1990 (1)

THE ZIMBABWE LAW REPORTS 1990 [PART 1]

CHIRIGO v MUDAVANHU 1990 (1) ZLR 1 (HC)

Court **High Court, Harare**

Smith J

Application for summary judgment

19 October 1989 & 10 January 1990

Flynote

Practice and procedure - application for summary judgment - contract work done and materials supplied - condition precedent - no action to compel performance of condition - fictional fulfilment - applicable to conditions precedent and to terms of contract.

Headnote

The applicant claimed summary judgment in the sum of $15 760 in terms of a contract for work done and materials supplied in the construction of a house. The respondent claimed that the contract price was in the sum of $11 200 and alleged that it had not fallen due for payment as it had been agreed that the applicant would be paid from the proceeds of a loan he was seeking from a building society. The respondent further alleged that as the applicant had not completed the construction as agreed, full payment was not due.

The respondent had applied for a loan which had not been granted by the time summons was issued two years later. The respondent had et all material times prior to the application admitted liability.

Held, that it was highly unlikely that the applicant would have agreed that payment would be dependent upon the respondent obtaining a building society loan. Such a term may be common in agreements of sale but not in construction contracts.

Held, further, that even if it were accepted that the agreement did contain such provision, it would impose an obligation on the respondent to apply for a loan as expeditiously as possible and to pursue the application with diligence. Such provision would be a term of the contract and not a condition precedent as the applicant had already performed his obligations.

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Held, further, that the doctrine of fictional fulfilment is applicable to both conditions precedent and to terms of the contract

Cases cited:

Design and Planning Service v Kruger 1974 (1) SA 689 (T)

Lanificio Varam SA v Masurel Fits (Pty) Ltd 1952 (1) SA 581 (C)

AR Chizikani for applicant

CM Jakachira for respondent

Judgment

Smith J: The applicant issued a summons against the respondent claiming $15 760,00 plus interest from 9 November 1987, for payment in respect of work done and materials supplied at the latter's request when the applicant built a dwelling house for the respondent. He claimed that he supplied materials and built the house but the respondent could not pay him so applied to a building society for a loan. The loan was offered subject to a mortgage bond being registered, but the bond could not be registered because the property on which the house was built had not been surveyed. The survey took a long time and before it was done, the building society withdrew the offer of the loan, sometime before 11 September 1987. The applicant's legal practitioner wrote to the respondent requesting payment. The respondent replied on 15 December 1987, saying that he was waiting for the survey to be done and offering to pay a maximum of $100 per month while waiting for the survey. By 29 March 1988 die survey had been approved by the Surveyor-General. However, on 10 August 1988 the respondent advised the applicant's legal practitioner that the appropriate diagrams were not yet available from the surveyor. On 20 August 1988 the respondent again wrote to the applicant's legal practitioner saying that on 5 June 1988 he had approached the building society for a loan but it required a diagram of the property. He said in the letter "If you want things to move fast now that you stay in Harare you can organise some of these things. I have forms from CABS I am waiting for diagrams. If you can help move that I would go straight to revive my bond." There was a subsequent meeting between the applicant and the respondent.

The respondent denied that he owed the applicant $15 760,00. He admitted that he was indebted to the applicant in the sum of $11 200,00 which was the agreed cost of the extensions to his house. However, he alleged that it was also agreed that the applicant would be paid through the proceeds of a loan to be obtained from a particular building society. Because it had not been possible to register the mortgage bond to secure the loan, he had not yet

received the loan and so the payment to the applicant was not yet due. The respondent further claimed that construction had not been completed and so the full amount of $11 200,00 was not due. He denied that he was being evasive in connection with his application for a loan. He accepted that there had been some delay in the building society processing his second

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application for a loan. After submitting his application, the building society kept asking for additional information and particulars on a piecemeal basis, he alleged. The last information sought was a certificate from the Chitungwiza Town Council which had been furnished in June 1989. The respondent said that he was still awaiting advice from the building society on the outcome of his loan application which he believed would be successful.

Mr *Chizikani* said that the respondent admitted his indebtedness to the extent of $11 200,00 and that the applicant had not established on the papers that the additional $4 560,00 was owing to him and therefore he abandoned, at this stage, the claim for any amount in excess of $11 200,00. He said that it was not part of the agreement between the parties as to how the respondent would get the money to pay for the extensions. Payment was not conditional on the respondent getting a loan from a building society. He submitted, further, that the respondent had admitted liability and as far beck as December 1987, had offered to make monthly payments. At no stage had the respondent alleged that construction had not been completed until he did so in his opposing affidavit. Even then, however, there was a bald statement that construction had not been completed without any attempt to detail what had not been completed.

Mr *Jakachira* resisted the application for summary judgment. He pointed out that the remedy was a drastic one which should be granted only in exceptional cases, where the applicant had a clearly unanswerable case. He submitted that there was a clear dispute between the parties as to what had been agreed. Was payment dependent upon the respondent getting a loan from a building society? Therefore it was not clear as to when and how the debt became due and payable. It was also in dispute as to whether construction had been completed.

It is clear from the papers that both parties were aware that the respondent was attempting to get a loan from a building society in order to pay for his house or extension. I consider it highly unlikely, however, that the applicant would have agreed that payment would be dependent upon the respondent obtaining a building society loan. This kind of condition is fairly common in agreements to buy a house but in such cases, if no loan is obtained the

agreement of sale either does not come into effect or is terminated. In the case of a contract to build a house it would not be sufficient merely to rescind the contract. The builder would have supplied materials and work for which he is due to be paid. What happens if the building society does not grant a loan? The builder would not be able to reclaim his materials because they would have adhered to and become part of the land and, therefore, immovable property. He would be reduced to claiming *quantum meruit*.

Even if I were to accept that the agreement between the parties did contain a provision that the costs of construction were to be obtained from a building society loan, the respondent cannot shelter behind such a provision. Such a provision would impose an obligation, on the respondent to submit an application for a loan to the building society, as expeditiously as possible - and to pursue the application with diligence. He cannot just sit back and wait for things to happen, even if he is stationed outside Harare. He is not entitled to write to the

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applicant's legal practitioner and say - if you want things to move fast, you can help to organise them. By 11 September 1987, the respondent was aware that the offer of a building society loan had been withdrawn. On 20 August 1988, almost a year later, he was telling the applicant's legal representative that "if you can help move that I would go straight to revive my bond". In other words, he still had the loan application form in his possession and was waiting for a diagram before he lodged it.

In *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 695C-D, BOTHA J said:

> "In the case of a suspensive condition, the operation of the obligations flowing from the contract is suspended, in whole or in part, pending the occurrence or non-occurrence of a particular specified event (cf *Thiart* v *Kraukamp* 1967 (3) SA 219 (I) at p 225). A term of the contract, on the other hand, imposes a contractual obligation on a party to act, or to refrain from acting, in a particular manner. A contractual obligation flowing from a term of the contract can be enforced, but no action will lie to compel the performance of a condition."

It is clear that if there were a provision in the agreement between the parties that payment would be made from a building society loan, such a provision would be a term of the agreement and not a condition, because the applicant has already performed his part of the agreement. Thus the provision could not be a suspensive condition. It is a rule of law that, where the parties have not expressly fixed the time for the performance of a contract, it must, unless

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the other terms of the contract indicate a contrary intention, be implied that performance should take place within a reasonable time - see *Lanificio Varam SA v Masurel Fits (Pty) Ltd* 1952 (1) SA 581 (C) at 586B. The applicant has performed. The respondent has not because he has not yet received a building society loan. In Christie's *The Law of Contract in South Africa* the learned author discusses at p 135 et seq the doctrine of the fictional fulfilment and non-fulfilment of conditions. He then goes on to discuss whether the doctrine applies only to pure conditions or also to so-called conditions that are really terms of the contract. After considering various cases he states at p 139 -

> "The conclusion to which the cases point, therefore, is that the doctrine applies equally to true conditions precedent and to terms of the contract that operate as conditions precedent; that in either case it will apply when there has been bad faith, it will also apply when there has been deliberate intention whatever the motive, unless the terms of the contract and the surrounding circumstances indicate to the contrary; it will apply when there has been negligence only if the terms of the contract and the surrounding circumstances so indicate; and at all levels no distinction is drawn between acts and omissions."

I agree with the conclusions of the learned author. Justice requires that where a party seeks to avoid his obligations by deliberate inaction, when the other party has fulfilled his obligations, the doctrine of fictional fulfilment must be applied. If it were not so, in this case the respondent could continue to resist demands for payment for many more years. I do not accept the respondent's allegation that the construction has not been completed. This allegation was not made in any of the letters he wrote to the applicant's legal practitioner. Yet, one would expect that to be the first point that he would raise in his letters. If the builder had not yet completed his task and was pressing for payment, surely the response from any reasonable person would be "but I'm not going to pay you until you have fulfilled your part of the contract". Furthermore, in

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his opposing affidavit the respondent gives no details as to the work that has not been completed.

Accordingly summary judgment in the sum of $11 200,00 plus interest at the rate of 10% per annum with effect from 9 November 1987, is granted in favour of the applicant. The respondent will also pay the applicant's costs.

AR Chizikani, applicant's legal practitioner

Sawyer & Mkushi, respondent's legal practitioners

ANGELIQUE ENTERPRISES (PVT) LTD v ALBCO (PVT) LTD 1990 (1) ZLR 6 (HC)

Court **High Court, Harare**

Smith J

Notice of motion

26 October 1989 & 10 January 1990

Flynote

Practice and procedure - pleadings - amendment - delay - whether ground for refusing amendment - prescription - whether point of prescription of cause of action may be raised to defeat amendment.

Prescription - manner of raising point - relevant document - time of raising point - whether may be allowed at stage of amendment of pleadings.

Legislation - High Court of Zimbabwe Rules, 1971, Rule 132; Prescription Act, 1975, s 19

Headnote

In an application to amend the defendant's pleadings by the introduction of a claim in reconvention, opposition was based on lengthy delay in seeking the amendment and on a claim that the cause of action sought to be introduced had prescribed.

Held, in the first instance, that delay in itself is no obstacle to amendment; the court has a discretion to condone any delay that is sufficiently explained.

Held, further, that prescription may be raised at any time but ought not to be allowed so as to dispose of a case at the stage of amendment of pleadings while it remains possible that some defence to the alleged prescription may yet be available.

Held, further, that a court cannot take notice of prescription *mere mote*, the point must be raised in a relevant document to the proceedings which includes an affidavit filed in motion proceedings - counsel's heads of argument raising the point from the Bar are not a relevant document.

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Cases cited:

Lourenco v Raja Dry Cleaners arid Steam Laundry (Pvt) Lid 1984 (2) ZLR 151 (SC)

Cordier v Cordier 1984 (4) SA 524 (C)

*Rand Staple-Machine Leasing (*Pty) *Ltd v ICI (SA) Ltd* 1977 (3) SA 199

George Singh & Co v Ensor NO & Anor 1981 (1) SA 1190 (N)

Lipschitz v Deschamps Textiles GmbH & Anor 1978 (4) SA 427 (C)

Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd 1967 (3) SA 632 (D)

M R D Stonier for the applicant

M J Gillespie for the respondent

Judgment

Smith J: The respondent instituted action by summons and declaration issued on 1 October 1985 against the applicant - Case No. HC 2738/85. A plea was filed by the applicant on 3 February 1986. Since then no further steps have been taken. Consequently, issue has not been joined and the pleadings are not closed, discovery has not been given by either party and no pre-trial conference has been held. By notice filed on 6 January 1988, the applicant gave notice that, failing the respondent's consent, it would apply in terms of Rule 121 of the High Court Rules to amend its plea by making a claim in reconvention. By letter dated 22 February 1988 the respondent's legal practitioner declined to consent. The claim in reconvention is a claim for damages arising from an injurious falsehood alleged to have been made by the respondent which resulted in the closure of the applicant's factory in December 1984. The factory remained closed until authority to re-open it was given in a letter dated 8 March 1985. The applicant alleged that it was only after receiving the said letter that it learnt that its factory had been closed as a result of the injurious falsehood specified in the claim in reconvention. After the applicant had filed its plea in Case No. HC 2738/85 on 3 February 1986, there were discussions and correspondence between the parties to see whether their dispute could be settled. When settlement negotiations failed, the applicant asked a firm of chartered accountants to devise a formula for the quantification of its damages which took a great deal of time. The managing director of the applicant was out of the country on 7 occasions, for periods ranging from 4 days to 30 days, during the period 26 March 1986 to 15 April 1987. It was only after his return on 15 April 1987 that he was able to attend to the quantification issue and instruct the legal practitioner to proceed with the claim in reconvention. Counsel was briefed on 12 June 1987 and responded on 14 September. The applicant did not agree with the

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computations of counsel and returned the brief with further instructions on 13 November. An amended claim in reconvention was returned by counsel on 27 December and filed on 6 January 1988.

In its opposing affidavit the respondent denied that the applicant has a good or *bona fide* cause of action against it. It pointed out that the alleged facts giving rise to the counter-claim came to the attention of the applicant on 11 March 1985. It also pointed out that settlement negotiations were terminated on 21 July 1986. The applicant's delay in bringing either the claim in reconvention or this application could not be excused. It submitted that it would suffer great prejudice if the applicant were allowed to institute action in respect of a cause of action which allegedly arose more that 4 years previously.

In terms of Rule 132 of the High Court Rules, the court may, at any stage of the proceedings, allow either party to alter or amend its pleadings, in such a manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. The intention behind this rule was summarised by DUMBUTSHENA CJ in *Lourenco v Raja Dry Cleaners and Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (SC) at 159E-F, as follows:

> "The main aim and object in allowing an amendment to pleadings is to do justice to the parties by deciding the real issues between them. The mistake or neglect of one of the parties in the process of placing the issues before the court and on record will not stand in the way of this unless the prejudice caused to the other party cannot be compensated for in an award of costs. The position is that even where a litigant has delayed in bringing forward his amendment, as in this case, this delay in itself, in the absence of prejudice to his opponent which is not remediable by payment of costs, does not justify refusing the amendment."

In this case there have been long delays. In relation to delays, BAKER J in *Cordier v Cordier* 1984 (4) SA 524 (C) at 528I-529B said:

> "... [The] defendant does not allege that he will be prejudiced by the condonation of Plaintiff s long delay in pursuing his amendment. Apart from the delay itself, defendant advances no good reason why condonation should not be granted. Long delay *per se* is not necessarily a good reason for refusing condonation. It is the long delay that necessitates condonation in the Court's discretion, and to say that long delay is reason

> to refuse condonation is to argue in a circle. In Park Finance Corporation (Pty) *Ltd v Van Niekerk* 1956(1) SA 669 (T) at 677 RAMSBOTTOM J pointed out that long delay alone should not debar the grant of an amendment where the amendment would facilitate the proper ventilation of the dispute between the parties."

In this case the respondent has alleged that it would be prejudiced if the amendment were allowed, in that the hearing of the main action would be further delayed, its case may be prejudiced by the passage of time in that witnesses may become unavailable or evidence lost, and no satisfactory explanation for the delay had been given.

In my opinion, the explanation given by the applicant is satisfactory. With regard to any delay of the main action - Case No. HC 2738/85 - the respondent has taken no active steps since the applicant's plea was filed on 3 February 1986 to close the pleadings and join issue. Since it has

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been so dilatory in finalising the issues, it can hardly complain at this stage about further delays caused by the amendment to the applicant's plea. I consider that the arguments raised by the respondent concerning prejudice to it do not justify refusing the amendment.

That decision, however, settles only one issue. Although the respondent did not specifically raise the question of prescription in its opposing affidavit, *Mr Gillespie* raised it in his heads of argument. He submitted that the respondent had referred to prescription in its opposing affidavit when it submitted that it would suffer great prejudice if the applicant were allowed to institute action in respect of a cause of action which allegedly arose over four years ago.

In *Cordier*'s case, *supra*, BAKER J also had to consider an objection that the amendments applied for in that case would have the effect of introducing a new cause of action which was prescribed. At p 533F *et seq* he said:

> "It has been held that an amendment seeking to introduce a claim which is prescribed will not be allowed (the *Park Finance Corporation* case at 674 and *Miller v HL Shippel & Co (Pty) Ltd* at 454, both *, supra*; see also *Du Plessis v Semmelink* 1976 (2) SA 500 (A at 501F, where the point was left undecided). On the other hand it has been held that the issue of prescription should be raised by special plea and not by way of an objection to an amendment, as Mr *Louw* has done here (*Rand Staple Machine Leasing (Pty) Ltd v ICI (SA) Ltd* 1977 (3) SA 199 (W) *per* VILJOEN J as he then was). I have already expressed the view that there

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> is not, and certainly appears not to be, any possibility of prejudice to defendant if the amendment be granted; he has in any event not alleged any prejudice in the legal sense, and only complains of the long delay and that the new claim is as prescribed as the old one. The only question therefore is whether the apparent (and very possibly real) prescription of Plaintiff's new claim is sufficient ground to refuse the amendment.
>
> Section 17(1) of the statute provides that a court shall not of its own motion take notice of prescription. This court is not doing so; defendant has already done so. Section 17(2) provides that a party to litigation who invokes prescription shall do so in the relevant document filed of record in the proceedings; provided that a court may allow prescription to be raised at any stage of the proceeding's. What is 'the relevant document filed of record in the proceedings?' The 1943 Act provided that a party who raised prescription had to do so in the pleadings (s 14 of Act 18 of 1943) and this has always been taken to mean in a special plea."

Then after referring to *Rand Staple-Machine Leasing (Pty) Ltd v ICI (SA) Ltd* 1977 3) SA 199 (W), George *Singh & Co v Ensor NO & Anor* 1981 (1) SA 1190 (N) and *Lipschitz v Dechamps Textiles GmbH & Anor* 1978 (4) SA 427 (C), he continued at p 535G:

> "It seems clear therefore, that at least two Divisions of the Supreme Court hold the view (correctly, with respect) that a special plea is not the only procedural device that can be used to raise the defence of prescription. But that is not the point. The question here is whether, in a trial action where we are still occupied with the pleadings, the defendant should be allowed to kill the case by successfully advancing the defence of prescription. I think not. While the first passage quoted above from the judgment of VILJOEN J may therefore be open to doubt in the light of the two subsequent judgment, I think the second part of the second passage quoted (at 202E-H) supplies the answer: it is only possible, not definite, that prescription is the full answer to *Plaintiff*'s case. It may be, on the other hand, that Plaintiff is able to allege and prove an acknowledgment of liability by the defendant (of s 14(1) of the 1969 Act) or a waiver of the defence, or some other counterblast to defendant's assertion that Plaintiffs new claim is prescribed. The grant of the amendment will leave it open to Plaintiff to do so, whereas its refusal will leave Plaintiff no option but to appeal.

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Section 19 of the Pescription Act, 1975 (No. 31 of 1975) is worded the same

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as the provisions of s 17 of the South African statute referred to in *Cordier*'s case, *supra*, in the extract I have cited earlier. It provides that no court shall of its own motion take notice of prescription (subs (1)) and that a party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings (subs (2)). I agree, with respect, with the views, expressed by BAKER J above. This is a trial action where the parties are still occupied with the pleadings. I do not consider that the respondent should be allowed at this stage to prevent the amendment of the applicant's plea by successfully advancing the defence of prescription.

Even if I were wrong in my conclusion above, I consider that the issue of prescription is not properly before the court because it has not been invoked in any "relevant documents filed of record in the proceedings". Despite the submissions made by Mr *Gillespie,* I do not consider that the respondent's opposing affidavit had the effect of invoking prescription. It merely stated that the respondent would suffer great prejudice. If the respondent wanted to invoke prescription it should have done so clearly and specifically so that the applicant would have been put on his guard and could have responded in his replying affidavit. The question of prescription was specifically invoked for the first time in the heads of argument furnished by *Mr Gillespie*. In my opinion, heads of argument cannot be regarded as documents filed of record in the proceedings. As the amendment is a claim in reconvention, it is necessary that it *prima facie* discloses a triable issue - see *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd & Anor* 1967 (3) SA 632 (D). The allegations made in the claim set out in the notice of amendment do disclose a proper cause of action.

The application is accordingly allowed and the applicant's plea filed of record in Case No. HC 2738/85 is hereby amended by the addition of a claim in reconvention as set out in the notice of amendment filed of record on 6 January 1988. Respondent is ordered to pay the costs of this application.

Scott area Associates, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

SOUTHAMPTON ASSURANCE CO OF ZIMBABWE LTD v MUTUMA & ANOR 1990 (1) ZLR 12 (HC)

Court **High Court, Harare**

Smith J

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Opposed motion

16 November 1989 & 17 January 1990

Flynote

Employment - Labour Relations Act, 1985 - definition of 'employee' - test to determine whether person is an employee - consideration of all factors in contract - insurance agent - independent contractor - control not that to sustain an employer/employee relationship

Headnote

The first respondent signed a contract with the applicant to work as an insurance agent. When the applicant sought to terminate the contract, the first respondent referred the matter to the second respondent, a labour relations officer. She determined that the first respondent was an employee as defined in the Labour Relations Act, 1985. The applicant sought a declaratory order that the relationship between it and the first respondent was not that of employer and employee, but that the first respondent was an independent contractor.

Held, that all the circumstances surrounding the contract must be considered to determine the issue, and no single factor could be treated as the sole basis of determining the issue. While the questions of control and supervision are important factors in determining the issue, they are not the sole criteria.

Held, further, that each contract must be considered in relation to the facts of the case, and little benefit is obtained by comparing the contract in issue with one in previous cases.

Held, further, that the organisation test formulated by DENNING LJ in *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101 (CA) was of no help in determining the issue.

SMITH J

Held, further, that on an analysis of the contract, and an examination of the working conditions of the first respondent, the first respondent was not an employee as defined in the Labour Relations Act, 1985, but an independent contractor. Declaration granted.

Cases cited:

Laws v Rutherfurd 1924 AD 261

Colonial Mutual Life Assurance Society Ltd v MacDonald 1931 AD 412

R v Feun 1954 (1) SA 58 (T)

R v AMCA Services Ltd & Anor 1959 (4) SA 207 (A)

Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB 1976 (4) SA 446 (A)

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Mhlongo & Anor NO v Minister of Police 1978 (2) SA 551 (A)

Rodrigues & Ors v Alves & Ors 1978 (4) SA 834 (A)

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A)

Stevenson, Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101 (CA)

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433 (QB); [1968] 2 QB 497

Sasverbijl Beleggings & Verdiskonterings Maatskappy Bpk v Van Rhynsdorp Town Council & Anor 1979 (2) SA 771 (W)

S v AMCA Services (Pty) Ltd 1962 (4) SA 537 (A)

FPS Ltd v Trident Construction (Pty) Ltd 1989 (3) SA 537 (A)

AP de Bourbon SC for applicant

MJ Gillespie for first and second respondents

Judgment

Smith J: The applicant carries on an insurance business in Zimbabwe and is a registered insurer in terms of the Insurance Act, 1987. The first respondent was a life assurance agent duly appointed by the applicant in an agreement entered into in March/April 1982 (hereinafter referred to as "the service contract"). By letter dated 14 July 1989, the applicant terminated the first respondent's appointment as a life assurance agent in terms of clause 73 of the service contract. The first respondent sought assistance from the second respondent who made representations to the applicant as a result of which the legal practitioner representing the applicant wrote to the second respondent stating that the first respondent was an independent contractor and not an employee. Accordingly the appointment of the first respondent had been validly terminated as his position was not governed by the Labour Relations Act, 1985, and the regulations made thereunder. The second respondent, in her reply, said that in her view the first respondent was an

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employee as defined in s 2 of the Labour Relations Act, 1985, and not an independent contractor. Therefore the provisions of that Act relating to the termination of service of employees should be complied with.

The applicant contends that the 1st respondent is in fact an independent contractor and not an employee as defined in s 2 of the Labour Relations Act, 1985, and therefore seeks a declaratory order to that effect.

In the papers the first and second respondents said that the applicant had previously submitted to a series of determinations and appeals in terms of the Labour Relations Act, 1985, in

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connection with the first respondent. Therefore it could not now regard the first respondent as an independent contractor and not as an employee. Mr *Gillespie* said that he would not rely on any argument that the applicant had waived his right to treat the first respondent as an independent contractor, but he did not concede the point. As the first and second respondents alleged waiver, the onus was on them to establish that the applicant, with full knowledge of its rights, decided to abandon them, either expressly or by conduct plainly inconsistent with an intention to enforce them - see *Laws v Rutherfurd* 1924 AD 261 at 263. This onus has not been discharged.

In s 2 of the Labour Relations Act, 1985, the term "employee" is defined as meaning:

> " . . . any person employed by or working for any employer, and receiving or entitled to receive any remuneration in respect of such employment or work . . ."

The *locus classicus* concerning the status of an insurance agent is *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412. At pp 434 435, DE VILLIERS CJ said:

> "But while it may sometimes be a matter of extreme delicacy to decide whether the control reserved to the employer under the contract is of such a kind as to constitute the employer the master of the workman, one thing appears to me to be beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract; in other words unless the master not only has the right to prescribe to the workman what work has to be done, but also the manner in which that work has to be done. In The *Queen v Walker* (27 LJMC 207) BRAMWELL

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> B put it in this way: 'A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.' In *Yewens v Noakes* (1880 6 QBD 530) the same learned Judge applied the same test. Pollock on Torts (12 ed pp 79-80) draws the same distinction: 'A servant is a person subject to the command of his master as to the manner in which he shall do his work... An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand.' So also does Salmond *Law of Torts* (6 ed p 96) ..."

The test of supervision and control enunciated by DE VILLIERS CJ, *supra*, has been followed in many other cases - see *R v Feun* 1954 (1) SA 58 (T), *R v AMCA Services & Anor* 1959 (4) SA 207 (A), *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A), *Mhlongo & Anor NO v Minister of Police* 1978 (2) SA 551 (A) and *Rodrigues & Ors v Alves & Ors* 1978 (4) SA 834 (A). In the *AMCA Services* case *supra* at pp 212-213 SCHREINER JA said:

> "But one naturally seeks a test by which to judge whether a person who in the widest sense works for another is really within the intention of the regulations. The first test to consider is that which is generally regarded as the most important for the purpose of deciding whether a person is a servant at common law, namely, whether the employer (using that word in a colourless sense) has the right to control, not only the end to be achieved by the other's labour and the general lines to be followed, but the detailed manner in which the work is to be performed. As I have indicated the principal reason for distinguishing between the servant and the independent agent is to fix the employer's liability for the other's delicts. To explain the reasons for the master's special liability for the delicts of his servant when he has not authorised them, and even when he has expressly prohibited them, has proved no easy task. The main reason may be historical, that, as Holmes put it in *The Common Law*, service is 'the decaying remnant of an obsolete institution', slavery. But at any rate if the employer can control, or at least has the right to

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control, the detailed manner of the other's work, it is not obviously unreasonable to hold the employer liable. But if the right of detailed control is crucial in deciding whether a person is a common law servant for the purposes of the law of delict, there seems to be no reason, in common sense, why it should be crucial in deciding whether a person is or is not an employee as defined in the present regulations."

SMITH J

In *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) the court considered what was meant by the term 'contract of service' in a particular statute. That term was construed as being equivalent to a common law contract of service. JOUBERT JA, who delivered the judgment of the court, analysed the distinction in Roman Law and in Roman-Dutch Law between *locatio conductio operarum* and *locatio conductio operis*, the former being the letting and hiring of personal services and the latter being the letting and hiring of a particular piece of work or job to be done as a whole. Then after referring to the "supervision and control" test enunciated by DE VILLERS CJ in *MacDonald*'s case *supra* he said at p 62:

"Insofar as the above *dictum* of DE VILLERS CJ regards the presence of the employer's right of supervision and control over the employee as an indispensable requirement for the existence of a contract of service (*locatio conductio operarum*) as distinct from a contract of work (*locatio conductio operis*) it must with due respect be qualified. The presence of such a right of supervision and control is indeed one of the most important *indicia* that a particular contract is in all probability a contract of service. The greater the degree of supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service. On the other hand, the greater the degree of independence from such supervision and control the stronger the probability will be that it is a contract of work. Cf *DeBeer v Thomson & Son* 1918 TPD 70 at 76; *AVBOB's* case, *supra*, at 456C. Notwithstanding its importance the fact remains that the presence of such a right of supervision and control is not the sole indicium but merely one of the *indicia*, albeit an important one, and that there may also be other important indicia to be considered depending upon the provisions of the contract in question as a whole.

In many cases it is comparatively easy to determine whether a contract is a contract of service and in others whether it is a contract of work but where these two extremes converge together it is more difficult to draw a border line between them. It is in the marginal cases where the so called dominant impression test merits consideration ..."

The learned Judge of Appeal considered whether the 'organisation' test formulated by DENNING LJ in *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101 (CA) was of use in distinguishing between an employee (*locator operarum*) and an independent contractor (conductor operis). After referring to questions concerning the

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'organisation' test raised by MACKENNA J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433 (QB) at 445G he concluded at p 63:

"In my view the organisation test is juristically speaking of such a vague and nebulous nature that more often than not no useful assistance can be derived from it in distinguishing between an employee (*locator operarum*) and an independent contractor (*conductor operis*) in our common law. In *R v AMCA Services Ltd & Anor* 1959 (4) SA 207 (A) SCHREINER JA in applying the definition of 'employee' as stated in certain regulations under a War Measure had occasion to use the organisation test without referring to it by name (at 213 *in fine*-214C and G-H). The

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manner in which he used it appears clearly from the judgment of BOTHA JA in *S v AMCA* Services (Pty) Ltd 1962 (4) SA 537 (A) at 541F:

> 'It is, I think, clear that this test, which may be called the organisation test, was not used by SCHREINER JA for the purpose of deciding whether a person is employed by or works for another, but for the purpose of excluding from the wide scope of the regulations persons who, though they may in a sense be said to be working for another, are not 'employed by or working for' such other person within the meaning of the regulations. It follows therefore that the organisation test cannot be used to bring within the regulations persons who do not work for another.'"

In my opinion, MARGO J in *Sasverbijl Beleggings & Verdiskonterings Maatskappy Bpk v Van Rhynsdorp Town Council & Anor* 1979 (2) SA 771 (W) at 776F succinctly expressed the legal position as follows:

> "It may be that under modern industrial conditions, where a person is employed to exercise skill or expertise according to his own judgment, the question of the right to control the method of doing the work is not always an essential characteristic of a master and servant relationship. Cf. *R v AMCA Services Ltd & Anor* 1959 (4) SA 207 (A) *per* SCHREINER JA at 211, and the discussion there on *Short v Henderson Ltd* 1946 Sc Lt 231. While the questions of control and the degree thereof are usually the most important considerations in testing whether the relationship of master and servant existed, they are not always decisive. There may be valid considerations pointing the other way. Each case must accordingly be decided in the light of its own particular circumstances."

The service contract provides that the applicant appoints the first respondent

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as its agent for specific purposes. These are, to obtain new business exclusively for and on behalf of the applicant and to maintain, preserve and service the new business he has introduced and, when called upon to do so by the controlling manager, to maintain preserve and service other business of the applicant. Business is defined as meaning the negotiation, maintenance and renewal of life assurance, endowments, retirement annuities or any other business of a similar nature. Until the first respondent obtained a permanent Insurance Agent's (Life) licence and had been appointed a qualified member of the applicant's field staff, he was on probation. The first respondent was obliged to keep complete and proper records of all premiums received by him and, on the termination of his appointment, he was obliged to hand over such records to the applicant. The applicant was required to provide him with such documents as it considered necessary to enable him to carry out his duties but such documents remained the property of the applicant and were to be returned to it on the termination of the agreement. The applicant undertook to pay medical fees in respect of applications for assurance with certain exceptions, in which case the first respondent would be responsible for the medical fees. The applicant had the right to settle such fees and recover the amount involved from the first respondent. The first respondent was personally responsible for all expenses in connection with his duties and was not permitted to incur any debts on behalf of the applicant. The agreement was personal to the first respondent and could not be ceded or assigned. The first respondent was prohibited from effecting or negotiating life business for any other life assurance company. He was also prohibited from being connected with or interested in any other similar appointments with any other life assurance company or any other occupation or business activity without the prior consent or knowledge of the applicant. The applicant was entitled to allot the first respondent an area of operation and he was not entitled

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to canvass outside that area without the applicant's permission. The remuneration of the first respondent was in the form of commission at a specified rate. The applicant was entitled to terminate the agreement on seven days notice if no new applications were received from the first respondent and accepted by the applicant in any three-month period. If any dispute arose between the applicant and the first respondent as to the construction of the service contract or the rights, duties or obligations of either party thereunder, the dispute was to be referred to the applicant's auditors whose decision on the matter would be final and binding upon both parties.

When the first respondent was first appointed as a life agent he was paid what is known as an advance factor. That is, he was loaned money by the applicant

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to assist him during his probation and training period. The loans were regarded as advances against the commission he would later receive. He had paid off the debts on his advance factor account within 18 months of his appointment and shortly thereafter was offered the post of Training Officer, which was a salaried appointment. He held the post for two years, whilst at the same time also performing the duties of a life agent. He relinquished the extra responsibilities of the post because the salary he was paid therefor did not compensate for the reduction in commission earnings.

The first respondent alleges that the applicant exercises a substantial degree of supervision and control over life agents. A hierarchical system prevails. In overall charge there is a General Manager (Agency) who is a salaried official. Under him there are two Regional Managers and under them there are eight District Managers. These controlling managers are all themselves agents who earn commission on their own business and also on the business of the agents who report to them. As regards the life agents, some are classed as senior representatives and others as executives. The senior representatives and executives are expected to attend monthly management meetings with the controlling managers and the General Manager (Agency). Each life agent is required to submit his business through his own particular controlling manager. The controlling manager is expected to ensure that each life agent secures a sufficient volume of new business and to report on poor performance.

The applicant provides of rice accommodation and telephone services for life agents but not transport. After completion of his probationary period, a life agent is entitled to participate in the medical aid and pension schemes established by the applicant, with the applicant paying the 'employer's contribution'. Unlike salaried members of the applicant's staff, however, membership of these two schemes is not compulsory. The applicant deducts income tax from the earnings of life agents because s 62 of the Income Tax Act [*Chapter 181*] requires it to do so. However life agents are permitted to deduct expenses such as costs of fuel for motor vehicles, telephone charges and all 'business related expenses' as a charge against income tax due by them.

The first respondent alleges that although the life agents are afforded a certain independence of operation, that is only after a thorough process of selection, involving interviews, training courses throughout the period of appointment which the life agents are expected to attend and

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a probationary period involving continuous supervision by the controlling manager and Training

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Officer. He correctly points out that the life agents are specifically referred to in the service contract as the applicant's 'field staff'. An affidavit by another life agent employed by the applicant was filed in support of the affidavit by the first respondent. There were few new matters raised therein. He said that each life agent was required to submit an annual budget setting out the anticipated business and forecast sales for each month which was used by the District Manager as a 'performance indicator'. If a particular life agent did not attract sufficient business, he would be warned and reported to the General Manager. Each life agent was obliged to report to the District Manager at monthly meetings, attendance at which was compulsory. The applicant denied that it was obligatory for life agents to attend the monthly meetings, but said that it had become a practice in the smooth running of the whole operation.

In *S v AMCA Services (Pty) Ltd* 1962 (4) SA 537 (A), the court was required to determine whether persons employed by a company to collect payments due in respect of policies of insurance or savings accounts were employees as defined in certain regulations. The definition in those regulations was identical to that contained in s 2 of the Labour Relations Act, 1985, *viz* "any person employed by or working for any other person and receiving or being entitled to receive in respect of such employment or work any remuneration". At pp 542-543 BOTHA JA said:

> "As was pointed out by SCHREINER JA at p 210 of the previous case, the expression
>
> > 'employed by' seems to be a colourless expression and in any event, since by definition it has a corresponding meaning to 'employee', it cannot help to define the latter.'
>
> The learned Judge of Appeal accepted that the expression 'working for' a person, which may be more naturally applicable to *locatio conductio operarum*, may suggest something slightly different from 'doing work' for him, which again is an expression more naturally applicable to *locatio conductio operis,* but nevertheless concluded that both expressions 'can cover both continuing or regular work and doing a job'. But there seems to me to be another important distinction between the two expressions, a distinction which it was not necessary to consider for the purposes of the decision in the earlier case, namely, that 'working for' a person implies the rendering of personal services generally or of a particular kind, which is a characteristic of the *locatio conductio operarum*, and which is neither implied by the expression 'doing work' for

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> another, nor a characteristic of the *locatio conductio operis.* This distinction is more clearly apparent between 'working for' a person, and 'having work done' for him. The latter expression clearly does not imply the rendering of personal services as does the former, but merely the production of a certain result by the labour of others.
>
> It follows that in my view the expression 'working for any other person' in the definition of 'employee' should be construed as implying the rendering of personal services. A person who is not bound to render his personal services to another cannot, therefore, be said to be 'working for' that other person within the meaning of the definition. I should add that it does not, however, follow that every person bound to render his personal services, necessarily falls within the intention of the regulations."

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I agree, with respect, with the remarks of the learned Judge of Appeal. An employee for the purposes of the Labour Relations Act, 1985, is a *locator operarum*. The question of whether or not in any particular case a person is a locator operarum must be determined according to the various indicia contained in the contract between the parties. In *Smit*'s case *supra* JOUBERT JA said that there was a strong resemblance between the contract in the matter under consideration and the contract under consideration in *MacDonald*'s case *supra*. He remarked that "with painstaking care counsel sought to compare similarities and differences between the provisions of the two contracts" and said that such an approach was not helpful. It seldom happened that the wording of two contracts was identical. He held that in construing a particular contract, regard had to be had to the wording of its own provisions as a whole. That was the approach adopted by EKSTEEN JA in FPS *Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) and I intend to adopt the same approach. I do not consider that it would be helpful to attempt to apply the "organisation" test formulated by DENNING LJ which I have referred to earlier.

The main features of the service contract and other conditions of service of the first respondent can be summarised as follows:

(a) he is specifically appointed as an agent and is referred to as such throughout the agreement;

(b) he receives no salary but is remunerated solely by way of commission earned;

(c) his working hours are left to his individual discretion;

(d) he is not entitled to vacation, sick or any other form of leave. However

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he can take a vacation whenever he so wishes, without having to obtain the consent of the applicant;

(e) the records he keeps of premiums received by him are his own property and, as long as his appointment subsists, cannot be taken from him by the applicant;

(f) he is not provided with a motor vehicle and is personally responsible for all expenses incurred by him in obtaining business. Furthermore these expenses can be claimed as deductions for the purposes of assessing taxable income;

(g) he is not required to devote the whole of his working time to his duties under the service contract. He is free to do whatever other work he chooses save that he is prohibited from effecting or negotiating life business for any other life assurance company. The service contract provides that he shall not be connected with or interested in any similar appointments with any other life assurance company or any other occupation or business activity without prior consent or knowledge of the applicant. This provision is very clumsily drafted and its meaning is obscure. *Prima facie*, however, and having regard to the *contra proferentem* rule, it appears to me that

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the first respondent is entitled to engage in any other occupation or business activity as long as the applicant has knowledge thereof;

(h) the applicant cannot require him to carry out any functions or duties other than those related to the life assurance business specified in the service contract;

(i) although he is entitled to join the applicant's pension and medical aid schemes, he is not required to do so;

(j) if any dispute or difference arises between him and the applicant concerning the construction of the service contract or the rights, duties and obligations of either party, it is referred to arbitration;

(k) there is no code of conduct laid down by the applicant covering life agents.

In my view, all these factors indicate that the first respondent's relationship with the applicant is that of an independent contractor. The degree of supervision and control is, in my opinion, minimal. The training is what one would expect to be given to anyone entering a new occupation. The controls over the premiums received by the first respondent for payment to the applicant and the hierarchical system under which life agents report through district managers to regional managers and then to the General Manager (Agency) do not, in my opinion, give the applicant control over the manner in which the first respondent obtains life assurance business. The restriction

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that he may canvass for life assurance business only within a specified area, likewise, is not a factor that enables the applicant to control the manner in which he performs his duties. In my view, it cannot be said that the applicant "provides work" for the first respondent. It is the first respondent himself who is required, if he wants to earn any remuneration, to go out and find the work. With the proviso that he may only find the life assurance business within a specified area, he is free to decide how he shall go about finding the business and what hours he will devote thereto. He may at the same time engage in any other activity, excluding effecting life business for another life assurance company, as long as he informs the applicant thereof.

Accordingly, it is ordered that:

1. the first respondent was not en employee, as defined in s 2 of the Labour Relations Act, 1985, of the applicant but was an independent contractor;

2. the first and the second respondents shall pay, jointly and severally, the Done paying, the other to be absolved, the applicant's costs in this action.

Condy, Chadwick and Elliott, applicant's legal practitioners

George Seirlis and Associates, first respondent's legal practitioners

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

ATTORNEY-GENERAL v PAWENI TRADE CORP (PVT) LTD & ORS 1990 (1) ZLR 24 (SC)

Court **Supreme Court, Harare**

Gubbay JA, Manyarara JA & Korsah JA

Application for leave to appeal and criminal appeal

15 May 1989 & 18 January 1990

Flynote

Criminal law - fraud - essential elements - causation

Appeal - Attorney General - right of appeal under Supreme Court of Zimbabwe Act, 1981 s 11A - error of fact must be inconsistent with logic and commonsense.

Criminal procedure - liability director for crimes committed by company - Criminal Procedure and Evidence Act [Chapter 59] s 357(5) - onus director must show he did not participate in acts or could not have prevented commission of offence.

Company - liability of director for crimes committed by company.

Evidence - circumstantial evidence - inference - proof of facts.

Criminal procedure (sentence) - fraud - prejudice of $1 352 906,20 - appropriate sentence - no purpose served by imposing longer sentence of imprisonment and suspending part.

Headnote

The three respondents were tried before the High Court (SANSOLE J and assessors) on 14 counts of fraud and alternative charges of theft. The first respondent (the company) was convicted of 11 counts of fraud and cautioned and discharged. The second respondent was convicted of 8 counts of fraud and sentenced to 25 years imprisonment, of which 7 years' imprisonment was suspended. The third respondent was acquitted of all charges. The Attorney-General sought leave to appeal against all the acquittals. The second respondent also sought leave to appeal

against the charges on which he was convicted, and against sentence. The applications were heard at the same time as the actual appeals. The Supreme Court held that the first respondent was correctly acquitted of 3 charges, but the third respondent should not have been acquitted on those counts for which the company was convicted.

Held, that a person is guilty of fraud even if the party to whom the false representation was made did not act on it to his prejudice.

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Held, further that the right of the Attorney-General to appeal against an acquittal in the High Court can be based on a point of law, including the proper construction of a statute, or upon a submission that the acquittal was based on a view of the facts which could not be reasonably entertained. This would include a determination as to what inferences ought properly to be drawn from the proved facts.

Held, further that a company director was personally liable to be convicted for a crime committed by his company unless he proved that he did not participate in the commission of the offence and also that he could not have prevented it. If the evidence is neutral of these points, he must be convicted.

Held, further that the appropriate punishment for the second respondent was 18 years' imprisonment. No principle of sentencing required an additional period of imprisonment being suspended.

Cases cited

R v Seabe 1927 AD 28

R v Heyne & Ors 1956 (3) SA 604(A)

S v Ostilly & Ors 1977 (2) SA 104(D)

R v Kruse 1946 AD 524

Attorney-General v Muganiyi S-109-86 (not yet reported)

Attorney-General v Regional Magistrate, Eastern Division & Anor S-75-87 (not yet reported).

Attorney-General v Bvama & Anor S-111-87 (not yet reported)

R v Sibanda & Ors 1965 RLR 363 (A); 1965 (4) SA 241 (SRA)

Edwards v Bairstow [1956] AC 14; [1955] 3 All ER 48 (HL)

Mallalieu v Drummond [1983] 1 All ER 801(CA)

R v Theron 1960 (3) SA 331 (T)

S v Avon Bottle Store (Pty) LTD *& Ors* 1963 (2) SA 389 (A)

S v Salama Taxis (Pty) Ltd & Ors 1964 (1) SA 371 (C)

S v Bledig & Anor 1974 (1) RLR 100 (A); 1974 (2) SA 613 (RA)

S v Moyo 1979 (4) SA 61 (ZRA)

R v Sargeant (1974) 60 Cr App Rep 74 (CA)

S v Sharma S-117-84 (not reported)

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S v Chirata & Ors S-41-86 (not reported)

S v Chitongo S-122-86 (not reported)

S v Chikopa 1984 (1) ZLR 209 (SC)

S v Gorogodo S-192-88 (not yet reported)

IJ Houston for the appellant

No appearance for the first respondent

E Chatikobo for the second and third respondents

Judgment

Korsah JA: Fourteen counts of fraud were preferred against the three respondents together with twelve alternative counts of theft. The trial court acquitted the respondents of all the alternative counts alleging theft and with regard to the counts charging fraud the first respondent on Courts 5, 8 and 9, the second respondent in respect of Counts 5, 8, 9, 11, 12 and 13, and the third respondent in respect of all counts. On 20 November 1986 the first respondent, being an artificial person, was cautioned and discharged. The second respondent, upon his conviction on eight counts of fraud involving an actual prejudice to the State of $1 352 906,20 was sentenced to serve a total of twenty-five years' imprisonment with labour of which seven years' imprisonment with labour was suspended for a period of five years.

On 27 November 1986, in pursuance of s 11A of the Supreme Court of Zimbabwe Act 1981, the Attorney-General applied to a judge of the Supreme Court for leave to prosecute an appeal against the judgment of the High Court in respect of the counts on which the respondents were acquitted, on the basis that the trial court acquitted the respondents on a view of the facts which could not reasonably be entertained. A draft notice of appeal setting out the appellant's grounds of appeal was annexed to the application. GUBBAY JA, before whom the application was placed in Chambers, ordered that the Attorney-General's application for leave be argued before a panel of three judges, so that if the application was granted the appeal would immediately be entertained. The second respondent, who was granted leave to appeal by the trial court against both his convictions and sentence, but had not noted his appeal timeously, was granted an extension of time within which to set his house in order, and appealed against his conviction on all counts on which he was found guilty, as well as the *quantum* of the sentence imposed.

In the heads of argument filed on behalf of the appellant, the Attorney-General conceded that the acquittals of all three respondents on Count 5 were not being challenged; nor were the acquittals of the second respondent in respect of Counts 9 and 12 made the subject of appeal. Thus, as regards the

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third respondent his acquittal on each count, save Count 5, is the subject of appeal, as is the case with the first respondent. The appellant also intimated that it pursues its appeal against the trial court's failure to consider the alternative counts of theft only in respect of the first and third respondents.

The first respondent is a limited liability company registered under the laws of Zimbabwe. It had an office in Mutare managed by the second respondent. Some time in 1983 the first respondent entered into an agreement with the Government of Zimbabwe, through the Ministry of Labour and Social Welfare (presently known as the Ministry of Labour, Manpower Planning and Social Services) to ferry drought relief food at twelve-and-a-half cents per loaded tonne per kilometre.

It is alleged by the S tale that delivery notes and consignment notes forged by the second respondent were used to support invoices which were submitted by the first respondent for payment by the Government as genuine claims, whereas the second respondent knew that these claims were not genuine and that by such fraudulent misrepresentations he induced the State to pay to the first respondent a sum of $3 389 140,60, to which the first respondent was not entitled.

As regards the third respondent, the State alleged that he was a director of the first respondent and sought to invoke against him the provisions of s 357 (5) of the Criminal Procedure and Evidence Act [*Chapter 59*].

In terms of subs (10) of s 357:

> "'director' in relation to a corporate body, means any person who controls or governs that corporate body or who is a member of a group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body."

Generally speaking, fraud consists in knowingly making a false representation of fact with the intention to defraud the party to whom it is made, and such false representation actually causes prejudice or is potentially prejudicial to another.

