand is 1.1361 acres.

The survey maps have been marked Exhibits 9 and 10 respectively.

4. The defendant's property was unimproved. It was in a generally very unkempt state. It was completely overgrown by grass measuring at least three to five feet in height.

1989 (2) ZLR p339

GREENLAND J

This grass had grown in the rainy season, being November to April, and, since full growth, had neither been slashed nor control-burned. By October 1985, the grass was in a tinder dry state and therefore highly combustible. The month of October occurs during the most dry period of Zimbabwean climate. The situation was greatly aggravated by a prevailing severe drought.

5. The plaintiff recognised the defendant's plot as a source of danger. In its overgrown state, it provided ideal cover for thieves who could use the plot as a staging post for their nefarious activities. More importantly, however, this plot full of tinder dry grass constituted a fire hazard. There was a real likelihood of it catching fire. This was because it was open to Northolt Drive along its 250 cape feet northern boundary. Unauthorised persons therefore had easy access to the plot. The danger of fire therefore is encapsulated in the common realization that man is a notorious fire-starter.
6. Imbued with this realization the plaintiff took certain precautions. His wife took the matter up with local authority anticipating that such blowing in the direction of the plaintiff's plot. The local authority would use its muscle to induce the defendant to act appropriately. This was to no avail. The plaintiff cut and maintained a fireguard on the *defendant's* side of their

common boundary. It ran the length of the boundary. It was between 6-7 feet in width. Also, a cypress hedge running the length of the boundary on the plaintiff's side was trimmed so as not to overhang the firebreak or grass on the defendant's plot.

7. At about mid-day on 14 October 1985, the plaintiff's fears were realized. A fire broke out on the defendant's plot. The grass along the eastern boundary of that plot, ie along the boundary furthest from the plaintiff's plot, was seen by a mature independent witness to be on fire. The prevailing wind, as was usually the case, was blowing in the direction of the plaintiff's plot. The fire quickly took the form of a continuous front of high flames moving westward across the defendant's plot. To quote the witness: "The front of fire moved in a more or less solid line, moving very quickly". The witness quickly dialled 99 and summoned the fire brigade who arrived in approximately five minutes. It was too late.

The wall of fire had raced across the whole of the defendant's plot, some 250 cape feet, and continued, apparently unchecked by the firebreak, into the plaintiff's plot. By this is meant that the cypress hedge caught fire immediately the fire reached the boundary. Photographs show that the foliage of the

1989 (2) ZLR p340

GREENLAND J

cypress hedge (some 15-20 feet in height) was totally destroyed. The fire entered the plaintiff's plot and caused fire damage to property, which included the destruction of a caravan and motor vehicle.

The plaintiff claims damages representing the loss occasioned thereby. This completes a sketch of the facts of the matter.

Mr *Stonier*, for the defendant, submits that no cause of action has been established. Assuming that the plot of dry grass constituted a fire hazard, so the submission goes, the defendant was in law required to do nothing more than take the precautions a reasonable man would take to guard against loss or damage being occasioned in the event of a fire.

Since these precautions were, in fact taken, albeit by the plaintiff (the defendant having done absolutely nothing), no other precautions were necessary or required of the defendant as he was not obliged, in law, to augment or add to reasonable precautions already actioned.

Mr *Stonier*, very understandably, relies heavily on the case of *Porritt v Molefe* 1982 (3) SA 76 (A).

In that case the plaintiff and the defendant owned adjoining farms. A fire broke out on the defendant's farm and, despite a firebreak cut by the plaintiff, the fire entered his farm and caused damage. The defendant escaped liability on the basis that he was not required, in law, to do anything more than plaintiff had already done by way of cutting a firebreak as a reasonable precaution. The relevant *dicta* which are self-explanatory appear at p 83 of the report:

"The trial Court concluded that the above question should be answered in the negative on the strength of Porritt's reply (quoted earlier in this judgment) to a question put to him during cross-examination. In this regard the learned

Judge said the following:

'...in the course of explaining why he was of the view that the fire would not have entered Snowhill Ranch had defendant cleared a fire-break on his side of the boundary, Porritt proffered a piece of information which I regard as decisive. It was to the effect that he did not expect the fire to traverse his 10 m firebreak. In saying that, *he* took into account the sparseness of the vegetation on FP 325 in comparison to that on Snowhill Ranch, the effect of which was that a fire on the former would have been of relatively low intensity. Now, if Porritt did not foresee as a reasonable possibility that his fire-break would not

1989 (2) ZLR p341

GREENLAND J

serve its purpose, why, one may ask, should defendant or any reasonable man have foreseen it? Admittedly there is almost no evidence of Porritt's background as a farmer or his experience in connection with veld fires; admittedly also, he had no personal experience of fire "jumping" barriers although like most of us, he had heard of it happening. But there is no suggestion in the evidence that he is totally inexperienced, and in any event the norm for the mythical reasonable man is not that of an experienced one having any special knowledge, but of an ordinary man having average knowledge. Add to that the fact that the fire-break was well within the standard for the area (which is between 5 m and 20 m, according to Porritt) and it seems to me to follow that there is no reason for ascribing to Porritt less foresight than any reasonable man would have had.'

Accordingly the trial Court found that the appellant had failed to establish a duty on the part of the respondent to provide his own fire-break on FP 325. Lastly the learned Judge considered the liability of the respondent in the light of the presumption created by s 23 of the Forest Act 72 of 1968 which is in the following terms:

'Notwithstanding anything to the contrary in any law contained, whenever in any proceedings under this Act or at common law the question of negligence in respect of veld or forest fires arises, negligence shall be presumed unless the contrary is proved.'

The learned Judge was satisfied that the presumption of negligence on the part of the respondent had been rebutted -

'for I find as a fact that he (the respondent) could not reasonably have foreseen the inadequacy of Porritt's fire-break and the consequent possibility of fire spreading from his property to Snowhill Ranch. This finding I base on Porritt's evidence referred to earlier.'

With respect to learned counsel it does not appear to me that *Porritt supra* is authority for application of a general rule that whenever a plaintiff takes precautions, **which he believes are reasonable**, this will absolve a defendant from whose property a fire spreads. In my view each case must be judged in the light of the prevailing facts and circumstances.

A crucial fact in *Porritt supra* was the plaintiff's knowledge and expertise on the matter of fire-breaks. I quote from p 84 of the report:

"It was said, in particular, that Porritt's own experience was limited; and that his foresight would not necessarily be that of a reasonable landowner

1989 (2) ZLR p342

GREENLAND J

in the area. There is, in my opinion, no real ground for this submission. It is true that on the evidence Porritt had been the manager of Snowhill Ranch for no more than 21 months when the fire in question took place. But at the very outset of his evidence Porritt described himself as "a farmer by occupation", and an examination of his further

evidence suggests, I think, that he was knowledgeable in regard to veld fires and the preventive techniques used to combat their spreading. In all the circumstances I am unpersuaded that the Court below was wrong in dismissing the appellant's claim."

It is patent that the court accepted that the plaintiff in *Porritt supra* was to be regarded as a reasonable farmer endowed with the necessary skill and expertise in the matter of firebreaks. Thus qualified, he was in a position to cut a firebreak of reasonable specification and did, in fact, do so. The proposition of law, that no more than reasonable precautions be taken, therefore fitted very neatly to the facts.

That is simply not the position in the present case, except superficially. True, the plaintiff did say that, in his view, the precaution he took of cutting the firebreak was reasonable. To quote his evidence under cross-examination:

- "- I could not have done any more to prevent a fire spreading ...
- my precautions were more than adequate ...
- hindsight proves that they were not adequate ...
- under the conditions I was not surprised precautions would have been adequate for a controlled fire ..."

My interpretation of the evidence, and impression of the witness, was that he was saying no more than that he did the best he could have been expected to do in a dangerous situation not of his own making. He was not claiming to be an expert. Neither did he profess to have any knowledge on the subject of fires and fireguards. He is employed as a security consultant.

In a sense the plaintiff may be regarded as a layman (as opposed to a trained firefighter) reacting to a dangerous situation as best he could.

As it turned out, the plaintiff's shortcomings in the matter were emphatically and dramatically revealed. The eyewitness stated that the wall of fire ignited the cypress hedge immediately on reaching the boundary. In the result the witness neither recalled the presence of a firebreak nor did he think one existed.

1989 (2) ZLR p343

GREENLAND J

On the evidence, therefore, the firebreak was no firebreak at all. Objectively, therefore, and this is the correct test (see *Porritt supra*) it cannot be said that the firebreak constituted a reasonable precaution, despite what the plaintiff thought of it. A reasonable firebreak, in my view, ought at least to have checked the march of the wall of fire.

It can be safely accepted that the plaintiff did not, in fact, take any reasonable precaution. Since the obligation to take such precaution was on the defendant, he cannot be absolved because of the inept precaution taken by the plaintiff in reaction to a threat in relation to which he had no skills. It must be remembered that, in law, a reasonable man is a notional creature. He is not any reasonable man. He is the reasonable man that the circumstances of the case demand. As

stated by McKerron, *The Law of Delict* 7 ed at p 36:

"But in delict there is only one standard - the standard of the reasonably prudent person situated in the same circumstances as defendant. But although there is only one standard, the quantum of care required to comply with that standard varies with the circumstances of the case."

In this respect, I hold that the question of how fires and fire hazards are to be dealt with is a matter requiring *some* skill. Such skill may be acquired either from experience, eg farmers in relation to veld fires as in *Porritt supra* or from training as with members of urban fire brigades.

See Boberg *The Law of Delict* generally at p 346 as to the notional reasonable man of whom skill is required.

There is not a shred of evidence nor is there any indication that the plaintiff possessed any knowledge or skill in the matter of fires or fire fighting.

An illustration is of assistance. The average person knows very little about dynamite except that it is liable to explode. Suppose our average person is confronted with a situation where a neighbour proceeds to store a ton of dynamite within close proximity to his residence. Suppose, thereafter, there occurs a catastrophic explosion, in which death and destruction to such person's family and property is caused. On Mr *Stonier's* approach, applying *Porritt supra*, our hypothetical plaintiff would succeed if he had not reacted to the threat but would fail if he had reacted by taking measures which he considered reasonable and adequate even if the facts reveal only ineptitude in this respect.

1989 (2) ZLR p344

GREENLAND J

This quite obviously cannot be correct and, in my view, was not a result intended by the court in *Porritt supra*.

At the end of the day, it is correct to hold that the onus of proving that reasonable precautions were taken is on the defendant. The defendant, by advancing the plaintiff as proof that his duty was in fact discharged, is in extreme difficulty as the facts do not show, objectively, that such precautions were taken. Quite the contrary.

My preliminary ruling is that the approach in *Porritt supra* therefore does not avail the defendant.

Besides, the approach in *Porritt supra* is only of relevance if it is accepted that the defendant's sole obligation was to cut a firebreak. In my view the question of an adequate or reasonable firebreak is not the real issue in this case. The real issue is far more fundamental. To illustrate this, it is useful to recount basic principles.

(a) In our law a person is generally not liable for loss or damage caused to his neighbour merely because he fails to stop such loss or damage. This principle is correctly expressed by saying there is no liability for mere omission. *Halliwell v Johannesburg Municipal Council* 1912 AD 659 at 670-2; *Cape Town Municipality v Paine* 1923 AD 207; *SA Railways v Estate Saunders* 1931 AD 276; Voet 9.2.3. There are exceptions which include the position where a person is in possession or control of a dangerous thing. To quote WESSELS CJ in *Colman v*

Dunbar 1933 AD 141 at 157:

"If the circumstances are such that a person of common sense who has the custody or control of a certain thing could recognize that it is likely to be a danger to others, then it is his duty to take reasonable care to avoid such injury."

Also, Ulpian states in the *Digest* 9.2.27.9 that a person is liable for damage caused by a fire which such person is guarding.

The position in the present case, however, is that the grass was not in itself dangerous nor was the defendant guarding or in control of the fire in question. Does this mean that the defendant is to be absolved at this stage?

(b) To furnish the answer to the question posed: no, because our law has long since developed to include liability for omission in other circumstances.

1989 (2) ZLR p345

GREENLAND J

See the judgment on the topic generally of STEYN JA in *Silva's Fishing Corporation v Maweza* 1957 (2) SA 256 (A) at 265.

(c) Such circumstances include a situation where a person permits his property to become a fire hazard because of the presence of dry grass thereon. See *Cambridge Municipality v Millard* 1916 CPD 724.

The facts and judicial approach in this case do bear repetition. The plaintiff owned property abutting that of the defendant. The latter allowed grass to remain growing alongside plaintiff's property. The grass was liable to catch fire and defendant had been warned of this danger. A fire broke out in the grass and spread to plaintiff's property and caused damage. There was no evidence as to the cause of the fire.

SEARLE J (as he then was) reviewed the common law and held:

- that in Roman-Dutch Law there could be liability founded on an act of omission;
- that therefore a person may be held liable for damage caused by a fire which originates on his property;
- that

"this principle, however, would not be applicable to a fire starting on a man's open veld and thereafter spreading to his neighbour's and doing damage : in such cases the Court always requires some direct proof of negligence in starting or dealing with the fire or the like. See *Van der Byl v De Smidt* (1869) Buch 183, *Lotter v Rhodes* (1902) 19 SC 122, *Appollis v Jarom* (1898) 12 EDC 187, *Glass v Graham's Town Municipality* (1904) 18 EDC 244. And the reason for that would appear to be that a man cannot be expected to be at all times on the watch all over his ground, the mere fact that a fire starts on a man's land is not *per se* proof of that man's negligence ..."