It was not disputed that the invoices, in the fourteen counts which were submitted by the first respondent to the State, represented false claims. However, in order to determine the involvement of each of the respondents in charges levelled against them, it is necessary to consider the evidence

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adduced by the State in support of each count and the answer of each respondent to that evidence.

[The learned Judge of Appeal analysed the general evidence and the evidence in respect of each count. In dealing with count 11, he made the following observations on the law of fraud.]

Now, "fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another". See Vol II of Hunt's *South*

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African Criminal Law and Procedure 2 ed p 755.

It seems to me, therefore, that if a person, with intent to defraud, unlawfully makes a false representation which is potentially prejudicial to another, he commits the offence of fraud. It is not necessary that the representation be acted upon by the party to whom it is made, to his prejudice, in order to constitute the offence. It is sufficient that the false statement was made with intent to defraud.

As WESSELS JA observed in *R v Seabe* 1927 AD 28, regarding the prejudice necessary to support a charge of fraud, at p 32:

> "It seems to me therefore that where there is some risk, though perhaps slight, the element of prejudice necessary to support *crimen falsi* exists."

In *R v Heyne & Ors* 1956 (3) SA 604 (A), SCHREINER JA commented at p 622 that:

> "It is unnecessary to discuss in detail the views that have at different times been expounded on the subject. There has been some development or clarification of the law. Today it seems correct to say that the false statement must be such as to involve some risk of harm, which need not be financial or proprietary, but must not be too remote or fanciful, to some person, not necessarily the person to whom it is addressed."

And KUMBELEN J said in *S v Ostilly& Ors* 1977 (2) SA 104 (D) at 115H-116B:

> "The causative link between any misrepresentation and the actual or potential result is, to my mind, an important element of the offence and a vital aspect of the enquiry in this case. In this regard I respectfully agree with the observation by Hunt in *South African Criminal Law and*

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> *Procedure* Vol II that this causative element is implicit in the concept of potential prejudice. At p 728 the learned author says:
>
> > 'It is often stated that there must be a causal link between the misrepresentation and the actual or potential prejudice. The word "potential", however, incorporates in itself a test of causation. "Potentiality" is a way of referring to causation. It is therefore logically redundant to say that the misrepresentation must cause the potential prejudice: if the misrepresentation is potentially prejudicial, the law's causation requirements will have been satisfied.'"

Finally, *Hunt*, in the second edition of his work, gives following examples at p 769:

> "It suffices here to emphasize that:
>
> (1) It usually does not matter at all that Y neither believed nor was induced to act to his prejudice upon X's misrepresentation, as where X fraudulently misrepresents to Y that some pieces of glass are diamonds - something which Y knows very well. Though there is not actual prejudice, there is usually potential prejudice.
>
> (2) Likewise, if Y actually ends up better off, as when the shares he is induced to buy appreciate through the sudden discovery of oil, there is nevertheless potential prejudice.
>
> (3) In many cases of actual prejudice, even if it is not clear that the prejudice was caused by the misrepresentation, X will still be convicted because of the potential prejudice."

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See *R v Kruse* 1946 AD 524, where part of the headnote reads:

> "Where an accused makes a false representation in order to induce the represented to part with his property and he obtains the property, if the false representation is of such a nature as, in the ordinary course of things, to be likely to prejudice the complainant, the accused cannot success fully contend that the crime of fraud is not established because the Crown has failed to prove that the false representation induced the complainant to part with the property."

[Having analysed the evidence, the learned Judge of Appeal then dealt with the appeal in respect of the third respondent.]

It was submitted by the State that the trial court erred in not convicting the third respondent in respect of all counts proven against the first respondent,

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either -

(a) because the facts proved established, as the only reasonable inference, personal involvement in the frauds; or

(b) because of the provisions of s 357(5) of the Criminal Procedure and Evidence Act [*Chapter 59*].

In the consideration of the above alternative submissions, one must be alive to the provisions of s 11A(1) of the Supreme Court of Zimbabwe Act 1981, which confers on the Attorney-General the right to:

> ". . . seek[s] the leave of a judge of the Supreme Court to appeal against the judgment of a court -
>
> (a) on a point of law; or
>
> (b) because it has acquitted or quashed the conviction of any person who was the accused in the case on a view of the facts which could not reasonably be entertained . . ."

In my view, the second of the submissions made by Mr *Houston* regarding the application of subs (5) of s 357 of the Criminal Procedure and Evidence Act to the finding of fact made by the trial court raises a point of law, because a proper construction of statutory language is always a matter of law; and if the statutory language is misunderstood, error may be occasioned in the application of it. Whereas the first of the alternative submissions is grounded purely on the inferences to be drawn from the proven facts. Thus, with regard to the first of the alternative submissions, the State bears the burden of establishing that the trial court acquitted the third respondent on all fourteen counts "on view or the facts which could not reasonably be entertained". Mr *Chatikobo*, for the second and third respondents, contended that the Attorney-General, in inviting this Court to exercise its powers in terms of s 11A(1) of the Supreme Court of Zimbabwe Act to reverse the acquittal of the respondents on any of the counts appealed, must establish that the acquittal rested on a view of the facts which could not reasonably be entertained. This argument, of course, overlooks the fact that s 11A(1) also empowers this Court to sustain an appeal on a point of law, because subpara (a) and (b) of s

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11A(1) are to be read disjunctively and not conjunctively. So that Mr *Chatikobo* is right in his contention only where the State seeks to impeach the acquittals on the ground that, as regards the third respondent, the only reasonable inference to be drawn from the proven facts was that he was personally involved in the frauds.

Mr *Chatikobo* said that, as far as he was aware, this Court has been called

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upon in only three cases, viz *Attorney-General v Muganyi* S-109-86 (not reported), *Attorney-General v Regional Magistrate, Eastern Division & Anor* S-75-87 (not yet reported), *and Attorney-General v Bvama & Anor* S-111-87 (not yet reported), to exercise the powers bestowed on it by 11 A(1)(b) of the Supreme Court Act. And that in none of those decisions did this Court hear argument, or pronounce, on what is the correct interpretation of the phrase "on a view of the facts which could not reasonably be entertained", which is the basis of the appeals based on errors of facts.

In *Attorney-General v Muganyi, supra*, the issue before the court was essentially what constitutes "reckless driving" as it appears in s 44(1) of the Road Traffic Act, 1976. Thus the question for determination was the proper construction of a statutory provision which, as I pointed out earlier, raised a point of law, and it was not necessary for the court to advert to the phrase "on a view of the facts which could not reasonably be entertained", in order to resolve the issue.

Likewise, in *Attorney-General v Regional Magistrate Eastern Division & Anor supra,* the question for resolution was whether any statute extant confers upon the Attorney-General a right to appeal against an interlocutory ruling, albeit on a point of law, made during the course of a criminal trial in the magistrate's court that has not yet terminated. Here again, the issue being a point of law, the phrase "on a view of the facts which could not reasonably be entertained" had no relevance to the determination of it.

In *Attorney-General v Bvuma & Anor supra,* the paramount question for resolution was whether or not the Attorney-General has a right of appeal on a question of fact upon an acquittal by the magistrates court upon a submission of no case to answer in terms of subs (3) and (3a) of s 188 of the Criminal Procedure and Evidence Act. And the CHIEF JUSTICE was, in my view, rightly disinclined to venture an interpretation of the phrase "on a view of the facts which could not reasonably be entertained", because no evidence was led on three counts and the evidence on the fourth count was inconclusive.

In the instant case, however, the court is faced squarely with the burden of shedding some light on the meaning of the phrase, because the State asserts that on the proven facts the only reasonable inference is that the third respondent was personally involved in the frauds and should be convicted on every count for which the first respondent was found guilty

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KORSAH JA

I am in complete agreement with *Mr Chatikobo* that it is not every error of fact which entitles the Attorney-General to lodge an appeal. In my view, it is only when the inference drawn from the primary facts is so inconsistent with logic and commonsense that die Attorney-General can succeed It seems to me that, in determining the parameters of the phrase under consideration, the court is in a way concerned with the rules governing circumstantial evidence; for the court is merely drawing inferences from the proven facts. And as BEADLE CJ observed in *R v Sibanda & Ors* 1965 RLR 363 (A) at 370 A-C; 1965 (4) SA 241 (SRA) at 246 B-C:

> "Generally speaking, when a large number of facts, taken together, point to the guilt of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt, it is sufficient if there are reasonable grounds for taking these facts into consideration and all the facts, taken together, prove the guilt of the accused beyond reasonable doubt: See *R v de Villiers* (1944 AD 493). Where, however, there is a particularly vital fact which in itself determines the guilt of an accused, it must be proved beyond reasonable doubt."

To my mind, then, if there are reasonable grounds for taking certain facts into consideration, and all the facts, when taken together point inexorably to the guilt of an accused beyond peradventure, but the trial court nonetheless acquits the accused, then the trial court has taken a view of the facts which could not reasonably be entertained. Put another way, if, on a view of the facts, the court could not reasonably have inferred the innocence of the accused, then the verdict of acquittal is perverse, and the Attorney-General is entitled to attack it.

VISCOUNT SIMONDS, delivering his opinion in *Edwards v Bairstow* [1956] AC 14 at 29; [1955] 3 All ER 48 (HL) at 53E-F made reference to the phrase under consideration. He said:

> "The determination cannot stand: this appeal must be allowed and the assessments must be confirmed. For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence, or **on a view of the facts which could not reasonably be entertained.** It is for this reason that I thought it right to set out the whole of the facts as they were found

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> by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts as they are sometimes called do not, in my opinion, justify the inference or conclusion which the commissioners have drawn; not only do they not justify it but they lead irresistibly to the opposite inference or conclusion" (emphasis added).

In the same case LORD RADCLIFFE also expressed himself in his speech thus at p 38-39; 59 C-E:

> "As I see it, the reason why the courts do not interfere with commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business, or any other matters. The reason is simply that, by the system that has been set up, the commissioners are the first tribunal to try an appeal and, in the interests of the efficient administration of justice, their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the

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subjects that commissioners deal with, or to invite the courts to impose any exceptional restraints on themselves because they are dealing with cases that arise out of facts found by the commissioners. **Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado**" (emphasis added).

SIR JOHN DONALDSON MR, applying these principles enunciated in *Edwards v Bairstow supra,* to the facts in *Mallalieu v Drummond* [1983] 1 All ER 801 (CA), said at p 803 h-j:

"That case establishes that where the facts warrant a determination either way, the issue is one of degree and is therefore a question of fact (see [1955] 3 All ER 48 at 56; [1956] AC 14 at 33 per Lord Radcliffe), but that, if the facts found are such that no person acting judicially, and properly instructed as to the relevant law, could have come to the determination under appeal, the court must intervene and that it does so on the basis that there is no evidence to support the determination or that the evidence is inconsistent with and contradictory of the determination or that the true

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and only reasonable conclusion contradicts the determination" (see [1955] 3 All ER 48 at 57, [1956] AC 14 at 36 per LORD RADCLIFFE).

What then, were the facts before the trial court from which it may, or may not, be inferred that the third respondent was privy to the first respondent's fraud.

Direct evidence of the third respondent's involvement in the fraud com misted by the first respondent under Count 1 came from Gideon Govere, Eric Chinaka and John Chinaka:

Govere met Haruperi at Haruperi's restaurant in town and demanded that the first respondent refund to the Ministry a sum of $4.7 million, which had resulted from the first respondent overcharging the Ministry for transportation of drought relief food. Govere threatened that he was not going to certify for payment the first respondent's vouchers which he was holding in his hand. We are not told the number of vouchers, nor indeed the requisitions to which they related.

Govere returned to his office and met Haruperi after work, as pre-arranged, at the restaurant. Haruperi bought drinks and when Govere was departing gave him some money for petrol. When they met the following day Haruperi gave Govere $1 500 and said:

"If you close these vouchers, then the Company will in turn look after you",

and promised to introduce Govere to the third respondent.

It was when Govere met the third respondent at Southampton House and the matter of the overcharging was discussed that Govere agreed to take back the incorrect vouchers to his office ad pass them for payment. After passing them for payment he was given $3 000 by the third respondent to keep quiet about the overcharging. There was evidence that the third respondent informed Govere, whether truly or falsely, that the overcharging was known to the Ministry and that he was in a position to compensate him financially if he would keep quiet about it and not pursue the recovery of the sums over charged.

This, in my view, is supportive evidence of the state of mind of the third respondent, that he

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knew about the fraud being perpetrated by the first respondent and, at the very least, gave his blessing to it.

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John Chinaka, as at April 1982, was employed at the Central Payments Office as Senior Executive Officer. His functions included the supervision of all claims made by Government creditors. He processed vouchers through a computer and issued cheques for their payment.

In early October 1983 the third respondent visited the Central Payments Office, in the company of Haruperi, to query the late payment of the first respondent's claims against the Ministry. John Chinaka referred them to the Ministry of Labour, as the vouchers in respect of which the query related had not reached the Central Payments Office. A few days later Haruperi went to the Central Payments Office to collect some cheques for the first respondent which were ready for collection, and invited John Chinaka to his restaurant.

The purpose of this invitation was to elicit from John Chinaka information about how to get claims by the first respondent cleared speedily. John Chinaka advised that the first respondent had to get the Senior Accountants of the Ministry of Labour to mark them "Urgent".

Some time after his encounter with Haruperi and the third respondent, John Chinaka's brother, Eric Chinaka, was offered, on the immediate payment of a sum of $3 900, a business stand in Mutare. Neither John nor Eric had at hand that amount of money. So John telephoned Haruperi to ask whether he or the third respondent could favour him (John) with a loan. Haruperi later telephoned John to say that the third respondent was prepared to grant him a loan of $3 900; and John gave the particulars of the stand in Mutare to Haruperi. Later, the third respondent telephoned John Chinaka to assure him that he had paid for the stand in Mutare, and John went to the third respondent's of rice to collect the receipt, Exhibit 12, which he posted to his brother in Mutare.

After this, the third respondent personally went to the Central Payments Office with a voucher, Exhibit 19, for the payment of $1.5 million and took it directly to John Chinaka. It is to be noted that vouchers are normally received from the various Ministries at the Central Payments Office through the Ministry's officers and messengers and not from the payee himself. Apart from this procedure being irregular, it is yet another factor which is also illustrative of the direct participation of the third respondent in the affairs of the first respondent. The third respondent himself admitted that he had been given the voucher to rush it to the Central Payments Office because he wanted an urgent payment made on it.

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The third respondent left exhibit 19 with John Chinaka and departed. John Chinaka instructed the clerks to process it and produce a manual cheque, by himself writing on the voucher and words "Manual cheque". The cheque was collected in the afternoon of the same day, and the third respondent telephoned John Chinaka to inform him that he had received the cheque and

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invited John Chinaka to pass through the third respondent's office on his way home. John Chinaka complied with the third respondent's request and the third respondent thanked him for processing Exhibit 19 urgently and gave him a cheque for $1 500 (Exhibit 10) for doing so. On the stub relating to that cheque is written: "Chinaka for cabbages".

Later the third respondent told John Chinaka to forget about the repayment of the loan, and the matter was never again discussed. No demand was ever made, nor repayment effected. Eric Chinaka never knew who his benefactor was.

Exhibit 19 was faulty in many respects, but was nonetheless processed for payment. It was not date-stamped in the top left corner. At the bottom where it says: "Pass for payment"' it was not certified; and where it says: "Audit office Examined", there is no signature to indicate who examined it. It was, however, certified correct, and two people from Social Services signed it. The Central Payments Office collection book indicates that the cheque was collected by Mr Mavunga.

Exhibit 19 relates to Count 1 which has been established to be a fraudulent claim. In relation to Govere, the trial court held that he had been bribed, but that these bribes were not to facilitate the commission of fraudulent acts but to dissuade him from pursuing the recovery of over-payments already made to PTC. This is a distinction without a difference. And when one takes into consideration the fact that the trial court found that, after being bribed, Govere processed other claims for the first respondent "knowing full well that they were false"' then the trial court's restrictive interpretation regarding the circumstances surrounding the bribing of Govere is so outrageous in its defiance of logic that no court applying its mind to the question to be decided could arrive at such a conclusion.

I find favour with Mr *Houstons's* submission that the only reasonable inference to be drawn from the bribing of Govere by the third respondent is that, not only was he bribed not to pursue the recovery of money already paid to the first respondent, but also to induce him to process other claims without question. The tenor of the whole of Govere's testimony, I agree with Mr

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Houston, was to the effect that he was expected to pass subsequent claims of the first respondent for payment even if they were false. It is also the only reasonable inference that the third respondent intended the bribe to Govere to have this effect. How could Govere keep quiet about the previous overcharges which he knew of, and complain about other fraudulent claims submitted for approval by the first respondent? By accepting a bribe from the third respondent he became so tainted that he could not betray the first respondent without betraying himself.

Similarly, in relation to John Chinaka, having accepted a gratuitous payment on behalf of his brother, he processed Exhibit 19 speedily and received $1 500 for his services. This amount of $1 500 paid by the third respondent to John Chinaka was not only for that one payment in respect of other claims of the first respondent. I am again in entire agreement with Mr *Houston* that the only reasonable inference that can be drawn from the sequence of events is that the third respondent was ensuring by bribery that claims which he knew to be fraudulent would be

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passed for payment by Chinaka.

Now, having set up the machinery whereby the fraudulent claims by the first respondent would be processed for payment at the Ministry of Labour and Social Services, where Govere worked as the Principal Executive Officer in charge of the whole Accounts Department of the Ministry, and payment of the fraudulent vouchers effected at the Central Payments Office, where John Chinaka was employed as Senior Executive Officer, the third respondent was in clover. There was no need for him to personally attend to each claim submitted by the first respondent for payment. He had by bribing the two officials of the Ministries concerned, effectively eroded the will, if there ever was any, of those officers so tainted to resist the processing of fraudulent claims submitted by the first respondent. He had in effect paved the way for each fraudulent claim to be smoothly processed from beginning to end without further ado. He, it was, who fashioned the mechanism for defrauding the State.

If I may borrow the words of VISCOUNT SIMONDS in *Edwards v Bairstow supra,* the primary facts do not justify the inference or conclusion which the trial court drew, that the third respondent was found guilty; not only do they not justify it, but they lead irresistibly to the opposite inference or conclusion. The involvement of the third respondent in the bribing of Ministry officials demonstrates that he was personally and actually involved in the perpetration of fraud on the Ministry. Any other conclusion would be in defiance of logic.

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I turn now to the interpretation which the trial court placed on subs (5) of s 357 of the Criminal Procedure and Evidence Act. The section recites that:

> " (5) When an offence has been committed (whether by the performance of any act or by the failure to perform any act) for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, **a director** or servant of the [said] corporate body, **shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of that offence**, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall, on conviction, be person ally liable to punishment therefor." (Emphasis added.)

This provision is not peculiar to the Criminal Procedure and Evidence Act of Zimbabwe. An identical section exists in the Criminal Procedure Act 1977, of the Republic of South Africa, *viz* s 332(5). The intention of the lawgiver was to make directors vicariously liable for criminal acts committed by their companies unless they can establish that they did no/participate in such acts. In the words of ROPER AJ in *R v Theron* 1960 (3) SA 331 (1) at 335 F-G:

> "The plain meaning of subs (5) is that, when an offence has been committed for which the corporate body is liable to prosecution, a director or responsible servant is to be liable as having committed that offence unless he shows that he was not responsible for it. I see no reason for limiting the language of the subsection to offences which are capable of being committed not only by a corporate body but also by an individual person."

By the use of the phrase "unless it is proved that they did not take part in the commission of that offence", the Legislature clearly intended that the director or responsible servant, in such circumstances, shall be deemed guilty of the offence for which the corporate body is liable to prosecution, and the *onus* is on the director or responsible servant of the corporate body to

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prove on a balance of probabilities that he did not take part in the commission of the offence and could not have prevented it. See *S v Avon Bottle Store (Pty) Ltd & Ors* 1963 (2) SA 389 (A) at 391H-392A

In its case against the third respondent the State relied, not only on the course of conduct by the third respondent to establish that he acted with a common purpose with other officers of the first respondent in the perpetration of the offences, but also that, by reason of his deep involvement in the management

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of the first respondent, he was a director of the first respondent by virtue of the provisions of s 357(10) and liable to conviction for all offences for which the first respondent is liable in terms of the provisions of s 357(5), unless he could prove on a balance of probabilities that he neither participated in the commission of the offences, nor could have prevented them.

Having held that the third respondent was a director of the first respondent in terms of s 357(10), the trial court indicated that such a finding led only to the possible drawing of an inference that as a director he knew or ought to have known of the frauds committed by The first respondent. The learned judge said:

> "The State has not led any conclusive evidence as to who in particular in the PTC presented these fraudulent claims to the Ministry for payment.
>
> . . .
>
> The best that can be said is that some director or servant of PTC did present them but there is no evidence to say it was the Third Accused."

This interpretation of s 357(5), insofar as it places the *onus* on the State to prove that the third respondent actually participated in the commission of the offences of which the first respondent was found guilty, is erroneous. By stating unequivocally that: "a director or servant of the corporate body, **shall** be deemed to be guilty of the said offence, **unless** it is proved that he did not take part in the commission of the offence . . .", (emphasis supplied), the Legislature clearly shifted the *onus* of proof of non-participation in the offence onto the director of a corporate body which has committed an offence.

I agree with Mr *Houston* that even where the evidence is neutral on the involvement of a director in the commission of the offence, if he does not establish that he took no part in the commission of the offence and could not have prevented it, he must be convicted of the offence.

In the instant appeal, the evidence against the third respondent goes beyond mere neutrality. It was he who personally submitted Exhibit 19, which related to Count 1, for payment. It is inconceivable that he did not know that it was an inflated claim. Of him the learned trial judge said:

> "He is very articulate and he clearly knew what he was talking about. Nonetheless, we are satisfied that his bare denial of all the State's evidence is unconvincing and quite untruthful. It is quite patent that he

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> was heavily involved in the management of the companies in the Group. His demeanour in the witness-box was good, save it was betrayed by the quality of his evidence."

It is clear from the above passage that the third respondent's defence amounted to no more than a bare denial of his participation in the offences of which the first respondent was found guilty, and that even his bare denials were not believed by the trial court. It was only the error of placing the *onus* of proving his participation in the offences on the State which misled the trial court into concluding that the third respondent was not guilty of the offences of which the first respondent had been convicted in terms of s 357(5) of the Act.

In *S v Salama Taxis (Pty) Ltd & Ors* 1964 (1) SA 371 (C), it was held that the *onus* on a director is to establish, firstly, that he did not participate in the commission of the offence, and, secondly, that he could not have prevented it; and that a mere statement that he could not have prevented the crime is insufficient.

Likewise, in the instant matter, a bare denial of the State's evidence was not sufficient to discharge the *onus* placed on the third respondent by s 357(5). He should have testified to facts designed to enable the court to reach a conclusion that he neither participated in the commission of the offences, nor could he have prevented their commission. In the absence of such evidence, the submission by Mr *Houston* that the third respondent should have been convicted on all counts except Count 5, by virtue of s 357(5) of the Criminal Procedure and Evidence Act, cannot be assailed.

Mr *Houston* finally submitted that even if it is said that the State failed to comply with the principle laid down in *S v Bledig & Anor* 1974 (1) RLR 100 (A); 1974 (2) SA 613 (RA), which indicated that where the State is seeking to rely upon s 357(5) in the prosecution of the director or responsible servant of a corporate body then this should be indicated in the charge, such an omission is not fatal if there is no resultant prejudice to the accused.

In the instant case, the third respondent was described as a director in the indictment. The whole tenor of his defence exhibits an attempt to show that he was not a director of the first respondent and had no participation in the commission of the offence. Even if he was not at that time aware of the danger faced by virtue of s 357(5) of the Act, his defence and evidence were clearly fashioned to disprove that he was a director of the first respondent and deny

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his participation in the offences. He thus offered the only evidence available to him to meet s 357(5), but found the burden insurmountable. He was certainly not prejudiced by the irregularity and no substantial miscarriage of justice would result if he is convicted by reason of subs (5) of s 357 of the Act.

There is much merit in the State's application to prosecute its appeal against the respondents. In the result, the application is successful; leave to appeal is granted; the hearing of the

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application will be treated as the hearing of the appeal; the appeal will be allowed; and the acquittals of the second respondent on Counts 11 and 13 are hereby quashed. And the acquittals of the third respondent in respect of all the offences of which the first respondent was convicted are hereby quashed.

In the result, the second respondent is guilty of Counts 1, 2, 3, 4, 6, 7, 10, 11, 13 and 14, and is acquitted on Counts 5, 8, 9 and 12. The second respondent was convicted by the trial court on eight out of the fourteen counts of fraud, involving an amount of $1 352 906,20. This Court has found that, on a proper interpretation of the evidence, he was in fact guilty of ten out of the fourteen counts charging him with fraud, involving a total amount of $1 917 501,90. In view of this finding this Court is at large to assess sentence afresh in terms of s 11A(2)(b) of the Supreme Court of Zimbabwe Act 1981.

As was stated by DAVIS JA in *S v MONO* 1979 (4) SA 61 (ZRA) at 63D:

> "One of the most important considerations in sentencing an offender is his moral guilt, and logically his motive in committing the offence bears strongly upon such moral guilt."

Mr *Chatikobo* contended, on behalf of the second respondent, that he did not stand to benefit from the fraud. But as Mr *Houston* submitted, rightly in my view, the second respondent was a blood relative of the third respondent, who controlled the first respondent. It is inconceivable that the second respondent would participate in such a long course of criminal conduct without at least the expectation that some benefit would accrue to him. Having regard to the third respondent's beneficience towards those who rendered nefarious service for him, it cannot be doubted that the second respondent's motive for participating in the frauds was the anticipation of some personal gain.

I do not consider the fact that the second respondent was operating in an environment of total chaos or that the Ministry with which the first respondent was dealing was disorganised and inefficient as, in any way, mitigating

the enormity of these offences. The second respondent set about forging a large number of consignment notes to facilitate the submission of fraudulent invoices, so as to deceive the personnel of the Ministry concerned that the first respondent was entitled to payments for work that had not been done. That the Ministry was disorganised or that he operated in an environment of total chaos are irrelevant to his intention to deceive.

It was further submitted on behalf of the second respondent that he played no part in bribing those officials of the Ministry who made the commission of the offences possible. This is also irrelevant in considering sentence because had the second respondent not also forged the consignment notes the commission of the offences may well not have been possible. It cannot be said that his participation was less grave than the others.

The second respondent participated in a carefully designed scheme to defraud the Ministry of a large amount of money from public funds. Of the magnitude of the offence the learned trial

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judge rightly observed that:

> "The enormity of your mischief is staggering. The magnitude of the loss is enormous. One can only hope that it is not an indication of things to come."

Despite these factors, it seems to me that the totality of a sentence of twenty-five years' imprisonment with labour for this offence errs on the side of the excessive. What ought the proper penalty to be?

The four classical principles of sentencing are summed up in four words; retribution, deterrence, prevention and rehabilitation. LAWTON LJ, delivering the judgment of the Court of Appeal in *R v Sargeant* (1974) 60 Cr App Rep 74 (CA) said of retribution at p 77:

> "The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked; it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentence they pass. The courts do not have to reflect public opinion. On the other hand the courts must not disregard it. Perhaps the main duty of the court is to lead public opinion."

These offences perhaps resulted in one of the greatest financial losses to the

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State perpetrated by one group of persons acting with a common purpose. Any punishment imposed must reflect the abhorrence of society in relation to them.

Having regard to the increasing prevalence of offences involving the unlawful acquisition of public funds (see *S v Sharma* S-117-84 (not reported); *S* v *Chirata & Ors* S-41-86 (not reported); *S v Chitongo* S-122-86 (not reported) and *S v Chimera* 1984 (1) ZLR 209 (SC), and that all these offences involve premeditation, a sentence of general deterrence is also indicated.

I do not think that in this case any consideration of prevention and rehabilitation need detain us; for, as LAWSON LJ observed in *Sargeant*'s case *supra*, at 77-78:

> "Unfortunately it is one of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection the public has is that such persons should be locked up for a long period."

This does not apply to the second respondent, who is but a first offender.

In determining what the limits of a proper sentence in respect of the offences of which the second respondent has been convicted, I am influenced by what McNALLY JA said at p 6 of the judgment in *Sharma v S supra,* that:

> "These considerations and comparisons suggest to me that a twenty year sentence for a crime of dishonesty unaccompanied by violence must be approaching the outer limit of what any court in this jurisdiction would impose for such a crime."

I am in entire agreement with Mr *Houston* that the instant case is of the gravity envisaged by McNALLY JA as one deserving of a sentence "approaching the outer limit of what any court in this jurisdiction would impose", and with his concession that while twenty-five years may be the

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absolute limit, or even slightly beyond, the effective eighteen years is appropriate. One final observation must be made: I do not think that where a convicted person is to undergo a very lengthy sentence, such as was imposed by the trial court, anything is to be gained by suspending seven years on condition of good behaviour. See *S v Gorogodo* S-192-88 (not yet reported) at p 6. There is no doubt that such suspension was made by the trial court as a matter of personal

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deterrence. Such personal deterrence is not justifiable because those who have their wits about them usually find the closing of prison gates an experience which they do not want again, and if they do not learn their lesson after a lengthy period of incarceration, they can always be dealt with by the courts on the basis of the severity of the offence committed. To bring into effect a suspended period of seven years for defrauding a man of $200 would appear unjust to the man in the street.

Having regard to all that has been said above:

The sentence imposed by the trial court is hereby set aside and in its place is substituted the following-

Taking all the counts of which the second respondent has been found guilty as one for the purposes of sentence:

> "The second respondent is sentenced to undergo a term of imprisonment for a period of eighteen years with labour."

As regards the third respondent, the Attorney-General has indicated that he seeks nothing more than a declaration. In the result it is declared that:

(1) The view taken by the trial court of the facts which led to the acquittal of the third respondent could not reasonably be entertained;

(2) The third respondent should have been convicted, by virtue of s 357(5) of the Act, on all counts of which the first respondent was convicted.

Gubbay JA: I agree.

Manyarara JA: I agree.

Gill, Godlonton & Gerrans, respondents' legal practitioners

S v RUDOLPH 1990 (1) ZLR 45 (SC)

Court **Supreme Court, Harare**

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Manyarara JA

Review of criminal matter

(In chambers, in terms of s 23 of the Supreme Court of Zimbabwe Act 1981)

22 January 1990

Flynote

Criminal procedure (sentence) - Firearms Act [Chapter 308] s 5(2) - mandatory sentence unless there existed "special reasons in the case" - Firearms previously licensed but licences not renewed - offence amounted to no more than "a mere procedural irregularity" - need to explain the meaning of "special reasons" to offenders - conduct of trial in an unduly harsh and oppressive manner - Criminal Procedure and Evidence Act [Chapter 59] - need to comply with s 255 (2)(b).

Headnote

The appellant was convicted on his plea of guilty of contravening s 5(2) of Firearms Act [*Chapter 308*] in that he had possessed three firearms and twelve rounds of ammunition without the necessary licences. Two of the weapons belonged to the appellant and the third to a friend who had previously left the country. All the firearms had been previously licensed but the licences had all expired, the appellant's in 1983. Having applied for the renewal of his certificates in 1982, and having received no reply thereto, appellant sent a reminder in 1983 but still received no response. Thereafter the appellant forgot about the matter and was technically in contravention of s 5(2). The owner of the third weapon had, to appellant's knowledge, applied for the renewal of its permit before leaving.

Having made a statement to the police admitting possession of the firearms, appellant was requested to appear before a magistrate for a "preliminary hearing" which, in ignorance of his legal rights, he did. The magistrate

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relying solely on the State outline proceeded under s 225(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*] but omitted to record appellant's replies to the charge as required by s 255(3)(d) of the Act, and, having found that no special reasons justifying the imposition of a penalty other than the mandatory minimum but without having explained the meaning of special circumstances to the appellant, sentenced him to 5 years imprisonment with labour;

Held, that the magistrate's failure to comply with the provisions of s 255(2)(b) of the Act amounted to a miscarriage of justice which rendered the subsequent inquiry into special reasons meaningless.

Held, further that the offence amounted to no more than a mere procedural Regularity and was deserving of no more than a relatively minor fine:

Held, further that the trial had been conducted in an unduly harsh and oppressive manner.

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Cases cited:

S v Chisiwa 1981 ZLR 666 (HC)

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

S v Matumbu HH-316-83 (not reported)

R v Muchena 1966 RLR 731 (A)

R Harvey prepared heads of argument for the appellant

JRB Small prepared heads of argument for the respondent

Judgment

Manyarara JA: The appellant was convicted on his plea of guilty to unlawful possession of three firearms and twelve rounds of ammunition. He was sentenced to the mandatory minimum sentence of five years' imprisonment with labour upon a finding that no special reasons existed to justify the imposition of any other sentence. The firearms and ammunition were forfeited to the State.

An appeal against sentence was noted but it lapsed due to some misunderstanding between the appellant's legal practitioner and the magistrate's court over the preparation of the record. A judge of this Court accepted the appellant's explanation of the cause of the misunderstanding as valid and granted an application for the reinstatement of the appeal. When the matter was set down for hearing, the State filed a notice saying that the proper forum was the High Court as the appeal was against sentence only (s 67 of the Magistrates Court Act [*Chapter 18*], but the notice conceded that a miscarriage of justice had occurred and also stated that the appellant's application to lead further evidence at the hearing would not be opposed. Therefore this

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matter must be dealt with by way of review: s 23 of the Supreme Court of Zimbabwe Act 1981.

The miscarriage of justice which occurred is traceable the magistrate's failure to comply with the provisions of s 255(2)(b) of the Criminal Procedures and Evidence Act [*Chapter 59*] in terms of which the trial proceeded. The record reads as follows:

> "Accused understands and admits both charges 255(2)(b)
> Facts handed in Ex 1.
>
> BY COURT
>
> Nature of offence explained
> Agree with facts
>
> . . .
> Guilty both counts
> No known criminal record Special circumstances explained to (the) accused.

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ACCUSED'S REPLY
My weapons had permits which expired in 1983. Thereafter I applied for renewal of the permits but got no reply. I then forgot to pursue the matter further because I was not using the weapons. I had acquired the weapons solely for hunting purposes. That is all.

MITIGATION
Nothing other than that I did not hold the weapons for any ulterior purpose. That is all."

The magistrate's finding was that it was not a "special reason" that the firearms were not kept for sinister purposes.

The appellant's account of the trial is narrated by the affidavit founding his application to lead further evidence. The application is not opposed.

Therefore, the facts set out in it must be taken as common cause. The affidavit reads:

"That at 10.45 am I was called into Court, completely taken aback at the way the preliminary hearing was conducted. That I was inarticulate, apart form the fact that, due to partial deadness under stress I could not hear a good deal of what the Prosecutor said. That I was questioned

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briefly by the Magistrate and as the weapons did not have current licences I pleaded guilty. None of the implications of the Firearms Act were explained to me by the Court, nor did the prosecution, as will appear from the record, produce the documents I had given to the Police, nor the statement made and signed by me.

That I was informed that sentence would be passed at 2.00 pm and was removed to the cells. My wife inquired, and was informed by a member of the Prison Service that she should ask the Magistrate to allow bail to enable me to be released for lunch. Bail was granted in the sum of $500 and I was released.

That I then made contact with my Company, and the Senior Medical Officer and the Assistant Fields Manager, Mr Fairlie, returned to Court with me.

That when the Court resumed I was sentenced to five years' imprisonment with labour. On my behalf Mr Fairlie asked whether I could appeal against the sentence, and he was cautioned for contempt of Court and asked what his claim was to address the Court on my behalf. He said that he was my department head. The Magistrate then allowed bail at $1 000,00 until an appeal was heard."

The facts deposed to by the appellant are these:

He was employed by Hippo Valley Estates in Chiredzi as a section manager and his duties involved the control of vermin on the estate. He owned two firearms - a 12 - bore shotgun and .22 calibre "Zidi" rifle - in respect of which he held the requisite firearms certificates expiring sometime during 1983. He kept the firearms locked in a gun cabinet.

There was a third firearm in the cabinet. This was a .22 "Savage" rifle. It had been left in his custody by a friend who had since gone to South Africa and decided not to return to this country for family reasons. The appellant had applied to the Controller of Firearms for the renewal of the certificates relating to his own weapons in 1982 and, to his knowledge, the owner of the "Savage" rifle had done the same before she left the country. The appellant held 12 rounds of ammunition for the shotgun but none for either of the rifles.

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Receiving no reply form the Controller of Firearms, the appellant sent a reminder in 1983 and he has annexed copies of the registered mail slips to his

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affidavit. As no response was still forthcoming from the Controller, the appellant forgot about the matter, not appreciating that after the certificates expired his authority to possess any of the firearms also lapsed. Thereafter he was technically in contravention of s 5(2)(b) of the Firearms Act [*Chapter 308*] regarding the firearms (count one) and of s 5(4)(a) regarding the 12 rounds of shotgun ammunition he still possessed (count two) when he was brought to trial in 1986.

On 11 December 1986 the appellant took the firearms and ammunition to Chiredzi Police Station in response to Const. Nyika's message inquiring about the same. His impression was that the authorities wished to retain the weapons pending renewal of the certificates. He also handed to the Police the registered mail slips which Const. Nyika indicated he wished to make copies of.

I would remark in passing that the appellant's reaction to Const. Nyika's enquiry was in accordance with s 5(a) of the Firearms Act which empowers the Controller of Firearms to order the production of any firearm to the authorities for inspection pending the renewal of the certificate relating thereto.

About one week later on 18 December, Const Nyika caused the appellant to make a statement admitting that he possessed the firearms and ammunition without holding current certificates. After Const Nyika recorded the statement, he requested the appellant to present himself before the magistrates court on 22 December for "a preliminary hearing". In ignorance of his rights, the appellant did as he was told without seeking any legal advice only to be dealt with in the manner he described.

Although there is no appeal against the conviction the point must be made that had the magistrate carefully observed s 255(2)(b) of the Criminal Code, the provision might have directed his mind to the correct approach to the question of "special reasons". It was not sufficient compliance with the provision for the magistrate to rely entirely on the State outline which omitted the vital information which he recorded as the "accused's reply" on special reasons. The facts disclosed by the reply properly came under subs (3)(d) of s 255 as the statement made by the appellant in connexion with the offence he admitted.

The provision states that where the magistrate proceeds in terms of subs (2) he shall record any statement made to the court in connexion with the offence

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to which he has pleaded guilty before the question of sentence is considered.

It was crucial to the magistrate's proper compliance with s255(2)(b) for trim to record -

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1. That the appellant had applied for the renewal of the Firearms certificates;

2. That the Controller of Firearms had failed to respond to the application so that the appellant forgot about the matter;

3. That the firearms were safely locked away and not in use; and

4. That they were not held for any sinister purpose.

These were facts omitted by the State. outline but without which the magistrate's purported enquiry into special reasons was rendered meaningless. See *S v Chisiwa* 1981 ZLR 666 (HC).

Had the magistrate probed the facts and looked up the law as he should have done, he need not have searched further that *S v Mapetese* HH-138-187 (not reported) and the authorities referred to therein to realise that the appellant's offence was no more than "a mere procedural irregularity", per McNALLY J (as he then was) in *S v Matumbu* HH-316-83 (not reported)(cited in *Mapetese*'s case). As such, the offence deserved of no more than a relatively minor fine.

The appellant did make the requisite application for certificates and he produced proof thereof which was not placed before the magistrate. This was improper. He knew that the owner of the "Savage" rifle had done the same. He produced the foams to the police when he was requested to do so. He was misled by Const. Nyika into presenting himself before the magistrate without realizing that he was up for Dial. The meaning of "special reasons" was not explained to him. Contrary to the magistrate's belief, that the firearms were not kept for a sinister purpose was a special reason of great weight, *a fortiori* because the Controller of Firearms was partly to blame, by not responding to the applications for the renewal of the certificate. See *S v Chisiwa, supra*. The trial itself was conducted an unduly harsh and oppressive manner which impermissible. See *R v Muchena*, 1966 RLR 731 (A) at 736H-737A.

In the light of the misdirections and the irregularities to which I referred the concession made by the State is sound and this Court is at large. Whilst the convictions must be allowed to stand, the sentence and the forfeiture order must be quashed and a fresh sentence imposed. Unless the appellant's

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justification for resuming his possession of the firearms no longer exists, the firearms shall be returned to him upon renewal of the firearms certificates, failing which he shall be permitted to freely dispose of the firearms by sale or in some other lawful manner.

The convictions are confirmed. The sentence end the forfeiture order are set aside. Taking the two counts es one, the accused is sentenced afresh to a fine of $100 or, in default of payment, one month's imprisonment with labour.

Dumbutshena CJ: I agree.

Granger & Harvey, appellant's legal practitioners

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CHITUNGO v MUNYORO & ANOR 1990 (1) ZLR 52 (HC)

Court **High Court, Harare**

Smith J

Election petition

1 June 1989 & 24 January 1990

Flynote

Constitutional law - election petition - late presenting - whether court may condone - nomination paper - invalidity - discretion of constituency registrar to accept or reject nomination - power of court to review decision of constituency registrar-nomination procedure - substantial compliance essential - elect of irregularities - costs - do not automatically follow the event.

Costs - electoral matters - principles.

Review - grounds for - exercise of discretion by public officer.

Practice - condonation - late filing of election petition.

Legislation - Electoral Act, 1979 - s53 - s 140(2) - s 143(3) - s 143(7) - s 151- s 156.

Headnote

The second respondent, presiding over the nomination court sitting prior to a by-election, had accepted first respondent's nomination paper although it contained certain irregularities. First respondent won the by election. Petitioner filed a petition, out of time, seeking an order setting aside first respondent's nomination and election, and declaring that petitioner was the duly elected Member of Parliament for the constituency.

Held, in the first instance, that as the election petition had been presented outside the period prescribed by s 140(2) of the Electoral Act, the petitioner was non-suited. The court did not have the authority to condone the late presentation of the petition.

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Held, further, that although the constituency registrar is given a discretion as to whether to accept or reject a nomination paper, there must be substantial compliance with the requirements of s 53 of the Electoral Act.

Held, further, that the court has an inherent jurisdiction to review the decisions of public officers in certain circumstances.

Held, further, that the court cannot condone a failure to comply with the requirements of the

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Electoral Act. The nomination and election procedures must be substantially complied with, in default of which the court shall set aside the election, even if the non-compliance did not affect the outcome of the election.

Held, further, that the successful party in an election petition is not automatically entitled to costs, which are normally shared in such proportions as the court may determine in terms of s 151 of the Electoral Act.

Held, further, that where the petition is successful, the court may order costs to be paid from the Consolidated Reserve Fund in the event of a mistake or improper performance of a function *bona fide* made by an official.

Cases cited:

Pio v Smith 1986 (3) SA 145 (ZH)

Nair v Teik [1967] 2 All ER 34 (PC)

Tighy v Putter 1949 (1) SA 1087 (T)

Saul v Allen 1924 TPD 382

Cilliers v du Toit & Anor 1957 (2) SA 139 (GW)

Eksteen v Odendualsrus Town Council & Weeber 1949 (4) SA 895 (O)

Shidiack v Union Government (Minister of the Interior) 1912 AD 642

Loxton v Kenhardt Liquor Licensing Board 1942 AD 275

Union Government v Union Steel Corp (SA) Ltd 1928 AD 220

Hackney Case: *Gill v Reed & Holmes* (1874) 31 LT 69 F

Gunn & Ors v Sharpe & Ors [1974] 2 All ER 1058 (QB); [1974] QB 808

Theron v Hylton-Smith & Anor 1978 (2) SA 294 (N)

Lewis v Culwick & Anor 1966(3) SA 52 (D)

Rustenburg Election Case:Du Plessis & Grobler v Van der Merwe 1921 TPD 620

Mtoba & Ors v Sebe & Ors 1975 (4) SA 413 (E)

RM Fitches for petitioner

J Dondo for first respondent

Judgment

Smith J: At the end of 1988 a vacancy occurred in the Makoni East Parliamentary constituency. The President, acting in terms of the Electoral Act, 1979, (No. 14 of 1979) (hereinafter referred

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to as "the Electoral Act')

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issued a proclamation declaring that a nomination court would sit on 5 January 1989, to receive of candidates who wished to contest the by-election to fill the vacancy. Nomination papers were submitted by the petitioner and the first respondent and both were accepted by the constituency registrar. Thereafter a by-election was held on 14 and 15 February. The petitioner received 331 votes and the first respondent received 8 622. The first respondent was accordingly declared to have been duly elected as a member of the House of Assembly on 16 February 1989.

On 30 March 1989 the petitioner filed an lection petition in terms of s 139(1) of the Electoral Act, in which he claimed that the nomination paper submitted by the first respondent was fatally defective in that it was signed by fewer than 10 persons duly enrolled on the voters' roll for the Makoni East Parliamentary constituency. Accordingly the second respondent, who is the Deputy Registrar-General and who presided over the nomination court, should have rejected the nomination paper of the first respondent and declared the petitioner as having been duly elected since his was the only other nomination paper. The petitioner sought an order that the nomination of the first respondent as a candidate for the Makoni East by-election and his election as a member of the House of Assembly be set aside and that the petitioner be declared the member of Parliament for the Makoni East constituency.

The first respondent denied the allegation that his nomination paper was defective in that it was signed by fewer than ten persons duly enrolled on the voters' roll for the Makoni East constituency. He averred that it was in fact signed by more than ten persons enrolled on that roll. Therefore his nomination was valid and his declaration as a member of Parliament was also valid. The second respondent admitted that he was Deputy Registrar-General but he was only appointed to that post on 6 March 1989, which was after the by-election concerned, and he had not presided over the nomination court. His predecessor, a Mr Smyth, had in fact presided over the nomination court Mr Smyth made an affidavit relating to the proceedings of the nomination court and attached thereto the nomination paper which nominated first respondent as a candidate for election to represent the Makoni East constancy. The nomination paper has provision for the names of 20 voters to be inserted as sponsors. The spaces are numbered from 1 to 20 and there are two columns, one is headed "Name in full (block letters)" and the other is headed "signature".Of the 20 names of sponsors inserted on the nomination paper, despite the clear direction at the head of the column that names be given in full, in only 9 cases are two or more names given In the other 11 cases, a name is given preceded by one or two initials. Mr Smyth

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said that a senior executive officer who was on duty with him at the nomination court on 5 January 1989 checked the names appearing on the nomination paper as sponsors against the voters' roll in accordance with his instructions. In the course of such check the officer wrote

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certain particulars that he obtained from the voters' roll against the names of 11 of the sponsors. In each case a national registration number was inserted and in the case of 4 sponsors where only an initial or initials were given, a forename (in one case, two forenames) was inserted. Mr Smyth averred that of the names of the twenty sponsors on the nomination paper, only thirteen (namely Nos. 1, 2, 3, 6, 7, 8, 10, 11, 13, 14, 15, 18 and 20) appeared on the voters' roll and were therefore entitled to sponsor the first respondent as a Parliamentary candidate. The names of seven sponsors (namely Nos. 4, 5, 9, 12, 16, 17 and 19) were not accepted as valid sponsors because their names could not be found on the voters' roll. Of those seven sponsors five gave their full names. Mr Smyth commented as follows upon what he referred to as "the unsatisfactory features concerning the identities of the sponsors who were accepted as valid sponsors":

"(a) it is accepted that in most cases the sponsors have only given their initials;

(b) sometimes the signatures do not give all the signatories initials and the initials do not always correspond with the voters' roll;

(c) some signatures are illegible."

He continued as follows in his affidavit:

"7.8 It is standard practice to accept nomination papers produced by candidates furnishing particulars of sponsors which do not include national registration certificate particulars. Such particulars would be the best proof of identity.

7.9 I have never before accepted a nomination form which was defective in that so many sponsors gave initials only. It is agreed that I could have rejected the nomination paper. A check of the voters' roll, however, does show that 13 of the sponsors do appear on the voters' roll and were entitled to nominate.