With respect the above exposition appears correct and accords with all known authority.

(d) Is the defendant therefore to be absolved because, as in *Cambridge supra*, there is no proof

that he either started the fire or had any control over it? Is there any evidence of negligence? In *Cambridge supra*, SEARLE J found negligence in terms of the following approach (at p 728):

"Now it does not appear to me that liability, if any, of the Council in this case should be decided upon the principles applicable to the duty of the

1989 (2) ZLR p346

GREENLAND J

Council towards persons using a street, who are injured through a street having been suffered to be in a dangerous condition in consequence of non-repair of the street, **but rather upon the principles applicable to owners of two adjacent properties, and the application of the maxim *sic utere tuo ut alienum non laedes***" (my emphasis).

Literally translated this maxim means:

"So use your own property as not to injure another".

As explained in Bell's *SA Legal Dictionary and Claassen Dictionary of Legal Words and Phrases*:

"As it is only where the legal rights of others are infringed by such use that an action lies, the maxim, in order accurately to explain a principle of law, should read, as suggested by Sir Frederick Pollock, *sic utere tuo ut aliena jura non infringas*, ie so use your own property as not to invade the rights of another. See *Le Roux v Fick* (1879) Buch 33. See also *Dukes v Marthinusen* 1937 AD 29, and *Herschel v Mrupe* 1954 (3) SA 489 (A)."

(e) In my view application of the maxim is a useful starting point. I am conscious of the criticism by SCHREIBER JA in *Union Government v Ocean Accident Guarantee Corporation* 1956 (1) SA 577 (A) at 584 that:

"Wide general maxims [like *sic utere tuo ut alienum non laedas*] ... are commonly more ornamental than useful; they can frequently be countered by similar ones ..."

As I said, it is a useful starting point. In *Cambridge supra*, SEARLE J made more use of the maxim. Analysis of his approach shows that he used the maxim in order to infer negligence. After correctly holding that:

"...a man cannot be expected to be at all times on the watch all over his ground, the mere fact that a fire starts on a man's land is not *per se* proof of that man's negligence ..."

he added an all important proviso:

"... assuming that his land is kept in its ordinary and natural state, and nothing of an unreasonably inflammable nature is brought upon his grounds (my emphasis).

He went on to hold that liability could be properly fixed if the court was:

1989 (2) ZLR p347

GREENLAND J

"satisfied that the existence of this grass ... at the season of the year ... constitutes a danger to the property of plaintiff adjoining, through the likelihood of its being set on fire ...that the defendant ...knew

this or had reasonable means of knowing this" (my emphasis).

He had said earlier:

"The whole matter appears to resolve itself into this, were the defendants guilty of negligence in keeping their ground, having regard to the purpose for which it was being used under their control, **in such a condition as to constitute a danger to the adjoining owner** : and was it satisfactorily proved that the **proximate cause of the loss suffered by the plaintiff was the dangerous condition in which they so kept it.**"

He went on to hold that it would not be perverse to infer from such facts that "the fire was occasioned through defendant's negligence."

As can be seen, crucial to the *Cambridge* decision was the fact that defendant had permitted a dangerous condition, ie a fire hazard, to materialise on the property. This was the all-important distinguishing feature.

(f) The same feature reposes in the present case. However, as already said, possession per se of potentially dangerous property does not give rise to liability. In *Cambridge*, SEARLE J found negligence by adding to this feature the factor that it could be safely assumed or inferred that the fire started as a result of human agency. He said:

"I think that a Court can take cognisance of the fact that unextinguished matches, as well as ashes from pipes, cigarettes, etc, are often dropped by careless persons using the streets and footpaths in their ordinary evocations."

In terms of *Cambridge supra*, therefore, delictual liability will be fixed where a defendant is in possession of property which he unreasonably permits to constitute a fire hazard if the danger materialises, causing loss or damage, in a way which defendant could have reasonably anticipated even though defendant neither started the fire nor had control over it. These factors in themselves prove negligence in terms of the principle *sic utere tuo ut aliena jura non infringas*.

This approach apparently has stood the test of time and although the case was referred to in *Van Wyk v Hermanus Municipality* 1963 (4) SA 285 (C) at 301, it has never been criticised.

1989 (2) ZLR p348

GREENLAND J

With respect, I am in general agreement with the approach in *Cambridge supra*, which appeals to me as according with common sense, logic, fairness and justice. However I am of the view, with respect, that it is incomplete.

(g) To it must be added the approach of BEADLE CJ in *Lomagundi Sheetmetal & Engineering (Pvt) Ltd v Basson* 1973(1) RLR 356 (AD) at 362-3; 1973 (4) SA 523 (RA) at 524E in which he properly brings into the equation the all important issue of foreseeability:

"I now turn to the principles of law to be applied. There have been many cases dealing with culpability through negligence, many cases dealing with what I may call the degree of foreseeability which must be established by a plaintiff before a defendant can be held to be liable. The cases which I consider most helpful in approaching this question of foreseeability in the present case are these: [in] *Herschel v Mrupe* 1954 (3) SA 464 (A) the *dicta* of SCHREINER JA at p 477, the two so-called *Wagon Mound* cases, No 1 reported in [1961] 1 All ER 404, and No 2

reported in [1966] 2 All ER 709, and in particular the judgment of LORD REID at pp 717 to 720 and, finally, the decision of this Court in the case of *King v Dykes* 1971(2) RLR 151 (AD); 1971(3) SA 540 (RA). *King's case supra* also reviewed a recent Privy Council case dealing with this subject, the case of *Goldman v Hargrave* [1967] 1 AC 645. At the onset, I should like to emphasise what was said generally by my Brother MACDONALD at p 542 where he said:

'The essential attribute of the law of negligence is that it should be flexible so as to be capable of providing an answer to the infinite variety of situations in which negligence is alleged. Once inflexible rules are adopted as the test of the existence of negligence, either generally or in a special type of case, a quite unwarranted inroad is made into the basic concept underlying the law.'

What a prudent man would or would not do, or would or would not foresee in any particular case, must depend on a very wide variety of circumstances and few cases are ever identical in the relevant circumstances. The sort of circumstances, however, which the Courts often look to in cases such as this in deciding what degree of foreseeability must be proved by the plaintiff before a defendant can be held responsible for the resultant damage are these: (1) How real is the risk of the harm eventuating? (2) If the harm does eventuate, what is the extent of the damage likely to be; and (3) What are the costs or difficulties involved in guarding against the risk? I give two examples to illustrate these

1989 (2) ZLR p349

GREENLAND J

points. If the risk of harm eventuating is very great indeed amounting almost to a certainty, even though in such a case the damage which is likely to result may only be very slight, and even though the costs of eliminating the risk might be very great, a defendant would still be liable if he took that risk in those circumstances, as the risk of harm eventuating was so great he should not have taken it at all. To take an example at the other extreme, supposing the risk of the harm eventuating is very slight indeed, the odds against it eventuating being almost astronomical, then, even though in such a case the damage which might result from the risk eventuating might be reasonably extensive, if the difficulty of eliminating the risk was almost insurmountable, the defendant would not be blamed for taking that risk, should the harm actually eventuate. An example of such a case is the famous cricket ball case of *Bolton & Ors v Stone* [1951] 1 All ER 1078; [1951] AC 850. In that case a batsman hit a cricket ball right out of the ground, something that rarely happened; it fell on vacant land where people rarely passed, but an old woman was passing over the land at the time and the ball hit her. The club were held not to be liable for the injury caused her. Here be it noted the really only effective way of eliminating the risk of such harm eventuating would have been to have stopped playing cricket on the ground. Between these two extremes there are an infinite combination of circumstances which may influence a court. I propose to apply these very broad tests to the instant case."

With respect I am in complete agreement with this masterly exposition of approach and will not attempt to improve on it.

In the result I find:

- (i) that the defendant's plot constituted a fire hazard;
- (ii) that the risk of fire was great because of the sheer volume of combustible material and the fact that it was accessible to the general public;
- (iii) that because of the sheer volume of combustible material and the fact that it was likely to be ignited in uncontrolled circumstances the resultant conflagration was likely to be of impressive proportions in terms of flame and heat output;
- (iv) that even in ideal conditions it is difficult to contain a fire of this nature and that there was therefore a reasonable possibility in terms of natural laws of physics involving wind, hot air rising etc even if the fire was attended, of the fire outwitting firefighters

and jumping fireguards;

1989 (2) ZLR p350

GREENLAND J

- (v) that in the event of either situations (iii) or (iv) above pertaining, because the plot was in a suburban area, the risk of injury, loss, damage or even death to neighbours was real and present because of the essentially destructive nature of a fire out of control;
- (vi) that the danger did not manifest itself overnight but persisted over a period of many months, and this condition represented grossly unreasonable use of the property;
- (vii) that in relation to this danger (dangerous condition) the averting or prevention thereof was the relatively simple and inexpensive matter of slashing or cutting the grass down to a point where it would be rendered harmless;
- (viii) that the danger, ie a huge uncontrolled fire, was perfectly foreseeable as this is a fairly common experience and within common knowledge;
- (ix) and that therefore a reasonable man would not have permitted this dangerous condition to develop and persist and would have slashed the grass accordingly.

It may be seen that, like the learned Judge in the court *a quo* in the case of *Porritt supra*, following the line of reasoning in *Ministry of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A), I see no reason why, in the case of property representing a potential hazard to others, a duty to act on the part of a landowner should not arise *before* any fire. See p 82A of the report on *Porritt, supra*.

Also, it will now be seen that *Porritt supra* is plainly distinguishable. The court there was concerned with a veld fire in a farming area. In such a situation the presence of grass and vegetation is perfectly reasonable and represents the normal and proper use to which the land is being put. It is not to be regarded purely as a source of danger and therefore a liability. It is regarded as an asset. It is a source of nourishment to livestock and helps to prevent soil erosion. Grass cover is to the general benefit of the farmer and his neighbours. It is visible proof of sound productive land management.

For obvious reasons, none of this applies to a plot in an urban residential suburb. This needs no elaboration save to say that a plot full of tall dry grass represents nothing but a fire hazard especially where the cigarette smoking public have access to it.

Employing the *Cambridge* approach it is proper to fix such a plot owner with

1989 (2) ZLR p351

GREENLAND J

liability if the threatened harm materialises. In terms of the approach of BEADLE CJ in *Lomagundi supra*, the preventive measures that a farmer and such a suburban plot holder are

required to take must be entirely different both quantitatively and qualitatively.

At the end of the day it is to do no more than hold that a man is required to conduct himself reasonably. Unreasonable conduct resulting in foreseeable loss or damage must be actionable. As said by HOLMES JA in *S v Burger* 1975 (4) SA 877 (A) at 879:

"In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense."

Also *per* STEYN J (as he then was), in *Minister van Vervoer v Bekker* 1975 (3) SA 128 (O) at 132, the reasonable man:

"represents the embodiment of all the qualities which we demand in a good citizen."

For all the above reasons therefore I hold that the plaintiff has made out a cause of action for damages in delict and the defendant is put on his defence.

Atherstone & Cook, respondent (plaintiff)'s legal practitioners

Scott & Associates, applicant (defendant)'s legal practitioners

1989 (2) ZLR p352

CHAWANDA v ZIMNAT INSURANCE CO LTD 1989 (2) ZLR 352 (HC)

Court High Court, Harare

Chidyausiku J

Special case under Order 29 of the High Court Rules

23 January & 27 September 1989

Flynote

Delict - negligence - liability for - loss of support - whether party to unregistered customary marriage is entitled to compensation for loss of support arising from unlawful killing of spouse.

Family law - marriage - unregistered customary law marriage - whether party to such marriage entitled to compensation for loss of support arising from unlawful killing of spouse.

Headnote

A driver insured by the defendant negligently caused a collision between the vehicle he was driving and a vehicle in which the deceased was travelling. The deceased was survived by the plaintiff, a woman with whom he had formed a union in accordance with customary law. This union was not solemnised or registered under the general law of Zimbabwe. She had lived with the deceased and been supported by him during his lifetime. The question for decision was whether a woman in her position was entitled to compensation for loss of support resulting from

the unlawful killing of the man with whom she had been living.

An unregistered customary union has always been regarded as invalid by reason of s 3(1) of the African Marriages Act [Chapter 238]. It was argued, for the plaintiff, that by virtue of ss 6(1) and 12(3) of the Customary Law and Primary Courts Act 1981 the law had been changed so as to impose a legal duty of support upon a husband in a customary union. Alternatively, the court was urged to use its law-making function and extend to the wife in a customary union the right to sue for loss of support.

1989 (2) ZLR p353

CHIDYAUSIKU J

Held, that, while it was well settled that the plaintiff had no right under common law to sue for loss of support, the Customary Law and Primary Courts Act gave the wife in a customary union the right to support from her husband. This right was legally enforceable and not merely a moral one.

Held, further, that the right to sue for loss of support was not limited to those persons who derived such right from the common law. Most marriages in Zimbabwe are contracted under the statute law, not the common law, and widows of such marriages have a right to sue for loss of support.