7.10 There is a problem involved in the precise identification of voters on the roll, if the national registration card is not insisted upon in proof of identity. For example the voters' roll itself does not always give all a voter's names. In fact, in the majority of cases, only one first

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name is given for a voter. In some cases the surname and only one initial is given on the voters' roll.

8. In the circumstances viz that 13 of the sponsors names could be reasonably agreed with names on the voters' roll I accepted the nomination of first respondent as valid as I was legally entitled to do particularly bearing in mind the provisions of section 53 (6b)(a) and (b) of the said Act."

The petitioner, in his answering petition, said that he and his Director of Elections were both present at the nomination court when the officer wrote in the forenames of some of the alleged sponsors. They told him that he was not entitled to make such entries on a nomination paper, especially entries which were based on guesswork on his part. The officer was clearly attempting to put the nomination paper of the first respondent into order, instead of allowing it to remain in the state in which it was submitted which would have resulted in it being rejected, so the petitioner submitted. The petitioner submitted that only four, or at most five, sponsors (namely Nos. 3, 4, 13 and 15 and possibly No. 20) had correctly completed the nomination.

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With regard to Mr Smyth's statement that in some cases the surname and only one initial (without any forename) is given on the voters' roll, the petitioner averred that only seven names appear on the voters' roll with initials and no forenames and he submitted that those voters should not be accepted as sponsors for a nomination paper. He further submitted that there were so many voters on the voters' roll who had the same surname that it would be impossible for Mr Smyth to be satisfied, on the basis of initials alone, that the signatories to the nomination paper were those persons whose names appeared on the voters' roll.

Mr Smyth, in his affidavit, submitted that the petition should be rejected on two grounds. Firstly, because the nomination paper had been correctly accepted as a valid nomination paper. Secondly, because the petition was out of time in terms of s 140(2) of the Electoral Act.

The petitioner accepted that his petition was out of time and applied for condonation of the late presentation thereof on the following grounds. His legal practitioner instructed counsel on 10 March 1989 to draw up the petition, the final date for the presentation thereof being 19 March 1989. Counsel unexpectedly died on 16 March before he had attended to the instructions. There was an unavoidable delay in retrieving the instructions and briefing other counsel. The draft petition was returned by counsel on 29

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March and presented on the 30 March. The explanation was satisfactory and accordingly would justify condonation if this court had authority to condone the late presentation of the petition.

Section 140(2) of the electoral Act provides that an election petition shall be presented within thirty days after the day on which the result of the election has been notified in terms of this section. There is no provision conferring on the High Court authority to condone the late presentation of a petition.

In *Pio v Smith* 1986 (3) SA 145 (ZH) the court was faced with the question of whether an election petitioner was non-suited because he had failed to comply with the equirements of s 141 of the Electoral Act. That section provides that notice in writing of the presentation of an election petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition, shall, within ten days after the presentation of the petition, be served on the respondent. The election petition had been presented within the period specified in s 140(2) of the Electoral Act. The petitioner's legal practitioner decided to obtain the ruling of the Registrar of the High Court on the sureties before serving any documents on the respondent. However, he had advised the respondent by telephone that the election petition had been presented. MFALILA J after considering a number of cases, including *Nair v Teik* [1967] 2 AIDER 34 (PC) and *Tighy v Putter* 1949 (1) SA 1087 (T), concluded at p 165-166 as follows:

> "The part of s 141 dealing with the limitation of time is peremptory and must be complied with either exactly or so substantially that the act could stand on its own, as would be the case, for instance, in a situation where the notice was served within 10 days but without the list of proposed sureties; in other words defects in the notice would not invalidate it. I am fortified in this view by the decision of the Judicial Committee of the Privy Council in the *Nair v Teik* case *supra* on a similar provision from another member of the Commonwealth. Before deciding on the status of Rule 15 with which they were concerned, their Lordships expressed the opinion that the case before them:

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'raises a question of exceptional public importance on the proper interpretation of the Rules relating to election petitions - and their Lordships' decision may also govern the practice and procedure in other parts of the Commonwealth which have adopted a similar code of procedure.'

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As indicated *supra,* their Lordships then held and concluded that the provisions of Rule 15 are mandatory and the petitioner's failure to observe the time for service prescribed by that rule rendered the proceedings a nullity. Likewise in this case the petitioner must be non-suited for his failure to observe the time limits for service prescribed by s 141."

In *Nair's* case, *supra,* LORD UPJOHN said at p 40:

"The circumstances which weigh heavily with their lordships in favour of a mandatory construction are: (i) The need in an election petition for a speedy determination of the controversy, a matter already emphasised by their lordships. The interest of the public in election petitions was rightly stressed in the Federal Court, but it is very much in the interests of the public that the matter should be speedily determined; (ii) In contrast, for example, to the rules of the Supreme Court in this country, the rules vest no general power in the election judge to extend the time on the ground of irregularity. Their lordships think that this omission was a matter of deliberate design. In cases where it was intended that the judge should have power to amend proceedings or postpone the inquiry it was expressly conferred on him, see, for example, r 7, r 8 and r 19; (iii) If there is more than one election petition relating to the same election or return, they are to be dealt with as one (r 6). It would be manifestly inconvenient and against the public interest if by late service in one case, and subsequent delay in those proceedings the hearing of other petitions could be held up."

The reasoning of MFALILA J with regard to s 141 of the Electoral Act cannot in my opinion, be faulted and it applies equally to s 140(2). A similar conclusion was reached in *Saul v Allen* 1924 TPD 382. MASON JP held at P 383 as follows:

"Now the period during which an election petition may be filed is 42 days - quite a substantial period. That period has elapsed, and unless there is some authority for the Court to extend that period, the applicant is not entitled to present his election petition and an order of court should not be made for the purpose of such an election petition. So far as I can judge, there is no power in the Court to extend the period of 42 days."

Accordingly, as the election petition was presented outside the period prescribed by s 140(2) of the Electoral Act, the petitioner is non-suited. This court has no authority to condone the late presentation of the petition.

SMITH J

Although my finding that the petitioner is non-suited has the effect of disposing of the case as a whole, I shall deal with the complaints raised in the election petition as that could affect the question of costs.

The procedure for the nomination of a member of the House of Assembly is prescribed in s 53 of the Electoral Act. Subsection (1) of that section provides that a candidate for election shall be nominated by means of a separate nomination paper in the form prescribed, which shall be signed by no fewer than ten and no more than twenty persons who are enrolled on the roll for the constituency for which the candidate seeks election. In terms of subs (5) of that section, the

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constituency registrar shall, in open Court, examine every nomination paper lodged with him in order to ascertain whether it is in order and "shall give any candidate or his election agent an opportunity to rectify any defect not previously rectified". Thereafter the constituency registrar shall, in open court, announce the name of every candidate who has been duly nominated. Subsection (6a) of that section provides that the constituency registrar in open court shall reject any nomination paper lodged with him if, in his opinion, the nomination paper is not in order. However, subs (6b) of that section provides that the constituency registrar shall not reject any nomination paper:

> "(a) solely on account of any minor variation between the name of any person as it appears on the nomination paper and as it appears on the voters' roll, if the constituency registrar is reasonably satisfied that the variation is due to an error; or
>
> (b) on account of any other imperfection in the nomination paper if the constituency registrar is satisfied that there has been substantial compliance with this section."

In terms of subs (1) of s 53 a candidate shall not be regarded as duly nominated for a constituency if his nomination has not been signed and countersigned in accordance with the provisions of subs (1) or is otherwise not properly completed. Thus, although the constituency registrar is given a discretion as to whether to accept or reject a nomination paper and is enjoined not to reject a nomination paper solely on account of minor variations between names or other imperfections, there must be substantial compliance with the requirements of s 53 of the Electoral Act. One of those requirements is that the nomination paper must be in the prescribed form. In order to enable the identification of the voters who sponsor a candidate to be ascertained, the prescribed form specifies that the name of the voter concerned be given in full. That was not done on the first respondent's

nomination paper. Mr *Dondo* submitted that the powers and duties of the constituency registrar in terms of s 53 were purely administrative and as such he had an absolute discretion in exercising his functions. Accordingly, no court could interfere with his decisions unless there had been manifest absence of jurisdiction or fraud. Alternatively, he argued that if the petitioner alleged that the constituency registrar had acted unreasonably, the court could only interfere if the unreasonableness was so gross as to be inexplicable except on the assumption of *mala fides*, ulterior motive or he did not apply his mind to the issue before him. In *Cilliers v du Toit & Anor* 1957 (2) SA 139 (GW) SMIT J said at p 141 that a returning officer had to exercise a quasi-judicial discretion in arriving at his decision on objections lodged and on the proof brought before him and that, although the ordinance concerned made no provision for bringing the decision of the returning officer, in accepting or rejecting any nomination, on review it has been held that the court has inherent jurisdiction to review the decisions of returning officers in connection with the acceptance and rejection of nominations. (*Eksteen v Odendualsrus Town Council & Weeber* 1949 (4) SA 895 (O)). He pointed out, however, that it was only in certain circumstances that the court would take under review the decision of a public officer made in the exercise of his discretion. He referred to *Shidiack v Union Government* 1912 AD 642 where it was laid down at p 651:

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> "Now it is settled law that where a matter is left to the discretion or determination of a public officer and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result . . . There are circumstances in which interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief."

Further grounds for review have been expressed in *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 and Union *Government v Union Steel Corp (SA) Ltd* 1928 AD 220 which are not relevant to this matter. I accept that there is no question here as to the *bona fides* of the constituency registrar nor is there any suggestion that he acted with an ulterior or improper motive. The question, however, is whether or not he has disregarded the express provisions of the Electoral Act.

I agree that in terms of s 53 of the Electoral Act, he has a degree of discretion

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which he may exercise in deciding whether or not to accept a nomination paper. However, he must ensure that there is substantial compliance with the requirements of s 53 of the Electoral Act. He must be satisfied that the persons whose names appear as sponsors on the nomination paper are also registered on the voters' roll. I fail to see how he could be so satisfied if the sponsors' names are not given in full on the nomination form. For example, sponsor No. 14 on the nomination paper of the first respondent gives his/her name as "J Chila J Mutasa" and the signature is indecipherable. Page 419 of the Makoni East voters' roll lists 58 voters with the surname Mutasa. There are obviously other Mutasas on pages 418 and 420. Of the Mutasas on page 419, there are eight whose first names begin with the letter "J", three of them being "Joyce". There are nineteen whose first names begin with the letter "M". There is no name equivalent to "J Chila Mutasa" on the voters' roll, yet the constituency registrar accepted the name as being that of a registered voter. Paragraph (a) of subs (6b) of s 53 of the Electoral Act, which is set out above, refers to "any minor variation between the name of any person as it appears on the nomination paper and as it appears on the voters' roll ..." In my opinion this predicates that the full name of the sponsor must appear on the nomination paper and not just an initial. I consider that an initial instead of a complete name is not a minor variation. Furthermore, the failure to insert the name in full of the sponsor, as required by the prescribed nomination form, constitutes a failure to comply with the requirements of s 53(1) of the Electoral Act. Accordingly, I consider that the constituency registrar should have accepted that the nomination paper of the first respondent was duly completed by only five persons enrolled on the voters' roll. The constituency registrar said that he accepted the nomination paper of the first respondent as valid because thirteen of the sponsors' names "could be reasonably agreed with names on the voters' roll". Section 53 of the Electoral Act requires a greater degree of certainty than that accepted by the constituency registrar.

It follows, therefore, that in my opinion the constituency registrar should have rejected the nomination paper of the first respondent, and declared the petitioner to have been duly elected, in the absence of any other duly nominated candidate. The actions of the senior executive officer at the electoral court when he wrote certain particulars on the nomination paper of the

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first respondent are to be deprecated. Section 53 of the Electoral Act makes it clear that the constituency registrar may give advice to a candidate or his election agent. That, however, is as far as he, or any other official assisting him, may go. Members of the Public Service presiding or assisting at the acceptance of nomination papers must act impartially and should not make any amendments to a nomination paper. They can only advise the

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candidate or his election agent if they consider that any amendment should be made, and then it would be for the candidate or his election agent to decide whether or not to accept the advice so given.

Section 156 of the Electoral Act provides as follows:

> "156. An election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the High Court that -
>
> (a) the election was not conducted in accordance with the principles laid down in this Act; or
>
> (b) such mistake or non-compliance did affect the result of the election."

In *Hackney Case* : *Gill v Reed & Holmes (* 1874) 31 LT 69 GROVE J said at 72-72:

> "An election is not to be upset for an informality or for a triviality. It is not to be upset because the clock at one of the polling stations was five minutes too late or because some of the voting papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated really to affect the result of the election."

Similar sentiments were expressed by WILLS J in *Gunn & Ors v Sharpe & Ors* [1974] 2 All ER 1058 (QB) at 1063-64:

> "We are very conscious of the importance of the principle which occurs throughout the cases to which we have been referred that elections should not be lightly set aside, simply because there have been informalities and errors, and that both s 13 of the 1872 Act and s 37 of the 1949 Act were framed with this principle in mind."

Mr *Dondo* urged that the acceptance of the contentions advanced by the petitioner would have far-reaching consequences because it would have the effect of imposing on the Makoni East constituency a Parliamentary representative who received only 331 votes as compared with the first respondent who received 8622 votes. That would be an unfortunate result. However, this court cannot condone a failure to comply with the requirements of the Electoral Act on that basis. The Legislature has prescribed the procedure to be followed in connection with the nomination of candidates for election to

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the House of Assembly. That procedure must be complied with. Where it is not complied with, the candidate has not been validly nominated and therefore the election has not been conducted in accordance with the principles laid down in the Electoral Act. As JAMES JP said in

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Theron v Hylton-Smith & Anor 1978 (2) SA 294 (N) at 299G:

> "The Electoral Law is explicit and it must be strictly complied with."

Section 156 of the Electoral Act requires that this court shall set aside an election by reason of non-compliance with the provisions of the Act if it appears that the election was not conducted in accordance with the principles laid down in the Act, even if the non-compliance did not affect the result of the election.

In *Lewis v Culwick & Anor* 1966 (3) SA 52 (D) the applicant, Lewis, applied for a court order declaring that the first respondent, Culwick, had not been duly nominated as a candidate for election and requiring the second respondent, the returning officer, to declare Lewis as the duly elected member. Lewis and Culwick were the only candidates who had been nominated. It was accepted that Culwick did not have the necessary residence qualification for election and would not be able to obtain it before the date of the election. The respondents opposed the application, saying that it was premature and that Lewis should wait until after the election and then present an election petition. MILNE JP granted the application on the basis that it was unthinkable that the Legislature intended that there must be an election on a duly appointed polling day where there were only two contestants for the seat, one of whom was not, and could not possibly be, by polling day, qualified to become a member of the House of Assembly. He described such an election as farcical. He continued, at p 55, as follows:

> "For the same reason it appears to me that, as there was due nomination of the first respondent on nomination day, and the applicant was the only person who was duly nominated on that day, the true position was that he should have been declared under sec.36(8) of the Electoral Act to be the duly elected member of the Umlaze division. But the second respondent was never informed by anyone of the true position. There can be no doubt that had he known the true position he would have been bound to reject the first respondent's nomination and, if there was no other besides the applicant's, to declare the applicant to be the duly elected member for the division. The fact that he did not know cannot possibly, it seems to me, assist the respondents in saying that there was

> a due nomination of an unqualified person to represent the voters of the Umlaze division in the House of Assembly."

Lewis' case was distinguished by JAMES JP in *Theron*'s case, *supra,* which concerned an election petition. In that case the applicant and the first respondent were the only two candidates for a seat in Provincial elections. Hylton-Smith, the first respondent, polled more votes than Theron, the applicant, and was declared duly elected. However, Hylton-Smith at the time of the election held an office of profit. The court held that his election was invalid but, instead of declaring Theron to be the duly elected member, ordered a fresh election. At pp 299-300 JAMES JP said:

> "The applicant has urged that, in these circumstances, this Court should declare him to have been elected in Hylton-Smith's place. I do not agree with this view. Section 146 (9) and (10) set out the Court's duties after it has determined that a candidate has not been duly elected. The subsections provide that where a Court is satisfied that another person was entitled to be declared duly elected it shall certify such determination so that that person can be declared to have been elected but, if the Court is satisfied that no other person was entitled to be declared duly elected, the Court must certify accordingly so that a new election can be held. It seems to me that the former situation will occur when, as a result of the petition there has been a re-count of votes which establishes that the

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petitioner in fact won the election, and that the latter will arise when the candidate polling the greatest number of votes is found to be incapable of being elected. Clearly in such a case the Legislature never intended that the runner-up who might have polled hundreds of votes less than the successful candidate should be given the seat. Clearly the electorate itself should not be denied the right to make its own decision at a fresh election. The situation is much the same as one in which the election of a candidate is declared void because he or his agent has been guilty of any corruptor illegal practice in terms of s 131 of the Act. In such a case it is provided that a fresh election shall be held. Mr *Booysen* placed some reliance upon the decision in the case of *Lewis v Culwick & Anor* 1966 (3) SA 52 (D) in which MILNE JP held that, since the nomination of one of two Parliamentary candidates in a constituency had been shown to be invalid, his opponent was entitled before the polling day arrived, to obtain an order upon the returning officer requiring him to declare that he was duly elected member for that constituency. *Lewis*' case was a special one, and s 146(9) and (10) did not apply to the set of circumstances occurring therein. In my view it is completely distinguishable."

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The provisions in the Electoral Act which correspond to s 146(9) and (10) referred to above are set out in s 143(3). Unfortunately JAMES JP does not give his reasons for holding that *Lewis*' case is completely distinguishable. Had Theron applied for an order setting aside Hylton-Smith's nomination before the election was held, the circumstances would have been the same and presumably then Theron would have been declared duly elected because he would have been the only candidate duly nominated. The fact that a poll was conducted should not, in my view, affect the position. JAMES JP refused to declare Theron as the duly elected candidate because he felt that the electorate itself should not be denied the right to make its own decision at a fresh election. Yet in *Lewis*' case, because the nomination was declared invalid, the result was that the electorate was denied the right to make its own decision at an election. If the returning officer, on nomination day, had rejected Hylton-Smith's nomination he would have been compelled to declare Theron duly elected in the absence of any other duly nominated candidate. The electorate would have been denied the right to make its own decision at an election. Such a result must automatically flow from a failure on the part of a candidate for election to comply strictly with the requirements of the Electoral Act. If he is not duly nominated, the electorate is deprived of an opportunity of showing its support for him or her or the political party of which he or she is a member.

It appears that most, if not all, of the voters on the voters' roll are identified by their national registration number and many are also identified by a voter number. There might well be merit in amending the prescribed form for nomination of candidates for election to the House of Assembly so as to require that not only the name in full of the voter who sponsors the candidate is given but also the voter's national registration number or voter number.

Both counsel submitted that costs should follow the event and that the successful party should be entitled to all his costs against the other. However, as MFALILA J pointed out in *Pio*'s case, *supra,* that is not the law in relation to election petitions. Section 151, as read with s 143(7), of the Electoral Act deals with the question of costs. In the light of those provisions, the successful party is not automatically entitled to an order for costs against his opponent. After referring to *Rustenburg Election Case; Du Plessis & Grobler v Van der Merwe* 1921 TPD 620 and *Mtoba & Ors v Sebe & Ors* 1975 (4) SA 413 (E), MFALILA J said that the question of liability or non-liability for costs was not determined by success or failure alone. At p 176 he went on to

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say:

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> "Indeed, unless one is successful on all the points raised, the main principle governing the determination of who pays the costs and by how much in election petitions is one of sharing in such proportions as the Court may determine along the lines laid down by the Act in s 151."

In this case the main issue for determination was whether the first respondent had been validly nominated. The petitioner succeeded on this issue. However, he was non-suited because his election petition was presented out of time. In the way the Act provides for the apportionment of costs, I can say, as MFALILA J did in *Pio*'s case, *supra,* each side won and lost. In the circumstances the fairest order in my view would be for each party to bear his own costs. This court cannot make an order in terms of s 143(7) of the Electoral Act that the costs be paid from the Consolidated Revenue Fund, even though there was a mistake or improper performance of a function *bona fide* made by an official, because it has not determined that the first respondent was not duly elected. Had the election petition been presented in time, I would have considered making such an order.

The petition is dismissed. Each party will bear its own costs.

Coghlan, Welsh & Guest, petitioner's legal practitioners

PA Chinamasa, Manyika & Co, first respondent's legal practitioners

Civil Division, Attorney-General's Office, second respondent's legal practitioners

MOBIL OIL ZIMBABWE (PVT) LTD v TRAVEL FORUM (PVT) LTD 1990 (1) ZLR 67 (HC)

Court **High Court, Harare**

Reynolds J

Opposed motion

14 November, 22 December 1989 & 24 January 1990

Flynote

> Practice and procedure - cause of action must be fully set out in the founding affidavit - the rule subject to the Courts discretion-the right of a judge to call a witness in a civil case - whether the consent of the parties is required.
>
> Practice and procedure - interdict - requirements.
>
> Delict - passing off - onus on applicant - what applicant must prove - likelihood of deception - all surrounding circumstances to be considered.

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Trade mark - prior use - saving of vested rights.

Headnote

The well-established general rule of practice that the cause of action must be fully set out in the founding affidavit is, like other procedural rules, subject to the overriding discretion of the Court.

Quaere whether the long-established rule of practice that a judge may not call a witness in a civil case without the consent of the parties should not be subject to the exercise of judicial discretion.

In actions of passing off, the onus lies upon the applicant to prove the following matters:

1) that the respondent has used the applicant's trade marks, or marks similar to those of the applicant;

2) that the use by the respondent of the applicant's trade marks would be likely to deceive the ordinary user of the respondent's services into believing that the services were those of, or were associated with those of, the applicant;

3) that the applicant has been, or probably will be injured in the goodwill of its business as a result;

4) that the requirements for the granting of a perpetual interdict have been established.

In considering the likelihood of deception one must consider all the surrounding circumstances including the nature of the business and the kind of customer who would be likely to buy the goods or use the services of the parties.

Cases cited:

Coffee, Tea and Chocolate Co Ltd v Cape Trading Co 1930 CPD 81

Mitton & Anor v Alcock NO & Ors HH-21-87 (not reported)

In re *Enoch and Zaretzky, Bock and Co Arbitration* [1910] 1 KB 327

Everest (Long Eaton) Ltd v P Camm Ltd (1950) 67 RPC 200 (CA)

Whitings Appln (1952) 69 RUSTIC 219

Singer Manufacturing Co v Loog (1881) 18 Ch D 395 (CA)

Burberrys v JC Cording and Co Ltd (1909) 26 RPC 693

Distilleerderij Voorheen Simon Rijnbende en Zoren v Rolfes, Nebel and Co 1913 WLD 3

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Bon Marche (Pvt) Ltd v Brazier & Anor 1984 (2) ZLR 50 (SC)

Draper v Trist and Tristbestos Brake Linings Ltd (1939) 56 RPC 429

International Power Marketing (Pty) Ltd v Searles Industrials (Pty) Ltd 1983(4) SA 163 (T)

Lennon Ltd v Sachs 1906 TS 331

Aktiebolaget Hjorth and Co v Aktiebolaget Optimus 1932 TPD 177

Annabel's (Berldey Square) Ltd v G Schock [1972] RPC 838 (CA)

Lorimar Productions Inc & Ors v Sterling Clothing Manufacturers (Pty) Ltd 1981(3) SA 1129 (T)

Eastman Photographic Materials Co Ltd & Anor v John Griffiths Cycle corporation Ltd & Anor (1898) 15 RPC 105 (ChD)

Barclays Bank (D C & O) v Volkskas Bpk 1951 (4) SA 630 (T)

Pianotist Co Ltd's Application (1906) 23 RPC 774

African Sewing Machine Co (Pty) Ltd v National Sewing Machines (Pty) Ltd 1967(1) SA 295 (C)

Leather Cloth Co v American Leather Cloth Co (1865) 11 HE Cas 523; 11 ER 1435

American Chewing Products Corp v American Chicle Co 1948 (2) SA 736 (A)

Pasquali Cigarette Co Ltd v Diaconicolas and Capsopolus 1905 TS 472

Adcock-Ingram Products(Pty) Ltd v Beecham SA (Pty) Ltd 1977 (4) SA 434 (W)

REYNOLDS J

Setlogelo v Setlogelo 1914 AD 221

AP de Bourbon SC for the applicant

KAR Laue for the respondent

Judgment

Reynolds J: This is an application on notice of motion for an interdict restraining the respondent from using the name and symbol used by the applicant in its business. The name is "Pegasus", and the symbol is the winged horse of Greek mythology of that name, depicted in red, and placed on a white circular background. It is referred to by the applicant as "The Flying Red Horse" or "Pegasus symbol", and is said to be "a secondary but important trademark or identifying element for Mobil Oil Corporation and its affiliates".

The applicant is part of a world-wide group of companies which market petroleum and petroleum products in 173 countries, including Zimbabwe, and within Zimbabwe itself it has many outlets for its products throughout the country. Both the name "Pegasus" and the red

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horse emblem were registered by the applicant in terms of the Trade Marks Act [*Chapter 203*] ("the Act"). The applicant has operated in Zimbabwe for some 80 years, using, as I understand it, the symbols in question throughout this period.

Initially, both marks were registered under class 4 of the schedule to the Trade Mark Regulations, 1974, which relates to goods such as fuels, oils and greases. The device of the flying horse was also registered under classes 1 and 12 of the Regulations, which relate to chemical products, and "vehicles; apparatus for locomotion by land, air or water" respectively.

The respondent commenced a travel agency business in May, 1986, under the style of "Pegasus Travel", using as a logotype the device of a winged horse arched over the "P" of "Pegasus Travel". The applicant avers that the respondent, in its use of both the word "Pegasus", and of the flying horse device, represents that its business is associated or connected with that of the applicant. It is on this basis that the applicant seeks the order of restraint prayed for.

Before giving consideration to the merits of the application, it is necessary to determine the application made by the respondent *in limine*. This was to strike out portions of the applicant's answering affidavit on the grounds that the contents in question:

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"a) were not set out in the founding affidavit;

b) seek to introduce a fresh basis of the application;

c) have been averred to for the first time in the applicant's answering affidavit with no explanation whatsoever as to why they were not mentioned in the founding affidavit.

In regard to 3, 4 and 6 above the grounds of objection are that the contents to which objections are taken are argumentative and therefore irrelevant."

The respondent avers that as a result of these omissions, it was taken by surprise, and its defence differed materially in consequence.

It is a well-established general rule of practice that new matter should not be permitted to be raised in an answering affidavit: the cause of action must be fully set out in the founding affidavit. This has been the settled practice of our courts at least since the matter was adverted to in *Coffee, Tea and Chocolate Co Ltd v Cape Trading Co* 1930 CPD 81 at 82. As remarked by SAMATTA J however, in *Mitton v Alcock NO & Ors* HH-21-87, at p 7 of the cyclostyled judgment: "It is, like other procedural rules, subject to the overriding discretion of the Court ". In the exercise of such discretion, the court would, obviously, only sanction a departure from the general rule on good cause shown. The applicant here has given no cause or reason for failing to include, in its affidavit supporting the notice of motion, the true basis of its action against the respondent, ie the fact that the name "Pegasus", and the symbol of the winged horse had both been registered under class 39 of the Trade Marks Regulations 1974. This class, class 39, incorporates "travel agencies", and these were not included in the classes in relation to which the marks were originally registered. Indeed, the fact of such later registration was only

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disclosed in the applicant's answering affidavit, after the matter was adverted to by the respondent in its replying affidavit.

It is significant that the respondent had previously written to the applicant, in October, 1987, stating, "To the best of our knowledge, your company does not operate any travel agency, and we reject your suggestion that our respective enterprises are associated". The applicant thereafter had the two marks registered, ie in August, 1988. The respondent's contention that the applicant "effected the further registration precisely because of the dispute" seems to me to have merit. This is supported by the fact that although class 39 relates to "transportation and storage" only, the actual certificates issued include, as a category, "travel agencies" as well. In the result, and but for two

other factors, the application to strike out the new matter would have succeeded. The first of these other considerations is that the further registration was published in the Patent and Trade Marks Journal, and the respondent should, in my view, have been aware of this. The respondent should not, therefore, have been taken by surprise as is alleged. Secondly, it is a fact that the marks have been registered under class 39 of the Regulations, and, provided that no prejudice to the respondent is apparent, as is the position here, it would be undesirable, at the least, to close one's eyes to this fact. As my final decision will be in the respondent's favour, it is clear that the respondent will not be prejudiced by this court ruling against it on the point raised *in limine*. In the result, and for the purposes of this judgment, the application to strike out is refused.

Application was also made to strike out other portions of the applicant's answering affidavit as "argumentative and therefore irrelevant", and "hearsay". In the light of my final decision in this matter, I find it unnecessary to decide on these aspects.

One further matter requires mention before the merits are considered.

Subsequent to the hearing, I considered it necessary to have certain information placed before me which I believed to be necessary in order to arrive at a just and proper decision in this case. Counsel were, accordingly, requested to submit written depositions in this regard. The first request made was for evidence to be submitted showing in which Part of the Register the two marks in question here had been registered. This aspect is of importance, for, depending upon that factual situation, different considerations as to onus and proof would apply. (See s 8(2) of the Trade Marks Act [*Chapter 203*].)

Mr *de Bourbon*, for the applicant, produced photocopies of the two certificates of registration, showing that both marks had been registered in Part of the Register.

Mr *Laue*, for the respondent, replied that it was not for the court "to go outside the papers" to obtain this information. It is a long-established rule of practice in our courts that a judge may not call a witness in a civil case without the consent of the parties (In re *Enoch and Zaretzky, Bock and Co* [1910] 1 KB 327). Although this rule of practice has been "self-imposed" by the courts, it may be questioned whether such a comprehensive, blanket bar to the exercise of a

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judicial discretion is desirable. This question, however, is beyond the scope of this judgment, but whatever the answer might be, Rule 409 of the High Court Rules, 1971, empowers a judge "in any cause or matter

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where it appears necessary for the purpose of justice" to call witnesses. The judge may also "empower" a party to give a deposition in evidence. The copies of the certificates produced by Mr *de Bourbon*, though not certified as such, appear to be genuine extracts from the Trade Marks Register, a public record. In the absence of objection from the respondent, I would hold that these documents show that the marks in question in this case were registered in Part A of the Register, and s 8(2) of the Act does not, therefore, apply.

I turn now to the merits of the application. Mr *de Bourbon* argued that the applicant was entitled to the interdict sought on the basis of an infringement of its registered trade marks, or, alternatively, on the basis of the respondent passing off its services as those of the applicant. It may be mentioned that no claim for damages has been made under either head. I shall deal with the application in terms of the Act first.

In my view this aspect of the case may be disposed of without undue difficulty. As already stated, I believe that it has been established that the respondent in this matter was a prior user of the two marks in relation to a travel agency business. The applicant's original registration was in relation to "goods" and not "services", and in relation to classes that would not include travel agencies. Its later registration, in class 39, occurred after the respondent had been using the marks continuously in its business for some considerable period of time. In this situation, as I see it, s 10 of the Act applies, and the common law rights acquired by the respondent by its prior use are protected by the provisions of this section. The section reads as follows:

> "10. Nothing in this Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it, in relation to goods or services in relation to which that person or a predecessor in title of his has continuously used that trade mark from a mark from a date anterior to -
>
> (a) the use of the first-mentioned trade mark in relation to those goods or services by the proprietor or a predecessor in title of his; or
>
> (b) the registration of the first-mentioned trade mark in respect of those goods or services in the name of the proprietor or a predecessor in title of his;
>
> whichever is the earlier, or, on such use being proved, to object to that

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> person being registered in the Register for that identical or nearly resembling trade mark in respect of those goods or services under subsection (2) of section *fifteen*."

By virtue of the provisions of this section, the respondent is, in my view, protected in respect of those services in relation to which it was the prior user, and which are included in the later

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registration, i.e. the class 39 registration. (See *Everest (Long Eaton) Ltd v P Camm Ltd* (1950) 67 RPC 200; *Whitings Appln,* (1952) 59 RPC 219). Although the respondent does not appear to have specifically relied upon this section of the Act, it is my view that the applicant is, nonetheless, barred from restraining the respondent's use of the marks in question in terms of its provisions, and the application fails on this basis. It is unnecessary, therefore, to consider the other defences raised by the respondent in this respect.

I pass now to the alternative basis for the action which is the alleged "passing off" by the respondent. The general principle embodied in the law of passing off, as I understand it; in simple terms, is that no-one is entitled to represent his goods or services as being those of another, thereby causing that other's injury. Thus, in the present context, if the respondent here has used the applicant's trade mark or, marks so as to represent that its business is associated or connected with that of the applicant, to the latter's prejudice, then the applicant is entitled to the relief sought. (*Singer Manufacturing Co* v *Loog* (1881) 18 Ch.D 395; *Burberrys v Cording and Co Ltd* (1909) 26 RPC 693). The principle is, with respect admirably expressed by GREGOROWSKI J in *Distilleerderij Voorheen Simon Rijnbende en Zonen v Rolfes Nebel and Co* 1913 WLD 3, at 9, s follows:

> ". . . a trader has no monopoly in the 'get-up' of his goods. However great the advantage and merits of his 'get-up' may be over that of his rivals, however much money, time and thought he may have expended over the designing of the particular, when once he has used and published them they do not become his property but are common property, which can be appropriated by his rivals provided they do not mislead the public but make it perfectly clear that the goods in the 'get-up' are not his but theirs."

Subject to what is said below, the onus lies on the applicant, and, as I see it, proof is required on the following matters:

(a) that the respondent has used the applicant's trade marks or marks similar to those of the applicant;

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(b) the use by the respondent of the applicant's trade marks would be likely to deceive the ordinary user of the respondent's services into believing that the services were those of, or were associated with those of, the applicant;

(c) that the applicant has been or probably will be injured in the goodwill of its business as a result (*Bon Marché* (Pvt) *Ltd v Brazier & Anor* 1984 (2) ZLR 50 (SC); *Burberrys v Cording and Co Ltd, supra*; *Draper v Trist and Trisbestos Brake Linings Ltd* (1939) 56 RPC 429);

(d) that the requirements for the granting of a perpetual interdict have been established.

I shall consider each of these necessary elements of proof in turn.

a) Use of similar marks.

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It is my view that the applicant has established that respondent has used and is using marks similar to those used by the applicant. The name "Pegasus" is identical in both cases, and each business uses the emblem of the well known winged horse of that name.

b) Likelihood of deception.

The respondent has itemized some fifteen points of alleged difference between its depictions of the flying horse and those of the applicant. I do not believe, however, that these relatively minor points of difference, including that of the colour difference, is of particular relevance in the present case. The important question is whether the general impression left on the casual and ordinary observer of each would be likely to cause him confusion as to whether the respondent's business is that of the applicant. (See *International Power Marketing (Pty) Ltd v Searles Industrials (Pty) Ltd* 1983 (4) SA 163 (T); *Lennon Ltd v Sachs* 1906 TS 331; *Aktiebolaget Hjorth and Co v Aktiebolaget Optimus* 1932 TPD 177). I am satisfied that such an observer would indeed consider die two renditions similar. As already stated the word "Pegasus" is identical, and the striking feature of each emblem is the picture of a flying horse, derived in both cases from the famed mycological creature. But this aspect of similarity is not the end of the matter. In considering the question of confusion or deception, the nature or character of the two businesses is of particular importance in my view. It is obvious that die more dissimilar the two businesses are, the less likely it is that the ordinary observer will be confused by the same type of trade mark being used by both. (*Annabel's (Berkley Square*) *Ltd v G Schock* [1972] RPC 838 at 844;*Lorimar Productions Inc & Ors v Sterling Clothing Manufacturers (Pty) Ltd* 1981(3) SA 1129 (T)). Indeed in the *Sterling Clothing Manufacturers*' case, VAN

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DIJKHORST J went so far as to say, at 1141F:

> "It is, however, only in the exceptional case where there will be passing off yet no actual common field of activity. Competition is normally the *casus belli*."

Naturally enough this would not apply in every case, particularly in those cases involving a trade mark which is fanciful or invented. In cases of that nature, and if proved as such, the trade mark has usually acquired a particular repute associated with a particular type of business, and the likelihood of confusion is much stronger as a result. A case which illustrates this point forcibly is *Eastman Photographic Materials Co Ltd v John Griffiths Cycle Corporation Ltd* (1898) 15 RPC 105. In this matter the well-known, invented word "Kodak" was involved; the Plaintiff's use of this name in the field of photographic equipment and materials being virtually a household word. The Defendant Company was restrained from using the word "Kodak" as a trade mark on the frames of bicycles that it was manufacturing and selling, items far removed in nature from photographic equipment.

In the present matter, the two marks are neither fanciful nor invented, and this qualification would not be applicable.

Certain words or emblems are of such common use that it would be a very unusual person who

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is genuinely deceived by two businesses, of different character, using the same "mark". I include the words such as "United", "National', "Modern", in this category, and symbols such as the picture of an Eagle; a national emblem, i.e. the Zimbabwe bird or the shamrock of Ireland; well-known flowers. An obvious qualification to the use of a common word, such as "Modern", is that if it is followed by a second word, such as "Motors" by two or more companies, then it is clear that confusion would follow. This qualification would not apply in the instant case, and in my view the winged horse named "Pegasus", would come close to fitting into this category of common usage as well. (See *Barclays Bank v Volkskas Bpk* 1951 (4) SA 630 (T).)

The overall test to be applied is, with respect, succinctly stated by DARKE J in *Pianotist Co Ltd's Application* (1906) 23 RPC 774, as follows:

> "You must take the two words. You must judge them both by their look and their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would

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> be likely to buy those goods. In fact you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks."

I would like to lay emphasis on the "kind of customer" who would purchase the goods or use the services of the parties in the present case. Essentially, the average customer of the applicant would wish to purchase or sell petroleum or petroleum products, or items related to the company outlets, whereas the normal customer of the respondent would wish to make inquiries and reservations regarding travel and accommodation in and out of Zimbabwe, and to purchase tickets in regard to such travel. To my mind these two businesses are widely different in their respective fields of operation, and I do not believe that the normal, average person would be confused into wondering whether the respondent was associated with the applicant because the former was using a similar trade mark device to that used by the applicant. (See, for example, cases such as *African Sewing Machine Co (Pty) Ltd v National Sewing Machines (Pty) Ltd* 1967(1) SA 295 (C); *Leather Cloth Co* v *American Leather Cloth Co* 11 HL Cas 523). As to the "ordinary purchaser" of the product, see such cases as *American Chewing Products Corporation v American Chicle Co* 1948(2) SA 736 (A); *Pasquali Cigarette Co Ltd v Diaconicolas and Capsopolus* 1905 TS 472; *Lennon Ltd v Sachs* 1906 TS 331.

In normal circumstances, the evidence of various members of the public that they were in fact confused by the similar marks would be of much assistance to the court in coming to its final decision on the merits. In the instant matter, however, the only witness whose evidence in this respect was not solicited was Mr Coley, and he, Mr Coley, is an ex-employee of the applicant. As such he would, in my view, fall into a specialist category rather than the "ordinary, average person" classification. He would have a particular interest in, and knowledge of the applicant's trade marks and their significance. Each of the other witnesses, whose evidence was solicited, would not be the ordinary, casual observer referred to by MASON J in *Lennon Ltd v Sachs, supra,* either. His attention would have been specifically drawn to the alleged deceipt, and the notion of association or connection implanted in his mind, either consciously or unconsciously.

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It is also apparent from the affidavits of the various witnesses that their opinions regarding their beliefs as to the respondent's association with the applicant would apply to any form of business using the same trade marks,

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regardless of the fact that they were wholly different in character.

(c) Injury to the applicant

In *Draper v Trist and Trisbestos Brake Linings Ltd, supra,* GODDARD LJ described the true basis of the action of passing off as being that:

> "the passing off by the defendant of his goods of the Plaintiff injures the right of property in the Plaintiff; that right of property being his right to the goodwill of his business."

(See, too, *Burberry*'s case, *supra*.)

The applicant here has not claimed that there has been any actual loss of goodwill as a result of the respondent's conduct, but does allege that the potential for such loss exists. Even assuming that this is correct, I do not think that potential loss is sufficient in this form of action. As was stated in *Barclays Bank v Volkskas Bpk, supra,* by PRICE J:

> "In such actions a Plaintiff must prove actual or probable injury to his business or reputation" (At 634D).,

(See, too, Halsbury, Statutes of England, 2ed vol 25 at 1025; *Adcock-Ingram Products Ltd v Beecham SA (Pty) Ltd* 1977 (4) SA 434 (W) at 438A).

(d) Interdict

The applicant seeks a perpetual interdict against the respondent. The principles which govern the grant of this form of court order in general are equally applicable in actions for passing off to the best of my knowledge, although it may be necessary, in a passing off case, for a qualified form of interdict to issue, if granted at all. These common principles were succinctly enunciated by INNES JA (as he then was) in *Setlogelo v Setlogelo* 1914 AD 221 at 227 as:

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

I would say that the applicant here has established such a clear right of action against the respondent, but I do not consider that, an "injury actually committed or reasonably apprehended" has been proved. As already stated, the applicant does not allege actual injury, but only "potential" injury. I find it difficult to envisage how there is a "reasonable apprehension" of injury here. To my mind the respondent's statement, at para 13 of the founding

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affidavit, has merit. This reads as follows:

> "13. In any event, I do not understand what possible injury or harm or damages could arise for the Applicant in this matter. A travel agency business in no way infringes upon the goodwill or line of business of the Applicant. In no way has the Applicant suggested that its reputation has in any way suffered, nor is there any possible reason why it should."

In the end result, and for the various reasons set out, I find that the applicant has not established that the respondent's use of the name and emblem of the winged horse amounts to a representation that its business is associated with that of the applicant.

The application is dismissed with costs.

Surgey, Pittman and Kerswell, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

S v CHAPUSA 1990 (1) ZLR 79 (HC)

Court **High Court, Harare**

Greenland J

Criminal Review 24 January 1990

Flynote

Criminal procedure (sentence)-culpable homicide - provocation as a mitigating feature - necessity for court to be informed of actual words used in insults - incorrect approach by trial magistrate.

Headnote

The accused had been convicted of culpable homicide following his plea of guilty and was sentenced to a fine of $250 or 75 days' imprisonment with labour. The accused and the deceased, his wife, had been drinking at a beerhall. Following a disagreement the accused assaulted the deceased which assault ceased upon the intervention of a third party. On arrival at their home, the deceased insulted the accused whereupon he again assaulted her, firstly with his hands and subsequently with a stick. The deceased died within half an hour of the assault from internal haemorrhage due to rupture of the spleen. The trial magistrate found that the deceased's spleen had probably been ruptured when she fell to the ground and also that the deceased had been, by her actions, asking for trouble.

Held, in the first instance, that before a court can weigh provocation as a factor in favour of the accused, it must be informed of the exact nature of the provocation. In the case of insults, the exact words used must be particularised. In the absence of such particulars it is not possible for the court to determine either the fact or the degree of provocation.

Held, further, that there was no basis for the trial magistrate to find that the deceased had

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ruptured her spleen when she fell to the ground. This was inherently improbable. It was more likely that the deceased's spleen was ruptured as a result of being struck with a stick. The stick should have

GREENLAND J

been produced to the court and its dimensions and weight recorded. Where there are competing propositions in cases involving severe assault or injury, the court should call for expert medical evidence.

Held, further, that the trial magistrate erred in finding that the deceased had been asking for trouble.

Held, further, that there was a failure of justice and that the proceedings could not be certified as being in accordance with real and substantial justice.

Cases cited:

S v *Nyathi* HB-160-88 (not reported)

Attorney-General v *Tobiwa & Ors* 1980 ZLR 192 (A)

S v *Ncube* S-14-87 (not reported)

S v *Sibanda* AD-10-72 (not reported)

S v *Marufu & Ors* S-223-81 (not reported)

S v *Muchine* HH-190-82 (not reported)

Judgment

Greenland J: The accused was prosecuted on a charge of culpable homicide. He pleaded guilty and was convicted, as charged, in accordance with the procedure set out in s 255(2)(b) of the Code, ie, with the facts being agreed.

The facts were produced in summary by the State and also canvassed by the learned regional magistrate. They are set out as follows.

The accused, aged 56 years, and the deceased, his wife of 25 years of age, attended at a beerhall at 10.30 hours on 3 July 1988. They both consumed beer. At about 11.45 hours the accused advised his wife to return home and prepare food for their three minor children. She declined and continued drinking beer.

The accused then assaulted her, punching her four times in the face. The assault ceased on the intervention of a third party who admonished both parties to go home as they were drunk. Accused admitted to being moderately drunk and claimed that his wife was very drunk.

On arrival at home she proceeded to insult him. He again assaulted her by grabbing her by the

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throat and forcefully pushing her against the wall.

Thereafter she proceeded to insult him for a period of some six minutes whilst he remained seated. He then got up, picked up a stick of approximately three feet in length, and struck her a blow to the back.

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This blow felled her. She lay on the floor muttering statements to the effect that the accused had not paid lobola and that she intended leaving him. Within half an hour she was dead.

The post mortem report particularises the cause of death as:

> "Death due to internal haemorrhage due to rupture of spleen."

On these agreed facts the court proceeded to pass sentence as follows:

> "Accused is a man in the afternoon years of his life. He is a first offender and he pleaded guilty. He and the deceased were married, they had attended a beer hall where they drank and became drunk.
>
> Accused says he was moderately drunk and the deceased was very drunk. Accused had trouble with the deceased because she would not stop drinking and go home with him and prepare food for her children there and this led to the accused punching her a number of times. When they got home to their residence, deceased insulted accused and this led to further violence.
>
> Eventually, the accused struck the deceased with a stick, which was almost 3ft long, and felled her. Though she continued talking for a bit after that, it is clear that she had been fatally injured. It seems probable that her spleen ruptured when she fell to the ground. She died as a result of internal bleeding. Accused was not his usual self because of the drink that he had consumed and it is clear that the deceased's conduct both at the beer hall and at their home provoked him. He seems to have lost control of himself and acted in a more violent fashion than can be justified. There was certainly no justification in resorting to the use of this stick. One must not of course lose sight of the fact that [a] life has been tragically lost but on the other hand deceased was asking for trouble in behaving as she did.
>
> The accused is looking after the deceased's three young children. Accused is sentenced to pay a fine of $250.00 in default of which to undergo 75 days' imprisonment with labour."

The court's approach to sentence, the sentence itself and, in particular, the statement:

> ". . . on the other hand the deceased was asking for trouble in behaving as she did"

has induced considerable public reaction and it is apparent that there exists

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a body of opinion that this type of approach to sentence on the killing of a female by a male brings the court, and the administration of justice into disrepute.

The matter is therefore necessarily of particular concern to me as judges are specifically charged win the duty to review such matters and be satisfied that they accord with real and

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substantial justice. See s 26(2) of the High Court of Zimbabwe Act, 1981.

The proceedings have therefore been carefully scrutinized and reviewed. The views of the Attorney-General have been obtained.

Regrettably it must be concluded that these is substance in the complaints about the proceedings and the sentence. In an apt and well presented submission the Attorney-General concludes:

> "The impression that one is left with upon reading the record is that this is one of those instances, where the Public Prosecutor influenced by the fact that an accused is pleading guilty takes the easy way out of accepting facts which clearly should not be accepted, in order to expedite proceedings, combined with a lack of proper enquiry by the Court. In this case it cannot be said that the Court was sufficiently informed, or sufficiently informed itself to assess an appropriate sentence.
>
> As his Lordship has pointed out, the case has provoked a measure of public concern it seems justifiably so, as the inference from the handling of the case by the Court and the unqualified remarks by the magistrate is that the Court discriminates in the view it takes and punishment it metes out where assaults are perpetrated by males upon females arising from domestic disputes even where death results. It ought to be made quite clear that, as was stated by MUCHECHETERE J in *Themba Nyathi* v *S* HC-B-160-88 that the Courts consider that 'the fact that an assault emanates from a domestic dispute does not in any way mitigate it. On the contrary close relationships between married persons should act to **prevent** assaults unless there is severe provocation such as unfaithfulness' (emphasis added).