Held, further, that in any case the plaintiff was entitled to sue under the *Lex Aquilia*, which had been extended - or should be extended - to include people in the position of the plaintiff.

Held, further, that even if the Aquilian action had not been extended to cover the present case, this was an appropriate case for the exercise of the court's law-making function. The jurists did not confine the right of action against the wrongful killer of a breadwinner to the close relations of the deceased. The killer was liable to make recompense to the widow, children and "others" who were accustomed to the deceased's support. The courts had extended this right to dependant husbands and it was desirable that persons in the plaintiff's position should have the same benefit. Customary law marriages are not *per se* contrary to public policy, being recognised in a number of statutes. The court would not be doing violence to the principles of the *Lex Aquilia* by including the plaintiff in the category of "others" who were accustomed to the deceased's support.

Cases cited:

Ex p Seti & Ors 1963 R & N 681 (SR); 1963 (4) SA 962 (SR)

van Rensburg NO v Board of Trustees, Mining Industry Pension Fund 1979 RLR 131 (GD)

Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo 1960 (2) SA 467 (A)

Miliangos v George Frank Textiles Ltd [1975] 3 All ER 801 (HL)

Union Government v Warneke 1911 AD 657

Katekwe v Muchabaiwa 1984 (2) ZLR 112 (SC)

M J Gillespie for the plaintiff

M R D Stonier for the defendant

Judgment

Chidyausiku J: This matter comes before me as a special case in terms of Order 29 Rule 199 of the High Court Rules 1971.

1989 (2) ZLR p354

CHIDYAUSIKU J

The facts of this case, which are common cause, are these.

At all material times the defendant insured Glens Corporation in respect of the latter's use of its heavy motor vehicle, registration number 370-418C, for the purposes of Part III of the Road Traffic Act 48 of 1976. On 20 December 1985 one Augustine Sibanda, an employee of Glens Corporation and acting in the course of and within the scope of his employment, was driving the above vehicle on the main Bulawayo/Harare Road. At or about the 183 kilometre marker a collision occurred between the vehicle driven by Sibanda and a Peugeot pick-up vehicle in which the deceased was a passenger.

The collision was caused solely by the negligence of Augustine Sibanda. The deceased is survived by the plaintiff with whom he had formed a union in accordance with customary law, which union was not solemnised or registered in terms of the general law of Zimbabwe. The plaintiff lived with and was supported by the deceased during his lifetime.

The parties are agreed that should this Honourable Court be of the opinion that the plaintiff is entitled to compensation, the quantum of such compensation be in the sum of \$57 313,79.

The question posed therefore is: "Is a woman who has been living with a man in terms of a customary, unregistered union entitled in law to compensation for loss of support resulting from unlawful killing of such a man?"

Mr *Gillespie* for the plaintiff submitted that formerly, a widow of an unregistered customary union had no claim in law for damages for loss of support as a result of the wrongful killing of her husband. This was so by reason of both common law and statute. He further submitted, however, that recent legislation has changed the position of the widow of a customary union and she can now claim for damages. This development, he argued, was in accordance with the demands of principle and justice.

Mr *Stonier*, who appears for the defendant, on the other hand, submitted that the widow of an unregistered union has never had a right of action against the wrongful killer of her husband, either at common law or statute. He further submitted that the position remains the same today as before and recent legislation has not altered the position.

An unregistered customary union has always been regarded as an invalid marriage. This has

been so by reason of the provisions of s 3(1) of the Native

1989 (2) ZLR p355

CHIDYAUSIKU J

Marriages Act 23 of 1950 and s 3(1) of the African Marriages Act [Chapter 238]. Accordingly, the High Court has held that the deceased husband of such a widow had no legal duty of support and that the widow had no claim for loss of support. See *Ex p Seti & Ors* 1963 R&N 681 (SR); 1963 (4) SA 962 (SR) and *van Rensburg NO v Board of Trustees, Mining Industry Pension Fund* 1979 RLR 131 (GD). The legislature, in its wisdom, recently enacted certain legislation which Mr *Gillespie* argues has effected certain changes. The effect of these changes has been to impose a legal duty of support upon a husband in a customary union. The recent legislation which Mr *Gillespie* refers to is the Customary Law and Primary Courts Act 6 of 1981 whose s 6(1) provides that an unregistered customary union may be treated by a court as valid for all civil purposes in certain circumstances and s 12(3) of the same Act provides that a Community Court may make an order of maintenance against the husband in a customary marriage and that such a husband shall be regarded as primarily responsible for the maintenance of that woman during the marriage and after the dissolution of their marriage. It was also argued that I must exercise my law-making function and extend the right to sue for loss of support to a widow of a customary union.

The issue can therefore be conveniently formulated in the following terms. Can a widow of a customary union claim damages against the wrongful killer of her husband at common law? If she has no such right of action at common law, has she been accorded the right to support by statute and consequently the right to sue for loss of that support? If the statute has not accorded her the right to support and consequently the right to sue for loss of support, is it desirable to extend to her that right by way of the general remedy provided by an Aquilian action and or extend to her that right by the exercise of the judicial lawmaking functions?

The right of action for damages by a widow of a customary union against the wrongful killer of her husband was discussed by the South African Appellate Division in the case of *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 (2) SA 467 (A). The facts of that case are briefly as follows. The wrongdoer negligently caused the death of the husband of the plaintiff. The plaintiff was married to the deceased by customary rites. The wife of the deceased instituted proceedings against the third party insurer of the wrongdoer for loss of support. The facts are almost on fours with the facts of this case. In that case BOTHA AJA, with the concurrence of the other four members of the Appellate Division, held that the plaintiff was not entitled to succeed because her right to support from the deceased did not arise from the common law. It is also clear from the

1989 (2) ZLR p356

CHIDYAUSIKU J

judgment that the court regarded the widow's and dependant's claim for loss of support against the wrongful killer of the breadwinner as *sui generis*. It was that court's view that the right to sue is derived from common law alone and not statute. The court also held that common law

conferred this right to children and widows of recognised marriages only. The court suggested *obiter* that the right to support based on statute cannot found an action for damages for loss of support in the event of the death of the breadwinner. BOTHA AJA expressed the view that where parties to a civil rites marriage have been divorced and the ex-husband is ordered to pay maintenance for the ex-wife in terms of s 10 of the South African Matrimonial Affairs Act No. 37 of 1953, if the ex-husband is wrongfully killed by a third party the ex-wife has no claim against the third party for loss of support.

The reasoning of the court in coming to the above conclusion was that it was clear from the writings of the jurists and from the object of the remedy that it was restricted to persons who were dependent for their support on the labour of the deceased. This was so because, so the reasoning went, according to Roman-Dutch Law no-one is obliged to support someone outside his family circle and because of the origin of the remedy in the custom of *soengeld*, it followed that the remedy was never other than restricted to the wife and those members of the deceased's family whom he was obliged to and did in fact maintain. The court also considered the provisions of s 10 of the South African Act 38 of 1927 which created an obligation for the husband of a customary marriage to support his wife. The court concluded that the creation of such an obligation did not elevate a customary union to the same level as a civil rites marriage and thus give a widow of such a marriage the same rights to sue as a widow in a civil rites marriage. The rationale behind that conclusion was that customary unions were polygamous and therefore contrary to public good or policy.

MJD Francis and MP Freemantle, Attorneys-at-law in the Cape Province, in a very lucid and very well reasoned article in (1961) 78 SALJ 103 advanced a number of criticisms against the judgment in *Fondo's case supra*. The first point that the learned authors of that article make is that the decision is inequitable. I agree with that criticism entirely. Very few people will disagree that the decision offends against the most elementary notions of justice.

The second point that the learned authors make is that in *Fondo's case* the plaintiff suffered patrimonial loss as a result of the wrongful act of a third party and that loss was foreseeable. It was contended that there was nothing

1989 (2) ZLR p357

CHIDYAUSIKU J

anomalous about a dependant's claim and that the modern Aquilian action is a general remedy for every kind of loss suffered by one person in consequence of the *culpa* of another. I find this contention somehow attractive.

The third criticism was that *Fondo's case* confines the right of action for wrongful killing of the breadwinner to close relations of the deceased. The learned authors argue that that conclusion is not justified on the correct interpretation of the jurists' writings. This is what they have to say at p 107:

"It is not even correct to state that the jurists confine the remedy to close relations of the deceased. Grotius 3.33.2 reads:

'But the killer is also liable to make recompense to the widow, children *and others*, if there were any, who

were accustomed to be supported by the deceased's labour.'

Matthaeus 48.5.7.11, van Leeuwen 4.34.14 and Voet 9.2.11 also mention the widow, children 'and others' as having a claim. (Incidentally BOTHA AJA was incorrect in stating that Voet confined the remedy to the widow, parents and children. It is true that at one place in Voet 9.2.11, the widow, parents and children are mentioned. But elsewhere in the same passage the wife, children 'and other relatives' are mentioned). In any case, even if the jurists mention only certain close relations of the deceased, no significance can be drawn from that, because those relations are only mentioned as examples. Van der Linden 1.16.2 mentions only the widow and children. It surely is not suggested that Van der Linden is authority for the proposition that a parent never has a claim for loss of support, irrespective of whether the breadwinner was under a duty to support him. Similarly there is no reason to assume that the jurists intended to convey that it is a prerequisite of a dependant's claim that the breadwinner should have been under a duty to support him."

Finally the learned authors attacked as unsound the distinction drawn by BOTHA AJA in *Fondo's* case between those cases where there is a common law duty of support (in which case there is a claim for loss of support) and those cases where there is either no duty of support at all or a duty of support which does not arise out of common law but from, say, statute (in which case there is no claim for loss of support). They argue that, carried to its logical conclusion, this distinction would deprive anyone whose right to support is derived from statute from the right to sue. They then cite numerous examples where the right to support is of statutory origin and yet the right to sue has been recognised. One such example given by the learned authors is where

1989 (2) ZLR p358

CHIDYAUSIKU J

the marriage officers in South Africa (this also is the case in Zimbabwe) derive their authority to officiate at a marriage from a statute. These are not marriage officers at common law and wives in marriages in which they officiate cannot be said to have a right of support arising from common law. In such cases the right to support arises from marriages, the validity of which depends on the competency of the marriage officers, who in turn get their authority from statute law and not common law.

Turning to the facts of this case, which are almost identical to *Fondo's* case, does the plaintiff have the right to sue at common law? *Fondo's* case clearly established that the present plaintiff cannot sue for loss of support at common law because her marriage to the deceased is one under the customary rites. Our own High Court in *Seti's* case (*supra*) came to the same conclusion. That question is therefore well settled. The plaintiff in this case cannot sue at common law.

The next question I wish to deal with is whether recent legislation has given a wife to a customary union a legal right or entitlement to maintenance or support from her husband and consequently the right to sue for loss of support against the wrongful killer of her husband. Sections 6(1) and 12(3) and (4)(a) of the Customary and Primary Courts Act 6 of 1981 reads as follows:

"6. (1) Subject to the provisions of section 3 of the African Marriages Act [Chapter 238], if in any civil case a question arises as to the effects of a marriage which was contracted according to customary law by a person at a time when he already had another wife or other wives married to him according to customary law, the court may treat such marriage as **valid for all civil purposes**, in so far as polygamous marriages are recognized by

customary law."

Sections 12(3) and (4)(a) read:

"(3) Without derogation from its powers to make any other order for maintenance, a community court may make an order for maintenance in accordance with the provisions of the Maintenance Act [Chapter 35].

(4) For the purposes of an order for maintenance in terms of subsection (3), a community court shall, notwithstanding anything to the contrary contained in customary law, regard -

- (a) the person who, according to customary law, is the husband of a woman as being primarily responsible for the maintenance of

1989 (2) ZLR p359

CHIDYAUSIKU J

that woman during the marriage and, after the dissolution of their marriage, until her remarriage;" (the emphasis is mine).

Section 6(3) of the Maintenance Act [Chapter 35] reads as follows:

"3. For the purposes of determining whether an African is legally liable to maintain any person he shall be deemed for the purposes of this Act, to be the husband of any woman associated with him in a customary union."

This section was repealed by s 14(d) of the Customary Law and Primary Courts Act 21 of 1982. The same act created ss 3 and 4(a) of the Act which I have quoted above and these new sections, it would appear to me, made s 6(3) of the Maintenance Act superfluous, hence its repeal.

I have no doubt in my mind that the Customary Law and Primary Courts Act gives a wife in a customary union a legal right to support from her husband. The same Act creates, for the husband, a legal obligation to provide such support. The wife in a customary union can sue for maintenance. Failure to comply with a maintenance order by a customary union husband can attract criminal sanction. In the light of this, Mr *Stonier's* submission that these provisions merely create a moral obligation is untenable. The above statutory provisions create a legal relationship, that is enforceable at law. I now turn to consider whether the creation of this right and duty to support entitles the spouse to sue for damages for loss of support against the wrongful killer of her husband.