With respect I am in agreement with these conclusions.

Firstly no attempt was made to particularise the words used in the alleged insults. Without knowing what words were used it was simply not possible

for a court to assess the quality and level of insult intended and occasioned thereby. Without such assessment it was not possible to determine either the fact or degree of provocation.

In our law the approach of a court to sentence where provocation is claimed is to be gleaned from the dicta of BARON JA, in the case of *Attorney-General* v *Tobiwa & Ors* 1980 ZLR 192 at p 197:

> "But much as one sympathises with the respondents - and Mr *Friedman* conceded that the learned magistrate was right to approach the case sympathetically - the law simply does not allow retaliation of the kind resorted to by the respondents. Provocation - and severe provocation - there clearly was; but the learned magistrate overlooked that for provocation to be pleaded in mitigation of sentence it must in fact give rise to loss of self-control; anger or resentment, however understandable, is not sufficient. This is why the spontaneity of the reaction is vital for the defence to succeed. In *George Tsiga* v *S* AD-77-76, LEWIS JA, as he then was, said:
>
> > 'It is of the essence of a defence of provocation that has the effect of reducing the crime from assault with intent to commit grievous bodily harm to common assault or murder to culpable homicide, that the reaction to the provocation must be sudden, in the sense that the person provoked acts on the spur of the moment and in circumstances where he has temporarily lost his power of self-control and does not appreciate what he is doing.'
>
> The same principles apply before the defence of provocation can succeed in mitigating sentence."

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BARON JA, was dealing with a case where black accuseds had assaulted a white complainant after he had insulted them by referring to them as "Kaffirs" worth less than "donkeys".

Because the words were particularised he was able to conclude at 197C-E:

> "Assuming - as we must for the purpose of this appeal - that the first complainant used the kind of language alleged, then far from condoning his behaviour it must, in my view, be condemned in the strongest possible terms. He fired a shot in the air and used highly insulting and abusive language. His behaviour was arrogant and contemptuous. To behave in this way at the present delicate and critical stage in the history of our country, when everyone should do his utmost to exercise restraint

GREENLAND J

> and refrain from provocative conduct calculated to exacerbate the feelings of others, is not only reprehensible but tragic for the country."

In the later case of *S v Ncube* S-14-87 McNALLY JA had this to say on the question of provocation:

> "The human mind does not move logically from one intention to the next. It is capable of entertaining contradictory intents and of disguising them from itself. The emotional response to provocation is difficult to measure, whether objectively or subjectively. I find it difficult therefore to adopt an analytical categorisation of the conduct of the appellant. I would say simply that if she had an intention to kill, it was formulated in circumstances where long-standing and deep provocation was brought to flash-point by the events immediately preceding the assault I am satisfied, in the words of FIELDSEND CJ, in *Nangani's* case, *supra,* that:
>
> > '... the provocation was such as could reasonably be regarded as sufficient ground for the loss of self-control that led the accused to act against the victim as (she) did.',
>
> and also that:
>
> > '... the provocation actually caused the accused to lose (her) self control'."

From the above, it is clear that before a court can weigh provocation as a factor in favour of the accused it must be informed of the exact nature thereof - in this case the actual words used in the insults.

Secondly the learned magistrate's finding that:

> "It seems probable that her spleen ruptured when she fell to the ground."

is at best, extremely precarious, and at worst totally wrong. It is inherently improbable that a young healthy woman will cause herself such a fatal injury simply from falling to the ground. If the magistrate's proposition is sound most sports would be out of the question for most people.

To my mind it is far more probable that the rupture of the spleen was caused by the blow with a stick delivered to the accused.

In such situations, ie, competing propositions in cases of severe assault or injury, the court must call the expert evidence of a doctor. See *S v Sibanda* AD-10-72; *S v Marufu & Ors* S-223-81; *S v Muchine* HH-190-82.

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GREENLAND J

Quite obviously if such evidence proved that it was the blow that caused the fatal injury the court would have assessed his culpability as much higher and as meriting far more severe punishment. In this exercise the stick ought to have been produced and its dimensions and weight recorded.

The above all lead to the third and final objection to the learned magistrate's approach. His statement that:

> "the deceased was asking for trouble"

constituted most inappropriate language for a judicial of ricer in the circumstances and betrays a fundamentally defective judicial approach to the facts.

As it was death that the court was concerned with, by no test could it be said that the deceased was requesting her death. Neither was she seeking to be severely assaulted. All she in fact did was to take a stand against the accused. Not surprisingly that stand or stance was verbal as she was a woman and therefore the physically weaker sex.

An objective judicial analysis reveals the following.

At the beerhall she refused to go home and cook. This was regarded as an act of disobedience by the accused. His solution was to resort to violence. He punched her four times in the face. The male fist is a vicious weapon. His action was totally unjustified, morally and legally.

On arrival at home she subjected him to a tongue lashing. Even if this was insulting is this surprising in view of the brutal assault to which she had already been subjected? The words used may not have been objectively insulting - she may have been saying "you are a bully, a brute, beating a woman ... etc" - we simply do not know since the words were not particularised. What may be concluded however is that by resorting to physical violence he was, at least, as much to blame for the continuance of the altercation.

His subsequent actions of grabbing her by the throat and beating her with a stick prove only that he was willing and prepared to settle the issue by even greater physical violence.

A court of justice should know from experience that such an attitude and behaviour can and often does culminate in serious injury or death.

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A court of justice should not be seen to be condoning such behaviour. Domestic altercations are a fact of life. The tendency of the male protagonist to settle the issue in such altercations by resorting to physical violence simply because of superior natural strength must be meaningfully condemned and deterred. It is a truism to say that the courts are there to protect the weak. Starting off on the premise that there can be no room for the settling of disputes by violence the

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court should have concluded that the facts revealed a shameful and brutal attack on a defenceless woman, a woman whom he had a moral duty to love and protect.

Before concluding I would emphasize that I am loathe to criticise any magistrate. There can be no doubt that the errors in the trial are explicable purely on the basis of human failing. There is no basis for suspecting or attributing incompetence, bad faith or bias.

I would associate myself with the remarks of GREENFIELD J in the preface to *Instant Crime* 1973, speaking of magistrates:

> "In my humble opinion they have, with very rare exceptions, consistently rendered service of a high standard in work which is arduous, and difficult, often distasteful and sometimes heart-rending. Magistrates do not enjoy all the advantages which fall to the lot of judges. In particular they do not always have the cases before them presented by experienced prosecutors with the qualifications of an advocate. Their diet of work is little relieved by interesting civil cases. I very much doubt whether any country in the world is better served by the persons who preside in courts of comparable jurisdiction than is Rhodesia by our magistrates." (For Rhodesia read Zimbabwe.)

The public is therefore re-assured that the errors in this trial are of the type that can and do occur in any competent jurisdiction. They represent an uncharacteristic lapse on the part of a competent, fair and industrious court.

As I am satisfied that there was a failure of justice in this case I am unable to certify the proceedings as being in accordance with real and substantial justice.

Because our law precludes a re-trial the matter is now at an end.

Gibson J: I agree.

MAJORA v KUWIRIRANA BUS SERVICE (PVT) LTD 1990 (1) ZLR 87 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Manyarara JA

Civil appeal

7 December 1989 & 29 January 1990

Flynote

Administrative Law - labour relations hearing - principles of natural justice applicable.

Contract - compromise - same effect as res judicata.

Employment - Labour Relations Act, 1985 - unfair labour practice - failure to comply with determination of labour relations officer - labour relations hearing - audi alterant partem rule to be observed.

Legislation - Labour Relations Act, 1985, ss 10, 109(2), 111(1), 112(3), 113(2) - Labour Relations (General) Regulations, SI 368/85 ss 14,15 and Third Schedule thereto.

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Headnote

The appellant was employed by respondent in the capacity of operations manager. He was suspended from employment without pay on 3 August 1987 and authority was sought from the responsible Minister to dismiss him as required by s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations SI 371/85. On 7 September 1987 authority was refused and respondent was ordered to reinstate appellant. Respondent unsuccessfully appealed to a regional hearing officer who on 21 December 1987 also ordered the reinstatement of the appellant.

Respondent did not comply with the determination made by the regional hearing officer on 21 December 1987. This failure to comply with a labour relations officer's determination of 21 December 1987, constituted an unfair labour practice in terms of s 10 of the Act as read with s 14 and the Third Schedule of the Regulations. On 10 March 1988 the

regional hearing officer found the respondent guilty of this latter unfair labour practice without affording the respondent a hearing. The determination consequent thereon was then registered with the High Court in terms of s 109(2), 111(1) and 112(3) of the Labour Relations Act, 1985 thereby rendering the determination enforceable as a civil judgment. A writ of execution was subsequently issued out of the High Court but before execution appellant agreed to stay execution on the writ pending an application to have the writ set aside.

Before the application was launched the parties' legal practitioners agreed to compromise the appellant's claim. Appellant's legal practitioner subsequently issued on the agreement of compromise on the ground that he had misunderstood his client's instructions. As a result the respondent (appellant *a quo*) applied to the High Court to have the writ set aside on two grounds that a) the registration of the determination was incompetent and b) the appellant's claim had been compromised.

On appeal:

Held, in the first instance, that an agreement of compromise is binding on the parties and has the same effect as *res judicata* and consequently excludes an action on the original cause of action.

Held, further, that a failure to comply with a determination of a labour relations officer is a fresh unfair labour practice and a determination to that effect can only be made after carrying out an inquiry in terms of the Act.

Held, further, that the rules of natural justice, in particular, the *audi alteram partem* rule must be observed in the determination of any dispute brought in terms of s 109(2) of the Act which obliges the determining authority to conduct a due inquiry.

Semble: A legal practitioner has implied or ostensible authority to compromise his client's claim on his behalf.

Cases cited:

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Nagar v *Nagar* 1982 (2) SA 263 (ZH)

Van Zyl v *Niemann* 1964 (4) SA 661 (A)

Orion Investments (Pvt) Ltd v *Ujamoa Investments (Pvt) Ltd & Ors* 1988 (1) SA 583 (ZS)

Art Corporation Ltd v *Moyana* S-43-89 (not reported)

Augustus v *Zvikararnba* S-20-89 (not reported)

MacFoy v *United Africa Co Ltd* [1961] 3 All ER 1169; [1962] AC 152 (PC)

E Chatikobo for appellant

MJ Gillespie for respondent

MANYARARA JA

Judgment

Manyarara JA: The Labour Relations Act 1985 makes provision for the registration in a court of law of orders made in labour disputes and their enforcement as civil judgments of the court. In this matter the appellant's recourse to the procedure failed when the High Court set aside the proceedings upon the respondent's application. It is against the High Court's judgment that this appeal was noted.

Two issues arise for consideration: The first is the validity of the proceedings set aside; and the second is whether the action was barred by a compromise reached by the parties. It is agreed that if the action was compromised, the whole appeal must fail. Therefore it is this point which will be considered first.

[The learned judge recited the facts and then continued:]

On 16 August 1988 a letter was addressed to the appellant's legal practitioners on the respondent's behalf in the following terms:

> "Further to our letter of the 29th July, 1988 (to stay execution) and our subsequent telephone discussions, we confirm that without prejudice we have put your proposals for settlement to our client, namely that your client would tender his written resignation from the Company provided that in addition to the amounts specified in the writ of execution, namely $5 583,62, interest and costs, your client in addition receive payment calculated in respect of the salary he would have received for the months of April, May, June and July 1988 ...."

It should be noted that the letter refers specifically to "proposals for a settlement" made by the appellant for the respondent's consideration. The significance of the quoted phrase will emerge in due course. The reply to the letter was brief. It reads:

> "We acknowledge receipt of your letter dated 16th August 1988, confirm the contents therein and await your client's response as a matter of urgency."

Then on 22 August 1988 Mr Eastwood wrote back as follows:

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"With reference to your letter of 17th August 1988 and the writer's subsequent discussion with your Mr Mufanebadza [also referred to as Mr Jakachira in the papers] on the 19th instant, we are pleased to annex

MANYARARA JA

our client's cheque in your favour for the sum of $9 000 which is tendered in full and final settlement of all claims by your client and includes all interest and your costs which we agreed with you.

The payment, however, is subject not only to its acceptance in full and final settlement aforementioned, but subject to your client's furnishing of his written resignation from our client's employ which should be back-dated to the 31st October 1987 - the date on which notice of termination expired.

Accordingly we shall be pleased if you will ensure that no amount is released to your client until he has signed such written resignation and we trust that you will furnish us with the written resignation simultaneously with your release of the settlement sum to your client."

It is on the exchange of these letters that Mr *Gillespie* contends on behalf of the respondent that the action was compromised by the appellant's acceptance of the proposals made by his client.

Mr *Chatikobo's* stance is that there was no compromise, as the terms thereof m were not fulfilled. The basis of Mr *Chatikobo's* argument is:

(a) that the appellant did not resign and in fact wanted his job back;

(b) that the sum of $9 000 tendered by the respondent was not accepted but returned;

(c) that the respondent's legal practitioners accepted that the compromise had failed.

The finding of the learned judge *a quo* (GIBSON J) was that there was a binding agreement between the parties, as the respondent's proposals were accepted "in full".

No problem is raised by the proposition referred to in *Nagar* v *Nagar* 1982 (2) SA 263 (ZH) or the correctness of the proposition of law set out in *Van Zyl* v *Niemann* 1964 (4) SA 661 (A) at 669-670, and quoted in *Nagar*'s case, *supra,* at 267F, that:

"It is clear that an agreement of compromise has the same effect as *res judicata* and consequently excludes an action on the original cause of action except where the compromise agreement expressly or by clear implication provides that in the event of non-compliance with the provisions thereof a party may fall back upon his original right of action."

MANYARARA JA

Affidavits in support of each side's contention were filed in the application before the High Court.

The salient portion of the affidavit filed by the appellant's legal practitioner, Mr Mufanebadza Jakachira, is that on 30 July 1988 he met his client by chance and the following conversation ensued:

"After apprising (the appellant) of developments and a brief chat, I enquired from him whether he had considered

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the possibility of a settlement in view of the fact that the matter was dragging endlessly resulting in a lot of inconvenience and financial hardships to himself and his family. The (appellant's) reply was that he would consider such a move only if he was paid 'his salary', failing which we were to pursue the matter in the Court."

On 3 August 1988 Mr Jakachira telephoned Mr Eastwood and put to him the proposal made by the appellant. This was followed by the exchange of the letters already quoted. On 15 August 1988 Mr Jakachira himself addressed the following letter to his client:

"The intended application to the High Court to set aside the determination order by the Regional Hearing Officer has been left in abeyance while your employers consider the possibility of payment of your outstanding salary to date in consideration for your resignation from the company's employ as per our previous discussion."

Mr Jakachira does not deny that the letter accurately reflects the position to which Mr Immerman deposed as follows:

"2. I was asked by my partner Mr Anthony Eastwood, who was departing on holiday, to follow up on his letter of 16th August 1988 to Respondent's legal practitioners (annexure 'M') by reaching a settlement in the matter.

3. I duly 'phoned Mr Mufanebadza Jakachira on the 19th August 1988 and over the 'phone I went through each and every amount that was to be taken into account for a settlement of the matter. These amounts were eventually established as being:

$5 583,62, the amount claimed under the writ of execution;

$2 756,80, the amount calculated (after deduction of P A.Y.E.) of salary for the months of April to July 1988 inclusive.

MANYARARA JA

4. I then suggested to Mr Mufanebadza that we round off the amount (which was $8 340,40) in settlement of the claim and his costs (without the need for taxation) to $9 000,00. Mr Mufanebadza readily agreed with the proposal and I undertook to obtain the Applicant's agreement and cheque for $9 000,00 in full settlement of the matters.

5. Accordingly I received the Applicant's cheque for $9 000,00 made in favour of the Respondent's legal practitioners which I sent to them undercover of a letter dated 22nd August 1988 (annexure 'Y') in which I referred to the settlement reached as 'in full and final settlement ...which we agreed with you'.

6. I recall receiving a 'phone call from Mr Rushwaya of the Respondent's legal practitioners who informed me that Respondent was refusing to accept the Applicant's cheque in settlement of the matter as he was also claiming leave pay. I advised Mr Rushwaya that if that was the case, then he should return the cheque. I recall that I expressed my dismay at the turn of events stating that I could not understand this in the light of the negotiations that had already taken place and his response was to the effect that these were his instructions."

I see no basis in the affidavit for Mr *Chatikobo's* submission that Mr Immerman "accepted that the compromise had failed", in the light of the conflation by Mr Jakachira that he discussed and agreed the terms of the compromise alleged by the respondent.

Mr Jakachira's further averment was that on 23 August 1988 the appellant came to his office "to

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acknowledge receipt of (his letter of 15 August) and to give us his further instructions". My view of the phrase "further instruction" is that the only meaning to be attached to it is that by then the substantial terms of the compromise had been agreed, and Mr Immerman's affidavit (which is not disputed) sets out the precise manner in which the agreement was concluded. Why else would it have been necessary to "round off" the odd figure of $8 340,40 to $9 000 if the negotiations were still proceeding? Why too would Mr Jakachira readily agree to the proposal if he did not consider it to be advantageous to his client and in accordance with his instructions? It would make nonsense of the appellant's case to suggest negative answers to these questions.

MANYARARA JA

As the learned judge found, and correctly so, the appellant's plea that his legal practitioners "obviously misunderstood the position on what he meant by his 'full salary'" (which was not established) was a matter between him and them. It did not and could not vitiate the agreement, simply because nothing which might or might not have occurred after the dispatch of Mr Eastwood's letter of 22 August 1988 can be allowed to stand by side with the contents of the letter. See *Orion Investments (Pvt) Ltd* v *Ujamaa Investments (Pvt) Ltd & Ors* 1988 (1) SA 583 (ZS). The same principle applies to the intervention of Mr Rushwaya, who does not appear to have been involved in the negotiations, as well as to a letter subsequently addressed to Mr Immerman proposing new terms of agreement, which crystallized into a letter of demand dated 20 September 1988 for the payment of a sum never brought into the computation of the $9 000 already agreed between the parties. Hence Mr Immerman's expression of "dismay at the turn of events". No more than this should or can be read into his affidavit.

I find myself in complete agreement with Mr *Gillespie's* argument, which may be summarised as follows:

1. A compromise was reached by the exchange of correspondence and telephonically;

2. The terms of the compromise were:

   "(a) That the appellant would resign;

   (b) That the respondent would pay the appellant the sum of $9 000:

      (i) $5 583,62 - the writ;

      (ii) $2 756,80 - further wages less tax;

      (iii) rounded up - costs."

3. The agreement was not at variance with the offer which the appellant accepted;

4. What the appellant alleged was a new condition introduced by the respondent's letter of 22 August 1988, that his resignation should be back-dated to 31 October 1987, made no difference to the matter as the dismissal on notice was invalid anyway - *Art Corporation Ltd* v *Moyana* S-43-89 (not reported).

5. Even if there was a misunderstanding of the appellant's instructions by his legal practitioner

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(which was not made out), it was not open to the appellant to reject the respondent's offer; and

6. The appellant's legal practitioners were authorised to compromise - *Augustus* v *Zvikaramba* S-20-89 (not reported).

MANYARARA JA

The learned judge's reason for granting the respondent's application was that, although the registration of Mrs Goromonzi's order of 10 March 1988 in the High Court was valid and the writ of execution was issued lawfully, "the judgment was abandoned (by the appellant) in preference for the newly agreed terms ...".

With respect, this is a misdirection. It is correct that the appellant's case failed on the compromise, as his appeal must also fail on the same point. However, the registration of the order in question was incompetent and it is necessary therefore to deal with the point, which is the first issue in the appeal.

The provisions of the Labour Relations Act which apply to the order made by Mrs Goromonzi on 10 March 1988 are these:

> "111. (1) After due inquiry into, and consideration of any matter that has been referred to it in terms of paragraph (d) of subsection (2) of section *one hundred and nine*, a determining authority may -
>
> (a) make such order as it thinks appropriate for determining the dispute or rectifying the unfair labour practice concerned; or
>
> . . .
>
> (2) . . .
>
> (3) Any party to whom an order made in terms of subsection (1) relates, may submit for registration copies thereof, duly certified by the determining authority or presiding officer thereof, to whichever court would have had jurisdiction to make the order had the matter been determined by it.
>
> (4) Where an order has been registered in terms of subsection (3) it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court."

The order was issued in form "LR 26" of the Regulations, which is the prescribed form for an order to rectify or redress an unfair labour practice: see s 15(i) of the Regulations. The determination of 21 December 1987, whose enforcement prompted the issuing of the order of 10 March 1988, was issued on form "LR 25" as was the determination of 7 September 1987 - pp 16 and 17 of the record and see s 15(h) of the Regulations. The distinction accords with the purpose for which each form is intended.

The relevant portions of the order to rectify or redress an unfair labour practice issued on 10 March 1988 in form "LR 26" are to the following effect:

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MANYARARA JA

> "I, Mrs WK Goromonzi, being Regional Hearing Officer ... have found you guilty of an unfair labour practice.
>
> The facts to which the unfair labour practice relates are failing to comply with the determination issued on 21 December 1987 (to reinstate the appellant on his full salary to date)."

Part II of the printed form is a "direction to (the) aggrieved party" that the order "is registrable with the Clerk of the Magistrates/Registrar of the High Court (as the case may be)". The explanation for the omission of a similar direction in form LR 25 seems to be that s 1 12(3) and s 1 13(2) of the Act make specific provision for the enforcement of a determination issued in that form unless the effect of the determination is suspended pending appeal upon the application of the party noting the appeal. And in the event that an order registered with a court is varied or set aside by the Labour Relations Board or the Labour Relations Tribunal above it, s 111(5) of the Act requires the clerk or registrar of the court concerned to amend his register accordingly.

It is against the statutory background which I have set out that several matters mentioned in the judgment of the court below require clarification and, in certain respect, correction.

[The learned Judge of Appeal made certain comments and continued:]

And finally, the learned judge correctly held that there can be no doubt that the *audi alteram partem* rule is enshrined in the determination of any dispute brought in terms of s 109(2) of the Act, which obliges the determining authority to investigate the matter and to decide it only after conducting **due inquiry** of the same. The provision is peremptory in its terms and is mirrored by the subsidiary legislation regulating the conduct of the proceedings (s 15 of the Regulations).

The respondent's failure to comply with the determination made on 21 December 1987 alleged in the 10 March 1988 order was a fresh unfair labour practice by virtue of s 10 of the Act as read with s 14 and the Third Schedule of the Regulations. It followed that s 109(2) of the Act and s 15 of the Regulations applied to the proceedings to determine the respondent's alleged "failure to comply" as distinct from the determination of 21 December 1987 itself, in which the determination made on 7 September 1987 had been confirmed on appeal.

MANYARARA JA

The admitted failure by the Regional Hearing Officer to observe the *audi* rule in respect of the making of the 10 March 1988 order vitiated its validity. As the proceedings on which the order was founded were incurably bad, compliance with s 111(3) of the Act in the registration of the order was impossible and the writ of execution purportedly issued in terms of s 111(4) was void - *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I; [1962] AC 152(PC).

As I said, the appeal fails on the second issue, the compromise which barred the appellant's action. But it has seemed necessary to dispel any misapprehension as to the applicability of the *audi* rule to the order which gave rise to the action.

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In dismissing the appeal, I would not disturb the award of costs made in the application before the High Court. It was proper that the respondent (which was the applicant in the proceedings) should bear the costs incurred until the action was compromised on 22 August 1988 and that the costs incurred thereafter should be borne by the appellant. The respondent was entitled to resist the proceedings, in spite of its mistaken impression that it could dismiss the appellant without ministerial approval.

It is on that basis that I would dismiss this appeal with costs.

Dumbutshena CJ: I agree.

Gubbay JA: I agree

Sawyer & Mkushi, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

NYATAWA v NENE 1990 (1) ZLR 97 (HC)

Court **High Court, Harare**

Ebrahim J

Notice of motion

16 November 1989 & 31 January 1990

Flynote

Family Law - husband and wife - whether lack of compliance with s 4 of African Marriages Act [Chapter 238] invalidates a marriage celebrated under that Act.

Family Law - husband and wife - distribution of assets following divorce - relevance of conduct - where no conspicuous disparity exists between conduct of spouses court will not indulge in exercise to apportion fault.

Headnote

Lack of compliance with the formalities prescribed by s 4(2) of the African Marriages Act [*Chapter 238*] will not necessarily render invalid the marriage concerned. The provisions of that section are designed as a safeguard against a woman being forced to marry against her will. The fact that the wife asserted the validity of her marriage and that her husband had sought and obtained a divorce from her indicated that there was no basis for a claim to invalidity for want of compliance with s 4(2).

The object of the distribution of the assets of spouses following a divorce stated in s 7(3) of the Matrimonial Causes Act, 1985 militates against the "clean break" principle towards which the Act is implicitly geared.

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In deciding upon a just distribution of assets following divorce the court will not indulge in an exercise to apportion fault unless there is a "conspicuous disparity" between the misconduct of the spouses. Where, however, the fault of one spouse is strikingly greater than that of the other a court would be justified in taking this factor into consideration.

EBRAHIM J

Cases cited:

Beaumont v *Beaumont* 1987 (1) SA 967 (A)

Wacktel v *Wachtel* [1973] 1 AH ER 829 (CA); [1973] Fam 72 (CA)

Van Gysen v *Van Gysen* 1986 (1) SA 56 (C)

DM Foroma for the applicant

O Gutu for the respondent

Judgment

Ebrahim J: This is an application on notice of motion for an order to eject the respondent from her former matrimonial home. The house was sold to the applicant by the respondent's former husband. The respondent and her husband were divorced by order of the Harare community court on 1 March 1989. No order apportioning the assets of the marriage was made. In terms of s 7 of the Matrimonial Causes Act, 1985 it is competent for this court to make such an order now. Should the respondent be successful, such an order will be necessary.

At the time of the divorce the respondent's husband, Arikeri Karidozo, was in the process of purchasing the disputed house from the Harare Municipality. The transaction between the applicant and Karidozo which I have referred to for convenience as a sale was in fact a cession of Karidozo's rights and obligations as purchaser from him to the applicant. In accordance with the deed of sale, the consent of the Municipality to the cession was obtained.

The respondent's principal ground for objection is that she ought to have been consulted before the cession was granted. She bases this claim on the fact that in order to obtain title to purchase the house originally it was necessary for Karidozo to produce to the authorities a marriage certificate in order for him to obtain married accommodation. She claims that the certificate he produced for this purpose was the certificate of marriage to her and that for this reason she has a proprietary interest in the house.

I am unable to accept the validity of this contention. No direct evidence was adduced regarding the necessity of producing a marriage certificate for the purchase of this house. Even if the necessity is accepted, I do not think it can be regarded as an essential term of the contract *per se*. No term in the deed requires such production. The contract embodied in the deed of sale is exclusively between Karidozo and the Municipality. There is no indication that the respondent made any tangible contribution towards the purchase of the house. I do not think that the mere fact that her name may have appeared on a marriage certificate which may have been a

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formalistic *sine qua non* of

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purchase gives the respondent any proprietary claim to the house.

The evidence of Karidozo puts at issue the validity of his marriage to the respondent and thus any possible right she may have had to occupy the matrimonial home. It is his contention that the marriage was one of convenience, fraudulently engineered by himself and two of his relatives in order, one gathers, to mislead the authorities responsible for allocating houses.

His evidence is that in 1949 he immigrated to this country from Mocambique. He was accompanied by a Mocambican wife, Maria. They had their marriage solemnised in terms of the African Marriages Act [*Chapter 238*] and on the strength of this they secured married accommodation in the Old Bricks area of the suburb then known as Harare Township. Maria went home sometime during the decade of the 'fifties and did not return to him. Subsequently he began to co-habit with the present respondent. When, in 1970, the Old Bricks complex was due for demolition, the residents were offered alternative accommodation in other municipal housing schemes. Without a wife, one supposes, Karidozo was in jeopardy of losing his entitlement to married accommodation. He says that he produced the marriage certificate relating to his marriage to Maria as formal proof of his status but that, evidently, was not sufficient. He required the presence of a woman to complete the appearance of marriage. Hence the "marriage of convenience".

It is alleged that this marriage was invalid for want of compliance with the requirements of pares (a) and (b) of subs (2) of s 4 of the African Marriages Act. The requirement of these provisions is that certain persons should be present at a marriage solemnisation, namely, the woman's guardian (pare (a)) and the chief: headman or kraal-head of the guardian or such other person as the marriage officer may approve (pare (b)). It is alleged that the people who purported to be the guardian and the person described in pare (b) were both relatives of Karidozo. Both these relatives were now dead and there is apparently nobody else who is able to corroborate this version of what took place at the ceremony. The marriage certificate has the appearance of authenticity. It seems to me that a party who asserts invalidity in circumstances where such invalidity is not patent must prove his assertion. If he cannot do so the alleged invalidity must be disregarded.

I would add that in any case I do not think lack of formality in these circumstances would necessarily render the marriage invalid.

EBRAHIM J

The provisions of s 4 are obviously designed as a safeguard against a wife being forced to marry against her will and that of her family. In this case there is nothing to suggest that the respondent was forced into marriage. Indeed, it is she who asserts the validity thereof. I do not think it is open to Karidozo to dispute the validity of the marriage at this stage when he has

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relied on its subsistence to his own convenience for the past nineteen years.

Respondent has also drawn attention to the fact that Karidozo sued her for divorce on the grounds of adultery. One might have supposed that if he had any conviction that the marriage was invalid he would have applied for a decree of nullity instead of divorce. His excuse for not doing so is his "little understanding of the Shona language and the Court procedures". It is scarcely credible that a man could be closely associated with Shona speakers for forty years and live for a large part of that time with a Shona speaking woman and still be able to claim little knowledge of the language. The acuity he has displayed in his dealings with housing and marriage officials suggest he is a man of intelligence and not the type who might passively live in ignorance of his linguistic environment. As for the plea of ignorance of court procedure: this is also incredible. Karidozo sued the respondent for divorce on the grounds of adultery. It requires no knowledge of procedure and only little of law to realise that if there is no marriage there can be no adultery. A person to whom one is not validly married does not commit adultery if he or she has sexual intercourse with someone other than their usual partner. This is not a legal technicality. It is simply common sense. If Karidozo genuinely believed his marriage to the respondent was invalid, he need not have gone to the trouble of divorcing her. Even if he believed, because of some misunderstanding, that divorce was the correct way of ending the liaison, adultery was an illogical ground on which to base the suit. I conclude, therefore, that there is no basis for Karidozo's claim that his marriage to the respondent was invalid. The claim is a belated ploy to attempt to avoid the patrimonial consequences of divorce in terms of the Matrimonial Causes Act.

The marriage and the consequent divorce being valid it now falls to consider the point which is the essence of this case, that is the correctness of the respondent's contention that her former husband has an obligation to provide her with suitable accommodation. At common law there is no suggestion of such an obligation. In this connection Professor Hahlo stated in the 4th edition of his authoritative book, *The South African Law of Husband and Wife* (published in 1975) at p 455:

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> "... the right of occupation [of the matrimonial home] of the spouse who has no legal title or interest in the home comes to an end when the marriage is dissolved by divorce. Our courts have no discretionary powers to permit him or her to continue in occupation."

Any provision for living arrangements subsequent to divorce had to be by agreement in the consent paper.

Since that time, however, the Legislatures in both Zimbabwe and South Africa have extensively altered the law relating to divorce, and in particular to the distribution of many of the assets of the spouses after divorce. In the Zimbabwe Matrimonial Causes Act, 1985, the object of this distribution is stated as being:

> "... to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses (s 7(3))."

The Legislature has prescribed certain guidelines for the achievement of this object. These will

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be referred to below. At present I should like to draw attention to the somewhat controversial requirement that a court should pay regard to the conduct of the parties in assessing the distribution of property.

It is necessary here to mention two aspects of subs (3) which were the subject of critical comment by a learned Judge of Appeal in a fairly recent South African Appellate Division decision. (See BOTHA JA in *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 992H *et seq*). I draw attention to these aspects because they have been included in our legislation, despite having been discredited in and repealed from the English law, upon which our statute is probably based.

The first aspect is the above stated statutory objective. This was criticised by the learned Judge of Appeal in *Beaumont*'s case, *supra,* as being:

> "... a concept wholly foreign to our legislation ..."

and one which militated against the "clean break" principle towards which the South African statute (and our own) is implicitly geared. The "clean break" principle envisages that, wherever possible the parties to a divorce should not be bound together by financial obligations. There are obvious economic and sociological advantages to such independence. In appropriate cases it can be achieved by a judicious sharing of the property in such a way

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as to obviate the necessity of a maintenance order. In many cases this will not be possible, but there is no call to frustrate the intention of the legislature because it may not be totally achievable in some cases. To aim at maintaining the *status quo* of the lifestyle enjoyed during the marriage could frustrate the "clean break" principle. It is noted that our Act was promulgated very shortly after the Act which repealed the statutory objective from English law.

The second aspect of s 7(3) which calls for comment is the requirement that a court should have regard to the conduct of the spouses when making an order for the apportionment, distribution or division of assets. How do courts reconcile this requirement with the "no fault" principle of divorce on the grounds only of irretrievable breakdown or incurable mental illness espoused by s 4? The compromise to which the English courts resorted when faced with this dilemma was to hold that only conduct which could be described as "both obvious and gross" would be taken into account. (*Per* DENNING LJ in *Wachtel* v *Wachtel* [1973] 1 All ER 829 (CA) at 835J). When the English legislation was amended in 1984 to facilitate the "clean break" principle an additional item was added to the list of factors to be taken into account when deciding on a just distribution. This required the courts to have regard to:

> "... the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inevitable to disregard it."

In *Beaumont*'s case (at p 994H) BOTHA JA expressed the view that South African courts would deal with the misconduct of the parties in assessing its relevance as a factor to be taken into consideration in a similar way. I would think that Courts in Zimbabwe are likely to do the same.

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The learned judge pointed out, by way of explanation that there will be fault on the part of both spouses and where there is no "conspicuous disparity" between the misconduct of the spouses the courts will not indulge in an exercise to apportion fault, thus nullifying the advantages of the "no fault" system of divorce. But where the fault of one spouse is strikingly greater then that of the other a court would be justified in taking this factor into consideration when ordering a division of assets. I respectfully agree with the remarks of the learned Judge of Appeal, especially in regard to this opinion on how courts should interpret the statutory injunction to take into account the conduct of the spouses when making an order for the division, apportionment or distribution of assets. I think the approach judging degrees of misconduct gives the greatest possible

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scope for the application of a "no fault" system based on irretrievable break down in appropriate cases.

Reference has been made to a list of factors which may be taken into account when a court makes an order for the distributions assets of spouses. In this connection the wording of the relevant provision must be closely examined. The wording and form of s 7(3) of our Act, makes the Zimbabwe law on this point possibly wider than the corresponding provision of South African law (compare s 7 of the Divorce Act 70 of 1969 (South Africa), as amended by s 3 of the Matrimonial Property Act 88 of 1984). In our law s 7(3) of the Matrimonial Causes Act enjoins the court considering distribution to:

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

There follows the "statutory objective" of the endeavour to place the spouses and children in the position in which they would have been if the marriage relationship had continued and the provision that the court should have regard to the conduct of the spouses in effecting a distribution.

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There is insufficient evidence in the present application to enable me to reach any conclusion as to whether the respondent is entitled to any, and if so how much, of the property presently registered in her former husband's name. The period of their marriage was not brief and it would be inaccurate to suppose that she contributed nothing towards the joint wealth. Without

EBRAHIM J

prejudice, I would point out for instance that, had it not been for the marriage, Karidozo might well have lost the house which is the subject of the present dispute. I say this bearing fully in mind that the court which granted the divorce clearly found misconduct on the part of the respondent in that she had committed adultery. This court has not, however, been told of the circumstances in which this adultery was committed. It could be that the circumstances reveal partial excuse, as in *Van Gysen* v *Van Gysen* 1986 (1) SA 56 (C) at 66B. In this case the seriousness of the misconduct might be less and we would not be obliged to attach the weight to such adultery as the bare finding might at first sight indicate.

Because of the want of evidence required to be considered, I dismiss the present application and order that a fresh hearing should be held to determine the extent of the respondent's entitlement to the house at 1 Dora close, Mufakose. The hearing is to be institute as soon as possible. The cession is cancelled with the proviso that the applicant should have first option to take it up again should the house be sold within a year of the final conclusion of the case.

The respondent is to have the right to occupy the house personally pending the outcome of the action. As this case has raised matters previously undecided in our case law, I do not think an award of costs would be appropriate. Each party must therefore bear his or her own costs.

Sawyer & Mkushi, applicant's legal practitioners

Chirunda, Chihambakwe & Partners, respondent's legal practitioners

FIKILINI v ATTORNEY-GENERAL 1990 (1) ZLR 105 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil appeal

4 February 1990

Flynote

Constitution of Zimbabwe - ss 12(1), 13(2)(e), 13(4) provide for trial within a reasonable time - factors to be taken into account.

Criminal Procedure and Evidence Act, [Chapter 59], s 106(2) certificate issued in terms thereof - ceases to be

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valid once s 13(4) of Constitution is violated.

High Court of Zimbabwe Act, 1981 - ss 26 and 27 - court's jurisdiction to review decisions of inferior courts - court entitled to review decisions where there is irregularity.

Onus - person who alleges contravention of s 13(4) of Constitution bears onus to prove such contravention.

Review - not an appeal - concerned with decision making process.

Headnote

A magistrate refused to further remand appellant after he had been on remand in custody for just over two months. The Attorney-General brought review proceedings in the High Court to have the decision of the magistrate set aside on the ground that the decision was irregular. The High Court (MUCHECHETERE J) set aside the decision and remitted the case for a rehearing before a different magistrate and the appellant noted an appeal to the Supreme Court *inter alia* that a) the Attorney-General should have appealed against the decision of the magistrate instead of instituting review proceedings and b) that his continued remand in custody was an unlawful deprivation of liberty end c) that s 13(4) of the Constitution had been contravened in that he had not been tried within a reasonable time.

1990 (1) ZLR p106

DUMBUTSHENA CJ

Held, that in deciding whether or not a person's detention pending trial had become unlawful for failure to bring him to trial within a reasonable time or to release him on appropriate conditions the court must take into account the following factors:

a) the length of the delay,

b) the reason given by the prosecution for the delay,

c) an accused person's failure to assert his rights, and

d) the prejudice occasioned to the accused by the delay.

Prejudice must be assessed in the light of the interests which the right to a trial within a reasonable time is designed to protect, namely:

i) to prevent oppressive pre-trial incarceration,

ii) to minimise anxiety and concern on an accused person, and

iii) to limit the possibility that the accused may be prejudiced in his defence.

Held, that in terms of ss 26 and 27 of the High Court of Zimbabwe Act, 1981, the High Court has jurisdiction to review the proceedings of the magistrates court on the ground *inter alia* of gross irregularity.

Held, further, that judicial review is not an appeal from a decision but a review of the manner in which the decision was made.

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Held, further, that the onus lies on the person who alleges a contravention of s 13(4) of the Constitution to prove that there has been an unreasonable delay.

Cases cited:

Chief Constable of the North Wales Police v *Evans* [1982] 3 All ER 141 (HL)

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

Barker v *Wingo* (1972) 407 US 514 (US SCt)

Regina v *Barkey* [1982] 1 CRR 289; [1982] 6 WWR 270 (Alta QB)

Koenig v *Federal Republic of Germany* (1980) 2 EHRR 170

Bell v *Director of Public Prosecutions & Anor* [1985] 2 All ER 585 (PC); [1985] AC 937 (PC)

E Chatikobo for appellant

AVM Chikumira for respondent

Judgment

Dumbutshena CJ: Mr *Chatikobo*, for the appellant, applied to amend the Notice of Appeal in this case by the addition of the following grounds of appeal:

> " The learned judge *a quo* erred in failing to hold that the appellant had not

> been afforded a fair hearing within a reasonable time and has thus become entitled to his release in terms of s 13(4) of the Constitution of Zimbabwe."

Mr *Chikumira*, for the respondent, did not oppose the application which we duly granted.

At the end of hearing argument, we dismissed the appeal and indicated that our reasons would follow. These are our reasons:

The appellant was arrested some time in September 1989 and charged with contravening the Exchange Control Act [*Chapter 170*] as read with the relevant Regulations. He was detained in custody. He applied for bail. The State opposed the granting of bail on the ground that he would interfere with police investigations. The police intended to search a number of houses for missing invoices and deposit slips. They also said the appellant's accomplices were still at large. A Ministerial Certificate, in terms of s 106(2) of the Criminal Procedure and Evidence Act [*Chapter 59*], was produced by the prosecutor before the magistrate reached a decision on the bail application. The court then refused to grant bail as it was expected to do. The appellant challenged the validity of the Ministerial Certificate in case No. HC-B-134-89 (not reported) in the High Court. His application was dismissed on 17 November 1989.

On 27 November 1989 the appellant was brought before the magistrates court for further

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remand. For some reason unknown to this court the prosecutor said, while applying for further remand, "The State is asking for further remand but wants to point out that bail is still opposed". The Ministerial Certificate was still valid. There was no reason for the prosecutor to make that indication. From that time on the magistrate wanted to know why bail was being opposed. The State called a witness to give sworn evidence in support of the State's opposition to the granting of bail. Mr James, for the accused, cross-examined the witness. It was during cross-examination that the prosecutor was recorded as saying he "cannot give trial date as requested by defence counsel". The court then entered the arena. The following exchanges are recorded:

"Court: Dockets are complete? Investigations are complete?

Answer: Yes, we are just perusing . . .

Court: So far as the documents accused holds, he is a Zimbabwean citizen?

DUMBUTSHENA CJ

Answer: Yes.

Court: Those who surrendered themselves to police, did they do so after accused's arrest?

Answer: After, when it came out in the papers.

No further Questions.

Addresses

P.O. None.

Court: (To Mr James) You insist on a trial date basically?

Answer: Yes.

Court: (To P P) Why can't the State give accused a trial date?

Answer: Because the dockets have got to be sent first to the A-G for perusal.

Court: (To P P.) You couldn't give a trial date notwithstanding that the papers have got to be sent first to the A-G?

Answer: No, we can't because on the trial date, the papers might still be with the A-G.

Court: (To P P) So that is he only reason why a trial date cannot be given?

Answer: Yes.

COURT'S RULING GIVEN EX TEMPORE:

A further remand is hereby refused."

The magistrate thereafter signed a warrant of liberation releasing the appellant from custody. The police arrested the appellant and detained him in terms of s 53(1) of the Emergency

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Powers (Maintenance of Law and Order) Regulations, SI 458 of 1983.

The State applied to the High Court for a review of the magistrate's decision.

On 27 December 1989 MUCHECHETERE J granted the application on the basis that there was gross irregularity in the proceedings in the magistrates court. He was right.

The appellant appealed to this court on a Certificate of Urgency. The appellant's contention is that "the magistrate properly exercised his discretion when he refused to remand him. His further incarceration after the decision was therefore unlawful and continues to be so. The matter is one involving the unlawful deprivation of an individual's liberty."

DUMBUTSHENA CJ

Mr *Chatikobo* contended that the High Court ought not to have entertained the application for review because the magistrate's decision should have been challenged by way of appeal and not by way of review. Mr *Chatikobo* cannot be right. There was procedural impropriety. The proceedings were conducted in a manner prejudicial to the State.

Let me, however, say in passing that the High Court has wide powers to review. These powers are not confined to matters referred to in s 63 of the Magistrates Court Act [*Chapter 18*]. Section 26 of the High Court of Zimbabwe Act, 1981, provides:

> "Subject to the provisions of this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe."

And s 27 spells out the grounds upon which decisions and proceedings of inferior courts, tribunals and administrative authorities may be brought to the High Court on review. Section 27 reads:

> "(1) Subject to the provisions of this Act and any other law, the ground son which any proceedings or decision may be brought on review before the High Court shall be -
>
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
>
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
>
> (c) gross irregularity in the proceedings or the decision.
>
> (2) Nothing in this section shall affect the provisions of any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

In this case the respondent applied by way of notice of motion to the High Court to review the proceedings in the magistrates court because they were irregular. MUCHECHETERE J reviewed those proceedings and found that there had been gross irregularity in the conduct of those proceedings. There was no appeal before the learned judge *a quo*. "Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made;" *per* LORD BRIGHTMAN in *Chief Constable of the North*

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DUMBUTSHENA CJ

Wales Police v *Evans* [1982] 3 All ER 141 (HL) at 155C.

In term s of s 27 of the High Court of Zimbabwe Act, 1981, one of the grounds upon which any proceedings or decision may be brought before the High Court for review is gross irregularity in the proceedings or decision. It was upon this ground that review was sought in the High Court.

The only limitation on the powers of review is that s 27 shall not affect the provisions of any other law relating to the review of proceedings or decisions of inferior courts, tribunals or administrative authorities. For instance, the powers of review contained in s 63 of the Magistrates Court Act [*Chapter 18*] are not affected by the provisions of s 27 of the High Court of Zimbabwe Act, 1981. This case falls into the ambit of s 27.

The magistrate, unsolicited, brought up the question of fixing a trial date. He was then told why it was not possible to do so. There and then he refused remand and signed a warrant of liberation. The defence counsel never objected to the further remand of his client. He had earlier on intimated to the prosecutor his desire to have a trial date fixed. Only when it was suggested to him by the court did he apply for a trial date. He did not ask the court to discharge his client.

Before liberating the appellant the magistrate had disregarded the ruling of the High Court on the validity of the Ministerial Certificate. It is true that a court may set free an accused even though there may be a Ministerial Certificate because such a certificate relates only to a lawful detention. If, as was submitted by Mr *Chatikobo,* the detention becomes unlawful by virtue of the failure to afford the accused a fair hearing within a reasonable time, then lawful custody will cease and the Ministerial Certificate is rendered ineffective. See *Bull* v *Minister of Home Affairs* 1986 (3) SA 870 (ZS) at 884E-G.

The Attorney-General was aggrieved by the decision of the magistrates court and applied to the High Court by notice of motion for a review of the magistrate's decision. It was proper for the Attorney-General to ask the High Court to review the case in order for the High Court to correct the irregularity. What was being objected to was the method employed by the magistrate at the remand proceedings. That needed to be corrected by way of review.

This case is an unusual one because there was never any justifiable reason for refusing to grant the further remand applied for by the State. The appellant

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himself did not oppose a further remand. It appears the magistrate, for what ever reason, was anxious to release the appellant. There was no earthly reason why he refused to remand him. The appellant was arrested in mid-September 1989. On 2 October 1989 he appeared in court and was remanded in custody. On 13 November 1989 bail was applied for end opposed. On 27 November 1989 the magistrate refused to remand him further and signed a warrant for his liberation. On that day the court had been informed that the docket had been sent to the

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Attorney-General who would decide whether the case was ready for trial and if it was in which court the appellant would be tried. There was, therefore, no factual basis upon which the appellant's detention could be challenged in terms of s 13 of the Constitution of Zimbabwe. Sections 13(1) and 13(2) read as follows:

> "13. (1) No person may be deprived of his personal liberty save as may be authorized by law in any of the cases specified in subsection (2).
>
> (2) The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorized by law -
>
> ...
>
> (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence; ...."

Mr *Chatikobo* argued that the existence of a reasonable suspicion was one of the pre-requisites for putting a person on remand. He did, however, say that the issue of the reasonable suspicion, having not been raised in the court below, was of passing interest. The nature of the charge tends to show that the suspicion was a reasonable one.

Mr *Chatikobo* further contended that a person, after being placed on remand, must be afforded a fair hearing within a reasonable time. He, at the same time, conceded that the release of the appellant was not based on s 13(4) of the Constitution, because the section was never referred to during proceedings in the magistrates court.

Section 13(4) of the Constitution reads:

> "(4) Any person who is arrested or detained -
>
> (a) for the purpose of bringing him before a court in execution of the order of a court or an officer of a court; or
>
> (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;
>
> and who is not released, shall be brought without undue delay before a

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

Mr *Chatikobo* sought to rely on the provisions of subs (4) of s 13. The plain and unambiguous words in subs (4) do not support Mr *Chatikobo's* contention. He cannot argue on the facts of this case that the appellant was not arrested and detained on reasonable suspicion of having contravened the Exchange control Act. It cannot be argued that he appellant was not brought before the court without undue delay and was not going to be tried within a reasonable time. The police did indicate what the appellant was being charged with, the amount of money he was alleged to have sent out of the country and that that money was from the sale of aeroplane

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tickets to foreigners.

Mr Chatikobo perceived the difficulty confronting him and conceded that in the circumstances of this case it could not be said that there was delay in the actual prosecution, the appellant having been arrested in September 1989 and placed on remand and the magistrate having refused remand on 27 November 1989. The period cannot, as Mr *Chatikobo* conceded, be said to constitute unreasonable delay and an infringement of the appellant's constitutional right to be tried by an independent court within a reasonable time.

In order to constitute undue delay in terms of subs (4) of s 13, there must be an extraordinary delay for one reason or another in the prosecution of an accused's case. The delay must deprive an accused of his personal liberty in violation of s 13(1) of the Constitution. There are, of course, many other factors to be considered before the court can form the view that an accused person has not been tried within a reasonable time.

Some of the factors leading to that conclusion were discussed by POWELL J in *Barker* v *Wingo* (1972) 407 US 514 (US SCt) in relation to the Sixth Amendment to the Constitution of the United States of America, which in part reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . ."

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POWELL J identified the following factors as among those that are to be considered in assessing whether an accused has been deprived of his constitutional right to a speedy trial. He stated them at 530-532 as follows:

> "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.
>
> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should score to justify appropriate delay.
>
> We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial
>
> A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests:

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(i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious

is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."

See also *Regina* v *Barkey* [1982] 1 CRR 333.

There are a number of cases in which the principles laid down by POWELL J in *Barker* v *Wingo supra*, were referred to and cited with approval.

Regina v *Cameron* [1982] 1 CRR 289 is one such case. In that case, besides relying on the principles enunciated by POWELL J in *Barker* v *Wingo supra*, McDONALD J made reference to Articles in the United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights. He considered the import of Art 9.3 of the United Nations Covenant on Civil and Political Rights and Art 5(3) of the European Convention on Human Rights. He said at 294-295:

"Article 9.3 of the United Nations Covenant on Civil and Political Rights, to which Canada is a party, provides in part as follows:

'9.3 Anyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release.'

The same provision appears in Art 5(3) of the European Convention on Human Rights. Article 6(1) of the European Convention, in terms not limited to circumstances in which a person charged has been detained, contains a provision even more apposite to s11(b) of the *Canadian Charter of Rights and Freedoms.* Article 6(1) provides, in part, as follows:

'6(1) In the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

Just as it is useful to take note of the factors which the Supreme Court of the United States has considered to be relevant in deciding whether a person's right to a 'speedy trial' has been violated, so too it is useful to note what the European Court of Human Rights has said in interpreting Article 6(1) of the European Convention. In *Koenig* v *Federal Republic of Germany* (1980) 2 EHRR 170, the Court said:

'The reasonableness of the duration of proceedings covered by Article 6(1) of the convention must be assessed in each case according to its

circumstances. When enquiring into the reasonableness of the duration of criminal proceedings, the Court has had regard, *inter alia*, to the complexity of the case, to the applicant's conduct and to the manner in

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which the matter was dealt with by the administration and judicial authorities.'"

In *Bell* v *Director of Public Prosecutions & Anor* [1985] 2 All ER 585 (PC), their Lordships were considering ss 13 and 20 of the Constitution of Jamaica.

Section 20 reads:

> "(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law . . ."

The facts in *Bell's* case *supra* were briefly as follows: On 18 May 1977 the appellant was arrested and convicted on 20 October 1977 in the Gun Court of illegal possession of a firearm and ammunition, robbery with aggravation, shooting with intent, burglary, and wounding with intent. He was sentenced to life imprisonment and to three concurrent sentences of seven, five and ten years for the other offences for which he was convicted. On 7 March 1979 the Court of Appeal of Jamaica quashed the convictions and ordered a re-trial. On 12 March 1979 the Registrar of the Court of Appeal sent written notice to the Registrar of the Gun Court and to the Director of Public Prosecutions informing them of the success of the appellant's appeal and the re-trial ordered. The Gun Court did not receive the notice until 19 December 1979. The investigating of officer was not available and the original statements could not be traced so they were not served on the appellant. On 28 January, 8 and 15 February 1980 the case was mentioned in the Gun Court. On 21 March 1980 when the case again mentioned the appellant was granted bail. More adjournments followed. On 10 November 1981 the Crown offered no evidence because the witnesses were not available. The appellant was discharged. On 12 February 1982 the appellant was re-arrested. His attorney objected. The appellant was ordered to be re-tried on 11 May 1982. The appellant alleged the contravention of his fundamental rights and took his case to the Supreme Court. I have repeated these facts to draw the contrast between the instant case and *Bell*'s case. The other purpose for highlighting the facts of *Bell's* case is to draw attention once more to the guidance already referred to above, provided by POWELL J in *Barker* v *Wingo supra*. LORD TEMPLEMAN cited passages from the judgment delivered by POWELL J The noble and learned Judge of Appeal referred to parts of the judgment as

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follows at 590f:

Power J pointed out (at 521-522):

> "... the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine wig precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate ... The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of indictment when the right has been deprived. This is indeed a serious consequence because it means that the defendant who may be guilty of a serious crime will go free, without having been tried."

LORD TEMPLEMAN then cited the four factors which POWER J said the court should assess in determining whether a particular accused has been deprived of his constitutional right. I have

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already referred to the four factors above. LORD TEMPLEMAN continued at 591h-j:

> "The four factors considered relevant in *Barker* v *Wingo* to the constitutional right to a speedy trial were reproduced and adopted by McDONALD J sitting in the Alberta Queen's Bench Court in *R* v *Cameron* [1982] 6 WWR 270. In that case the applicant alleged infringement of the right granted by s 11 of the Canadian Charter of Rights and Freedoms in Pt I of the Constitution Act 1982 to 'Any person charged with an offence . . . (b) to be tried within a reasonable time. . .'
>
> Their Lordships acknowledge the relevance and importance of the four factors lucidly expanded and comprehensively discussed in *Barker* v *Wingo.* Their Lordships also acknowledge the desirability of applying the same or similar criteria to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case."

In *Bell's* case their Lordships advised Her Majesty that the appeal should be allowed and that the appellant was entitled to a declaration that s 20(1) of the Constitution of Jamaica "which afforded the appellant the right to a fair hearing within a reasonable time by an independent and impartial court established by law has been infringed."

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I have referred to a few persuasive cases from other jurisdictions in order to emphasise, not only the factors to be considered in determining whether an accused's Constitutional right to a fair trial by an independent tribunal within a reasonable tune by an independent and impartial court established by law has been infringed, but also in order to point out the lack of merit in the present appeal.

The appellant was arrested on reasonable suspicion. It was alleged by the State that he had contravened the Exchange Control Act. He is said to have illegally sent out of this country about $2.3 million. The infringement was a very serious one. One of his accomplices was outside the borders of this country. The police feared that he would interfere with the evidence they wanted to gather. Besides, the police suspected that he was not a genuine citizen of Zimbabwe. He held a Zimbabwean passport However, the police suspected that he had foreign passports which he could use to abscond. What is more significant, there was no delay in the prosecution of his case. To be fair to the appellant, he did not ask to be discharged. It was the magistrate who in a way decided without more to free him.

I must point out in passing that the burden of proof in cases such as this is on the person who alleges undue delay. The appellant had to satisfy the court that the delay was unreasonable. The plain fact is that it was not. There was no delay of any kind in the prosecution of the case.

It was for these reasons that we dismissed the appeal.

Gubbay JA: I agree.

Korsah JA: I agree.

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

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S v MAFARACHISI 1990 (1) ZLR 118 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

6 October 1989 & 6 February 1990

Flynote

Criminal law - theft - unauthorised borrowing of cash is - payment by cheque - nature of discussed - appellant replacing stolen money with a cheque - mitigatory nature of - appropriate sentence - duties of Police as regards tender of repayment discussed.

Headnote

Appellant who had been employed as a clerk in a Government office, took $1 700 in cash from a cash box and put in its place a cheque of a like amount. This cheque was dishonoured on presentation. Appellant was convicted of theft in the magistrates court and sentenced to undergo 8 months' imprisonment with labour of which 3 months was suspended on condition of good behaviour.

Held, that the unauthorised borrowing of cash was theft.

Held, further, that in normal circumstances, a cheque is not the equivalent of cash unless perhaps the cheque is bank guaranteed or a building society cheque.

Held, further, that appellant's intention had been to deprive the State of its cash, his motive may have been to reimburse the State but that was only relevant to the question of mitigation.

Held, further, that as to sentence, however, that appellant's conduct had been more irresponsible than criminal and that accordingly the sentence should be reduced.

In the circumstances such as the present, when an accused tenders reimbursement of monies stolen to the Police, they should accept the same because their failure in this regard might prevent recovery of the money.

McNALLY JA

Cases cited:

Eriksen Motors (Welkom) Ltd v *Protea Motors, Warrenton & Anor* 1973 (3) SA 685 (A)

R v *Albertyn* 1931 OPD 178

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S v *Graham* 1975 (3) SA 569 (A)

S v *Wood* S-171-89 (not reported)

CT Jeche for appellant

MT Boylan for respondent

Judgment

McNally JA: I am unable to accept the defence contention that the appellant in this case should be found not guilty of theft. In my view what he did amounted to unauthorised borrowing of money. That is a form of theft, although I agree it is a less serious form than ordinary theft.

The facts are basically simple: The appellant took cash which belonged to the Government and which was in his custody as a Government clerk, and he converted it to his own use. In its place he put a cheque. In due course that cheque was dishonoured.

What he did was clearly shown to be contrary to Treasury Instructions, and he knew that. There was some suggestion that in that particular office in Shurugwi people tended to ignore that instruction. That does not seem to me to make any difference. Furthermore, I would be very surprised to learn that people were in the habit of cashing cheques as large as one for $1 700. I can imagine, though I do not condone, a certain laxity over small amounts like $10 or $20, but I cannot accept that any senior of ricer in that office, if asked, would have agreed to allow the appellant to cash a cheque for $1 700.

In any event the appellant did not ask anyone. He took the $1 700 and in its place he left a cheque for $1 700.

It may be said that it is no crime to take cash in one form out of someone else's cash box if you immediately replace it with cash in another form. Let us suppose you have two dirty old $20 notes in your pocket and you see that the office cash box contains two brand new $20 notes. If you exchange your old notes for the new notes in the cash box is that theft?

I am satisfied that it is not. An interesting situation might arise if it turned out that your old noses were forgeries. But we do not need to go into that question.

McNALLY JA

What is the difference then, when instead of cash, you put a cheque into the office cash box? Is not a cheque equivalent to cash?

This, it seems to me, is the essential question. In my view, authority clearly supports the contention that a cheque is not the equivalent of cash in normal circumstances, and by "normal circumstances" I mean when the cheque is not a bank guaranteed cheque or a building society cheque or perhaps a cheque whose recipient agrees to accept it as cash.

The classic statement is that of HOMES JA, in *Eriksen Motors (Welkom) Ltd* v *Protea Motors,*

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Warrenton & Anor 1973 (3) SA 685 (A) at 693G:

> "In general, payment by cheque is *prima facie* regarded as immediate payment subject to a condition. The condition is that the cheque be honoured on presentation. When the cheque is so honoured, the date of payment of the debt is the date of the giving of the cheque. Conversely, if the cheque is dishonoured there has been no payment."

(See also *The Legal Aspect of Money* by FA Mann 4 ed pp 73-74.)

I recognise that MR JUSTICE HOLMES was dealing with a civil case and we are dealing with a criminal case. But in essence one might say that the appellant in this case was "buying" the cash from the Government and paying for it by cheque. The Government had not agreed to accept his cheque as cash; indeed we know that the Government would not have agreed to the transaction at all if it had been asked, because it was contrary to Treasury Instructions to do so.

So the payment for the cash was not immediate, but "immediate subject to a condition". Or, to put it another way, cash was replaced by something less than the equivalent of cash. It was potential cash. It was "cash subject to a condition". It was a promise to pay cash. As we now know, it was a promise that was not fulfilled. But even if it had been fulfilled, it would have made no difference except, of course, from the point of view of mitigation.

Once the transaction fails to be categorised as a simple exchange of one form of cash for another, then it is clear that the Government's cash was borrowed without authority. That is theft - see *R v Albertyn* 1931 OPD 178, as approved as approved in *S v Graham* 1975 (3) SA 569 (A) at 575E. HOLMES JA dealt win the matter as follows:

> "The question whether an accused is rescued by an intention to make

McNALLY JA

> restitution was answered negatively in *R* v *Albertyn* 1931 OPD 178. In that case a civil servant took £15 from the official cash box on a Saturday morning to enable him to pay a creditor during the week-end. He hoped to borrow this money from another person in order to replace the deficiency on Monday morning. When he arrived at work on Monday morning a surprise inspection by a senior official revealed the shortage. The accused made good the shortage, but he was charged with, and convicted of, theft. On appeal the Court... held that, as the appellant had taken and consumed the money, he was guilty of theft despite his intention to return an equivalent amount."

The logic of this approach is further borne out if one looks at the definition of "cheque" in the Bills of Exchange Act [*Chapter 277*]. "A cheque is a bill of exchange drawn on a banker payable on demand" (s 72). "A Bill of Exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer" (s 3).

It seems to me to be clear from these definitions that a cheque is not equivalent to cash. It is no more than a promise of cash. Thus Cowen *The Law of Negotiable Instruments in South Africa* 5 ed vol I at p 47 says:

> "Negotiable instruments as a class do not constitute 'legal tender'; that is to say, the medium legally authorised by the State for the payment of debts. As VAN DEN HEEVER JA pointed out, (in *Tjollo Ateljies* (*Edms*) *Bpk* v *Small*

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1949 (1) SA 856 (A) at 876) 'a cambial document is not cash'."

It is surely also in accord with common sense that a cheque is not equivalent to (i.e. of the same value as) cash. This is so for two reasons: First, it takes a little time to convert a cheque into cash. Second, and more important, the cheque may be dishonoured for any one of a number of reasons, or payment may be stopped. In this case it was dishonoured for the simple reason that there were no funds in the account (on the first occasion) and that the account had been closed (on the second occasion). Compare Mann *op cit* at p 73 "This does not mean that it would be safe to assume that a cheque would or should be held to be equivalent to legal tender - no creditor can be expected to take the risk of the cheque being stopped or dishonoured."

Once one accepts that a personal cheque is not the equivalent of cash, then in principle this case becomes wholly indistinguishable from *Albertyn supra*.

McNALLY JA

I conclude therefore that on the facts the crime of theft was established. The appellant's **intent** was to deprive the State of its cash. His **motive** may have been to re-imburse the State, but that is a matter of mitigation.

Once one looks at the appellant's explanation of this conduct as an exercise in mitigation, in regard to which the onus is on him, one is impelled to the view that his conduct was really only technically theft, though I consider he displayed a high degree of irresponsibility over a period of some four months. Indeed his failure to provide the funds in January 1987 suggests gross irresponsibility.

The position was this: He needed $1 700 urgently in Shurugwi. His wife, who was in Gweru, controlled a Building Society account opened in the name of their minor child but over which she had signing powers. The amount in that account was about $2 500. He instructed his wife to transfer $2 000 from that account to his trading account at Standard Chartered Bank, Gweru. The latter account was in the name of Batanai Sales and Transport Services, over which he and his brother had signing powers, although he (the appellant) held the cheque book. The appellant worked in Shurugwi. Assuming that his wife would do as instructed, he drew a cheque on that account early in September 1986 payable to himself. He then endorsed that cheque and put it in the cash box in exchange for cash. The cheque "bounced" on 15 September 1986. He persuaded his colleagues to give him time to sort the matter out. He took some days off in December 1986 to go and resolve the problem. This was over three months after the cheque had been dishonoured. In January 1987, after he came back, he advised his office to deposit the cheque again. Again it was dishonoured. This time it was because the account had been closed.

The appellant's defence was that he had told his wife on both occasions to transfer the money to his account, and unbeknown to him she had failed to do so. Nor had she informed him when in late September 1986 a letter came from the bank saying: "As you continue to draw cheques without first providing for them, we are not prepared to allow your account in our books to

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continue and it has therefore been closed". It seems the appellant and his wife were not at that time on the best of terms.

The auditors came in January and discovered the shortfall and charged the appellant with theft. He did then, in February 1987, obtain the money from the Building Society, but the police refused to accept it. He paid it back into the Building Society and has now used the funds to support himself since his dismissal and to pay legal fees.

McNally JA

Once again, as in *S v Woods,* S-171-89 (not reported), I point out that this misguided attitude by the police has cost the State money.

The appellant should either have asked his wife to send him a Building Society cheque for $1 700, or should have checked with his bank by telephone before issuing the cheque which was dishonoured. His irresponsibility lay in his readiness to make assumptions, especially when, as it appears, his matrimonial relations were strained. He took a risk, and passed that risk on to the State.

The appellant was sentenced on 28 July 1987 to 8 months imprisonment with labour of which 3 months imprisonment with labour was suspended on the usual conditions, and his appeal was not heard until 6 October 1989. He was dismissed from his job with the Government as a result of this matter, and has not managed to find employment again. His moral blameworthiness is to be assessed, as I have said, on the basis of irresponsibility rather than as a thief. I do not think an effective prison sentence is warranted, especially after so long a delay.

In my view the justice of the case would be met by the imposition of a sentence of three months' imprisonment with labour, the whole of which is suspended on condition that the appellant repays to the Ministry of Local Government, Rural and Urban Development the sum of $1 700 on or before 31 March 1990. In addition the appellant is sentenced to a fine of $250 or, in default of payment, 25 days' imprisonment with labour, of which $100 or 10 days' imprisonment with labour is suspended for three years on condition that the appellant is not convicted of an offence, committed during that period, of which dishonesty is an element.

Accordingly the appeal against conviction is dismissed, but the appeal against sentence is allowed to the extent that the effective sentence of imprisonment is set aside and replaced as indicated above.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Chirunda, Chihambakwe & Partners, appellant's legal practitioners

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S v MALUNGA 1990 (1) ZLR 124 (HC)

Court **High Court, Harare**

Gibson J & Chidyausiku J

Criminal appeal

25 September 1989 & 21 February 1990

Flynote

Criminal procedure - sentence - approach to female offenders - first offenders - need general not to impose unconditional period of imprisonment

Appeal - effect of prior confirmation of sentence on automatic review.

Headnote

The appellant, a female first offender, was convicted on her guilty plea of contravening s 24(1)(a) of the Post Office Savings Bank Act [*Chapter 249*] having on four occasions altered the balance in her husband's savings bank book.

The magistrate, having apparently accepted that the appellant had done so to deceive her husband rasher then to defraud the Post Office Savings Bank, she having misapplied money which the former had given to her, sentenced her to 5 months imprisonment with labour. Before the appeal was heard, the matter had come before a different judge on review under s 63(1)(a) of the Magistrates Court Act [*Chapter 18*] and had been certified as having accorded with real and substantial justice.

On appeal:

Held, that the approach adopted in *R* v *Harvey* 1967 RLR 203 (A), *viz* that a sharp distinction should be made between male and female offenders, is currently apposite and that the tendency in certain subsequent eases to innovate by adopting a more uniform approach between the sexes is premature. Cases involving such divergent views reviewed and discussed.

Held, further, that although there is a need for uniformity in sentencing, the principle is subservient to factors such as the interest of the offender and,

GIBSON J

inter alia, individualisation.

Held, further, that whilst the appellant must have foreseen the likelihood that her husband would act upon the alterations in the pass book to the detriment of the Post Office, her prime motive having been to deceive her husband reduced some of the gravity of appellant's acts and that this, together win the fact that appellant is the mother of two young children, necessitated the adoption of the conservative approach in sentencing women.

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Held, further, that although a first offender is not entitled as of right to the suspension of a portion of a prison sentence, it is usual to do so in the case of females.

Held, further, that as there is a clear distinction between the functions of a judge exercising appellate jurisdiction and one who has previously confirmed a sentence on automatic review, the former is not bound by the views of the latter.

Cases cited:

R v *Noble* AD-55-80 (not reported)

S v *Ndhlovu* HH-471- 83 (not reported)

S v *Moyo* HH-63-84 (not reported)

R v *Harvey* 1967 RLR 203 (A)

S v *Rowan* AD-78-78 (not reported)

S v *Jones & Anor* HH-35-84 (not reported)

S v *Muchakwa* HH-53-83 (not reported)

S v *Peterson* HB-134-87 (not reported)

S v *Ncube* GB-41-80 (not reported)

S v *Scheepers* 1977 (2) SA 154 (A)

S v *Chigwida* HH-310-88 (not reported)

S v *Wiskesi* HH 440-84 (not reported)

S v *Gorogodo* S-192-88 (not reported)

S v *Ndhlovu* S-84-84 (not reported)

S v *Moyana* 1980 ZLR 460 (A)

AA Musunga for the appellant

M Jones for the respondent

Judgment

Gibson J: The appellant was charged and pleaded guilty to one count in contravention of s 24(1)(a) of the Post Office Savings Bank Act [*Chapter 249*]. The allegation was that the appellant made alterations in a Post Office Savings Bank book showing a balance only of $5.00, on five separate occasions, as follows:

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GIBSON J

On 5/8/87 altered $5,00 to $105,00

On 19/9/87 altered $105,00 to $205,00

On 3/11/87 altered $385,00 to $465,00

On 25/1/88 altered $465,00 to $600,00.

She was sentenced to 5 months' imprisonment with labour.

The Post Office Savings book belonged to her husband. The appellant was arrested after her husband attempted to withdraw $10,00 from the account.

The general and only ground of appeal is that the sentence is manifestly excessive and induces shock. It was argued that the court ought to have sentenced the appellant to a fine with or without an additional sentence of imprisonment, wholly suspended. The particular argument was that the appellant was a woman and a first offender, that the courts generally, treat women first offenders more leniently than male offenders.

Reliance was placed on the following cases: *R* v *Noble* AD-55-88 (not reported); *S* v *Ndhlovu* HH-471-83 (not reported); *S* v *Moyo* HH-63-84 (not reported)

The finalisation of this appeal has been delayed, rather unduly, because no reasons for the sentence were included in the record. It is not easy to evaluate the criticisms made on the sentence without the trial court's indications of what factors it took in to account when it imposed the sentence. Order IV Rule 1(b) of the Magistrates Court Rules, states:

> "1. Where appropriate the magistrate presiding at a trial shall -
>
> (a) .... ;
>
> (b) state shortly any special factors which he takes into account in assessing the sentence, if any, which is passed."

Accordingly, an enquiry was made, in this court, but by the time the explanation was received from the trial magistrate the court was already in recess: I am only able to resume the matter now.

The trial court's explanation is that reasons were furnished at the time but these must have been misplaced when the record was prepared for appeal. The trial court now forwards the reasoning as reconstructed, I presume. The reasons are noted. But because of the length of time it has taken to get this far, I have felt unable to invite further representations from the parties.

GIBSON J

Another preliminary matter I wish to deal with before going into the meets of the appeal is that this matter has already come under review in terms of s 63(1)(a) of the Magistrates Court Act

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[*Chapter 18*] following which review this court certified the proceedings as being in accordance with real and substantial justice. It is therefore with reluctance that the stance taken now is persisted in, but I feel compelled to do so in these circumstances. The judge President Mr Justice Sandura who reviewed the case feels unable to withdraw his certificate. I am mindful of this attitude, but still incline to the view that the sentence imposed is far too excessive bearing in mind the facts as found by the court *a quo* that the fraud had been perpetrated for "domestic purposes' ie to deceive the appellant's husband.

[The learned judge proceeded to review the facts and then concluded:]

At any rate, whatever views this court makes of the facts, as an appellate tribunal, this court is bound by the record.

Though it is not usual for members of this court to come to divergent views on the results of a given case, and rightly so, because if the practice occurred with too great a frequency it would be undesirable and lead to uncertainty in the minds of the public, it is my view that this may occur because the concern, of a reviewing judge and those of a judge sitting in court are largely of a differing nature. The concern of a judge on review is more general, and his certificate which is not an order of court, ensures that there has been a general and substantial compliance with justice. This must differ from the powers of a judge sitting in court. Apart from that a hearing on appeal has the benefit of assistance from legal practitioners from both sides, whose research into past decisions of the court enables the enquirer to weigh and assess the justness of the sentence more thoroughly. I think also, that the Legislature envisages the possibility that there may sometime, occur this divergence in the decisions of this court. The parallel existences of ss 26 and 28 of the High Court Act, 1981 bestowing the review powers, and s 36 enabling the court to hear appeals from magistrates courts, in sentencing matters, or generally where there is special provision in the Act, is evidence of this.

If the court were merely to deal with an appeal against sentence as a formality because the sentence had been confirmed on review, that would be improper and would amount to a denial to an appellant of his rights and expectations under the law. The power of the court on appeal against sentence is not merely illusory.

GIBSON J

THE MERITS

The general and only ground of appeal is that the appellant as a woman and a first offender should have been treated differently from male offenders.

This court and the Supreme Court has generally stood by the approach adopted by MACDONALD AJP (as he then was) in 1967 in *R* v *Harvey* 1967 RLR 203 (A), namely that generally in sentencing "a sharp distinction" should be made between men and women. To my mind the reasons given by the Learned Acting Judge President, then still stand, notwithstanding the present make up of our society. But, it has become clear from certain decided cases, that the courts in some cases have become impatient with this approach and are tending to adopt sociological jurisprudence and call for a departure from a view expressed in the *Harvey*'s case,

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above, more than 20 years ago. There is now a tendency in some cases to view this hallowed principle with caution.

But it is sometimes overlooked that the learned Chief Justice in 1978 affirmed his earlier remarks in the case of *S* v *Rowan* AD-78-78. The view then is not far removed from our times.

In *S* v *Jones & Anor* HH-35-84 PITTMAN J felt that "it was positively unfair to give women as criminals the comparatively lenient treatment described by MACDONALD AJP". The reason the learned Judge gave was that, "since 1978, women have begun to receive similar conditions of employment as men receive" (at p 3 of the judgment). This view was approved very shortly thereafter by the current Judge President, SANDURA JP in *S v Muchakawa* HH-53-83. Even though that court felt unable to sustain the sentence of imprisonment on female first offenders convicted of two counts, one of possession, and the second of selling dangerous drugs, the court nevertheless felt a word of warning was needed. It said that if more and more women are seen to commit crimes in future, the court may feel that "lesser weighs ought to be attached to the fact that the offender is a woman".

That line of approach was adopted 4 years later in *S* v *Petersen* HB-134-87 where at p 2, SANSOLE J said:

> "It should be remembered that not only does this law espouse equality but as a matter of fact more and more women are competing on par with men . . . We are concerned that there is a significant increase in this type of offence. And, indeed with women as equal competitors in this type of crime."

GIBSON J

To me, though there may be just cause for a critical appraisal of the remarks of MACDONALD AJP, *supra*, this must be done within the context of the basic principles of sentencing policy. The need for the "individualisation" of punishment must remain the unquestionable approach. The remarks of the learned REYNOLDS J are more in tune with this fundamental proper approach to sentencing. In *S* v *Mayo,* HH-63-84 the learned Judge at p 1 had this to say:

> "In so far as punishment for female offenders is concerned it is true that there has been a noteable change in the role and status of women in contemporary society. In addition there is some evidence that female criminality has increased in recent years. (see Carney's *Introduction to Correctional Sentence* 2 ed 189). But it is not certain whether there is a correlation between these 2 facts and, in any event, this does not necessarily mean that any equality of the sexes requires equality of treatment in criminal cases. The position is, as I see it, that the 'practical reasons for treating the sexes differently in the matter of sentence' referred to in *R v Harvey* 1967 RLR 203, still hold good to-day though with some qualifications (see *Anne Jones & Anor* v S HH-35-84). These 'practical reasons' may be enumerated as -
>
> (a) offences involving dishonesty committed by men outnumber those committed by women;
>
> (b) the incidence of recidivism amongst women is comparatively rare;
>
> (c) it often happens that the female offender has young children requiring care."

The differentiation in sentence for men and women, would appear on these factors to be consistent with the other competing policy of punishment - uniformity of sentences in like with like is desirable, but as the learned Reynolds J found in *Moyo*'s case, *supra*, the rationale lies in

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the statement that:

> "Equality means equal treatment for persons in equal conditions - it does not mean absolute equality for everyone. To treat alike, ignoring their differences, adult and child, the insane, the raw savage and the civilised man would be the height of injustice. *Suum cuique tribuere* implies that everyone should be given his due, not that everyone should be given the same."

The learned judge quoting from Hahlo & Khan's *South African Legal System and its background* at p 35, concluded:

GIBSON J

> "The Learned authors, may well have included 'male and female' in the categories they chose to distinguish above."

Much earlier on in 1980, Gubbay J as he then was, showed the same reluctance to treat female first offenders on a par with male first offenders in sentencing. In *S* v *Ncube* GB-41-80 the trial court, in dealing with a female first offender charged with possessing dagga for the purposes of selling, had remarked:

> ". . . this particular court has always tended to be a lot more lenient with females than it has with males, for the simple reason that offences of this type committed by females are less prevalent than males and that the deterrent aspect is to some extent not so important. However, this particular court has been criticized on a number of occasions recently by the reviewing Regional Magistrates of being lenient with females and on reflection, I think that there is little reason to deal with this female any more leniently that with the men. She stood to gain an equal amount by the resale of the dagga . . ."

The learned judge had little sympathy with the court's predicament, he said:

> "It is of course true to say that the accused stood to gain as much as a male offender from the sale of the dagga, and I accept that having regard to the large quantity involved and its possession for potential sale, an effective term of imprisonment was warranted. But there was no justification to impose upon this accused a period of incarceration deemed appropriate for a person of the opposite sex. Courts in this country, not surprisingly, tend to treat a female first offender more lightly than a male, especially where a sentence of unconditional imprisonment cannot be avoided."

To me this obvious vacillation in the courts approach suggests the need for a restraint in the tendency to innovate.

But to suggest the adherence to the conservative approach does not mean society's interest is to be overlooked, for individualisation of punishment has to be balanced against the need for uniformity. In that process of weighing up:

> "Not only must the nature of the offence be taken into account and the interests of the public protected, but the interests of the offender should also be cared for, in the process of individualisation, sociological

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GIBSON J

> circumstances, punishment experience factors, the prospects of rehabilitation and other relevant circumstances which surround the individual cannot be lost sight of. However desirable uniformity might otherwise be, the

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observance of these factors must necessarily encroach thereupon."

This passage is taken from the judgment in *Moyo*'s case *supra* approving the headnote in *S* v *Scheepers* 1977 (2) SA 154 (A).

It does strike me therefore that the tendency to innovate is premature, with all due respect to the views of the learned judges who are thus inclined. While there may be an increase in female criminality, this increase remains in inverse proportion to the numbers of women as against men in the population of today. As well as that, the tendency in female offenders for recidivism remains much lower, if not non existent in comparison with men. A quick glance at the case loads in these courts will soon show that occasions when female offenders are dealt with for say cases of corruption, or fraud remain matters of great moment and interest in the courts.

To me therefore the remarks of PITMAN J, in the *Jones* case *supra*, of SANDURA JP in the *Muchakawa* case, and those of SANSOLE J in the *Peterson* case, must be looked at with certain caution without losing sight of the principles of sentencing and the need to treat each case on its merits, but bearing in mind the interests of society as a whole.

Turning now to the particular submissions in this case. The State, though opposing the appeal, appeared to list all the factors that underline the mitigatory features in this case. In his Heads of Argument, Mr *Jones* states:

> "It could not be sensibly suggested that the within crime exemplified any measure of sophistication needless to say, upon presentation of the pass book, the likelihood is that detection would have been immediate. Furthermore no actual prejudice was suffered.
>
> Roundly put, it could be argued that the appellant made no more than a clumsy attempt to secure an advantage in the sum of $600."

Though Mr *Jones* states that similar efforts have resulted in effective prison sentences, he immediately points to the distinction in the cases heretics upon, *S* v *Chigwida* HH-310-88; *S* v *Wiskesi* HH-40-84, actual prejudice had resulted.

GIBSON J

But by far the most important mitigating feature in the case was the reason by the appellant for altering her husband's POSB book on those five occasions. The trial court appears to have accepted the explanation, and so did the State, namely that she did it because she had misapplied the funds given to her by her husband. This must take away some of the gravity of the appellant's actions.

Though the appellant must have foreseen the likelihood that her husband might act upon the alterations made by her and seek to withdraw moneys on the basis of what was shown in the account, to the prejudice of the Post Office, I still feel that both the alteration, accepted by the State, and the appellant's statement that she had hidden the book, suggest that her limited objective was to deceive her husband. Apart from these very peculiar features in this case, the appellant's personal circumstances as a woman first offender, with two very young children, aged 3 and 1 at the time of conviction, point the need to stay within the established approach in

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sentencing women first offenders.

Another reason which entitles me to interfere with the sentence is the failure by the trial court to suspend a portion of the sentence on the usual conditions of good behaviour contrary to the established practice of these courts. Though the attitude of the courts is not to be regarded as an entitlement by accused persona: *S* v *Gorogodo* S-192-88; *S* v *Ndhlovu* S-84-84; *S* v *Moyana* 1980 ZLR 460 (A) at 465. But in *Noble supra*, the learned judge stated:

> "It is not in general considered desirable in the case of a woman first offender to impose an unconditional prison sentence."

It is my view that the trial court in the proper exercise of its discretion should have followed the above guideline. By his failure to do so the sentence has been rendered unduly harsh.

For all the above reasons the sentence is set aside. The appeal is allowed. In its place there is substituted a sentence of a fine of $500 i d p 2 months. In addition 3 months iwl, the whole of which is suspended for 5 years on condition that accused is not convicted of an offence involving a contravention of s 24(1) of the Post Office Savings Bank Act, and to which she is sentenced to a term of imprisonment without the option of a fine.

Chidyausiku J: I agree**.**

Chirunda Chihambakwe & Partners, appellant's legal practitioners

Attorney General's Office, respondent's legal practitioners

COBRA & THE WILD CAT (PVT) LTD v TUNDU DISTRIBUTORS (PVT) LTD 1990 (1) ZLR 133 (HC)

Court **High Court, Harare**

Mtambanengwe J

Civil application

8 & 21 February 1990

Flynote

Practice and procedure - default judgment - judgment given for failure to effect discovery in terms of court order - rescission in terms of Rule 63 - renunciation of agency by attorneys - allegation of failure to forward documents duly served - proof necessary - comparison of common law rescission and that under the Rules of Court

Headnote

Where respondent was by trial action claiming a liquidated amount in money the applicant failed to make discovery and was compelled to do so by Court Order failing which its plea would be

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liable to be struck out and judgment given in default. Upon failure to comply with the order default judgment was duly ordered and an application for rescission thereof was duly brought. The applicant alleged as a reason for delay the failure of his erstwhile legal practitioners of record, who had duly renounced agency, timeously to forward to it the order to make discovery.

Held, that the application was one under Rule 63 of the High Court Rules, 1971 and not under the common law.

Held, further, that the applicants cannot expect the explanation for delays, which involves an allegation of a gross dereliction of duty, to be accepted in the absence of affidavits from the attorneys.

Cases cited:

Bennett v *Fleming* 1976(1) RLR 405 (G)

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

MTAMBANENGWE J

Grant v *Plumbers (Pty) Ltd* 1949 (2) SA 470 (O)

Muller v *Braes* S-51-86 (not reported**)**

Brnic v *Stuttaford* 1956 R&N 171 (SR); 1956 (3) SA 540 (SR)

HB Mugabe for the applicant

DM Foroma for the respondent.

Judgment

Mtambanengwe J: A notice to discover was filed and served on applicant's legal practitioners in Case Number HC 5165/88 wherein respondent (as Plaintiff) claims against applicant (as defendant) the sum of $552 001,74. On 19 July 1988 SMITH J on respondent's Chamber Book application made an order compelling applicant to make discovery within seven (7) days of service. The order granted leave to respondent to make a Chamber Book application for applicant's plea to be struck out and judgment entered in favour of respondent failing compliance with the order. That application was made on 5 September 1989 and judgment was accordingly entered against applicant. This application is for the rescission of that judgment.

The notice to compel discovery as outlined above was served on Messrs Chirunda Chihambakwe and Partners on 3 August 1989 after they had filed and served a notice of renunciation of agency to act on behalf of the applicant, on 27 July 1989 but that same day Messrs Winterton Holmes and Hill assumed agency to act on behalf of applicant. It is not in issue that service on Chirunda Chihambakwe & Partners was proper service. It is in fact conceded that such service was proper in terms of Order 2 Rule 8 of the High Court Rules,

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1971, no new address for service having been given. On 8 August 1989, Winterton Holmes and Hill addressed a letter to Messrs Sawyer and Mkushi, respondent's legal practitioners, advising that the former had assumed agency and were perusing the applicant's file. In a letter dated 12 December 1989 and addressed to the current legal practitioners for the applicant, Messrs Mugabe, Mutezo and Partners (handed in as Annexure "D" to applicant's founding Affidavit) the recollection (without the file) of Mr V Ferrao of Winterton Holmes and Hill "is that when the file was handed to him, Mr Chiguvare indicated that the next step in the procedure was in fact for discovery to be made and given". He goes on to say:

> "The writer does not recall that there was an urgency in the master or that an order had been obtained compelling discovery in Case Number HC 5165/88. Had this been so, the writer would have drafted the discovery affidavit."

MTAMBANENGWE J

Winterton Holmes and Hill renounced their agency on 14 September 1989. On 7 October 1989, a writ of execution was served on the applicant and on 31 October, more than three weeks later this application commenced. The applicant has deposed to the effect that Messrs Chirunda Chihambakwe and Partners did not timeously advise it of the existence of the Court Order compelling it to effect discovery, that it was only on 13 October 1989 that it received a copy of the said order, well after default judgment had been entered.

It will be noted that in para 6 of respondent's opposing affidavit a clear invitation is made to applicant to 'approach' Messrs Chirunda Chihambakwe & Partners to furnish en affidavit explaining how, if true, it came about that applicant only received the Court Order compelling discovery, so late, when respondent states that in the absence of such a supporting affidavit that assertion is denied as being untruthful. However, not only has applicant omitted, in the first instance, to explain how but, in its Answering Affidavit, despite that invitation, it stops at merely explaining how Winterton Holmes and Hill could not have had the Order since it was served on Chirunda Chihambakwe and Partners on 3 August 1989, their draft of the Notice of Assumption of Agency, also filed and served on 3 August 1989, having been made on 2 August 1989; it does not give further explanation as to how the Court Order was brought to applicant's attention, whether by post, by hand delivery or any other method. It merely repeats the assertion and the argument that it was the fault of Chirunda Chihambakwe & Partners that it received the Court Order late.

Order 2 Rule 8 of the High Court Rules 1971 states:

> "8. 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."

Where, as is implied in applicant's affidavits in this case, the allegation is made which amounts to charging a legal practitioner of gross dereliction of duty, and a flagrant violation of this Court's rules it is my view that it is incumbent upon the applicant to afford the legal practitioner involved an opportunity to condemn himself, if that be the case, from his own mouth; he should be asked

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to swear an affidavit as to the facts for which he is being

MTAMBANENGWE J

blamed. Failure to do so on the part of the applicant, particularly after his attention has been drawn to the need to do so, as in this case, must inevitably lead the court to draw the necessary inference that the applicant is not being truthful. To take the matter further it can be asked, did Messrs Chirunda Chihambakwe and Partners, on renouncing agency and on being served thereafter with the Court Order fail to discharge what was, in terms of Rule 8, their mandatory duty? It was for the applicant to put facts before this Court revealing the true position. The applicant has failed to do so in this case.

It follows, in my view that applicant has not all explained its default.

Mr *Mugabe* for the applicant submitted that this application falls to be determined in terms of Rule 63 which provides:

> "63. (1) A party against whom judgment has been given in default under these rules may apply to the court, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
>
> (2) If the court is satisfied on an application in terms of sub rule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the Plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just.
>
> (3) Unless an applicant for the setting aside of a judgment in terms of this rule proves the contrary, he shall be presumed to have had knowledge of the judgment within two days after the date thereof."

Mr *Foroma* on the other hand argued that the matter falls for determination under the common law principles governing *restitutio in intergrum*. Under the common law principles a heavy onus rests on the applicant to establish *justus error*. It seems, from authorities drawn to my attention by Mr *Foroma*, and other cases which I have examined, that the common law principles apply to circumstances where a party's (the applicants) default involves failure to appear on trial date: *Bennett* v *Fleming* 1976 (1) RLR 405 (G), (application for default judgment on notice of motion) *Vista Estates (Pvt) Ltd* v *Animal Breeders Co-Op Co Ltd* 1974 (2) RLR 147 (G) (default of appearance at the trial). The heavy onus resting on applicant in such cases is that he can justify *restitutio* only if he can establish "a supremely just cause of ignorance free from all blame whatsoever" Voet 2.4.14.

BRINK J in *Grant* v *Plumbers (Pty) Ltd* 1949 (2) SA 470 (Q) discussed what would constitute "sufficient cause" and concluded at p 476:

MTAMBANENGWE J

> ". . . I am of opinion that an applicant who claims relief under Rule 43 should comply with the following requirements:
>
> (a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it

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was due to gross negligence the Court should not come to his assistance.

(b) His explanation must be *bona fide* and not made with the intention of merely delaying Plaintiffs claim.

(c) He must show that he has a *bona fide* defence to plaintiffs claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. (*Brown* v *Chapman* 1938 TPD 320 at p 325.)"

In *Muller* v *Braes* S-51-86 (not reported), GUBBAY JA stated at p 5 thereof:

> "Once the explanation for the default is found to be unacceptable, as it is in this case, a disdain of the Rules is the inevitable inference. In other words the default is classed as wilful in the sense of a deliberate acquiescence, thereby barring the indulgence of rescission (See *Barclays Bank* case *supra)*. This conclusion resolved the appeal."

I regard this matter as one clearly falling for determination in accordance with the Rules where the court has a wider discretion and the onus of proving wilful default rests on the respondent (see *Brnic v Stuttaford* 1956 R & N 171 (SR) at p 172-3). I have already observed above that the application has not given a *bona fide* explanation for its default ie its failure to comply with the Court Order compelling discovery. The reason given that the applicant received that order very late ie when default judgment had already been entered is worthy of no credence in the absence of a supporting affidavit from the legal practitioners that it seeks to blame. There is not even an explanation why such an affidavit could not be obtained. In these circumstances the *ipse dixit* of applicant is not an acceptable explanation or such as would cast the burden of proof of wilfulness on the respondent, because in the first place the default has not been satisfactorily explained.

For these reasons it is impossible for me to exercise my discretion in favour of the applicant. The application is therefore dismissed with costs.

Mugabe, Mutezo & Partners, applicant's legal practitioners

Sawyer & Mkushi, respondent's legal practitioners

S v ZIMBABWE UNITED FREIGHT CO LTD 1990 (1) ZLR 138 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Manyarara JA & Korsah JA

Criminal appeal

7 November 1989 & 27 February 1990

Flynote

Posts and Telecommunications Corporation - exclusive privilege of delivering letters - applies to all letters,

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personal and business

Criminal law - mens rea - offence of strict liability - factors to be considered in determining legislative intention

Legislation - Posts and Telecommunications Services Act [Chapter 250], s 3 - meaning of 'letter' - s 43 - creates offence of strict liability

Headnote

Appellant carried a letter for a fee. The letter concerned the business affairs of the sender. Appellant was prosecuted for contravening the exclusive privilege set out in s 3 of the Posts and Telecommunications Services Act [*Chapter 250*]. On appeal:

Held, that the word 'letter' as used in the legislation covers all correspondence, and not simply letters of a personal nature.

Held, further, that the offence created by s 43 of the Posts and Telecommunications Services Act [*Chapter 250*] is one of strict liability.

Semble, even if the offence was one in which an accused could prove the absence of *mens rea*, the appellant had acted recklessly, and had the required *mens rea.*

Cases cited:

Lentell v Registrar-General & Anor (1) 1979 RLR 62 (G)

National Railways of Zimbabwe Contributory Pension Fund v Edy S-141-88 (not yet reported)

KORSAH JA

Loryan (Pty) Ltd v *Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W)

Unwin v *Hanson* [1891] 2 QB 115 (CA)

Byrne & Co v *Leon van Tienhoven & Co* (1880) 5 CPD 344

Macey's Consolidated Ltd v *Cheeseborough-Ponds (Pvt) Ltd* 1967 RLR 253 (G)

S v Zemura 1973 (2) RLR 357 (A); 1974 (1) SA 584 (RA)

R v P Hall & Co (Pvt) Ltd 1966 RLR 374 (A); 1966 (3) SA 669 (RA)

R v City Butchery(Pvt) Ltd & Anor 1967 RLR 69 (G); 1967 (3) SA 5 (R)

S v Maceys of Salisbury Ltd 1982 (2) ZLR 239 (SC)

AP de Bourbon SC for the appellant

MT Boylan for the respondent

Judgment

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Korsah JA: The appellant appeals against the decision of the magistrates court, sitting at Harare on 12 July 1988, convicting the appellant of contravening s 43 of the Posts and Telecommunications Services Act [*Chapter 250*] ("the Act"), as read with s 3 of that Act, and whereby the appellant was sentenced to a fine of $10.

The undisputed facts are that the appellant, as its name suggests, is a limited liability company which operates general freight services in Zimbabwe. It has permits to carry all sorts of goods and merchandise, from a weight of under one kilogram up to one hundred kilograms, throughout the country. And it is as such a common cattier. It has rendered this type of service to individuals and business establishments alike for over twenty-five years.

The complainant is employed by the Postal and Telecommunications Corporation ("the Corporation") as a Director of Postal Services.

On 2 September 1987 the appellant carried a letter written by Robert Dube of Pullen & Sons (Pvt) Ltd Bulawayo, and delivered it at the Posts and Telecommunications Headquarters, situate at 107 Union Avenue in Harare. For this service the appellant charged Pullen & Sons (Pvt) Ltd a fee of $5. This was evidenced by a Consignment Note, produced as Exhibit 2.

Section 3 of the Act, which provides for the exclusivity of the right of the Corporation in the carriage of letters for a fee, is in these terms:

> "3. (1) Subject to the provisions of this section, the Corporation shall have the exclusive privilege of receiving, collecting, dispatching,

> conveying by any means whatsoever and delivering letters and of performing all the services incidental thereto."

Subsection (2) of s 3 of the Act manifests the intention of the Legislature to make the carrying of letters for a fee the exclusive preserve of the Corporation. For instance para (b) of subs (2) provides that

> "(2)Subject to the provisions of subsection (3), nothing contained in subsection (1) shall make unlawful -
>
> (a) ....
>
> (b) the conveyance and delivery of a letter to the person to whom, it is addressed by a friend of such person or of the sender of the letter, **without hire, reward or other profit or advantage for receiving, carrying or delivering it.**" (Emphasis added.)