In *Fondo's* case, as I have already stated, the court came to the conclusion that the right to sue was *sui generis* in that it was available only to those whose right to support was derived from common law. In other words, those who derive their right of support from a statute cannot sue. This conclusion was *obiter*. The illogicality of that conclusion was clearly demonstrated by the learned authors Francis and Freemantle in an article I have referred to above. The validity of the majority of marriages today in many countries, including Zimbabwe, is derived from statute law. All registered marriages are in terms of Statute Law in Zimbabwe and not in terms of common law. It follows, therefore, that even the right to sue of widows of marriages other than customary marriages, strictly speaking, has its origin in statutory law. I am, for that reason, unable to follow the *obiter dictum* in *Fondo's* case that the right to support derived from statutory law cannot form the basis for a claim of damages for loss of support against the wrongful killer of the

CHIDYAUSIKU J

Even if I am wrong in coming to the above conclusion the plaintiff, in my view, should be entitled to sue for damages under the principle of *damnum injuria datum* or the Aquilian action. In my view the Aquilian action has been extended or should be extended to cover people in the category of the plaintiff. Professor RG McKerron in his book *The Law of Delict* 7 ed p 8 had this to say about the modern Aquilian action:

"In *Cape of Good Hope v Fischer* (1886) 4 SC 368 at 376 DE VILLIERS CJ states that in the time of Voet and Matthaeus 'the Aquilian action had received an extension by analogy to a degree never permitted under the Roman law'. 'The action *in factum*', he says, 'was no longer confined to cases of damage done to corporeal property, but was extended to every kind of loss sustained by a person in consequence of the wrongful acts of another'. No statement to that effect, however, is to be found in the commentaries of Voet or Matthaeus on the Aquilian action, nor any passage indicating the recognition of such a wide extension of the action. (The learned Chief Justice relies upon Voet 20.1.11. But in this passage Voet does not purport to lay down any principle of general application: see Sande, *Decis Fris* 3.12.15 upon which the passage is founded).

It is true that in the Roman-Dutch law the action was made available to the dependants of a person who had been killed by the wrongful act of another, (Voet 9.2.11) and that in certain cases persons having rights of a merely personal nature in a thing might bring the action (Voet 9.2.10). But both Voet and Matthaeus appear to have regarded the remedy as in general still confined, as in the Roman law, to persons having real rights in a corporeal thing which had been damaged by the wrongful act of another (see Matthaeus *De Criminibus* 47.3.1.2; Voet 9.2.10). Moreover, it is significant that both writers treat the *actio doli* as still in force; there would have been no need to retain that action if the Aquilian action was so comprehensive (see Lawson, 26-7). **The precise scope of the action in the old law, however, is now purely an academic question, since it is not open to doubt that in the modern law the action is not confined to loss resulting from physical injury to the person or property of the plaintiff.** But it must not be inferred from this that loss resulting from physical injury to the person or property stands on the same footing as mere pecuniary loss (as to the distinction between physical damage and mere pecuniary loss, see above 3, n21). As we shall see, (below, 32-4) apart from the anomalous remedy accorded to the dependants of a person wrongfully killed, and apart from claims in which liability is dependent on proof of wrongful intent - for example, claims

CHIDYAUSIKU J

in respect of fraudulent misrepresentation or inducement of breach of contract, in which the remedy, although rightly treated as Aquilian today and aptly described by DE VILLIERS AJA in *Matthews v Young* 1922 AD 492 at 505 as 'an Aquilian action for patrimonial loss based upon *dolus*', is in reality the *actio doli* of the old law - the courts are reluctant for reasons of social policy to recognize the existence of any duty in respect of the infliction of mere pecuniary loss. The view sometimes expressed - both by the courts and by text-writers - that in the modern law all harm caused to another which could reasonably have been foreseen and guarded against is *prima facie* actionable, must therefore be regarded as fallacious." (The emphasis is mine.)

It would appear to me from the above passage that the modern Aquilian action has been extended or should be extended to include at least people in the category of the plaintiff.

Even if I am wrong in my interpretation of the above passage and in my holding that the Aquilian action has been extended to cover the present case, the case before me is a proper case for the exercise of my judicial law-making function. I accordingly hold the plaintiff in this

case has the right to sue the defendant. The proposition that the courts have a law-making function is well settled but if authority is required for such proposition it is to be found in the following cases: *Miliangos v George Frank Textiles Ltd* [1975] 3 All ER 801 (HL) at pp 812 F-8 and 820 b-d; and in the case of *Union Government v Warneke* 1911 AD 657 INNES J had this to say at pp 664 to 665:

"Recognising, as I think we must, that it never occurred to the jurists of the seventeenth century to extend this remedy to a husband, and that there is no reported decision so extending it, we are still at liberty to inquire whether there is any reason why we should not make it available now. The position of our law with regard to negligence to-day is the result of the growth and the regulated expansion of the original provisions of the *Lex Aquilia*. Crude and archaic in some respects, their operation was gradually widened by the application of the *utilis actio*, and by the interpretation of the Roman jurists. The broadening process was continued by Dutch lawyers on the same lines; and there is no reason why our Courts should not similarly adapt the doctrine and reasoning of the law to the conditions of modern life, so far as that can be done without doing violence to its principles."

Following this approach in *Warneke's* case the Appellate Division had no

1989 (2) ZLR p362

CHIDYAUSIKU J

difficulty in applying the dependant's claim to the husband who had lost his wife's support, even though the usual classical statement of the dependant's claim did not mention the husband.

The jurists did not confine the right of action against the wrongful killer of the breadwinner to the close relations of the deceased. The killer was also liable to make recompense to the widow, children **and others**, if there were any, who were accustomed to be supported by the deceased's labour: Grotius 3.33.2. The plaintiff, in my view, clearly falls in the category of **and others** who were accustomed to be supported by the labour of the deceased. Even if I am wrong in thinking plaintiff is included in the **others** it certainly is desirable that she be included and I include her in that category for a variety of reasons.

Firstly, in Zimbabwe today, a customary union is not *per se* contrary to public policy. It is true that in terms of s 3 of the African Marriages Act [Chapter 238] only a registered marriage is fully recognised. However, the legislature has granted the female spouse in a customary union a great deal of protection and support in a number of statutes. Thus she can claim maintenance in terms of the Customary Law and Primary Courts Act and in terms of the War Victims Compensation Act she is regarded as a dependant. The parties to a customary union, their families and all the people in their social sphere regard the marriage as a proper marriage and the male spouse as having an obligation to support the female spouse in the same way as in a registered marriage.

In the light of the above, by including the plaintiff in the category of "**and others**", if there are any, who were "accustomed to be supported by the deceased's labour" (Grotius 3.33.2) one would not be doing any violence to the principles of *lex Aquilia* but rather augmenting it. There is no doubt that to refuse the plaintiff this right of action is inequitable. This approach is, in my view, consistent with the sentiments expressed by DUMBUTSHENA CJ in *Katekwe v Muchabaiwa* 1984 (2) ZLR 112, namely that the courts by their judgments should seek to heal the pangs inflicted on African women by legal disabilities. This is a movement towards the

removal of legal disabilities suffered by African women.