Even more pertinent to the resolution of the issue for determination is the provision by subs (4) of s 3, which stipulates that

> " (4) Save as otherwise provided by or under this Act, the following persons **shall not carry,** receive, collect or deliver a letter **although** they do not receive any hire, reward or other advantage for doing so, that is to say -
>
> (a) a common carrier, his agent or servant:
>
> Provided that the provisions of this paragraph shall not apply to a letter concerning goods in the train,

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aircraft, vessel, vehicle or other conveyance of the common carrier;

(b) any other person on a train, aircraft, vessel, vehicle or other conveyance." (Emphasis added.)

So that even the gratuitous carriage of letters may not be undertaken by a common carrier, save as permitted by the proviso to pare (a) of subs (4) of s 3.

What the appellant delivered to the complainant, and produced as Exhibit 1, was an envelope containing a single sheet of communication commencing with the words "Dear Sir". The rest of the communication which follows is captioned

"RE - CONTRACT OF CARRIAGE OF REGISTERED MAIL BAGS BY VARIOUS CARRIERS."

The communication concludes with the usual affirmation of faith: "Yours faithfully", and is signed by the sender.

KORSAH JA

The interpretation of s (s 2) of the Act does not specify what a "letters is; but the Postal and Telecommunications Services (Postal) Bye - Laws 1986 (SI 175 of 1986), in its interpretation section, states that:

"'letter' **includes** any communication in the nature of actual and personal correspondence."

This provision clearly places no limitation on the meaning of the word "letter", so as to exclude from that word other forms of written communication. One cannot, therefore, pray in aid the above provision in SI 175 of 1986 for a resolution of the meaning to be ascribed to the word "letter" in the Act.

Mr *de Bourbon* contended on behalf of the appellant, and rightly in my view, that a "letter" is a "communication in writing" or "an epistle". Nor did Mr *Boylan*, for the respondent, dispute this cryptic definition of the word. What Mr Boylan took issue with was the inference by Mr *de Bourbon* the origins of which are obscure, that "a letter, by its very nature, is a communication of personal correspondence, and not of business matters". If this distinction between personal and business correspondence were accepted, then Exhibit 1, being correspondence of a business nature, was not a letter within the meaning of the Act.

Neither general nor legal usage, I agree with Mr *Boylan*, has restricted the meaning of the word "letter" to communications of personal correspondence, and the Act does not exhibit any inclination to place such restriction on the word.

The basic rule of interpretation of statutes, as indeed agreed by both counsel, is that the words of a general statute are *prima facie* to be presumed to have been used in their popular sense. Thus, if a word, such as the one under consideration, has not acquired a technical or artistic meaning, then it is to be construed as it is understood in common language. Subtle distinctions are to be avoided, and the obvious and popular meaning, as a general rule, adopted.

In *Lentell v Registrar General & Anor (1)* 1979 RLR 62 (G) at 63D, WHITAKER J said:

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"The plain words used in the statute must be given their ordinary meaning unless to do so would lead to an absurdity so glaring that it could never have been contemplated by the Legislature or where it would lead to a result contrary to the intention of the Legislature as shown by the context

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or by such other considerations as the Court is justified in taking into account."

In a more recent case, *National Railway of Zimbabwe Contributory Pension Fund v Edy* S-141-88 (not yet reported), GUBBAY JA had occasion to reiterate the rule thus (at p 4 of the judgment):

"Plain words used in a statute must be adhered to and given their literal meaning, unless that meaning is at variance with the intention of the Legislature as shown by the context or such other indicia as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result." Mr *Boylan* submitted that, in the absence of a statutory definition of a word in common usage, the dictionary definition of the word may be adopted for the purposes of interpretation, and suggested the adoption of the meaning of the word "letter" ascribed to it in the Oxford English Dictionary, which is to the effect that a "letter" is "a missive communication in writing, addressed to a person or body of persons; an epistle".

In *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 846G, MARGO J cautions that:

"Dictionary definitions of a particular word are very often of fundamental importance in the judicial interpretation of that word in a statute or in a contract or in a will. Nevertheless, the task of interpretation is not always fulfilled by recourse to a dictionary definition, for what must be ascertained is the meaning of that word in its particular context, in the enactment or contract or other document."

The Act under consideration is one designed to affect everyone generally; for no-one can gainsay that people of all walks of life have recourse to the services rendered by the Postal and Telecommunications Corporation, which this statute seeks to regulate and control. It seems to me, therefore, that in an attempt to interpret the ordinary everyday words used in that statute the language used must not be strained to mean something other than the commonly accepted meaning of the word. As LORD ESHER MR observed in *Unwin v Hanson* [1891] 2 QB 115 (CA) at 119:

"If an act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language."

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Mr *de Bourbon*, on the one hand, contends that the word "letter" does not include business communications in writing. Mr *Boylan*, on the other, asserts that it does. If it does not then the appellant has not carried a letter.

To my mind the general public have never by nomenclature distinguished between written communication of personal correspondence and a written communication of business matters.

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They have always used the word to mean any written or printed message addressed to a person or persons, firms or corporations, usually sent by post or a messenger. It is not its enclosure in an envelope that transforms a communication into a letter. An envelope may contain material which is neither a written nor printed message ad dressed to a person or firm.

Mr *Boylan* made the point, with which I am in entire agreement, that authoritative commentators on English usage do not restrict the meaning of "letter" to communications of personal correspondence. In support of this assertion he summons in aid Fowler's *Modern English Usage* 2 ed p 332, where the article on "letter forms" includes references to diplomatic communications, official and formal communications, communications to firms and unknown persons on business and to newspapers.

The various Law Reports are replete with evidence that the courts, too, have used the word "letter" to describe written business communications. To cite but two instances: In *Byrne & Co v Leon van Tienhoven & Co* (1880) 5 CPD 344 at 348, LINDLEY J said:

> "It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted ... even although it never reaches its destination."

And in *Macey's Consolidated Ltd v Cheeseborough - Ponds (Pvt) Ltd* 1967 RLR 253 (G), part of the Headnote reads:

> "*Held,* that an examination of the letters showed that respondent under took to deliver goods ordered by the applicant, and while this might be merely a 'standing offer' in English Law, in our law, unfettered as it was by the doctrine of consideration, it constituted a valid bilateral contract."

I do not think that anywhere, except in a court of law, would it be seriously contended that a letter is not a letter because it is a written correspondence of

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a business nature. This argument is too reminiscent of Humpty Dumpty's assertion that when he uses a word it means just what he chooses it to mean - "neither more nor less". See Lewis Carrol's *Through the Looking-Glass*, Chapter 7.

Subsection (2) of s 3 exempts certain letters from the provisions of s 3(1). It is evident from the use of the word in pares (c) and (f) of s 3(2) of the Act that inclusive in the meaning of the word "letter" are communications of a business nature. These subsections recite:

> " (2) (c) the conveyance of a letter solely concerning goods or proper which is sent by water, land or air, to be delivered with the goods or property to which the letter relates, without hire, reward or other profit or advantage for receiving, carrying or delivering the letter if the letter is open to inspection and has superscribed thereon the words 'Consignee's letter' or other words of similar import."

This means that a "Consignee's letter", which is a communication of a business nature, is a letter, but may be carried together with a consignment of goods, provided no charge is made for carrying the letter, but a reward is paid for the consignment of the goods only. By subs 2(f):

> "the conveyance and delivery of a letter containing process or other proceedings or pleadings in any court or

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affidavits or depositions"

may be undertaken for a fee. Such a letter must necessarily fall within the description "communications of a business nature".

From the foregoing, Mr *Boylan's* submission, that, "for the purposes of s 3 of the Act, a letter is any postal article not exceeding the prescribed dimensions (see s 3(2)(e) of the Act, and the First Schedule to SI 175 of 1986) and not being a post-card, printed paper, small packet, newspaper, literature for the blind, parcel or telegram (see also s 2(o) of Act No. 25 of 1982)", cannot be faulted. The trial court was right in holding that Exhibit 1 was a letter within the meaning of s 3 of the Act.

Section 43 of the Act provides that:

"43. Any person who -

(a) save as otherwise provided by or under this Act, performs in relation to any letter any act within the exclusive privilege

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conferred upon the Corporation by subsection (1) of section *three*; or

(b) sends, tenders or delivers any letter to be dealt with otherwise than in accordance with the provisions of section three;

shall be guilty of an offence and liable to a fine not exceeding fifty dollars or, in default of payment, to imprisonment for a period not exceeding one month for every such letter in respect of which the offence was committed."

It was next contended by Mr *de Bourbon* that s 43 of the Act did not create an offence of strict liability; that the offence contemplated by this section falls within the intermediate group of offences; and that the trial court fell into error when it held that the section created an offence of strict liability.

As a general rule, *mens rea* is an essential ingredient of every statutory offence, unless some reason can be found for holding that it is not necessary. In some cases, where the crime consists of doing an act prohibited by statute, the statute clearly states the proposition as to the state of mind of the doer by the use of such qualifying adverbs as "maliciously", "fraudulently", "negligently"or "knowingly". In this group of statutes, described by BEADLE CJ in *S v Zemura* 1973 (2) RLR 357 (A) at 364; 1974 (1) SA 584 (RA) at 586 as the "positive proof group", the onus is on the State to prove that the accused committed the offence with the requisite guilty state of mind. (The third group).

The learned CHIEF JUSTICE also identified a second group of offences which he termed the "intermediate group" which "consists of those statutory offences where the *onus* is on the State to prove that the accused committed the acts constituting the offence, but thereafter an evidential burden is thrust on the accused to disprove the inference that he had the requisite *mens rea* when he committed the offence".

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The first group of offences consists of offences of "strict liability" where the State has to do no more than prove that the accused committed the acts prohibited by statute, and notwithstanding the fact that the accused did so act without any guilty intent he is, nonetheless, guilty of the offence.

Difficulties in determining whether the law-maker intends to create an offence of strict liability arise when the actual words used by Parliament to define the offence are in themselves descriptive only of a physical act and bear no connotation as to any particular state of mind of the doer of the act.

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In the instant appeal s 43 makes any contravention, by anyone, of the exclusive privilege conferred on the Corporation to carry letters for reward an offence. The section contains no adverb which explicitly spells out the proposition as to the state of mind of the person who contravenes it.

In *R v P Hall & Co (Pvt) Ltd* 1966 RLR 374 (A) at 376; 1966 (3) SA 669 (A) at 670, FIELDSEND AJA (as he then was) said:

> "The tests to be applied in determining whether or not legislation imposes absolute liability where unqualified prohibitive words are used are well known, if not always easy of application. Generally, the factors to be taken into account are:
>
> (1) the object and scope of the legislation;
>
> (2) the nature and extent of the penalty;
>
> (3) the ease with which the beneficial provisions of the Act could be evaded, if the defence of absence of *mens rea* were allowed to be set up."

See also *R v City Butchery (Pvt) Ltd & Anor* 1967 RLR 69 (G); 1967 (3) SA 5 Do); *S v Zemura supra* at 329.

To begin with, the subject-matter of the Act generally is to regulate the Postal and Telecommunications Services in Zimbabwe. Section 3 of the Act grants exclusivity of carrying letters for reward to the Corporation; and s 43 it seems to me, was intended to protect that exclusive privilege conferred on the Corporation. Those are the objects and scope of the two sections read together. As such, a contravention of s 43 is not criminal in any real sense of the word, but is rather an act which, in the public interest, is prohibited under a penally. No real stigma attaches to a person who contravenes s 43, as would to a person who is convicted of fraud, theft, rape or a truly criminal offence. Absolute offences are mostly to be found in this class of quasi criminal acts which are introduced by the Legislature in the public interest. See *S v Maceys of Salisbury Ltd* 1982 (2) ZLR 239 (SC) at 246C.

Mr *Boylan* submitted that s 43, when read with other sections which, like the said section, fall under Part III of the Act which deals solely with offences, would provide the best evidence of the intendment of the Legislature. For instance, s 45, which deals with stamps and money orders,

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etcetera, commences:

"45. (1) Any person who, **without due authority or lawful excuse . . .**"

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Section 46 recites that:

"46. (1) Any person who -

(a) **with intent to defraud . . ."**

Section 47 (1) provides that:

"47. (1) Any person authorised to receive or in any way handle any mail or postal article who -

(a) **negligently** loses or wilfully detains, . . .

(b) **unlawfully** communicates or divulges . . .

(c) while in charge of any mail or postal article -

(i) **permits** any unauthorized person . . .

(ii) loiters or **wilfully** mix-spends time . . ."

And s 47(2)(b) stipulates that:

"(2) Subject to the provisions of subsection (3), any person who -

(a) . . .

(b) sends or **knowingly** causes to be sent by post . . ."

(The emphasis is mine throughout).

Mr *Boylan* submitted that the presence of the underlined words in the other sections under Part III, and the absence of any such word in s 43 (which also falls under Part III), indicates that it is not a *casus omissus*, but a clear intention of the Legislature to create an offence of strict liability under s 43 of the Act.

Mr *de Bourbon* further contended that the conveyance of business documents by firms such as the appellant and similar courier organisations was well established; and that to interpret s 43 as creating an offence of strict liability would be to impose on those organisations the intolerable burden of having carefully to check each consignment received to ensure that there was nothing therein contained which would constitute a letter.

The simple solution to this problem is to ask the sender whether the consignment is a letter; and if it is, to refuse to carry it. I have already mentioned that in terms of the proviso to pare (a) of subs (4) of s 3 a courier may carry a letter, so that the conveyance of business documents by such organisations is not wholly prohibited by the Act.

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KORSAH JA

The penalty for a contravention of s 43 is only a fine. Its extent is not great. The maximum fine that a court may impose is $50. It is only in default of paying whatever fine is decreed by the court as a penalty that imprisonment may follow. The provision for such a paltry fine as the maximum penalty to be imposed is in character with penalties exacted for offences of strict liability.

It does not appear to me to be relevant that the maximum penalty attaches to every single letter that is carried. It is the policy both of the law-maker and the courts, that offences devoid of moral culpability should not attract onerous sanctions, but this is not to say that such conduct, if it poses a threat to the public interest, should not invite the sanction it merits. There is no warrant for treating the dealing with large numbers of letters in contravention of the section any differently from such dealings with a single letter.

There can be no doubt that the carriage of letters for reward is an act which is not easy of detection, especially as there exists no State machinery specifically set up for monitoring such activities, because a majority of people find the services provided in this regard by the Corporation inexpensive and adequate for their purposes. So that, it is only when the exigencies of the situation so demand that recourse is had to the use of messengers and couriers. Yet a sizeable number of people and organisations, not infrequently, have occasion to resort to the use of messengers and couriers for several reasons. It is as unlikely for a person or organisation, who wants a letter urgently delivered, to report the offence, as it is for the messenger or courier who is carrying it for reward to do so.

Mr *de Bourbon* contended that the consignment note (Exhibit 2) indicated that what the appellant conveyed was "1 envelope", without knowledge of its contents; and that it would be more appropriate to classify the present offence as one falling within the intermediate group of cases. He submitted that it would be more appropriate to shift the *onus* onto the accused to prove that he did not have the required knowledge as to the contents of the envelope, and if he acted recklessly in avoiding obtaining that knowledge then he could still be convicted.

Persuasive as this argument may seem, it does not appear to me to comply with the intendment of the Legislature. Having regard to the almost invariable practice of sealing letters and other postal articles, a messenger or courier could always say that his enquiries elicited the information that what was contained in the postal article was not a letter. If *mens rea* were to be

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made an essential ingredient of the offence, it seems to me that the exclusivity of the privilege accorded the Corporation by the Act would be so eroded as to render it worthless.

In any case, in the instant case the postal article transmitted by the appellant was one brown envelope. It looked like a letter, felt like one, and was dealt with as such. There was no evidence that the appellant enquired about the contents of the envelope. So that even if one

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were to accede to Mr *de Bourbon*'s submission that the present offence falls within "the intermediate group", which I do not, the failure to ensure by due enquiry that the item was not a letter was, as Mr *Boylan* submitted, reckless.

In my views s 43 of the Act, which was given birth in 1973, after the decision in *R v P Hall & Co (Pvt) Ltd supra* complies with all the tests to be applied in determining whether or not the legislation creates an offence of absolute liability. The trial court was therefore right in its determination that the section created an offence for which no *mens rea* was required.

Accordingly, the appeal fails and it is dismissed.

Dumutshena CJ: I agree.

Manyarara JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

S v CHILIMANZI 1990 (1) ZLR 150 (HC)

Court **High Court, Harare**

Smith J & Greenland J

Criminal appeal

12 & 28 February 1990

Flynote

Criminal procedure - sentence - extraordinary delays in prosecution of accused and hearing of appeal - dilatoriness in preparing record - approach of - court to sentence.

Constitution of Zimbabwe - Declaration of Rights - s 18 - right to trial within a reasonable time - extraordinary delays in prosecution of accused and hearing of appeal - approach of court to sentence.

Headnote

The appellant was convicted of fraud in respect of an amount of $6 237,08 and sentenced to 22 months' imprisonment on 19 August 1987. Eight months of the sentence were suspended on conditions of good behaviour.

The appellant was convicted just over a year after his arrest and his appeal against sentence was heard some 21/2 years after sentence was imposed. On appeal:

Held, that even if such a delay in bringing an accused to trial is not unusual nowadays the further delay of almost 21/2 years in the preparation of the record and setting down the appeal is unconscionable.

Held, further, it would not be just to send the appellant to prison after so long a delay even

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though the offence justified a custodial sentence.

Held, further, delays of this nature cause suffering and mental anguish to the accused and are incompatible with justice or the provisions of s 18 of the Constitution.

In the result, having regard also to the change in the personal circumstances of the appellant since sentence, that is to say, marriage, birth of a child and new employment, the sentence was set aside and a fine of $1 500 substituted together with a wholly-suspended sentence of imprisonment.

1990 (1) ZLR p151

SMITH J

Cases cited:

S v Musanyeya HH-192-82 (not reported)

S v Pfidze HH-80-83 (not reported)

S v Tande HH-376-84 (not reported)

S v Chinyangwa S-22-86 (not reported)

S v Masoreka S-5-85 (not reported)

S v Sithole HH-331-88 (not reported)

S v Mupinda HH-354-88 (not reported)

S v Ndanga HH-29-89 (not reported)

S v Dube & Anor S-169-89 (not yet reported)

S v Mureruswa HH-(27/11/89) (not reported)

S v Kuzvarwa HH-12-90) (not reported)

S v Mafarachisi S-198-89 (not yet reported)

S v Manera S-153-89 (not yet reported)

S v Gonese HH-218-89 (not reported)

S v Kaschula HH-220-89 (not reported)

S v Kaja S-129-89 (not reported)

GT Mutendadzamera for appellant

J Samkange for respondent

Judgment

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Smith J: The appellant was employed in the Public Service as an assistant development officer, in charge of the "Food for Work" programme in Gutu. On 26 May 1987 he appeared before the magistrate on a charge of fraud. The allegation was that on or about 24 June 1986 the appellant had pretended that an amount of $6 237,08 was needed to pay casual labourers at a resettlement scheme when in fact no such labourers had been employed. Unfortunately for the appellant a random spot check was carried out after the money to pay the labourers had been drawn and that was when it was discovered that there were in fact no such labourers. The appellant pleaded not guilty but was convicted. On 19 August 1987 he was sentenced to a period of 22 months imprisonment, of which 8 months were suspended on condition of good behaviour.

The appellant appealed against sentence on the grounds that the sentence was too severe and induced a sense of shock, that the magistrate failed to take into account that the prejudice was merely potential and not actual and that the sentence failed to take into account the appellant's personal circumstances. The notice of appeal was dated 27 August 1987.

In giving his reasons for sentence the magistrate said that "the potential was

SMITH J

high and it was grossly high and that you could have went away (*sic*) with $6 237 but for the spot checks which were made by the Head Office Staff". In the next sentence, however, he went on to say "having diverted those funds to your own use, in my view, amounts to economic sabotage". There is therefore merit in the argument that the magistrate failed to take into account that the prejudice was merely potential. However, even if the appellant is given the benefit of the doubt in that regard, I do not agree with the submission that the sentence is too harsh and induces a sense of shock. The appellant was a civil servant and he attempted to steal a considerable sum of public funds. He held a position which carried a high degree of responsibility and he grossly abused the trust imposed in him. He planned the deception very carefully and was caught only because of the spot check instituted by the Ministry. Had that not been done, he would, in all probability, have got away with the money. He did not show any contrition when he was caught and he did not allege any pressing need for the money on his part. The offence he committed was a very serious one and the magistrate acted quite properly in imposing the sentence which he did. He took into account the personal circumstances of the appellant, the fact that he was a first offender and the fact that he had been awaiting trial for just over twelve months. The approach taken by the magistrate was consistent with that adopted by this court and the Supreme Court in many other cases - see *S v Musanyeya* HH-192-82; *S v Pfidze* HH-80-83; *S v Tande* HH-376-84*; S v Chinyangwa* S-22-86*; S v Masoreka* S-S-85.

Mr *Mutendadzamera* argued that the delay in hearing the appeal was also a factor which justified the setting aside of the sentence of imprisonment. He conceded that the record of the trial was a lengthy one. The transcript ran to 152 pages of typing with a further 12 pages for the judgment and sentence. But, he said, the appellant's legal practitioners had approached the magistrates court on a number of occasions to see what progress was being made in the transcribing of the record. He produced a copy of a letter dated June 20 1989 from the legal

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practitioners addressed to the clerk of the Mbare magistrates court saying "we, once again, request you to prepare the record of the proceedings in the above matter". At that stage a period of almost 20 months had elapsed from the date the appeal was noted. Mr *Samkange* agreed that there had been an undue delay in the transcribing of the record and said that there was nothing that he personally could do to rectify the position. Likewise there was little that the clerk of the court could do. The delay occurred in getting the record typed. He pointed out that at present in the case of appeals against sentence the average period that elapsed between the noting of the appeal and the hearing of the appeal was 18 months and the

principal cause of the delay lay with the transcribing of the record.

In *S v Sithole* HH-331-88 the court considered an appeal against sentence. The appellant had been convicted on three counts of theft and sentenced to 14 months imprisonment of which 7 months were conditionally suspended. EBRAHIM and GIBSON JJ who heard the appeal considered that the sentence was appropriate and were far from shocked thereby. They would not have considered interfering with the sentence but for the fact that the appellant was convicted on 22 August 1986 and released on bail some three weeks later and the appeal was not heard until 4 July 1988. At p 3 of the cyclostyled judgment EBRAHIM J said -

> "I consider it unsatisfactory that a person, through no fault of his own, has had to wait nearly two years before knowing his fate. It is my view that it would be unjust for him to be sent to prison so long after he was sentenced, particularly as the delay was not caused by him."

The sentence was reduced to a fine of $500 with an additional 9 months imprisonment all of which was conditionally suspended. In *S v Mupinda* HH-354-88 an appeal against sentence was heard and GIBSON J who delivered the judgment of the court quoted with approval the extract cited above from *Sithole*'s case. The appellant, who had been the headmaster of a secondary school, was convicted of fraud and sentenced to 12 months imprisonment of which 4 months were conditionally suspended. He was convicted in June 1986 and kept in custody for 6 weeks until released on bail. His appeal was heard on 18 July 1988. Here too, the court felt that the sentence was quite appropriate and did not induce a sense of shock because it was a serious case of fraudulent conduct by a public servant in a position of trust. However, because of the delay in the hearing of the appeal and the fact that the appellant had obtained alternative employment, the court felt constrained to set aside the term of imprisonment and substitute a fine of $1 600 and an additional 3 months' imprisonment, all of which was conditionally suspended.

One would have thought that these those judgments would have resulted in some improvement in the situation but alas, that was not to be. In *S v Ndanga* HH-29-89, where a civil servant who had been convicted of 7 counts of theft by conversion and sentenced to 24 months imprisonment of which 6 months were conditionally suspended appealed against sentence, the court felt constrained to interfere. The court found that the offences were serious, involved a substantial sum of money and had been committed over an extended period by a person employed in a position of trust. Because it had

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taken the State two years and eight months to bring the matter to court, the sentence of imprisonment was set aside and substituted by a fine of $2 000 and an additional 12 months' imprisonment, all of which was conditionally suspended.

In *S v Dube & Anor* S-169-89 (not yet reported) DUMBUTSHENA CJ at pp 8-9 of the cyclostyled judgment said:

> "The feature I find worrying, however, is that the appellants were arrested on 4 September 1985. They first appeared in court on 3 November 1986, more than a year after they were arrested. The trial was finalised on 15 January 1988, the day they were sentenced. To make it worse, their appeal was only heard on 16 October 1989, that is, a little more than four years from the time they were arrested. While the machinery of justice could be said to work exceedingly slowly, tolerating the slowness works injustice on those who must wait for their trials before they are found guilty or acquitted. We have repeatedly said that justice delayed is justice denied. This case should remind us of the need to expedite trials.
>
> It is for this reason that I am of the opinion that sending the appellants to prison, after spending many years out of prison awaiting their trial and the hearing of their appears, would not be in the interest of justice. For justice to be seen to be done the machinery of justice, as it grinds on through police stations, the Attorney-General's Department and the courts of justice, must move expeditiously."

Unfortunately the position has not improved. If anything, it has got worse. In an appeal against sentence, *S v Mureruswa,* which was heard on 27 November 1989, the appeal had been pending for well over 3 years. Because of that delay, the sentence of 10 months imprisonment was set aside and a fine of $250 together with a wholly suspended term of 6 months imprisonment was substituted. In another appeal against sentence, *S v Kuzvarwa* HH-12-90, which was heard on 22 January 1990 there was a delay of 41/2 years in the hearing of the appeal. Once again the sentence of imprisonment was set aside, solely on the grounds of the delay in the hearing of the appeal, and a fine was substituted. In *S v Mafarachisi* S-198-89 (not yet reported) the accused had been sentenced to imprisonment on 28 July 1987 and his appeal was not heard until 6 October 1989. Similarly in *S v Manera* S-153-89 (not yet reported) the accused had been convicted on 28 September 1987 and his appeal was not head until 24 October 1989. In that case not only was there a substantial delay but also part of the record was irretrievably lost and therefore not available to the court. The conviction was set aside although

SMITH J

GUBBAY JA entertained an uneasy feeling that the order setting aside the conviction may lead to a failure of justice in that a guilty person went free.

In *S v Gonese* HH-218-89 a delay of 17 months ensued after conviction until the appeal against sentence was upheld. The court held that the mental anguish suffered by the appellant over so long a period was a factor that had to be taken into account and that that, coupled with the appellant's contrition and timeous restitution, necessitated altering the sentence from 12 months imprisonment. Likewise, in *S v Kaschula* HH-220-89, through no fault on the part of the appellant, there was a delay of nearly 17 months after conviction before the appellant's appeal

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against sentence was heard. Once again the court referred to the mental anguish suffered by the appellant over an extended period and ordered that in view of the delay and of a misdirection on the part of the magistrate 9 months' of the 12 months' prison sentence imposed should be suspended. In *S v Kaja* S-129-89 DUMBUTSHENA CJ referred to the inordinate delay in the processing of the appeal. The appellant had been convicted and sentenced on April 26 1988. Notice of appeal was settled on April 28 and received by the magistrate's court on 3 May. On 14 November 1988 new grounds of appeal were added. Thereafter nothing was heard. The proceedings before the magistrate were contained in two pages. The record was eventually prepared by the appellant's legal practitioner and received by the Supreme Court on 13 April 1989. At pp 1-2 of the cyclostyled judgment the learned CHIEF JUSTICE said-

> "I was reliably informed that the court record could not be found. In spite of reminders from the appellant's legal practitioners addressed to the magistrate's court in Mutare there was no response and the record was not prepared. It is wrong and unfair for the courts to keep convicted persons who have filed notices of appeal waiting for records which only consist of a few pages just because court officials have, through negligence or disregard for the need to expedite the judicial process, neglected to perform their duties. Delayed justice is denied justice."

It would appear that no disciplinary action is taken against court officials who neglect their duties. Consequently there is no incentive for them to improve their performance.

Where persons have been convicted of offences which merit a custodial sentence which is duly pronounced but subsequently set aside merely because of the delays in the hearing of an appeal, there is also, in my opinion, a failure of justice.

SMITH J

It is difficult to believe that the position has been reached where the present state of affairs cannot be put right. The concern of the judiciary over these delays has been expressed, sometimes very forcefully, time and again without any noticeable effect. State counsel is placed in an invidious position, week after week, of having to try to justify the delays or at least to attempt to explain them. Justice is not being done in these cases where perfectly proper sentences have to be interfered with on the grounds of humanity. It should be the prime concern of the Ministry to ensure that justice is done. As the learned CHIEF JUSTICE said in *Dube*'s case *supra,* justice delayed is justice denied. If the Ministry is unable, or unwilling, to do anything to rectify the position, the matter should be referred to the Public Service Commission to see what can be done. It should not be beyond the resources of Government to remedy a situation which has deteriorated so much over the last few years.

In this case the appellant was convicted just over a year after his arrest. It appears that such a delay in bringing an accused to court is not unusual nowadays. It is most unfortunate that everyone appears to accept such a state as normal and therefore little is being seen to be done to minimise such delays. Even if this delay of almost 13 months is accepted, it has been followed by a delay of almost 21/2 years in the preparation of the record of the case and the setting down of the appeal. Such a delay is unconscionable. In the interim since his conviction the appellant has got married, his wife has had one child and is expecting another and he has secured employment as a driver, earning a net monthly salary of $343,00. Having regard to the cases cited above, it would not be just to sent the appellant to prison after so long a delay, even

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though the offence he committed justified a custodial sentence.

Mr *Samkange* pointed out, if this court sets aside sentences of imprisonment because of the delays in the hearing of appeals more and more convicted persons will start appealing against custodial sentences, even if they don't have a good case, in order to try to avoid going to prison. The effect of greater numbers of such appeals will no doubt be to place a greater strain on the present system and this will then lead to greater delays. It is difficult to believe that the present situation can deteriorate much further but if it has managed to get worse each year over the past three or four years no doubt it can continue to do so. I sincerely hope not.

The appeal is allowed. The sentence is set aside and the following is substituted -

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SMITH J

> "The accused is sentenced to a fine of $1 500 or, in default of payment, 6 months imprisonment. In addition, he is sentenced to 12 months imprisonment, all of which is suspended for 5 years on condition that he is not convicted of an offence involving dishonesty committed within that period for which he is sentenced to imprisonment without the option of a fine."

In order to give the appellant an opportunity to pay the fine, it shall be payable on or before 30 April 1990.

Greenland J: I agree and would add, for the sake of emphasis, that in the cases of delay particularised above, the court accepts that the accused suffers and endures mental anguish. When such a person is placed in a position of not knowing his fate for a long period of time the mental anguish involved assumes a keen and extreme character which a court of justice will recognise as being incompatible with sacred notions of justice. Included is the notion enshrined in s 18 of the Constitution that every person charged with a criminal offence be afforded "a fair hearing within a reasonable time by an independent and impartial court. . .". It is implicit that such person have the matter finalised within a reasonable time. Acquiescence in the present state of affairs insidiously renders nugatory this Constitutional right and the court is sworn to uphold the Constitution.

As particularised above, a situation is developing where justice is being compromised. Simply by appealing, those with the financial means to do so are able, in effect, to force the court to interfere and substitute punishments which are not commensurate with the crime committed. An inherently unfair and unjust situation is thereby induced for the reason that persons committing the same or similar offences and having the same or similar moral blameworthiness are then treated unequally with those unable to finance appeals having to endure the devastation of custodial punishment.

The sacred notion that all are equal before the law and that justice is blind to status, position, wealth etc is violated. The principle of uniformity of punishment is jettisoned from the ship of justice.

This court therefore takes this opportunity to bring this unacceptable state of affairs to the notice of the Executive.

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Justice demands that the prevailing situation be rectified.

Sawyer & Mkushi, appellant's legal practitioners

LINCOLN COURT (PVT) LTD v ZIMBABWE DISTANCE CORRESPONDENCE EDUCATION COLLEGE (PVT) LTD 1990 (1) ZLR 158 (HC)

Court **High Court, Harare**

Smith J

Notice of motion

15 & 28 February 1990

Flynote

Landlord and tenant - termination of monthly tenancy - period required - statutory tenant- order for ejectment - court can suspend order - factors to be taken into consideration.

Headnote

If a tenant who occupies property on a monthly basis is given one month's notice, expiring at the end of the month, he then becomes a Statutory tenant.

Once a lessor of commercial premises in terms of Pt IV of the Commercial Premises (Rent) Regulations, 1983, has established "good and sufficient grounds" he is entitled to an order for ejectment of the lessee, without having to give the lessee notice of termination of the lease.

However, in granting the order, the court must consider all the circumstances, including the equities in favour of the lessee, and the order of ejectment should only take effect after the lapse of a reasonable time, depending on the circumstances.

Nevertheless, the interests of the lessee cannot be taken to extremes and the lessor cannot be expected to wait indefinitely whilst the lessee re-locates himself.

Cases cited:

Tiopaizi v Bulawayo Municipality 1923 AD 317

Lyle v Kemp 1948 (1) SA 165 (D)

Union Wine & Spirit Corp Ltd v Ferreira 1948 (2) SA 647 (O)

Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd & Ors 1985 (4) SA 809 (A)

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SMITH J

Newman v Biggs 1945 EDL 54

The Trustees in Mashonaland of the Church of the Province of Central Africa v Timms 1973 (1) RLR 307 (G); 1973 (4) SA 464 (R)

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

EWW Morris for the applicant

JS Sayce for the respondent

Judgment

Smith J: On 27 October 1988 the applicant purchased a piece of land on which commercial premises known as QV House had been erected. Title was transferred to the applicant on 22 December 1988. At the time the respondent leased the first and second floors of QV House. There was no written agreement of lease between the respondent and the former owner of QV House. The respondent paid rent on a monthly basis. There were three other tenants in QV House. When the applicant purchased QV House its intention was to procure accommodation for itself and three other companies which were associated with it in that the principal shareholder of the applicant, Mr Margolis, held the majority of their shares. On 18 November 1989, notice was given to all the tenants in QV House to vacate the premises on or before 31 January 1989. Two of the tenants vacated the premises in accordance with the notice. Because notice was given before the applicant became the registered owner of QV House, further notice dated 22 January 1989 was given to the respondent to vacate the premises on or before 28 February 1989. The respondent failed to vacate the premises and the applicant instituted an action for its eviction - Case No. HC 1434/89.

RENOLDS J heard the application on 8 May 1989. He dismissed the application. In his reasons for judgment he said that assuming that the respondent was not a statutory tenant, the Application was required to give reasonable notice of the termination of the lease and that one month's notice was unreasonable in the circumstances. Reasonable notice "would be approximately 5-6 months". On the other hand, if it was assumed that the respondent were a statutory tenant, the applicant would have to establish "good and sufficient grounds" before the court would order the recovery of possession of the premises. From the evidence submitted, he agreed that the applicant had established that it and its three associated companies required accommodation and had therefore shown "good and sufficient grounds" as required by Part IV of the Commercial Premises (Rent) Regulations, 1983 (SI 676 of 1983) (hereinafter referred to as "the Commercial Rent Regulations"). However, the notice given was not reasonable in the circumstances in that it did not afford the respondent sufficient time to relocate its business.

Thereafter, on 31 May 1989 the applicant again gave the respondent notice to vacate the premises. This time it gave six month's notice terminating on 30 November 1989. Mr Ndlovu, a

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director of the respondent, sought to get the respondent's occupation of the premises extended beyond the end of November because it would be very busy with examinations during November and early December. Mr Margolis, on behalf of the applicant, tentatively agreed to an extension up to 31 December 1989. The respondent made no attempt to vacate the premises in QV House by 30 November 1989 and hence the applicant initiated the present proceedings. The applicant is seeking an order evicting the respondent within 7 days and ordering payment of damages in the sum of $3 945,60 per month *pro rata* from 1 December 1989 to the date of eviction. Mr *Morris* wisely abandoned the claim for damages. No evidence had been produced to substantiate the measure of damages claimed.

The respondent's attitude to the application is as follows. Most public examinations are set during the period October to December each year and it would be impossible for the respondent to move during the month of November. Approximately 2500 students had sat examinations at the premises in QV House between 1 October and 31 December 1989 and some 300 students would sit examinations in January 1990. In the light of those circumstances, the notice given is unreasonable. The respondent also alleged that the applicant did not in fact need all the offices in QV House for the four associated companies. It said that the proprietor of Elite Fashions, one of the former tenants of offices on the ground floor of QV House, had been told that he would be permitted to reoccupy the offices on the ground floor but only after the respondent had been evicted. It submitted in proof of that statement an affidavit from the said proprietor in which he said that he had been approached by Mr Margolis in October 1989 and the latter had indicated that he would permit Elite Fashions to reoccupy its former premises in QV House. The respondent further contended that the companies associated with the applicant did not in fact require all the office space in QV House as claimed by the applicant. The respondent then went on to chronicle the attempts it had made to find alternative accommodation. These had culminated in the respondent purchasing property commonly known as the Commercial Careers College but it would not be able to take occupation thereof until the second half of this year.

Mr Margolis, in his answering affidavit, denied the allegation made by the proprietor of Elite Fashions and said that, in fact, his own office was on the ground floor in one of the offices previously occupied by Elite Fashions.

SMITH J

Mr *Morris* argued strenuously that the lease between the respondent and the previous owner of QV House, which continued in force between the respondent and the applicant, was a verbal agreement which continued on a monthly basis and was therefore terminable on one month's notice. He referred to *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 326 where DE VILLIERS JA said

> "From the various cases decided in our courts it may now be taken as settled that in the absence of agreement or custom to the contrary, a monthly contract of letting and hiring for an indefinite period requires a month's notice, to expire, in all cases except in the case of domestic or menial servants, at the end of a month."

In *Lyle v Kemp* 1948 (1) SA 165 (D) CARLISLE J said at p 166

> ". . . under the common law, it is clear that as this is a monthly tenancy a month's notice would in the ordinary way

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be sufficient to terminate it. The question is whether there is anything in the legislation ... to alter the common law in this regard."

See also *Union Wine and Spirit Corp Ltd v Ferreira* 1948 (2) SA 647 (O) at 651. Mr *Sayce* referred me to *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd & Ors* 1985 (4) SA 809 (A) where the court had to decide whether the contract concerned, which was of indefinite duration, had been discharged. It decided that the contract was terminable on reasonable notice. SMALBERGER AJA said at p 829G that in order to determine whether a valid and reasonable notice of termination had been given, it was necessary to consider the nature and effect of the agreement since the agreement "does not fall into one of the recognized categories of contract such as sale or lease". His opinion therefore was that cases such as *Tiopaizi's supra* and the others I have quoted were not applicable because the agreement concerned was not one of lease.

In my opinion, the one month's notice of termination of the lease on 31 January 1989 that was given by the applicant was sufficient notice to terminate the monthly lease agreement that subsisted between the parties. Thereafter the respondent became a statutory tenant for the purposes of Pt IV of the Commercial Rent Regulations. In terms of s 22 of the Commercial Rent Regulations no order for the ejectment of a lessee from commercial premises shall be made by a court unless it is satisfied that the lessor has good and sufficient grounds for requiring such order. Section 23 of the said regulations goes on to provide that a statutory tenant shall be entitled to give

SMITH J

up possession of the premises only on giving such notice as would have been required under the lease or, if there is no provision for such notice, on giving reasonable notice. The proviso to that section provides that a lessor who obtains an order for the ejectment of a lessee shall not be required to give any notice to vacate to the lessee.

Has the applicant established good and sufficient for requiring an order of ejectment? In Case No. HC 1434/89 REYNOLDS J said that if the respondent were a statutory tenant, he considered that the applicant had established "good and sufficient grounds" but that "in the interests of justice and reason, a recovery order should only be effective after a reasonable period to allow the respondent to relocate his business." It seems to me, with respect, that once a lessor has established "good and sufficient grounds" he is entitled to an order for the ejectment of the lessee, without having to give the lessee notice of termination of the lease. However, in granting the order of ejectment, the court must consider all the circumstances of the case and the order of ejectment should only take effect after the lapse of a reasonable period. What is reasonable would depend on the circumstances of the case and would not necessarily be equivalent to one month's notice.

Mr *Morris* argued that the finding by REYNOLDS J that the applicant had established "good and sufficient grounds" meant that the matter was *res judicata.* Mr *Sayce*, on the other hand, argued that the finding was *obiter* and was therefore not binding on this Court. He went on to submit that the various explanations given by the applicant as to the needs of the four associated

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companies for premises contained a number of contradictions and that the *bona fides* of the applicant had been brought into question by the allegations made by the proprietor of Elite Fashions. Therefore the matter should be sent to trial so that the applicant's case could be properly tested. In my view, the finding of REYNOLDS J was *obiter.* He refused the application because he considered that the applicant had not given the respondent reasonable notice of termination of lease. When giving his views on the question of "good and sufficient grounds", he said that he had given the alternative view to indicate that, "in either event the respondent will, as I see it, and provided that the applicant takes proper action, be required to vacate the premises shortly". Accordingly the question of "issue estoppel" does not arise.

In the *Union Wine & Spirit Corp* case *supra,* the court had to consider whether the applicant who wished to eject a tenant had established its *bona fides.* At p 651-2 DE BEER J quoting PITTMAN JP in *Newman v Biggs* 1945 EDL 54 said:

SMITH J

> "It is difficult to see what more can ordinarily be required of a claimant, than that he should assert his good faith, and bring some small measure of evidence to demonstrate the genuineness of his assertion. He can normally scarcely do more, and it rests with the lessee resisting ejectment to bring forward circumstances casting doubt upon the genuineness of his claim."

At p 651 DE BEER J went on to say:

> "The first defence advanced, namely, that the respondent has exhausted all possibilities of obtaining any other accommodation is naturally one which evokes sympathy, but in my view this factor is hardly relevant as was stated by MILLIN J in *Johannesburg Board of Executors & Trust Co Ltd v Gordon* (1947 (1) SALR at p 90):
>
> > 'The question is not who will suffer the greater hardship, the applicant if the respondent is not ejected or the respondent if he is ejected; the question is simply whether the applicant has shown that it reasonably requires the leased premises for its own use.'"

In *The Trustees in Mashonaland of the Church of the Province of Central Africa v Timms* 1973 (1) RLR 307 (G) at p 314 H BEADLE CJ said that the court was called upon to exercise a value judgment which must be based on all the equities of the case. The learned Chief Justice pointed out that even though the regulations under consideration did not give any special consideration to lodgers as such, the court was entitled to take into account all the equities and one of the equities was the unfortunate position in which the lodgers might be placed if they were ejected from the premixes immediately. In *Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd* S-146-86 (not yet reported) GUBBAY JA referred to this case as well as to a number of other cases which supported the proposition cited in the *Union Wine & Spirit Corp* case *supra,* to the effect that the needs and circumstances of the respondent were irrelevant; it was only the applicant's needs and circumstances that had to be objectively examined. He found it unnecessary to decide which approach was to be preferred since the court *a quo* had weighed in the balance the hardship that an eviction order would undoubtedly cause the lessee in that case. It seems to me, with respect, that the judge in the court *a quo* followed the proper procedure. It is for the owner of the premises to satisfy the court that he has "good and sufficient grounds" for an order of ejectment. Once he satisfies the court in that regard, he is entitled to the order. But, in determining the date by which the lessee must evacuate the premises the

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court must have regard to "all the equities" which would include the interests of the lessee.

SMITH J

Consequently the court should, in my opinion, afford the lessee a reasonable amount of time to evacuate the premises. In fixing the period, however, the interests of the lessee cannot be taken to extremes. It may well be that at times accommodation is difficult to obtain. The owner of the premises concerned cannot be expected to wait indefinitely whilst the lessee endeavours to relocate himself or his business. After all, due regard must be had to the fact that the owner does in fact own the premises and has satisfied the court that there are "good and sufficient grounds" why the eviction order should be granted.

The applicant, both in Case No. HC 1434/89 and in this case, has set out in detail why the premises in QV House are required for use by the four associated companies. In my view the issue of the applicant's *bona fides* is not a genuine dispute of fact incapable of satisfactory determination without the aid of *viva voce* evidence. I do not think that serious consideration can be given to the affidavit of the proprietor of Elite Fashions. In my opinion the applicant has made out a good case as to why the four companies require accommodation in QV House. It is clear that all four have participated in the purchase of the premises and have incurred obligations in connection with the repayment of the loan which has been obtained. The interests of Mr Margolis in the four companies are sufficient to establish the identity of interests amongst the four companies. I do not consider that there are any serious contradictions in the various explanations given by the applicant.

Having found that the applicant is entitled to the order claimed, this Court must consider what is a reasonable period within which the respondent must vacate the premises in QV House. In Case No. HC 1434/89 REYNOLDS J held that one month was not a reasonable period whereas five to six months would be. Mr *Sayce* argued that the six months' notice given to the respondent was not reasonable because it expired at the height of the examination season, the very time when it could not move. I cannot accept such an argument. On that basis it would follow that 12 months' notice or 2 years' notice which expired at the end of November would also be unreasonable. It could be argued, of course, that since the applicant could not move at the end of November because that would be in the middle of the exam season, the effect was to reduce the period of notice to four or five months. In my opinion, even four or five months' notice would be reasonable in the circumstances. But the respondent has not satisfied me that it could not move at the end of November, 1989 had it had alternative accommodation to which to move.

The applicant purchased QV House in October 1988 and obtained title in

SMITH J

December of that year. It first gave notice to the respondent of termination of its lease with effect from 31 January 1989 and then gave similar notice with effect from the end of February. After its application in Case No. HC 1434/ 89 was dismissed it gave six months' notice of

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termination of the lease. As at February 1990 the respondent is still in occupation of the premises in QV House. It has known for over a year that the applicant wants to take possession of the premises and that it must find alternative accommodation. It has now obtained alternative accommodation but apparently will not be able to take occupation thereof until the second half of the year, that is in at least six months time. In my view it would be unconscionable to withhold from the applicant for a further six months the advantages and rights it sought in purchasing QV House. The period the respondent has had to relocate its business has been more than reasonable.

It is ordered -

1) that the respondent vacate the premises occupied by it on Stand 2171, Salisbury Township, otherwise known as QV House, within 21 days of the service of this order upon it and, in the event of its failure to vacate as aforesaid, the Deputy Sheriff be and is hereby authorized to evict the respondent from the said premises;

2) that the respondent pay the applicant's costs incurred in this action.

Condy, Chadwick & Elliott, applicant's legal practitioners.

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

MASIYIWA v TM SUPERMARKETS 1990 (1) ZLR 166 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Korsah JA

Civil appeal

6 February & 5 March 1990

Flynote

Employment - Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 SI 371/85 - s 3(b) - wilful disobedience - meaning of term - s 3(2) - whether s 3(2) confers a discretion - determination must be served on parties.

Interpretation of statutes - mandatory duty to act where no justification for failing to exercise power.

Words and phrases - "wilful disobedience" - moral justification makes disobedience no less wilful - "may" means "shall" in s 3(2).

Headnote

The respondent suspended the appellant from its employ and, thereafter, in terms of s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371/85), applied for an order or determination terminating the contract of

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employment. The application was rejected by the labour relations officer but dismissal of the appellant was eventually confirmed by the Labour Relations Tribunal.

On appeal:

Held, that the Tribunal was entirely justified in concluding that the respondent's conduct amounted to wilful disobedience for the purposes of s 3(b) of the Regulations and that moral justification made the disobedience no less wilful.

Held, further, that the word "may" in s 3(2) of the Regulations does not confer a discretion on a labour relations officer, board or tribunal, as the case may be, but that a determination must be made in terms of s 3(2)(a) or (b).

McNALLY JA

Cases cited:

Matereke v CT Bowing & Associates (Pvt) Ltd S-80-87 (not yet reported)

Salisbury Financial Holdings (Pvt) Ltd v Van Niekerk 1974 (1) RLR 333 (G); 1974 (3) SA 836 (R)

Annison & Ors v District Auditor for St Pancras Borough Council & Anor [1962] 1 QB 489; [1961] 3 All ER 914 (QB)

Miss *C Chitiyo* for appellant

EWW Morris for respondent

Judgment

McNally JA: The appellant was employed as a till operator in TM Supermarket, Masvingo. On 26 August 1986 he was given written notice of summary suspension without pay, to take effect the following day. On the same date a letter was addressed by TM (as I will call the respondent) to the Principal Labour Relations Officer, Masvingo, setting out TM's complaints against the appellant and seeking authority to terminate his employment in terms of the provisions of SI 371/1985.

Initially the labour relations officer rejected the application and ordered the re-instatement of the appellant. On appeal to the regional hearing officer this decision was reversed. Thereafter, in turn, the Labour Relations Board and the Labour Relations Tribunal (by a majority) upheld the regional hearing officer and thus confused the dismissal of the appellant. He now appeals to the Supreme Court.

The appellant set out three grounds of appeal in his notice filed on 21 March 1989. They were:

1. The Tribunal gave a one-sided consideration of the evidence. Relevant facts and information in favour of the appellant were disregarded.

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2. The Tribunal misdirected itself as to the point of law applicable in this case. The respondent did not establish and satisfy the necessary legal requirements for dismissal of an employee from his work in terms of SI 371 s 3. There was neither disobedience of a lawful order nor gross incompetence on the part of the appellant. The decision of the Tribunal is therefore wrong in law.

3. The judgment is harsh, inequitable, and manifestly unjust.

These general submissions were developed in the Heads of Argument filed by Miss *Chitiyo*. But in developing the submissions she in fact moved away from them and made somewhat different submissions. They may be

McNALLY JA

summarised as follows:

1. It is not "wilful disobedience" of an order if an employee disobeys an order because of his fear of the consequences of carrying out that order.

2. The grounds upon which the various authorities (regional hearing of ricer, Board and Tribunal) made their decisions were all so different that the appellant did not know what charges he was really facing.

3. In fact none of the grounds for dismissal was established.

[The learned Judge of Appeal then analysed the factual background and continued.]

Miss *Chitiyo* contended that the appellant had reasonable, or at least genuine, grounds for fear of victimisation if he continued to work at the till, and that this took his action outside the definition of "wilful" in the phrase "wilful disobedience". She sought to rely on the judgment of this court in *Matereke v CT Bowring & Associates (Pvt) Ltd* S-80-87 (not yet reported). She referred us to a passage at p 7 of the judgment, but did not draw our attention to the following passage at p 8:

> "The existence of a moral excuse for such disobedience will not make the disobedience any less wilful or the order any less lawful."

This passage disposes of her argument completely. Indeed the considerations in *Matereke*'s case were not very different in essence from those in this case, as appears from the following words of GUBBAY JA at p 9:

> "Satisfied as I am that the appellant vehemently believed that he was morally justified in refusing to vacate the office, I do not see how the harbouring of such belief made his disobedience any less wilful in degree, or affected the lawfulness of the order."

The difference between the two cases is that in this present case the Tribunal, for clear and good reasons which it set out in its judgment, disbelieved the appellant. His alleged belief that his till shortages were the result of victimisation was fanciful. His accusation that the spot check on his till and in his pockets on 25 August 1986 was further evidence of his victimisation

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ignores the fact that both checks proved positive. He was short, albeit by a mere 79 cents; and he was carrying cash in his pocket in deliberate defiance of a written regulation that till operators should put their personal cash in a safe place before taking up their posts at the tills.

McNALLY JA

It seems to me therefore that the Tribunal was entirely justified in coming to the conclusion that the appellant's conduct on 25 August 1986 amounted to wilful disobedience of an order lawfully given, on two counts: First, he was ordered to continue to work on his till while his request for a transfer from till duties was considered. Management, in terms of agreed procedures, was entitled to two days to resolve this request. Yet he walked out immediately. Secondly, and in clear contravention of an instruction in the booklet of whose contents he was aware, he carried money in his pocket while on till duties. His answer to this allegation was no more than mere bluster.

That really is the end of the matter, because wilful disobedience of a lawful order given by the employer is a ground for summary suspension without pay in terms of s 3(b) of SI 371 of 1985. Once the labour relations officer (or higher authority on appeal) is satisfied that the ground for suspension is proved, he may serve a determination or order on the employee concerned, terminating his contract of employment (s 3(2)(a)). It is not for this Court to intervene if the Labour Relations Tribunal has properly satisfied itself that a ground for suspension has been established, and, in the proper exercise of its jurisdiction, decides that dismissal is warranted.

However, because the Tribunal's decision was reached by a majority of two to one, the dissenting member agreeing that acts of misconduct were established but taking the view that dismissal was not warranted, it is desirable to examine the matter further, both from the factual and the legal points of view.

As a matter of fact it must be acknowledged that a number of other allegations against the appellant were established:

[The learned Judge of Appeal then considered these allegations and continued.]

The Tribunal was entitled, in coming to a decision on the matter, to have regard to the totality of the conduct of the appellant. Part of that totality consisted of the till shortages and the "short change" incident, even though in themselves they did not constitute gross incompetence.

The matter of law which arises is this: Suppose a labour relations officer (or the Board or the Tribunal on appeal) finds as a fact that one at least of the grounds of suspension relied upon the employer is proved. To what extent is that labour relations officer or Board or Tribunal entitled to say: "In the

McNALLY JA

exercise of our discretion, and despite the proof of the grounds of suspension, we think you

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should re-instate the employee, or at least employ him in another section or in a lower-ranking job?" That was the proposal of the dissenting member in this case.

It seems to me, although it is not necessary to decide the question for the purposes of this case, that there is no discretion in the matter. The use of the word "may" in s 3(2) of SI 371 of 1985 seems to suggest a discretion, but a closer reading of the section indicates to me that that suggestion is illusory.

The section reads as follows:

> "Upon application being made in terms of subsection (1) the labour relations officer shall investigate the matter and may, according to the circumstances of the case -
>
> (a) serve a determination or order on the employee concerned terminating his contract of employment if the grounds for his suspension are proved to the satisfaction of the labour relations officer; or
>
> (b) serve a determination or order on the employer concerned to remove the suspension of the employee concerned and to reinstate such employee if the grounds for his suspension are not proved to the satisfaction of the labour relations officer."

I consider that this is a case where the words of Bennion apply (Bennion *Statutory Interpretation* p 27):

> "Where a court or tribunal is given in terms a power to exercise a certain jurisdiction, this may be construed as imposing a mandatory duty to act. This will arise where there is no justification for failing to exercise the power. In such cases, as it is often put, 'may' is held to mean 'shall'."

And see *Salisbury Financial Holdings (Pvt) Ltd v Van Niekerk* 1974 (1) RLR 333 (G) at 335D-E; *Annison & Ors v District Auditor for St Pancras Borough Council & Anor* [1962] 1 QB 489; *Craies on Statute Law* 7 ed p 285.

Thus, in the case of s 3(2), the labour relations officer has to determine whether the grounds of suspension are proved or not proved. If they are proved, he must proceed in terms of subpara (a); if they are not proved, he must proceed in terms of subpara (b). To put it another way, he has a choice,

but that choice is governed, not by his discretion, but by his finding. If he finds the grounds proved, he must choose (a); if not proved, (b).

Accordingly, it seems to me that there is no basis for interfering with the majority decision of the Tribunal. I should add that Miss *Chitiyo* was unable to develop any convincing argument that the appellant was misled because he did not know which charges he was being called upon to answer. The simple position was that he was called upon to answer all the allegations in the original letter of complaint of 26 August 1986. Some points were stressed at one stage and others at another stage, but the particulars of the charges against him never varied.

In the result therefore the appeal must be dismissed with costs.

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Gubbay JA: I agree.

Korsah JA: I agree.

Chitiyo & Associates, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

S v CHAMUKWANDA 1990 (1) ZLR 172 (HC)

Court **High Court, Bulawayo**

Sansole J

Criminal review

9 March 1990

Flynote

Criminal law - statutory offences - Criminal Law Amendment Act [Chapter 58] s 3(d) - unlawful carnal knowledge of female imbecile or idiot-improper to convict without expert medical evidence of imbecility - evidence - expert evidence - imperative in matters relating to person's state of mind.

Headnote

No person may be convicted on a charge of unlawful sexual intercourse win a female imbecile in the absence of expert medical evidence of her imbecility.

Cases cited:

S v Nyathi 1982 (2) ZLR 197 (HC)

S v Mbizi S-184-89 (not reported)

R v Dimane 1940 TPD 372

R v S 1951 (3) SA 209 (C)

Judgment

Sansole J: The accused in this matter was charged with contravening s 3(d) of the Criminal Law Amendment Act [*Chapter 58*] namely having sexual intercourse with an imbecile. He was duly convicted and was sentenced to five years' imprisonment with labour.

The facts are these:

The accused was caught red-handed having sexual intercourse with a young woman, of 18 years of age. Her mother led evidence to the effect that the complainant was mentally subnormal and an epileptic. Later on in her

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SAMSOLE J

evidence she referred to the complainant as "a cripple".

The second witness said that she found the accused atop the complainant and having sexual intercourse with her. Some eleven days later the complainant was taken to hospital to be medically examined; in respect of an "alleged rape or other sexual offence".

The medical report under the heading "Mental State" reads as follows:

> "Known to be mentally subnormal and epileptic, on treatment"

She had had one pregnancy previously which she miscarried at seven months. But there was no proper medical examination in regard to her mental condition.

In the result I was concerned at the fact that the issue of imbecility or idiocy remained unresolved.

Consequently I sent the master back to the trial magistrate for his comments.

In his reply the trial magistrate conceded that "the question of imbecility was a medical one and expert opinion should be sought in order to determine this issue (see *S v Nyathi* 1982 (2) ZLR 197 (HC) in particular at p 199)". His letter continues:

> "However the question remains one of fact and whilst detailed medical evidence could have been called, I respectfully submit that this was not essential. On the medical report exhibit 2 the Doctor who examined the complainant after the rape states that she is "known to be mentally subnormal and epileptic on treatment." Furthermore, the complainant was called to give evidence and it was quite apparent and the court recorded its finding that the complainant is clearly not coherent at all and judging from the difficulties that we experienced in just administering the oath alone, it became clear that her mental abnormality was so severe as to border on complete idiocy."

He argued that he was justified to dispense with expert evidence because firstly the accused himself had conceded that the complainant was mentally subnormal and secondly the calling of expert evidence would have been a waste of time since all that such expert would say would have been "to state what was already obvious to everyone else".

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Furthermore, in his view, the calling of such evidence would have delayed the trial and "the accused would have spent another nine months in custody pending my return to Victoria Falls on circuit".

With all due respect to the trial magistrate these excuses are unreasonable as they are unwise. They were not insurmountable. The accused should have been released on bail or remanded out of custody. Justice is much too precious to be so readily sacrificed on the altar of convenience.

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Nonetheless, I referred the matter to the Attorney-General for his views. The Attorney-General's office replied as follows:

> "Although the Magistrate is right in holding that the question of imbecility is one of fact and therefore can be decided without expert evidence, this goes against the views of the Supreme Court.
>
> See *S v Nyathi* 1982 (2) ZLR 197 at 199D; *S v Mbizi* S-184-89 *per* GUBBAY JA at 4.
>
> > 'Whether the requisite state of mental defectiveness has been reached in a particular case is a question of fact, to be determined after the reception of expert medical testimony.'
>
> Such medical evidence as there was in this case was to the effect that the Complainant was "known to be mentally subnormal and epileptic on treatment". As has been noted in the case of *Mbizi* mental retardation or subnormality is not the same as imbecility.
>
> It is submitted therefore, that inconvenient as it was, the Magistrate should have sought expert medical evidence especially as the evidence disclosed that the complainant was sexually experienced."

I agree.

In my view matters which touch or relate to a person's state of mind, must as a matter of principle be referred to experts for their opinion. And though ultimately, the determination of the issue is a matter of fact, it is a special kind of fact. It would be unwise of lay people to venture into the unknown purely on the basis of appearance. As GUBBAY JA put it in *S v Mbizi* S-184-89 at p 4:

> "It is inadvisable to pronounce on what depth of mental retardation is necessary before a person can be described as being an idiot or imbecile"

SANSOLE J

For as it was stated in *R v Dimane* 1940 TPD 372 at 373, evidence of mental subnormality or feeble-mindedness is not of necessity proof of idiocy or imbecility.

See also *R v S* 1951 (3) SA 209 (C).

Accordingly the trial magistrate was in error.

Consequently, both the conviction and sentence are set aside.

Blackie J: I agree.

S v MASANGO 1990 (1) ZLR 176 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Manyarara JA

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Criminal appeal

23 January & 13 Match 1990

Flynote

Criminal procedure - evidence-sexual offences involving young complainants - corroboration and cautionary rule - identity of assailant the main issue - dangers of false incrimination eliminated by surrounding circumstances.

Headnote

On the evening in question accused visited the 12-year-old complainant's hut where he borrowed a banjo which he was given by the young occupants of the hut who knew him. Accused was later passed on the way by some of the young occupants of the hut who were on their way to their sleeping quarters. Complainant, who had retired to another hut to sleep was later raped and identified the culprit as accused by his voice. Complainant did not immediately report the incident because of threats by accused and only reported when she fell ill. In an appeal against conviction:

Held, that the meets of the evidence of a witness where the danger of false incrimination exists should be considered in conjunction with all surrounding circumstances of the case.

Held, further, that in the instant case complainant's credibility and the surrounding circumstances excluded the possibility of false incrimination.

Held, further, that the inherent danger that a young complainant who has been raped will thereafter falsely implicate an innocent man or imagine that the wrongdoer is someone else had been eliminated. The evidence placed the accused at the right place at the relevant time and complainant's evidence lacked any exaggeration.

Held, further, that although corroboration was not a strong feature of the

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prosecution case, the two-pronged inquiry stated in *S v Mupfudza* 1982 (1) ZLR 271 (SC) was fulfilled and the dangers of false incrimination excluded. The cumulative effect of the totality of the evidence amounted to proof beyond a reasonable doubt.

Cases cited:

R v Judson 1965 RLR 501 (A); sub nom *R v J* 1966 (1) SA 88 (SRA)

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

The appellant in person

Mrs *SC Mavangira* for the respondent

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Judgment

Dumbutshena CJ: The appellant was convicted of raping a twelve year old child. He was sentenced to seven years' imprisonment with labour. Two years of that sentence were suspended for three years on appropriate conditions. He now appeals against conviction.

He was granted leave to prosecute his appeal in person by a judge of this Court.

The appellant and the complainant live in Chikwasha Village in the District of Mhangura. On 18 July 1987 the appellant visited the complainant's kitchen hut. She was in the kitchen with her brothers and cousin. They were playing a banjo. The appellant asked the brothers to lend him their banjo. They gave it to him. He left. Both the complainant and her brothers testified that they identified him by the light of the fire that was burning in the kitchen. They only saw his face.

The appellant admitted collecting the banjo but denied that it was on 18 July 1987.

After he had left, the complainant's brothers left. They caught up with the appellant, who was walking slowly, and passed him. The complainant retired to bed in another hut. She had two small children with her. Soon after falling asleep she felt some weight on her body. She could not scream because a hand had been placed over her mouth. She felt pain in her private parts. A man was raping her. He told her to keep quiet and promised to give her sweets and biscuits.

The complainant had not identified him because it was dark. She was, however, able to identify him by his voice when he spoke to her. He later

announced himself as the father of Garikayi.

The following day the complainant met him. He gave her ten cents and told her not to say anything about what had happened the previous night because the police would arrest both of them. She did not report the incident to her relations. She said she feared being arrested by the police and she feared the appellant.

The complainant fell ill. That was what betrayed her. Her grandmother discovered what had gone wrong. The complainant told her the truth. The matter was reported to the police.

In considering the evidence in this case I am reminded of what LEWIS AJA (as he then was) said in *R v J* 1966 (1) SA 88 (SRA) at 93 E-H; *R v Judson* 1965 RLR 50l (A) at 507 E-I when discussing circumstances that might create a potential danger, that is, of incriminating an innocent man. The learned Acting Judge of Appeal commented:

> "Again, the position might be similar in a case where, for example, the evidence showed that a child, even of the age of the present complainant, had only come out with an allegation of rape after her mother had accidentally discovered signs of sexual interference, of which the child had never complained, and after the mother had demanded an explanation from the child. Here, too, it might conceivably be said that there would be a potential danger that the child might have willingly indulged in some form of sexual experience with another child or adolescent of the opposite sex, and that, when forced to explain away the physical evidence of it, she might endeavour to cover up the real truth by making a false allegation of rape against an innocent person. However,

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> where it is proved beyond all reasonable doubt that a child has been raped by someone, with no suggestion that she was a willing party at any stage, and where it is also established beyond question that the child makes an immediate complaint to her mother, that she is at that time in a genuine state of distress and shock, that she exhibits her injuries and names the accused as her assailant, and where, in addition, there is no reasonable possibility of mistaken identity, it is difficult to see how there remains any inherent potential danger of a false implication . . ."

I appreciate that in the instant case there was no report made soon after the rape was committed. The complainant kept everything to herself for the reasons she gave. She fell ill and when discovered she told it all. There is

no evidence that she was reluctant to tell her grandmother once she had been discovered. All she said afterwards has a ring of truth about it. She told the truth. It is not every child who is raped who prefers not to tell her parents until she is found out who then proceeds to tell lies.

The complainant was a credible witness. The appellant was neither credible nor truthful. He was unwilling to challenge her story. On the whole of the evidence and in the circumstances of this case I cannot perceive any miscarriage of justice.

Why should the complainant tell a lie? Why should she implicate an innocent man? There is no apparent reason for doing so:

> "I know of no authority which suggests that there is an inherent danger that a child, who has been wronged and injured in this way by a person known to her and who feels genuinely hurt and aggrieved by what has been done to her, will immediately thereafter imagine that the wrongdoer is someone else or maliciously blame someone else for the wrong done to her. On the contrary, common sense end human experience suggest that the spontaneous reaction will be to name the real offender."

per LEWIS AJA in *R v J, supra*, at 94G; 1965 RLR at 508 G-H. I endorse that view.

On 28 July 1987 the appellant was arrested. He denied raping the complain ant. When he was warned and cautioned he just denied. He had no alibi then. At the trial he proffered an alibi. It was simple and straightforward. On 24 July 1987 he went to Ferris Farm. There was his deceased father's ceremonial beer drink. It was common cause that he did go to Ferris Fawn on a Saturday, 24 July 1987. But the crime of rape had already been committed. That was a week earlier than his alibi.

What ties the knots together in this case are the following events: The appellant visited the complainant's kitchen hut on 18 July 1987. He was seen by the complainant and the boys who were there playing a banjo. He asked for the banjo from the boys. They gave it to him. He left the hut. All of them, including the complainant, say they identified the appellant by means of the light from a burning fire. They recognised his face. A little while after the appellant had left, Corontino and Wadzanai left the complainant's kitchen hut. They caught up with the appellant, who had left earlier and who was walking slowly.

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This evidence shows that the appellant was in Chikwasha Village on 18 July 1987. He visited the complainant's kitchen hut. He was given a banjo. He was seen moving slowly in the immediate area of the crime. The evidence puts the appellant in Chikwasha Village on 18 July 1987.

When the complainant retired to another hut to sleep, the appellant must have been in the vicinity of that hut. She was in the sleeping hut with two young children. When she was asleep she felt a heavy weight on top of her body. She could not scream because a hand was placed over her mouth. It was dark. She could not identify him by his features. It was his voice that she recognised. She had heard it many times before. During cross-examination the appellant was asked:

> "You used to speak to the complainant before this incident? In fact members of their family used to come to my house and they used to spend some hours there, chatting in the presence of my wife."

He was admitting that the complainant knew his voice.

The complainant's evidence of identity has one outstanding feature - the reluctance to exaggerate. This marks her as a truthful and reliable witness. Most of her evidence is corroborated. The medical evidence, albeit taken two weeks after the event, shows that someone had sexual intercourse with her. Her hymen was ruptured. The doctor found that there was penetration but he could not tell when it was effected.

Who did it? The learned regional magistrate rejected the appellant's alibi because it related to a time after the crime was committed. The appellant conceded that the day he went to Ferris Farm was exactly a week after the rape. Although he was evasive on this point, he had already observed that the complainant was ill before he went to Ferris Farm. He had asked her brother in-law why she was lying down. He was told there was something wrong with her. He showed interest in her condition. When he realised that his concession contradicted his alibi, the appellant changed his story. He now said he saw her lying down after he had returned from Ferris Farm.

When Patrol Officer Rigomeka warned and cautioned him, he replied:

> "I do not admit the charge because I did not sleep with the girl."

As pointed out before, there was no mention of the visit to Ferris Farm. The

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alibi might have been proffered because the warn and caution said the rape was committed between 12 and 25 July 1987.

However, the charge did specifically allege that:

> ". . . on 18 July 1987 . . . the accused did wrongfully and unlawfully assault (the complainant), a girl there residing,

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and did then and there wrongfully, unlawfully, violently and against her will have sexual intercourse with her."

The date 18 July 1987 was drawn to his attention before the trial. During the trial the appellant admitted that the police had informed him that the rape was committed on 18 July 1987. Why then did he persist with his alibi? He knew when it was alleged he had committed the offence. When he was cross examined about 18 July he said he could not remember where he was on that day. He testified, as pointed out before, that the ceremonial beer drink was on 24 July 1987 - it is, however, common cause. Under cross-examination he said that the crime of rape was committed prior to the ceremony at Ferris Farm. He must have known that he borrowed the banjo during the night of 18 July 1987. He was wilfully telling lie when he denied this.

The complainant said she was raped during the night the banjo was borrowed.

Corontino and Wadzanai corroborated her evidence. Wadzanai was asked:

"What did he do when he came to your place? . . . When the accused came he asked for a guitar and we gave him one.
What happened after that? . . . He then left.
And then what happened? . . . From that place, we went to a place where we were going to sleep and on our way, that is when we saw the accused and the accused was walking on the road and we passed him and went to a place where we were going to retire for the night.
The accused says that on this date, the 18th July 1987, he was not at the village, that is Chikwasha Village? . . . He was there."

Is there something in this case which tends to show that the complainant, a credible and truthful witness, did not have any intention to implicate the appellant falsely? There is. She did not exaggerate her story. She remained silent in spite of the pain she must have suffered as a result of the intercourse. She was silent because she had been threatened. Her evidence of identification was truthful and simple. When she said she knew the appellant's voice, he agreed with her. In my view her evidence does not show that she intended

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to implicate the appellant falsely. Corontiono's and Wadzanai's evidence corroborates her evidence in time and place. Her evidence as to what happened in the sleeping hut soon after the appellant had been seen by Corontino and Wadzanai brings the appellant in time and place at and near the complainant's sleeping hut.

I am appreciative of the two-pronged inquiry so clearly stated by BARON JA in *S v Mupfudza* 1982 (1) ZLR 271 (SC). The first leg of the inquiry is fulfilled: The complainant is a truthful and credible witness. The second leg is, bearing in mind the peculiar facts of this case, also fulfilled. The surrounding circumstances have been corroborated. As I have already pointed out, prosecution witnesses tied up the loose ends together.

In my judgment, the danger of false incrimination has been excluded. The chain and sequence of events prior to the commission of the crime was confirmed by the evidence of credible witnesses including, in some respects, the evidence of the appellant. This confirmation or corroboration makes the evidence of the appellant less probable.

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What is more important is that when the appellant was asked to cross-examine the complainant he said:

> "I have no questions but I know nothing about what she has told the court about me going there, getting a banjo and having sexual intercourse with her afterwards."

When he was giving his evidence-in-chief, the court put this question to him:

> "You appear to accept the evidence of the last two witnesses about your collecting the banjo in the hut they were in? . . . Yes, what the witnesses have told this court is true, that I went to their home and collected a banjo."

When cross-examining the complainant, the appellant addressed the court in these words:

> "Your Worship, this witness says that when I raped her, she did not recognise me; she only did when she heard my voice and about the money she said I gave her, in fact I have no questions."

The appellant did not dispute or deny what the complainant said. It took a lot

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of persuading to drag him into asking questions.

One aspect of the appellant's evidence which sticks out like a sore thumb was his failure to explain or to give an account of his movements on 18 July 1987. He was evasive and unsure of himself. He admitted that the police had told him that he had raped the complainant on 18 July 1987. He tried by his alibi to remove himself from the scene of the rape on 18 July 1987.

The learned Regional Magistrate assessed all the evidence in a thorough and detailed judgment. There is no doubt in my mind that his verdict was correct.

This is one of the cases in which corroboration may not be a strong feature of the prosecution case. But nevertheless the cumulative effect of the totality of the evidence will result in the prosecution proving its case beyond a reasonable doubt. This happens, as in the instant case, when the court is satisfied that the surrounding circumstances eliminate the danger of false incrimination. In *S v Mupfudza supra,* BARON JA remarked at 275 C-G:

> "But even in the absence of corroboration there may be circumstances which can properly satisfy the court that the danger has been excluded. These circumstances do not lend themselves to close description; the nature and sufficiency of the evidence in question will depend on the nature of the facts of the particular case. The danger in all cases of this kind is of false incrimination, but the reasons for that danger - the possible motives of the suspect witness - may be many and various, and will vary from case to case. The possible motives for false incrimination of the accomplice, the complainant in a sexual case and the possessor of stolen property will inevitably be very different; the accomplice may seek to implicate the wrong person because of his relationship with the real culprit or culprits, or because of his fear of them, or because of a hope that he will receive a share of the proceeds of the crime. The complainant in a sexual case may allege that a consensual intercourse was a rape out of fear of a father or a husband; or she may accuse the wrong person of what was clearly a rape in order to protect the real culprit; the possessor of stolen property may falsely incriminate an innocent man in order to exculpate himself. It is the possible motives in the particular case which the court must consider together with the evidence in the case in order to decide whether in the particular circumstances the danger of false incrimination can safely be regarded as having been excluded."

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In *R v J supra* at 94H-95A; 1965 RLR at 508I-509B, LEWIS AJA considered

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the point which is the cause of worry in this case, that is, where the evidence of identity may not be satisfactory. He said:

> "It seems to me, therefore, that where the identity of the offender is the sole issue, the approach to be adopted, at the stage when the court weighs up all the evidence and considers its verdict, should depend on the particular circumstances of each case. Generally speaking, the special formula as laid down by WATERMEYER CJ, will be appropriate where it is a question of the complainant's word against that of the accused, where the court can derive no real assistance from the surrounding circumstances and where the danger of a false identification has not been eliminated; but if the surrounding circumstances exclude any reasonable possibility of mistaken identity or of any potential motive to falsify the identity of the offender, then the underlying reason for that special approach will fall away. In that type of case, provided the court has properly cautioned itself initially, I can see no reason why the question of the accused's guilt, at the verdict stage, should not be treated in the same way as it is in any other criminal case."

In the instant case there are not many unsatisfactory features in the prosecution case. The learned Regional Magistrate considered the question of identity as such a feature. I do not share his views. The complainant recognised his face in the kitchen hut. She recognised his voice in the sleeping hut. The appellant did not dispute that. He announced himself as Garikayi's father. It may be asked whether it is reasonable to expect a man committing a crime to identify himself in that manner. I do not know the answer. It is difficult to determine individual human reactions in circumstances of intimacy. However, the magistrate found no motive inducing the complainant and her family to implicate the appellant falsely. The appellant himself could not give any reason why they would falsely implicate him. The surrounding circumstances and the general probabilities show that the complainant had no motive falsely to incriminate the appellant.

This case defies any fixed formula determining when an accused person should be convicted or acquitted. Whatever the position is, it is important that the court must be fully conscious of the danger inherent in cases of this nature and treat them with special caution. See *R v J supra* at 94C.

In my view, the learned Regional Magistrate did so treat this case and found that the prosecution had proved its case beyond reasonable doubt. The appeal against conviction must fail.

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Accordingly the appeal is dismissed.

McNally JA : I agree

Manyarara JA: I agree.

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S v KADONZVO 1990 (1) ZLR 186 (SC)

Court **Supreme Court**

Dumbutshena CJ, Gubbay JA & Manyarara JA

Criminal appeal

6 & 20 March 1990

Flynote

Criminal Law - traffic offences - Road Traffic Act 1976 s 44(1) - reckless driving - what constitutes - sentence in terms of s 44(3)(a)(ii) A&B - necessity for court to investigate special circumstances - in terms of provision (a) to the section.

Headnote

The accused was charged with contravening s 44(1) of the Road Traffic Act 1976 in that he failed to yield to a vehicle approaching from the opposite direction on a narrow bridge. As a result the accused's omnibus collided with the oncoming vehicle and ran off the bridge into the river below. The accused was convicted of reckless driving in terms of s 44(1) of the Act and sentenced to a fine of $500, a prohibition from driving all classes of vehicles for 6 months and the cancellation of all his licences.

Held that the word "reckless" in s 44(1) of the Act denotes a conscious advertence by an accused driver of the risks involved in his conduct.

Held, further, that the prohibition imposed by the court *a quo* was incompetent in terms of s 44(3)(a)(ii) L and that such prohibition be set aside and the matter remitted to the trial magistrate to conduct an enquiry in terms of proviso (a) of s 44(3).

Cases cited:

Attorney General v Muganyi S-109-86 (not yet reported)

S v Shupikai 1973 (1) RLR 13 (A); 1973 (2) SA 471 (RA)

S v Moyo AD-102-78 (not reported)

R v Ezekiel AD-100-69 (not reported)

GUBBAY JA

R Harvey for appellant

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Mrs *SC Mavangira* for respondent

Judgment

Gubbay JA: The appellant, who pleaded not guilty, was tried in the magistrates court at Masvingo on a charge of contravening s 44(1) of the Road Traffic Act, 1976, in that on 23 December 1986, and at or near the Papoteke River Bridge on the Gutu-Chatsworth Road, he drove an AVM omnibus recklessly. He was convicted and sentenced to a fine of $500 or, in default of payment, to three months' imprisonment with labour. In addition, he was prohibited from driving all classes of motor vehicle for a period of six months, and all licences held by him were ordered to be cancelled.

The prohibition, insofar as it included the driving of an omnibus failed to comply with the provisions of s 44(3)(a)(ii) B of the Act, which lay down that in the case of a first conviction relating to the reckless driving of an omnibus it is mandatory to prohibit the offender from driving that class of motor vehicle during his life time, save where, in terms of proviso (a) thereto, the court finds that there are special circumstances - an enquiry not undertaken in this case. If, therefore, the appeal against conviction is to be dismissed, this court will have no option but to set aside the incompetent prohibition with a direction to the trial magistrate that he consider the existence or otherwise of special circumstances, and then fix the length of the prohibitory period in the light of such finding. On the other hand, in the event of the conviction being altered to one of negligent driving of the omnibus, for it was conceded properly by the appellant that at best he was guilty of that offence, this court will be at large in the matter of sentence and may, in its discretion, prohibit the appellant from driving an omnibus, or all classes of motor vehicle, for any period it thinks fit.

No good purpose will be served by traversing the factual conflict which arose at the trial between the State and the defence. In dealing therewith the magistrate accepted substantially the evidence of the prosecution's witnesses and rejected that of the appellant. He had good reason to do so. I am satisfied that his main findings of fact relating to the sequence of events cannot be interfered with. Those findings may be restated as follows:

On the early afternoon of 23 December 1986 Marshall Kapfumvuti was driving his Renault 12 sedan motor vehicle along the main Gutu-Chatsworth Road on his way to Chatsworth. He was accompanied by his wife, who was holding their infant grandson on her lap. Approaching the low-level Papoteke River Bridge, which is 26,65 metres long and 3,85 metres wide,

being too narrow to accommodate two vehicles abreast, he sighted a truck about to enter from the opposite eastern end. He brought the Renault to a stand-still about 20 metres from his end, and only when the truck had passed over the bridge did he commence to drive forward at a very slow speed.

As soon as he gained access to the bridge, Kapfumvuti noticed an omnibus, then some good distance away, travelling towards the eastern end at what appeared to be a high speed. He assumed, not unreasonably, that the omnibus would stop and allow him to complete the

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crossing. In this he was mistaken. The driver, who was the appellant, on becoming aware of the danger ahead, swerved to the left side of the road but was unable to yield to the Renault in time. Immediately upon entering the bridge the nearside front wheel of the omnibus collided with the first concrete pillar of the wall of the bridge and thereafter its offside rear mudguard scraped the side of the Renault, which by then had stopped about five metres from the eastern end. In continuing along, the omnibus knocked down several more wall-pillars on its left before ultimately plunging over the bridge into the flooded river. It landed on its side. Carrying a full compliment of passengers and luggage it is remarkable that no one was killed. Eleven persons were however injured, two of them seriously. The occupants of the Renault escaped unhurt, though badly shaken.

The magistrate found that the speed at which the appellant was travelling was such that on observing the Renault moving slowly across the bridge, he was unable to stop the omnibus in time to allow the approaching vehicle to clear the bridge; he thus left himself with no alternative but to attempt to squeeze the omnibus past the Renault while both vehicles were on the bridge.

I agree with that analysis of the situation. But the crux of the matter is whether the magistrate was right in holding that such conduct on the appellant's part constituted recklessness as opposed to ordinary negligence.

In *Attorney General v Muganyi* S-109-86 (not yet reported) BECK JA had occasion to review extensively the numerous decisions of the courts of this country over the past thirty years, dealing with the criteria to be considered in drawing a line between reckless and negligent driving. There is little point in my now multiplying authority in an area which is so well settled. It suffices to state that the word "reckless" in s 44(1) of the Act, without any qualification by the use of such words as "knowingly" or "wilfully", denotes a conscious advertence by an accused driver of the risks involved in his conduct, that is *dolus directus*, or *dolus eventualis* (as to which see *S v*

GUBBAY JA

Shupikai 1973 (1) RLR (A) at 16H-17B), as well as a gross and aggravated form of negligence, close in degree to wilfulness. See *S v Moyo* AD-102-78 (not reported).

It was not contended, and rightly so, that the deliberate manner of the appellant's driving revealed a deliberate and conscious disregard for the rights of other road users. Yet did it constitute a gross and aggravated form of negligence?

At an enquiry of this kind each case must be determined according to its own particular circumstances. There is no hard and fast rule that can be applied. The question, as I see it, is whether a reasonable person who is aware of all the facts and circumstances of which the accused driver was aware, would regard his conduct as grossly negligent. Did it exceed the bounds of ordinary negligence? Should there be any doubt as to whether the accused's conduct amounted to gross negligence he must, of course, be given the benefit of the doubt and be convicted merely of ordinary negligence.

The appellant was familiar with the nature of this section of the road. He had driven along it on

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many occasions prior to the date of the accident. Although aware that the bridge was only wide enough to permit the safe passage of a single vehicle, he did not give way to the Renault which had already entered from the opposite end of the bridge. That failure was due either to his driving at a speed which was excessive in the circumstances, or to the fact that he only saw the Renault at a stage when it was too late to take effective avoiding action. In other words, in motor traffic parlance, he was not keeping "a proper look out".

No acceptable explanation was offered by the appellant for his conduct. He set up a false defence that the omnibus and the Renault arrived at and entered the opposite ends of the bridge at practically the same moment in time. It seems to me that even making the favourable assumption that the cause of his not giving way was due not to the excessive speed at which he was driving towards this narrow bridge, but to a failure to timeously observe the presence of the Renault upon it, his conduct, according to general human experience, can only be deemed grossly negligent and, therefore, reckless. His visibility of the bridge was not in any way impaired. It was broad daylight and his approach was on a fairly long straight road. He knew that the bridge only permitted single-lane traffic yet he did not keep it under constant attention. This was not a momentary lapse, for the very slow moving Renault had reached the middle of the bridge before the appellant became aware of its

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GUBBAY JA

presence. I need only reiterate the remarks of BEADLE CJ in *R v Ezekiel* AD- 100-69 (not reported) that:

> "The driver of a public service vehicle which is loaded to capacity with passengers owes a high duty of care to his passengers."

To have driven in the manner the appellant did on this day exhibits in my view, a serious disregard for that high duty of care. He endangered the lives not only of his passengers but of the occupants of the Renault as well.

It follows that the appeal against conviction must be dismissed.

As mentioned above, the order prohibiting the appellant from driving an omnibus for the limited period of six months will only be valid in the event of it being found by the trial court that there are special circumstances in the case which do not justify the mandatory life time prohibition. In order to enable that determination to be made it is necessary to set aside the prohibitory orders in respect of the driving of an omnibus and all classes of motor vehicle as well as the cancellation of all licences, and remit the matter to the magistrate so that the relevant enquiry may be carried out.

The fine of $500 was not attacked as excessive and will stand. It is ordered accordingly.

Dumbutshena CJ: I agree.

Manyarara JA: I agree

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Granger & Harvey, appellant's legal practitioners

K v THE COMMISSIONER OF TAXES 1990 (1) ZLR 191 (HC)

Editor's Note:(1)

Court **High Court, Harare**

SMITH J

Income tax appeal

26 June 1989 & 21 March 1990

Flynote

Income tax - source - payment within Zimbabwe by an employer to two employees temporarily employed by associated companies outside Zimbabwe performing no services for the local employer for the duration of their temporary employment - deemed source - whether "close line" between trade inside Zimbabwe and employment externally.

Legislation - Income Tax Act [Chapter 181] ss 2(1), 8(1)(b), 12(1)(e).

Headnote

The appellant is a chartered accountant employed by a Zimbabwean partnership independent of, but associated with, firms of the same name all over the world. As part of a training programme the appellant, while remaining the employee of the local firm and receiving full salary within Zimbabwe, spent an extended period overseas in the employ of a foreign associated firm and was remunerated with certain allowances and benefits. The appellant's wife did not participate in the programme but, being a professional employee of the local firm, was retained on full salary by the local firm during the period of her absence abroad with the appellant, during which time she also was employed by another associated overseas firm.

Held, that the fact that the appellant and his wife received payment locally was irrelevant to the determination of source; since there was no work performed for the local firm during He period within Zimbabwe the originating cause of the payment was not within Zimbabwe.

SMITH J

Held, further, that the relevance of participation in the training scheme to the appellant's promotion and partnership prospects within the local non established so close a link between the external employment and the carrying on of his profession within Zimbabwe as to render the source of the salary a deemed source for the purposes of the Act.

Held, further, that there was no such close link between the employment overseas of the

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appellant's wife and the practice of her profession within Zimbabwe.

Cases cited:

S v Lyons Brooke Bond (Pvt) Ltd 1981 ZLR 384 (A)

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A)

Secretary for Inland Revenue v Somer's Vine 1968 (2) SA 138 (A); (1968) 29 SATC 179 (A)

ITC 749 (1952) 18 SATC 319 (T)

ITC 837 (1957) 21 SATC 413 (C)

Commissioner for Inland Revenue v Nell 1961 (3) SA 774 (A); (1961) 24 SATC 261 (A)

ITC 1130 (1969) 31 SATC 148 (R)

Commissioner of Taxes v Shein 1958 R&N 384 SC); (1958) 22 SATC 12 (FSC); 1958 (3) SA 14 (FSC)

Commissioner for Inland Revenue v lever Bros & Anor 1946 AD 441; (1946) 14 SATC 1 (A)

ITC 1088 (1966) SATC 202 (R)

AP de Bourbon SC for the appellant

MJ Gillespie for the respondent.

Judgment

Smith J: The appellant and his wife were both employed as chartered accountants by a firm which carries on business as such in Zimbabwe (hereinafter referred to as "the employer"). The employer is a partnership with international associations. It is a member of a scheme known as the Managers International Development Programme (here in after referred to as "the Programme"). The appellant and his wife resided outside Zimbabwe for a continuous period of 206 days from 19 July 1985 to 10 February 1986 during which time they rendered services to firms in England. They were provided by the firms concerned, which are associated with the employer, with accommodation and an allowance to cover their living costs. During that period (hereinafter referred to as "the overseas period") they were also paid their normal salaries by their employer. By Assessment No. 1/83654/ 86 the respondent assessed the gross income earned by the appellant and his

for the year ended 31 March 1986 and included in such income en amount of $35 875 (hereinafter referred to as "the disputed amount") which was the total of the salaries paid by the employer to the appellant and his wife during the overseas period. The appellant duly objected but his objection was disallowed. He thereafter noted an appeal to the High Court. The basis of

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the appeal was that the disputed amount was earned form a source outside Zimbabwe and should not have been included in his gross income.

The respondent averred that the contracts of employment of the appellant and his wife enjoined them to perform services in Zimbabwe for the employer.

It was purely incidental to those contracts that during the overseas period, the appellant and his wife rendered services to Fens associated with the employer in England and bearing a similar name. The allowances paid to them by the overseas firms to which services were rendered were not brought to tax in Zimbabwe. As a result of their participation in the Programme, the appellant and his wife had enhanced their professional expertise and were better able to fulfil their obligations to, and render services to, the employer. Accordingly, having regard to their contracts as a whole, the disputed amount was paid in respect of contracts of employment to render services in Zimbabwe and had accrued from a source within Zimbabwe. Alternatively, the disputed amount was received for services rendered by the appellant and his wife in the carrying on in Zimbabwe of a trade, namely their employment with the employer, and was therefore deemed, in terms of s 12(1)(b) of the Income Tax Act [*Chapter 181*] (hereinafter referred to as "Chapter 181") to have accrued from a source within Zimbabwe.

Two witnesses gave evidence in support of the appellant's case. The first was a senior partner of the employer. He said that the employer was one of a number of accounting firms using the same name which carry on business in different countries. Each such firm was a member of an international co-ordinating body which was incorporated in the Bahamas and had offices in London and New York. There were no direct financial interests involved. The co-ordinating body co-ordinated manpower development programmes, helped in the recruitment of manpower and developed accounting standards.

It monitored audit technique and developed new ones and produced information booklets which were distributed to member firms. It was responsible for operating the Programme. The co-ordinating body had issued a booklet setting out the purpose and objectives of the Programme. According to the booklet, it was intended to benefit both firms and staff. It had a number of objectives, including the following:-to encourage the personal development of the participant through exposure to people and practices in another

country; to make participants aware of the group of accounting firms as an international organization and to foster enthusiasm for it in preparation for their assuming more senior positions in tack own firms; to further the professional development of participants and thereby promote the highest calibre of work through-out firms in the group; to encourage participants in their careers with their own firms and to indicate to them, by selection to participate in the scheme, that they were under consideration for further progress. The booklet also set out administration arrangements. It stated that participants should only be selected from staff who were considered to have clear partnership potential and also that normally managers would participate in the Programme at an early stage in their careers as managers. It also set out guidelines to be used as a basis for setting financial arrangements for participants. One of the

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guidelines was that a participant would continue to receive his salary from his own firm during the period of the Programme.

The employer had a number of managers who were senior chartered accountants who had not been admitted as partners. When a manager was identified as a potential partner, he was requested to participate in the Programme. Whilst such a person would not be obliged to participate, it was virtually a prerequisite before a manager was offered a partnership. A person selected to participate in the Programme would go to another country to work for an associate firm and the employer was obliged, in terms of the Programme, to accept and provide work for participants from other countries. In terms of the Programme, a receiving firm was required to pay all living expenses of a person participating in the Programme and to provide transport and accommodation or funds to pay therefor. As participants received in the country in which they were working, less than they would have received had they not participated, they continued to receive from the sending firm their full salaries during their absence. When a participant was engaged on the Programme, whilst technically he remained an employee of the firm which sent him on the Programme that firm had no control over the work he did or the manner in which he did it. Once a sending firm had selected a particular employee to participate in the Programme, it contacted the co-ordinating body and indicated the level of experience of the participant and the field in which it wished him to gain experience. When a participant returned from the Programme, he submitted a report to his employer as to the type of work he had done and the experience he gained. The firm for which he actually worked would also send a report to his employer on his technical ability. There was no obligation on the participant to remain with his employer after his return from the Programme. However he would be expected to remain and to become a partner.

1990 (1) ZLR p195

SMITH J

The appellant was the second witness. He started work with the employer at the end of 1978 after leaving university. He and his wife both qualified and were registered as chartered accountants. Early in 1985 be was asked to participate in the Programme. The employer agreed that his wife should participate in the Programme during the same period as the appellant. However, she later advised the employer that she would be starting a family and therefore could not consider becoming a partner. Consequently she was ineligible to participate in the Programme. The appellant and his wife left Zimbabwe on 19 July 1985 and returned on 10 February 1986. They spent 10 days holidaying in Spain before arriving in London to take up employment and a further 10 days in Kenya after the Programme before returning to Zimbabwe. During the Programme the appellant worked as a manager for an accounting firm associated with the employer. He took over responsibility for the clients of a manager who had been sent to Australia as a participant in the Programme. He had the same responsibilities as he had had when working for the employer, namely planning and controlling audits and reporting thereon to the partner concerned. During the Programme he had had no contact with any clients of the employer and his only contact with the employer was that once or twice he spoke on the telephone to one of the senior partners on a social level butnot about his professional work. The appellant's wife was not able to participate in the Programme because she did not intend to become a partner of the employer. However the co-ordinating body

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referred to earlier employed her at its office in London to assist in writing information booklets and pamphlets on a worldwide approach to auditing for distribution to all the associated members of that body. She did not do any auditing. Both of them were paid a daily allowance whilst in England to cover transport and living costs and they were provided with accommodation. The employer continued to pay their salaries in Zimbabwe whilst they were in England and also the employer paid contributions to a medical aid society. The amount involved was $18 425 for the appellant's salary and $17 450 for his wife's. The appellant was admitted as a partner of the employer some 16 months after his return from England. His wife resigned from her employment some three months after their return. Whilst they were participating in the Programme they continued to accrue leave and they were not required to take vacation leave to cover their absence whilst on the Programme. The appellant said that his participation in the Programme contributed significantly to his professional development. Whilst on the Programme he earned fees for the associate firm which employed him and the employer continued to pay his and his wife's salaries although they did not earn any fees for the employer. They also continued to earn vacation leave which accrued to them whilst they were working in England.

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The respondent did not lead any evidence. He did not contest any of the evidence adduced by the appellant.

Mr *de Bourbon* submitted that the issue to be decided in this case was whether the appellant and his wife were employed by the employer whilst they were working in England during the overseas period. He argued that they were not so employed. The employer had no control as to where, how or when either of them worked in England. They were subject to the direct control of their respective firms for which they actually worked, namely the associate few in the case of the appellant and the co-ordinating body in the case of his wife. In support of his submission on this point he cited *S v Lyons Brooke Bond (Pvt) Ltd* 1981 ZLR 384 (A), *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) and *Secretary for Inland Revenue v Somer's Vine* 1968 (2) SA 138 (A) amongst others. I accept that the work done by the appellant and his wife whilst they were in England was not done subject to the control of, or within the course of their employment with, the employer. Each was working under the direction and control of the few concerned in England which would have been recognized for many purposes as his or her employer. However, they both continued as employees of the employer during that period, even though they were not doing work specifically for or on behalf of the employer. The employer continued to pay contributions to the pension fund and medical aid society on their behalf. As far as the employer was concerned, they were both on leave, from which they could presumably be recalled at any time should the exigencies so require. It is not unknown in law for an employee to have two employers at the same time. The employer continued to pay their salaries whilst they were in England but this was not related to the particular services they performed whilst in England.

Mr *de Bourbon further* submitted that, in respect of the disputed amount, the source of the income was the United Kingdom, because that was where the work was done. The fact that the payment was actually made in Zimbabwe was not relevant - see *ITC 749* (1952) 18 SATC 319

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(T) at 322, *ITC 837* (1957) 21 SATC 413 (C) at 416, *Commissioner for Inland Revenue v Nell* (1961) 24 SATC 261 (A) at 269 and *ITC* 1130 (1969) 31 SATC 148 (R) at 150. Mr *Gillespie,* on the other hand, argued that both the appellant and his wife were parties to a contract of employment with the employer which had been entered into in Zimbabwe. The policy of the employer was to enable its employees to participate in the Programme in an overseas country which was to encourage the personal and the professional development of participants. The participants were expected to leave Zimbabwe for a short period

SMITH J

to work for a firm that was associated with the employer. They remained in the employment of the employer and were paid their salaries by the employer during the overseas period not because of the particular functions which they performed in England but because they remained as employees.