For the foregoing reasons the question posed is answered in the affirmative. For the avoidance of doubt, the conclusion I have reached is, a woman who has been living with a man in terms of a customary, unregistered marriage is entitled in law to compensation for loss of support resulting from the unlawful killing of such a man. I accordingly enter judgment for the plaintiff

1989 (2) ZLR p363

CHIDYAUSIKU J

in the sum of \$57 313,79; interest at the rate of 10% per annum from 23 August 1988 to date of payment. The defendant will pay the plaintiff's costs.

Winterton, Holmes & Hill, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

1989 (2) ZLR p364

S v CHIWOKO & ANOR 1989 (2) ZLR 364 (HC)

Court High Court, Harare

Smith J

Criminal review

27 September 1989

Flynote

Criminal procedure (sentence) - suspended sentence - conditions of suspension - improper to suspend sentence on condition that compensation order under s 341 of the Criminal Procedure and Evidence Act [Chapter 59] is complied with.

Headnote

It is open to a court convicting an accused person either to make an order for compensation to the complainant under s 341 of the Criminal Procedure and Evidence Act [*Chapter 59*] or to order restitution under the wide powers of s 337(1) of the Act as the basis upon which a portion or the whole of a sentence of imprisonment is suspended. The court cannot combine the two, by ordering compensation and suspending part of the sentence on condition the accused pays the compensation. An order for compensation under s 341 has the effect of a civil judgment against the accused, enforceable by the complainant against the accused, and it is undesirable, if not improper, to invoke the sanction of the criminal law to enforce a civil liability.

Cases cited:

S v Chamboko 1983 (1) ZLR 292 (HC)

S v Nhongo HH-398-83

Judgment

Smith J: The accused were charged with the theft of 187 kg of fish valued at \$626, of which 67 kg, valued at \$224,45, were recovered. They both pleaded guilty and were duly convicted. The complainant applied for compensation. The two accused were fined \$150 each and sentenced to two

1989 (2) ZLR p365

SMITH J

months' imprisonment, which was suspended for 5 years on condition that they were not convicted of a crime involving dishonesty committed within that period. Compensation in the sum of \$381,55 was awarded and the magistrate imposed a further two months' imprisonment, which were suspended on condition that the accused paid full compensation. The condition was silent about whether the liability was joint or several. The regional magistrate who scrutinised the record was of the opinion that it was not competent for the magistrate to impose the further two months' imprisonment on condition that the compensation was paid. The trial magistrate disagreed, citing *S v Chamboko* 1983 (1) ZLR 292 (HC) as authority therefor. As the regional magistrate has pointed out, *Chamboko's* case does not support what the trial magistrate did. In that case KORSAN J, as he then was, merely stated that where an order for compensation is made in terms of s 341 of the Criminal Procedure and Evidence Act [Chapter 59] to the maximum permitted amount of \$1000 and there is an outstanding balance due by the accused, it is permissible for the court to suspend a portion of the sentence on condition that the balance is paid by the accused.

In *S v Nhongo* HH-398-83 at p 2 of the cyclostyled judgment SQUIRES J said:

"As was pointed out by JARVIS J in *S v Gombarume* GS-67-75 and reiterated in *S v Chiukira* HH-402-82, in terms of s 341(7) of the Code a complainant may have an award of compensation made a civil judgment of the Court. If he does this, he is entitled to enforce it without any delay and this right is quite incompatible with an order of the Court giving the judgment debtor time to pay. Apart from that, it is undesirable if not improper to invoke the sanction of the criminal law to enforce what is a civil liability if compensation is ordered under s 341(1).

The present order, therefore, cannot stand. But it is clear from the evidence given to the trial magistrate that the accused can make restitution to the complainant, being the owner of five head of cattle, some \$63 in savings, and earning an income of \$130 per month. It was also clear that the complainant was anxious to have his economic loss repaired.

The justice of the case will best be met, therefore, if the order of compensation made by the magistrate under s 341(1) of the Code is set aside, and acting under the general powers given to a Court in s 337(1)(b) I order simply that restitution of the value of the cycle be made to the complainant, as part of the basis upon which a portion of the sentence is suspended."

1989 (2) ZLR p366

SMITH J

In this case, the magistrate had the option of either making an award of compensation under s 341(1) of the Code, in which case it could be made a civil judgment of the court, or ordering restitution under the wide powers of s 337(1) of the Code as the basis upon which a portion of the sentence of imprisonment is suspended. I consider that the course followed by SQUIRES J in *Nhongo's* case *supra* should be followed. Accordingly, with the consent of REYNOLDS J, the order of compensation in favour of the complainant is set aside and the basis upon which the additional period of 2 months' imprisonment is suspended is altered to read:

"all of which is suspended on condition that the accused jointly or severally make restitution to the complainant in the sum of \$381,55 through the clerk of court, Mbare, before 31 October 1989."

According to the outline of the State Case, the two accused were employed as fishermen by the complainant. They stole 40 kg of fish on 21 March 1989 and sold them. They stole and then sold a further 40 kg of fish on 23 March and again on 25 April and then stole 67 kg of fish on 27 April. Thus on four separate occasions they stole fish, the total value of which was \$626, from their employer. In my view a fine of \$150 was much too lenient. I consider that a custodial sentence of not less than six months was called for in this case. The accused were employees of the complainant and stole from him on four separate occasions spread over a relatively short period. Accordingly, I am unable to confirm the proceedings as being in accordance with real and substantial justice.

Endnotes

1 (Popup - Popup)

This judgment was overturned on appeal. See *S v Levy* [1991 \(1\) ZLR 128 \(SC\)](#).

2 (Popup - Popup)

See [1988 \(2\) ZLR 372 \(SC\)](#) - Editor.

3 (Popup - Popup)

See *supra* p12 - Editor.

4 (Popup - Popup)

the *obiter* remark by the learned Judge to the effect that the Civil Evidence Act [Chapter 41] does not freeze the application of English law at a certain date was, with respect, incorrect, as s 39A of that Act declares that English law enacted after 1 June 1927 does not apply within Zimbabwe.

5 (Popup - Popup)

This judgment was reversed on appeal on different grounds. See S-160- 90.

6 (Popup - Popup)

See *infra* p173 - Editor.

7 (Popup - Popup)

See *Trinity Engineering (Pvt) Ltd & Anor v Anglo-African Shipping Co (CA) (Pvt) Ltd* [1986 \(1\) SA 700 \(ZS\)](#) - Editor.

8 (Popup - Popup)

An appeal was noted.

9 (Popup - Popup)

This judgment was overturned on appeal. See *S v Mutumbuka & Anor* S-163-91 (unreported) and *S v Levy* [1991 \(1\) ZLR 128 \(SC\)](#).