Gross income is defined in s 8(1) of the Income Tax Act [*Chapter 181*] (hereinafter referred to as "Chapter 181"). The relevant portion of the definition, for the purposes of this case refers to -

> "the total amount received by or accrued to or in favour of a person . . . in any year of assessment from a source within or deemed to be within Zimbabwe . . . [and] includes
>
> (a) . . .
>
> (b) any amount so received or accrued in respect of services rendered or to be rendered, whether due and payable under any contract of employment or service or not . . ."

Section 12(1) of Chapter 181 provides -

> "(1) An amount shall be deemed to have accrued to any person from a source within Zimbabwe whenever it has been received by or has accrued to or in favour of such person -
>
> (a) . . .
>
> (b) for any service rendered or work or labour done by such person in the carrying on in Zimbabwe of any trade . . . "

The term "trade" is very widely defined in s 2(1) of Chapter 181 as including, inter *alia,* any profession, employment, calling or occupation.

I accept that it is settled law that the source of any payment means the originating cause thereof and *prima facie* that would be where the work was performed - see *Commissioner of Taxes v Shein* 1958 R&N 384 (FSC) at 387E; 1958 (3) SA 14 SC) at 16H (also (1958) 22 SATC 12) where TREDGOLD CJ said:

> "It may be accepted that, *prima facie*, the test of the source of a payment for services rendered is the place where those services are rendered."

The learned CHIEF JUSTICE went on, however, to say that the ultimate test of source is the originating cause. At p 388E-F he said:

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SMITH J

> "When a man is engaged to perform a certain work in a given country but has minor duties, which are purely subsidiary and incidental that fall to be performed in another country, then I do not think it is a practical approach to suggest that portion of his income has its source in that other country."

It was explained by WATERMEYER CJ in *Commissioner for Inland Revenue* v *Lever Bros & Anor* 1946 AD 441 at 450 in regard to the meaning of the word "source" that -

> "the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income, and that this originating cause is the work which the taxpayer does to earn them, the *quid pro quo* which he gives in return for which he receives them."

Whilst the appellant and his wife remained as employees of the employer during the overseas period they did not carry out any work or perform any services for the employer. Therefore the salaries that they were paid during the overseas period were not paid for services performed. Why were they paid? In my view they were paid because the appellant and his wife had agreed to leave the country and, at least in the case of the appellant, to participate in the Programme. Therefore the originating cause of the payment was the fact that they were working outside Zimbabwe, although the employer would also have been motivated by its wish to retain the services of the appellant and his wife after completion of their sojourn in England. Accordingly the source of the income was outside Zimbabwe.

Could it be said that the disputed amount is deemed, in terms of s 12(1)(b) of Chapter 181 to have accrued from a source within Zimbabwe? For the purposes of this issue, I consider that the circumstances of the appellant differ from those of his wife. The only reason why the appellant left Zimbabwe to work overseas was because he wanted to participate in the Programme. He did so in order to broaden his experience, both personal and professional, in order to make himself better fitted to become a partner with the employer. He was well aware that participation in the Programme was virtually a *sine qua non* to becoming a partner. The appellant was carrying on his profession as an accountant in Zimbabwe. Is there some "close line" between the work he did outside Zimbabwe and the carrying on of his "trade" within Zimbabwe, a link closer that is the mere fact that the work done outside Zimbabwe was of the same nature? A test enunciated by DOWLING J in *ITC 749* (1956) 18

SMITH J

SATC 319 (I)) and approved, *inter alia*, in *Commissioner for Inland Revenue* v *Nell* (1961) 24 SATC 261 (A), 1961 (3) SA 744 (A), and *ITC 1088* (1966) 28 SATC 202 (R). In my opinion there is this close link. It was because of the appellant's position with, and the regard in which he was held by the employer that he was invited to participate in the Programme. He participated in the Programme in order to further himself in his career and in his profession. Accordingly, the salary paid to him by the employer during the overseas period is deemed to have accrued to him from a source within Zimbabwe.

With regard to the appellant's wife, she too was originally invited by the employer to participate

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in the Programme because she was regarded as "partner material". Had she in fact participated, her position would have been no different to that of the appellant. However, when she informed the employer that she would not accept any offer of a partnership she ceased to be eligible for participation in the Programme. In England she did not work for an associated firm which she had done in Zimbabwe. She did work for an organization but she was working on pamphlets and training material and not doing auditing work. In my view, there was no "close link" between the work she was doing in England and the trade or profession she was carrying on in Zimbabwe. Whilst the appellant was doing the work in England in order to further his career in Zimbabwe, she was merely making time in order to be with him whilst he was living abroad. The work she was doing could in no way have furthered her position in her trade or profession in Zimbabwe.

The appeal is accordingly upheld in part. It is ordered that Assessment No 1/83654/86 be amended by deducting from the gross income of the appellant the amount of $17 450 that was received by his wife during the overseas period.

The amount of any costs, taxed by the registrar of the High Court during the year of assessment and not recovered from any source whatsoever, incurred by the appellant in connection with this appeal shall be allowed as a deduction in terms of para (f) of s 15(2) of Chapter 181.

Atherstone & Cook, applicant's legal practitioners

Civil Division of the Attorney General, respondent's legal practitioner

LATIMER MANLEY & ASSOCIATES (PVT) LTD v LAVERNA INVESTMENTS (PVT) LTD 1990 (1) ZLR 200 (HC)

Court **High Court, Harare**

Gibson J

Opposed motion

18 January & 21 March 1990

Flynote

Landlord and tenant - illegal use of premises - evasion of rent restriction regulations - court will not enforce rentals under illegal agreement - parties cannot reclaim rentals paid under illegal agreement.

Contract - illegality - when court will intervene to allow monies to be reclaimed.

Legislation - Rent Regulations 1982 s 3 - Commercial Premises (Rent) Regulations 1983 s 3.

Headnote

The parties entered into an agreement of lease for premises to be used as commercial premises, but which premises were zoned for residential use. The applicant sought repayment

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of rentals paid in excess of that permitted in terms of the Rent Regulations 1982. The respondent argued that the agreement of lease was illegal and unenforceable and that the equitable jurisdiction of the court should not be exercised in favour of the applicant.

Held, that the agreement of lease was illegal as the intended use of the premises was in conflict with the zoning of the premises.

Held, further, that there were no equities in favour of the applicant to permit the court to rule in its favour. In any event, the inclination to relax the *pari delicto* rule faltered because

of the facts of the matter.

Cases cited:

Jajbhay v Cassim 1939 AD 537

Dube v Khumalo S-103-86 (not yet reported)

GIBSON J

GS Wernberg for applicant

EWW Morris for respondent

Judgment

Gibson J: The applicant seeks payment of the sum of $15 600,30 and costs, being a repayment of monies paid by the applicant including interest on such monies under a lease agreement entered into by the parties. The allegation is that the refund is due to the applicant because the rent charged and paid by the applicant to the respondent was in excess of that which was permitted by the Rent Regulations 1982 (SI 626/1982) for the period July 1988 - May 1989. Included in the sum claimed is a refund of a deposit of $750,00. This figure was admitted but corrected by the respondent in his opposing affidavit to read $700,00. The applicant has not disputed that correction. The sum of $700,00 accordingly, should be paid back.

[Her Ladyship stated and analysed the facts and continued: . . .]

It is to be noted that according to the terms of the lease, the applicant was to pay, and did start paying $1 150,00 per month from the 13th month of the signing of the lease. Therefore from that fact one concludes, unavoidably, in my view, because the letter states that the subtenant was already in, that the subletting must have started soon after the signing of the lease. But apart from that, there is in the contents of Annexure "B" a vagueness and uncertainty that could only have been removed by the applicant itself. I do not accept the applicant's contention that the subletting is irrelevant to the consideration of whether the applicant is entitled to restitution of the excess rent. This is because, if it were found that the parties were in *pari delicto*, the court would have to decide whether to relax the rule. In that event the court would be moved by considerations of equity to ensure that the respondent is not unjustly enriched at the expense of the applicant. In considering whether equity ought to be allowed to intervene, the question of

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the amount illegally transferred is affected in no small measure, by the question of what the applicant has unjustly paid. Further, in my view, Annexure "B" above, standing unchallenged and unexplained as it does, has only served to underline the respondent's assertion that the applicant is not the right candidate which the court ought to assist to recover its losses. The lack of candour and frankness on the part of the applicant is patently obvious. The applicant is as much steeped in illegality as is the respondent.

I turn now to the final question - which is - the legal implications of the facts found, namely the question whether the premises concerned were commercial premises regulated by the Commercial Premises (Rent)

GIBSON J

Regulations, 1983(SI 676/83) or the Rent Regulations, 1982(SI 626/82).It is common cause that the premises were zoned as residential in terms of existing laws. There is no doubt that both parties were aware of this fact at the time of the signing of the lease.

The evidence is that the applicant, by agreement, made approaches to the town planning authorities for change of use in respect of the premises. The factual position found is that the applicant used the premises as a dwelling at the start of the lease but well before entry into the 13th month of the lease the applicant sublet the premises to a commercial concern. The probability is that during the subletting the premises were used for commercial purposes by the subtenants. Thereafter, it is clear, the applicant used the premises for commercial purposes namely between July 1988 and May 1989.

The respondent has argued in his heads of argument that there is a material dispute of fact in the papers, and that therefore the matter should be referred to trial. I do not think so. Although there is a conflict as to whether the applicant's employee took occupation immediately on signing the lease or 6 months later, it is unnecessary to resolve this conflict in order to reach a decision. For that purpose therefore, the conflict is immaterial. In any event, a robust approach to the evidence makes it possible to establish the essential facts without the need to go to trial. What does emerge, and which is found, is that the premises were used initially as a dwelling, then partly as a dwelling and partly for commercial purposes; and, finally as commercial premises. There was therefore, a composite use of the premises for most of the period of the lease. The question to ask at this stage is whether premises zoned in terms of the existing laws as a dwelling may be transformed by private agreement mutually entered into by parties, and thus limit the effect of the protection given to tenants from increases of rent, *inter alia.*

As a starting point to the answer, it is necessary to look at the relevant Regulations in order to find out what is the meaning of the expression "commercial premises" or "dwelling house". Section 3, the interpretation section of the Rent Regulations, 1982, defines "dwelling" as "dwelling means any room, flat, apartment, house or other immovable property occupied as a human abutting under a lease . . .". As Mr *Wernberg* rightly pointed out, whereas the Rent Regulations 1982 in defining a dwelling look to the actual use, the Commercial Premises (Rent) Regulations 1983 look only at the purpose for which the premises are taken.

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The interpretation section in the Commercial Premises (Rent) Regulations,

GIBSON J

1983 is also s 3. The section provides that commercial premises are "any premises or part thereof occupied under a lease for the purpose of carrying on therein any industry, business, trade or occupation, and includes any ground, parking-space, garage, outbuilding, workers' quarters and other improvement let therewith. "The meaning of these Regulations has to be read in the context of the other legislation governing the situation. These statutes create among other things, regions or zone of premises according to use. Thus we find that the premises under consideration are zoned for dwelling. Therefore the premises retain that character because the Regulations are merely subsidiary to the Acts of Parliament. This in my view is where the distinction lies between our Laws and the Laws in South Africa under which the cases which were cited by the applicant at pp 4 and 5 of his heads of argument were decided.

It is not open to the parties to negotiate terms which are clearly illegal and then to turn around and invite the court to recognise or enforce their illegal activity. I would therefore hold that if the lease agreement had not been acted upon, this court would have refused to enforce it. But since it has been acted upon, the court will intervene if justice and equity deem it proper. The contention that the premises fall to be considered under the Commercial Premises (Rent) Regulations, 1983, must therefore fail. If that were all, the applicant would be entitled to a refund of the excess payment, subject only to quantum. But the picture is not so simple. The only real issue in this case is, and has been, the question whether the parties having entered into an agreement of lease which is clearly in contravention of the law, the applicant should be entitled to receive assistance from the court to recover what it had paid under the illegal agreement. The well established rule is that, where a party has paid monies pursuant to an illegal agreement, the loss lies where it falls, unless, on the facts of the particular case it is clear that an injustice would be caused thereby. In that event, and by way of exception to the rule, the court will relax the maxim and order that restitution be made. Thus, the court would be prepared to grant the relief sought where the principle of public policy is involved. See *Jajbhay v Cassim* 1939 AD 537 at 543 - approved by the Supreme Court in *Dube v Khumalo* S-03-86.

In this case the illegality was not in my view, innately reprehensible, it was *mala prohibita*. Ordinarily then one would incline to relax the Rule - *in pari delicto potior est conditio defendentis*. But the inclination to relax the Rule in this case falters because of a number of features in this case.

Firstly, because there is to me an overall and all persuasive odour of illegality

GIBSON J

that is unavoidably off-putting. As a result I do not think that any court of law could overcome the feeling, as the respondent put it in his heads of argument, that the applicant's approach to He was an impertinence and an abuse of the court's time.

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Secondly, the applicant is tainted with illegality, not only in the agreement of lease under consideration, but in its own separate and distinct contract of subletting, which it has not attempted to deny. It is clear that the applicant profited from the illegal contract of subletting for an amount which it has not had the candour to disclose. Apart from the lack of candour that the evidence discloses, there is the refusal to reveal the rent the applicant charged its subtenants. This refusal creates real practical problems. Thus if it had become necessary to calculate the sum liable to be refunded it would have been difficult to determine the extent of the applicant's loss, therefore the sum to be refunded would have been impossible. I am disposed to think that this lack of certainty about the figure to be repaid redounds against the applicant. The applicant, must be seen, in this event, to have failed to prove its claim. Therefore, restitution, if it had been found necessary, would have been defeated by the lack of certainty and proof as to quantum.

In conclusion, therefore I find that the applicant is as much a party to the illegality as the respondent. Further, it is my view that the applicant is so steeped in that illegality as to make it thoroughly odious for me to relax the *pari delicto* rule.

The application is dismissed, save for the refund of the deposit paid in the sum of $700,00.

It is ordered that the application be dismissed.

The respondent is to repay the applicant $700,00 plus interest from the date of termination of the lease.

The applicant is to pay the costs of the application.

Kantor & Immerman, applicant's legal practitioners

Byron Venturas & Partners, respondent's legal practitioners

S v CORBETT 1990 (1) ZLR 205 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Manyarara JA

Criminal appeal

6 March & 22 March 1990

Flynote

Criminal law - motoring of Fences - culpable homicide - sufficiency of evidence - Road Traffic Act, 1976 - s 61(1)(iv) - "failure to guard corpse" - other persons capable of guarding corpse.

Criminal procedure - evidence - single witness with interest - cautionary rule - corroboration necessary.

Criminal procedure - sentence - factors affecting sentence - delay.

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Headnote

The appellant was convicted of culpable homicide arising out of a collision between the vehicle he was driving and a pedestrian who was carrying the deceased on her back. He was also convicted of failing to guard the corpse in contravention of s 61(1)(iv) of the Road Traffic Act, 1976. Evidence for the State was given by the pedestrian, the mother of the deceased. Despite the failure of the court *a quo* to take account of the cautionary rule, by reason of her being a single witness with an interest to serve there was sufficient evidence, including that of the appellant, to support the conviction of culpable homicide, particularly as the appellant was driving under the influence of alcohol.

The conviction on the second count was set aside, it being held that as a number of people converged on the scene of the accident, it was not established that the appellant could have guarded the corpse any better than they did. The offence was committed on 17 March 1985, the appellant convicted on 6 August 1987, and the appeal heard on 7 March 1990. No explanation was tendered for such inordinate delay.

1990 (1) ZLR p206

DUMBUTSHENA CJ

Held, that despite the seriousness of the offence, the sentence of imprisonment imposed on the appellant had to be substituted with a fine by reason of the delay.

Cases cited:

S v Nhemachena S-89-86 (not reported)

R v Tomlinson 1953 (2) SA 13 (SR); 1952 SR 314

S v du Plessis 1973 (2) RLR 69(GD)

R v Nel 1957 (2) SA 422 (O)

Fikilini v Attorney-General 1990 (1) ZLR 105 (SC)

Barker v Wingo (1972) 407 US 514 (SC)

Bell v DPP of Jamaica & Anor [1985] 2 All ER 585 (PC)

MRD Stonier for the appellant

Mrs *SC Mavangira* for the respondent

Judgment

Dumbutshena CJ: The appellant was convicted of culpable homicide and the contravention of s 61(1)(iv) of the Road Traffic Act, No. 48 of 1976. He was sentenced to four months' imprisonment with labour and was prohibited from driving all classes of motor vehicle for a period of six months. He now appeals against both convictions and sentence.

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The State alleged that on 17 March 1985 Niddar Makamure alighted from a bus. She then walked along Lundi Road. The road had two lanes divided by a traffic island. She was walking on the extreme right of the lane, that is, near the island. The appellant was also driving along that lane. Niddar Makamure was about to go onto the traffic island when she was struck by a motor vehicle. She had her baby, Patience Makamure, strapped on her beck. Patience died as a result of the collision between the motor vehicle and her mother.

It was dark at that time of the day. The appellant was driving his motor vehicle with dipped lights. He said it was drizzling, although this evidence was contradicted by Niddar Makamure. Because it was dark and his lights were dipped the appellant could not see far. He only saw Niddar Makamure when he was about six paces from her. He said she was in the middle of the road and she was in the process of crossing it. He tried to swerve to the left but failed. He knocked her down and she fell onto the traffic island. Patience died. The post-mortem examination revealed that she sustained a depressed fracture of the left parietal bone of the skull with extensive brain damage.

That was the cause of her death.

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Niddar Makamure was badly injured. She was rendered unconscious. She spent two months in hospital and another two at home.

The appellant was driven to hospital where a blood sample was taken. There were two separate readings - the reading from the Forensic Science Laboratory was 225 milligrams of ethyl alcohol in 100 millilitres of blood; the reading from the Government Analysts Laboratory was 164 milligrams of ethyl alcohol in 100 millilitres of blood.,

Mr *Stonier*, for the appellant, contended that the only witness called by the State who deposed to what happened at the time of the accident was Niddar Makamure. He said she was injured in the accident and was rendered unconscious. Because she suffered from amnesia her evidence cannot be relied upon.

It is true that a concussion has several important medico-legal connotations, one of which is that:

> ". . . it commonly produces a genuine state of retrograde amnesia for events immediately before injury - a concussed person is likely to be an unsatisfactory witness."

See Mason *Forensic Medicine for lawyers* 2 ed at 111.

Niddar Makamure's evidence seems amazingly convincing. Yet she suffered from amnesia. She was in hospital for along time. She might, of course, have reconstructed what happened and made it to appear real. The magistrate believed her. No other person witnessed the accident. The accident happened where she said she was. She was knocked onto the island, a fact which seems to support her story that she had put one foot on the island. What is more, the appellant testified that he was travelling on the extreme right of the lane. The sketch plan suggests the same. Niddar Makamure said she was not crossing the road as deposed to by the

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appellant. Her story is supported by the fact that she was hit at the back and not sideways.

Mr *Stonier* submitted that the magistrate should have place little reliance on Niddar Mikamure's evidence because she was a witness with an interest of her own to serve. He relied for his submission on what was said in *S v Nhemachena* S-89-86 (not reported) at p 4. It was there said:

> "The court must, when confronted by a single witness with an interest to serve, not only apply the cautionary rule but also look for corroboration.

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> In *R v Mokoena* 1932 OPD 79 at 80 DE VILLIERS JP said this of the evidence of a single witness and of a witness with an interest:
>
> > 'Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by section 284 of Act 31 of 1917 but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused ...'
>
> The cautionary rule is not of course a rule of law but the court should, in assessing the evidence of a single witness, be cautious and should 'weigh up the good qualities of such a witness against all the factors which may diminish the credibility of the witness', per RUMPFF JA in *S v Webber* 1971 (3) SA 754 (AD) at 758H (official translation)."

There is force in Mr *Stonier's* submission that the magistrate did not treat Niddar Makamure as a single witness with an interest of her own to serve. He did not therefore treat her evidence with caution. He narrated her evidence and commented on it as follows:

> "In the result the evidence given by Mrs Makamure was simple and straightforward. She struck the Court as an intelligent and truthful witness. She was subjected to some lengthy cross-examination, but her consistency was remarkable."

While it is true that the magistrate did not apply his mind to the cautionary rule, a reading of the record shows that Niddar Makamure's evidence was remarkably true. She deposed to walking on the extreme right side of the lane. The appellant in his defence outline said he was driving on the extreme right side of the two-way traffic road which is separated by an island when he knocked down Niddar Makamure and her baby. She said she was about to get onto the traffic island. She was found on the island.

Is there any other evidence on the record which can sustain the conviction? One has to examine the appellant's evidence to see whether that evidence supports in a material way Niddar Makamure's evidence or the allegations made by the State. It is common cause that the appellant was the driver of the motor vehicle which collided with Niddar Makamure and her deceased child. The appellant said that he was very familiar with the Lundi Road. He testified that it was impossible to see between the lampposts and that there were always people on the road. He said the street lights leave pockets of

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darkness and there were trees which caused blackness around the road. He said that it was dark and drizzling, yet he travelled with dipped lights in spite of the conditions he described above.

Mrs *Mavangira*, for the respondent, contended that on the appellant's own version, which was reflected in the heads of argument, the streetlights would have been of little assistance to the appellant. His lights should have been on full beam. I agree with that submission.

During cross-examination the appellant was asked:

"Q. If your speed had been below 60km you could have avoided (the) accident?

A. I do not know the answer to that question.

Q. You stopped (your) vehicle, cover(ed) 30 metres?

A. Yes.

Q. Could you not have stopped much sooner?

A. I do not know.

Q. Did you fail to see (the) complainant because it was dark only?

A. Yes, she just crossed the road.

Q. Had you not dipped your lights, the lights could have covered a wide area?

A. Yes.

Q. It was negligence on your part to dip your lights then?

A. I agree."

On his own evidence, the appellant was travelling at a speed of between 60 75 km with his lights dipped. He knew that the road was badly lit. Cyclists without lights and pedestrians frequented it. Added to this, he had consumed alcohol. Taking a view that is favourable to him, he had at least 164 milligrams of ethyl alcohol in 100 millilitres of blood. This factor aggravates his negligence and might account for his failure to travel on a dark part of the road with lights on high beam and to see Niddar Makamure a little time before the collision.

Even if the magistrate failed to take into account the cautionary rule, the totality of the evidence on the record supports the conviction. This Court is qualified to assess that evidence. On the strength of the evidence adduced by the appellant and Niddar Makamure's evidence, which is not contradicted to a great extent by the appellant, the conviction on Count One must be confirmed.

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The State conceded that the conviction on Count Two was improper. There were at the scene

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of the accident a number of people. The appellant testified that they were hostile to him. A State witness who came after the appellant had left the scene testified that the people were not hostile. The crowd could be expected to be hostile to the person who had caused the death of the deceased. It was not shown that the people who gathered at the scene of the accident did not guard the corpse and that the appellant would have guarded the corpse any better than those people. See *R v Tomlinson* 1953 (2) SA 13 (SR) at 15E; *S v du Plessis* 1973 (2) RLR 69 (GD) at 70C, *R v Nel* 1957 (2) SA 422 (O) at 425A. In my view, the concession made by the State was proper.

With regard to sentence, Mr *Stonier* submitted that the sentence of four months' imprisonment with labour was manifestly excessive. He did not, however, point out any misdirection. He based his submission on the ground that the magistrate had erred in finding the appellant guilty of gross negligence.

I can only say that the appellant drove in the manner he did because he had consumed alcohol. This fact should have been taken into account when assessing his sentence. The magistrate should have come to the conclusion that the alcohol content in the blood was at least 164 milligrams of ethyl alcohol in 100 millilitres of blood. This was the more favourable concentration of alcohol in the appellant's blood. The magistrate was generous in coming to the view that there was "an unspecified element of drunkenness on the part of the accused".

In this case a baby lost her life because of the manner the appellant drove. He was spurred by the alcohol he had consumed to drive in the manner he did. His state of intoxication is a factor of aggravation. It should have been taken into account when assessing sentence.

Counsel are agreed that there was considerable delay in the trial of the appellant. He was arrested on 17 March 1985 and sentenced on 6 August 1987. His Notice of Appeal was dated 7 August 1987. It must have been filed with the clerk of court soon afterwards. The record was only received by the Registrar of this Court on 7 September 1989. That was two-and-a-half years after the Notice of Appeal had been lodged with the clerk of court. The appeal was only heard on 7 March 1990.

Now this Court is being asked to set aside the sentence of imprisonment

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because the delay in the prosecution of the appellant's appeal was inordinate. We were not appraised of the circumstances that caused the delay. We do not know whether there were problems which inhibited the expeditious transcription of the record or whether the appellant did not sufficiently probe the clerk of court to provide him with a record.

In *Fikilini v Attorney-General* 1990 (1) ZLR 105 (SC) this Court had occasion to consider the factual basis upon which a detention could be challenged in terms of s 13(4) of the Constitution of Zimbabwe, that is, where there is an unreasonable delay. Section 13(4) reads:

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

(a) for the purpose of bringing him before a court in execution of the order of a court or an officer of a

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court; or

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

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

In *Fikilini*'s case *supra* we said that in order to constitute an unreasonable delay in terms of subs (4) of s 13 there must be an extraordinary delay caused by one reason or another in the prosecution of an accused's trial.

This case concerns an undue delay in the prosecution of an appeal. The principles we applied in *Fikilini*'s case *supra* apply with equal force to an inordinate delay in the prosecution of an appeal. In that case we cited with approval the principles laid down in the judgments of the Supreme Court of the United States in *Barker v Wingo* (1972) 407 US 514. The learned judges of the Supreme Court were there considering the Sixth Amendment to the Constitution of the United States, which provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

In his opinion POWELL J considered the following four factors to be relevant

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to a consideration of an alleged infringement of the Sixth Amendment by reason of an undue delay. He stated the four factors at 530-532 as follows:

"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependant upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded Courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant's responsibility to assert his right. Whether, and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

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A Fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews

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the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."

The guidance provided by these four factors is not only relevant to delayed trims, it is equally relevant to unduly delayed appeals. In considering whether an appellant's sentence should be set aside and substituted by a less severe one on the ground that there has been an inordinate delay in the prosecution of his appeal, it is important to pay heed to the four factors identified by POWELL J Briefly stated, the court has to decide whether the delay was presumptively prejudicial to the appellant in that the appellant would have served his sentence or a greater part of it were it not for the delay. This factor is relevant to the instant appeal.

In my opinion this case was inordinately delayed for two-and-a-half years from the time the appellant was arrested to the time of trial and another two-and-a-half years from his conviction to the hearing of the appeal. The record contains only eleven pages of evidence. It could have been transcribed within a short time. Besides, there was no reason proffered by the State to justify the delay. In fairness to Mrs *Mavangira,* the State conceded and agreed to the alteration of the sentence of imprisonment to one of a fine. She said there was a delay of two-and-a-half years, and it would be unjust to send the appellant to prison now.

It is impossible to apportion the causes of the delay. We were told by Mr *Stonier* that letters had been written to the clerk of courts asking for the record. We were not, however, shown copies of those letters. It is impossible, therefore, to judge the interest of the appellant in having the appeal heard within a reasonable time.

In *Bell v Director of Public Prosecutions of Jamaica & Anor* [1985] 2 All ER 585 (PC), LORD TEMPLEMAN remarked on the four factors outlined in *Barker v Wingo supra* at 591h-592a:

"The four factors considered relevant in *Barker v Wingo* to the constitutional right to a speedy trial were reproduced and adopted by McDonald J sitting in the Alberta Queen's Bench Court *in R v Cameron* [1982] 6 WWR 220. In that case the applicant alleged infringement of the right granted by s 11 of the Canadian Charter of Rights and Freedoms

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in Pt 1 of the Constitution Act 1982 to 'Any person charged with an offence ... (b) to be tried within a reasonable time ...'

Their Lordships acknowledge the relevance and importance of the four factors lucidly expanded and comprehensively discussed in *Barker v Wingo.* Their Lordships also acknowledge the desirability of applying the

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> same or similar criteria to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case.
>
> Their Lordships accept the submission of the respondents that, in giving effect to the rights granted by ss 13 and 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica."

I agree with those views. In this country regard has to be had to the shortage of transcribers and the relevant equipment experienced by the Ministry of Justice, Legal and Parliamentary Affairs. This cannot, however, outweigh the need to be just and fair to both the State and the accused or the appellant.

The application of the four factors considered above must be done, in the circumstances of this case, in the light of the knowledge that the appellant spent seventeen days in prison before he was released on bail.

Albeit this case is a serious one. A child lost her life. Her mother was seriously injured. And, what is more aggravating, the appellant was drunk, hence his failure to keep a proper lookout and to drive his car in a dark area frequented by pedestrians with his lights on full beam. While I agree with counsel that the appellant must not be sent to prison because of the inordinate delay in the prosecution of his appeal, and the added factor that he has already served seventeen days of his four months' sentence the penalty to be imposed must of necessity be a severe one in order to emphasise the seriousness of the offence committed.

Accordingly the appeal against conviction on Count One is dismissed. The appeal on Count Two is allowed. But the appeal against sentence succeeds to this extent: The sentence of four months' imprisonment with labour is set

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aside and substituted by a sentence of a fine of $600. The prohibition from driving imposed by the magistrate is not disturbed.

Gubbay JA: I agree.

Manyarara JA: I agree.

Danziger & Partners, appellant's legal practitioners

S v A 1990 (1) ZLR 216 (SC)

Court **Supreme Court**

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Gubbay JA Manyarara JA & Korsah JA

Criminal appeal

12 & 26 March 1990

Flynote

Criminal law - indecent assault - male under sixteen years of age engaging in sexual intercourse with female under sixteen years of age - as no charge could be brought in terms of s 3 of the Criminal Law Amendment Act [Chapter 58], no charge should be brought in terms of the common Law.

Headnote

The appellant, a fifteen year old boy, had engaged in sexual intercourse with the complainant, a fourteen year old girl, with her consent. The appellant was charged with the common law crime of indecent assault as the State was precluded from charging him with contravening s 3(1) of the Criminal Law Amendment Act [*Chapter 58*] because proviso (i)(b) to that section afforded the appellant a complete defence. The trial magistrate found that as s 12 of the Criminal Law Amendment Act provides that consent shall be no defence to any charge of indecent assault on a person under the age of sixteen years, the appellant should be convicted.

Held, allowing the appeal, that the Legislature, in enacting proviso (i) to s 3 of the Criminal Law Amendment Act, had conferred upon an accused person charged with an indecent assault upon a girl under the age of sixteen years the three defences set out therein which defences were not provided by the common law. It would be absurd and unjust that whilst a boy under the age of sixteen years who has sexual intercourse with a girl under the same age commits no offence he could be liable to a charge of indecent assault by virtue of the very same Act.

1990 (1) ZLR p217

GUBBAY JA

Cases cited:

S v A Juvenile S-64-89 (not yet reported); 1990 (4) SA 151 (ZS)

R v Dixon 1939 (1) PH H142 (C)

R v M & Anor 1950 (4) SA 101 (T)

R v Z 1960 (1) SA 739 (A)

Socout Ally v R 1907 TS 336

R v Sideropoulos 1910 CPD 15

Sagaye v R 1932 NPD 236

R v Cromar 1953 SR 19

R v E & Anor 1960 (4) SA 445 (C)

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R v Abrahams 1947 (3) SA 181 (C)

R v D 1956 (4) SA 277 (N)

R v H 1959 (1) SA 343 (C)

S & Anor v R 1959 (1) PH K33 (C)

R v H & Anor 1959 (4) SA 427 (A)

R v Forde (1923) 17 Cr App R 99 (CCA); [1923] 2 KB 400

R v Laws (1928) 21 Cr App R 45 (CCA)

R v Keech (1929) 21 Cr App R 125 (CCA)

R v Maughan (1934) 24 Cr App R 130 (CCA)

Casserley v Stubbs 1916 TPD 310

Dhanabakium v Subramanian & Anor 1943 AD 160

Siegel & Frenkel v The King 1943 SR 13

S v Robinson 1975 (4) SA 438 (RA); 1975 (2) RLR 12 (A)

R v M 1953 (4) SA 272 (SR)

IA Kurawley for the appellant

IJ Houston for the respondent

Judgment

Gubbay JA: his appeal must be allowed.

The appellant, a fifteen year old youth, was tried upon a charge of having indecently assaulted a fourteen year old girl. The particulars of the charge were that on 29 May 1989 he:

> "... seize(d) (the complainant) and placed her against the wall and did remove her clothes and did expose his private parts and did place his private parts against her private parts . "

Despite a plea of not guilty and the raising of the defence that the complainant had willingly engaged in sexual intercourse, the trial magistrate convicted the appellant, holding that the complainant was below the age of consent. He

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ordered the appellant to receive a moderate correction of two cuts with a light cane, a punishment which subsequent to its imposition was declared by this court to be unconstitutional, as violative of s 15(1) of the Declaration of Rights. See *S v A Juvenile* S- 64-89 (not yet

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reported).

It was hardly in dispute at the trial that carnal connection had taken place in circumstances which did not amount to rape. Why then, one asks, did the State choose to charge the appellant' with the common law crime of indecent assault rather than with unlawful carnal knowledge of a girl under the age of sixteen years, in contravention of s 3(1) of the Criminal Law Amendment Act [*Chapter 58*]? The answer emerges clearly from a reference to proviso (i)(b) to that section. It provides that it shall be a sufficient defence to such a charge if the accused was at the time under the age of sixteen years. This proviso also applies to a charge laid under s 3(b) of the Act, that is, to the commission of an immoral or indecent act upon a girl under the age of sixteen years. See *R v Dixon* 1939 (1) PH H142 (C).

It is a rule of the common law, and one hallowed by long practice, that there is an irrebuttable presumption that a girl under the age of twelve years is incapable of consenting to sexual intercourse. See *R v M & Anor* 1950 (4) SA 101 (T) at 102C-D; *R v Z* 1960 (1) SA 739 (A) at 742E and 743 *in fine* - 744A. Thus, where the girl is over the age of twelve years, the mere fact of intercourse does not establish the crime of rape.

This rule has been extended to indecent assault. In *Socout Ally v R* 1907 TS 336, that most pre-eminent of jurists, INNES CJ observed at 338:

> "It seems clear that in regard to charges of rape upon children, the common practice in South African Courts, both here and at the Cape, has been to adopt the rule laid down by Carpzovius, that a child under the age of twelve years is conclusively presumed not to be able to consent to the commission of the crime of rape upon her. After all, rape is only the most aggravated form of indecent assault, and I can see no ground of principle upon which we should draw any distinction, so far as the consent of a child under the age of twelve years is concerned, between a charge of rape and a charge of indecent assault. Every ground of policy, every consideration which justifies the one justifies the other. If a child under the age of twelve years is conclusively presumed not to be able to consent to her own corruption by an act of carnal connection, she ought to be presumed not to be able to consent to her own defilement in the way in which the accused was charged with defiling this child. That being so,

GUBBAY JA

> I think we should lay down the rule once and for all that there is no distinction in principle with regard to the consent of children between charges of rape or charges of indecent assault or of assault with intent to commit rape."

See also *R v Sideropoulos* 1910 CPD 15 at 18; *Sagaye* v R 1932 NPD 236 at 237.

In *R v Cromar* 1953 SR 19 QUENET J had occasion to voice disquiet at the rule deeming under twelve years the limit at which a child is rebuttably presumed to be incapable of consenting to an indecent assault. Considering that age to be too low and arbitrary, he remarked at 20:

> "It is a pity that in cases of indecent assault upon persons of immature years consent should constitute a valid defence. I venture to hope that the legislature in this Colony will, before long, consider the desirability of incorporating provisions similar to those contained in section 1 of the Criminal Law Amendment Act, 1922 (12 and 13 Geo. 5)."

Immediate heed was taken by the Legislature of this *obiter dictum,* and on 26 June 1953 the Criminal Law Amendment Act, No. 39 of 1953, was promulgated for the purpose of amendment

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to the rule with respect to the crime of indecent assault. Section 2 read:

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

This provision is now incorporated in the present Criminal Law Amendment Act [*Chapter 58*] as s 12. Its effect has been to alter the common law by excluding consent as a defence where either a male or a female person is charged with indecent assault upon:

(a) a boy under the age of sixteen years; or

(b) a girl under the age of sixteen years.

There is of course no express mention in s 12 of the Act that the three defences set out in proviso (i) to s 3, which may be raised to a charge of committing or attempting to commit an immoral or indecent act with a girl under the age of sixteen years, extend as well to the common law offence of indecent assault.

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The short point to be decided, therefore, is whether, in charging the appellant with the common law offence of indecent assault, the State was correct in its understanding that the statutory defence that he was at such time under the age of sixteen years was not open to him.

Plainly, the phrase "immoral or indecent acts" in s 3(b) of the Act, when used in the context of sexual activities, connotes acts that contain an element of lewdness, debauchery, licentiousness and lasciviousness. See *R v E & Anor* 1960 (4) SA 445 (C) at 448A. (For examples of such acts see *R* v *Abrahams* 1947 (3) SA 181 (C); R v D 1956 (4) SA 277 (N) at 278B-C). The immoral or indecent act must, however, be committed with a girl. It is not sufficient for it to be committed merely in her presence. There must be some mutual physical contact or, at least, some measure of participation by both parties in the immoral or indecent act. See *R v H* 1959 (1) SA 343 (C); *S & Anor v R* 1959 (1) PH K33 (C); *R v H & Anor* 1959 (4) SA 427 (A) at 433F-G.

If this analysis of s 3(b) of the Act is correct, as I perceive it to be, it follows that the commission of an indecent assault upon a girl under the age of sixteen years falls within the ambit of the phrase "immoral or indecent acts". Consequently, the stance adopted by the State leads to the startling and anomalous state of affairs that the law affords a youth a conclusive defence if charged with a contravention of s 3(b) of the Act, on proof by him that he is under the age of sixteen years, but denies him the same defence if charged with the common law crime of indecent assault upon a female person.

Furthermore, it seems to me absurd and illogical that a youth under the age of sixteen years, who has carnal knowledge of a girl under the same age, commits no offence, yet by that very act should render himself liable to prosecution on a charge of indecent assault.

Such English cases as *R v Forde* (1923) 17 Cr App R 99 (CCA); [1923] 2 KB 400; *R v Laws* (1928) 21 Cr App R 45 (CCA); *R v Keech* (1929) 21 Cr App R 125 (CCA); and *R v Maughan*

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(1934) 24 Cr App R 130 (CCA) do not assist the State. They hold that although on a charge of contravening s 5 of the Criminal Law Amendment Act, 1885, that is, carnal knowledge of a girl above the age of thirteen years and under sixteen years, an accused may raise the defence set out in the proviso to s 2 of the Criminal Law Amendment Act 1922, that he had reasonable cause to believe the girl was over sixteen, that defence is not open to him on the lesser statutory charge, based on the same facts, of having indecent assaulted her. This is because the Legislature, in its wisdom, purposefully restricted the defence to the more serious charge. In

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the words of AVORY J in *Forde*'s case *supra* at 103-104; 404:

> "The words of a statute cannot be construed contrary to their meaning as embracing cases merely because no good reason appears why they should be excluded. It is not the duty of the Court to make law reasonable, but to expound it as it stands according to the real sense of the words, and applying that principle we can find no justification for reading the proviso to s 2 of the Act, which in terms is limited to charges of offences under section, as applicable to a charge of indecent assault, which is separately dealt with in s 1 . . .
>
> The result of this legislation is that a boy who is tempted and induced to have carnal knowledge of a girl who misrepresents herself to be over sixteen, and who appears to be so, has no possible answer if he is charged with indecent assault and not with the full offence."

The issue in this appeal is very different from that which confronted the Court of Criminal Appeal in the cases above-cited. It is whether in enacting proviso (i) to s 3 of the Criminal Law Amendment Act the Legislature must have intended the defences set out therein to be available to an accused person charged under the common law with indecent assault - an offence which, as I have noted, comes within the scope of subs (b). In other words, is it open to an accused charged under the common law to prove on a balance of probability that at the time he indecently assaulted the girl, who was under the age of sixteen years,

(a) she was a prostitute; or

(b) he was under the age of sixteen years; or

(c) he had reasonable cause to believe she was of or above the age of sixteen years.

It is a trite principle that a statute must be construed in conformity with the common law rather than against it, except where the intention to alter the common law is expressly stated, or where by necessary inference the lawmaker must have intended such alteration to take effect. See *Casserley v Stubbs* 1916 TPD 310 at 312; *Dhanabakium v Subramanian & Anor* 1943 AD 160 at 167; *Siegel & Frenkel v The King* 1943 SR 13 at 16; *S v Robinson* 1975 (4) SA 438 (RA) at 441E-F; 1975 (2) RLR 12 (A) at 19G-H. The common law is not, as it has been put, "an impenetrable barrier" against the will of the Legislature. If a statute couches a provision in unambiguous terms, which provision is in conflict with the common law, the common law must give way.

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GUBBAY JA

It appears to me that the Legislature in enacting proviso (i) to s 3 has spoken clearly and has conferred upon an accused person charged with an indecent assault upon a girl under the age of sixteen years the three defences set out therein - defences which the common law denies him. To construe the intention of the Legislature so as not to extend proviso (i) to the offence of indecent assault would result, unquestionably, in an anomaly and an injustice

Happily I am fortified in this view by the review judgment of TREDGOLD CJ in *R v M* 1953 (4) SA 272 (SR). In that case the accused, a juvenile under the age of sixteen years, was charted with and convicted of what was assumed to be the common law offence of indecent assault upon a girl under the age of sixteen years. In quashing the conviction the learned CHIEF JUSTICE pointed out that if the charge had been laid under s 3 of the Criminal Law Amendment Act [*Chapter 33*], the commission of an indecent act, the defence that the accused was under the age of sixteen years would have prevailed. He went on to say at 272H-273A:

> "It would therefore seem that, by laying the charge of indecent assault under the Common Law, as he was technically entitled to do, the prosecutor defeated the intention of the Legislature as evinced in Chapter 33.
>
> This is to be deprecated and should be borne in mind by prosecutors in laying charges against juveniles under sixteen years of age in respect of indecent acts."

For these reasons it is ordered that the conviction and sentence be set aside.

Manyarara JA : I agree.

Korsah JA: I agree.

DW Aitken & Co, appellant's legal practitioners

NATIONAL FOODS LTD v KARE & ORS 1990 (1) ZLR 223 (HC)

Court **High Court, Harare**

Mtambanengwe J

Notice of motion

26 October 1989 & 28 March 1990

Flynote

Review - jurisdiction of High Court - whether gusted - Labour Relations Act, 1985 - Labour Relations (Labour Relations Tribunal) Regulations 1985 - powers of High Court on review - unreasonableness not ground for employment - labour relations - appeals - determining authorities - locus stand) to note appeal - grounds of appeal - powers of determining authorities in hearing appeals.

Headnote

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The first respondent, a regional hearing officer, made certain determinations on appeal from decisions of a senior labour relations officer in disputes between the applicant and its employees, the second, third and Fourth respondents, in terms of the Labour Relations Act, 1985 and the Labour Relations (General) Regulations, 1985. The determinations were brought on review by the applicant, and the first respondent asserted that the High Court had no jurisdiction to hear the matter.

Held, that neither s 9 of the Labour Relations Act, nor s 24 of the Labour Relations (Labour Relations Tribunal) Regulations, 1985, expressly or impliedly ousted the jurisdiction of the High Court to review determinations made in terms of the Act.

The applicant objected to the determinations of the first respondent on various grounds *inter allia* a) that a trade union official had no locus stand) to note an appeal on behalf of the other respondents; b) that it was improper and incompetent for the first respondent, on appeal, to conduct a general inquiry or investigation into the disputes between the parties; c) that the first respondent's determinations were grossly unreasonable; d) that two of the determinations of the first respondent related to matters

MTAMBANENGWE J

outside the ambit of the appeals.

Held, further, as to a) that an appeal to a regional hearing officer may be noted on behalf of an appellant, and that a trade union official representing such appellant has sufficient interest in the matter to do so; as to b) that the functions of the first respondent were to carry out a re-hearing and an investigation, including, if necessary, the taking of fresh evidence, such functions being competent in terms of the Act and the Regulations; as to c) that the unreasonableness is not by itself a ground for review at common law, and if the complaint is that the decisions were wrong, the remedy is by way of appeal; as to d) that the first respondent was not entitled to make determinations on matters which were not the subject of appeal, and such action was grossly irregular.

Cases cited:

Art Printers Ltd v Regional Hearing Officer & Anor HH-168-87 (not reported)

Ntini v Jongwe Printing & Publishing Co (Pvt) Ltd HH-623-87 (not yet reported)

Photocircuit SA (Pty) Ltd v De Klerk NO & De Swardt NO & Ors 1989 (4) SA 209 (C)

South African Technical Officials' Association v President of the Industrial Court & Ors 1985 (1) SA 597 (A)

SA Broadcasting Corp v Transvaal Township Board & Ors 1953 (4) SA 169 (T)

Edwards & Sons(Pvt) Ltd v Stumbles NO & Anor 1963 (2) SA 140(SR)

Minister of Labour, Manpower Planning & Social Welfare & Ors v PEN Transport (Pvt) Ltd

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S-45-89 (not yet reported)

AP de Bourbon SC for the applicant

F Musakana for the first respondent

No appearance for the second, third and Fourth respondents

Judgment

Mtambanengwe J: This is an application for the review of orders and determination made by a regional hearing officer in terms of the Labour Relations Act, 1985 (the Act) and the Labour Relations (General) Regulations, 1985 published in SI 368 of 1985 (the Regulations).

The applicant is a public company involved in the milling industry. Second, third and Fourth respondents are employees of applicant at its Mutare branch, they are employed respectively, in the capacity of security officer, sales representative and workshop supervisor. First respondent is a regional

hearing officer (in terms of the Act) for the Manicaland Region Labour Relations Department of the Ministry of Labour, Manpower Planning and Social Welfare.

The circumstances giving rise to this application are briefly that towards the end of 1988 certain difficulties arose between applicant and some of its employees at the applicant's Mutare branch. The matter was referred to a senior labour relations officer who, in an attempt to resolve the difficulties, conducted a hearing on 24 November of that year. Management representatives of applicant, various employees of applicant and some trade union officials attended and took part in the hearings. Consequently the senior labour relations officer made five determinations in terms of the Act and of the Regulations.

The first determination involved applicant and second respondent, the complaint being "too long a delay in the confirmation of his (second respondent's) appointment; and it was determined that in view of the complainant second respondent's confirmation 'is back dated six months'". The second determination: applicant versus A Kusena (third respondent): the complaint was "that A Kusena has suffered injustice by the delay in his rectification both in salary and status to that of sales representative as against a clerk", and the determination was that in view of that delay "from date of appointment to his adjustment award of 1 July 1988 ... the 1 July award is backdated six months". The third matter involved applicant and a Mr Benyu, workshop supervisor (fourth respondent) who complained of being discriminated against in that certain benefits were withdrawn and his status was lowered to supervisor as against workshop manager: it was ordered that the use of a company car be restored to Mr Benyu with immediate effect.

The Fourth and fifth matters dealt with by the senior labour officer involved allegations of racial discrimination, victimization, oppression and other misdemeanours by some named managers of applicant at the branch. The parties in this matter were said to be applicant's "junior workers

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and Departmental heads *versus* two Managers namely Mr Lampert and Mr Foster". The last determination also arose from allegations of racial discrimination against Mr Chirimukanzu by the applicant. In regard to the Fourth and fifth matters the senior labour relations officer found no evidence of discrimination and that the allegations were difficult to prove. He therefore made no specific orders in those regards.

The applicant thereafter noted the appeals in terms of the Act and the

MTAMBANENGWE J

Regulations to the first respondent, namely in respect of the second and third determinations. A certain Mr Musekiwa, an official of the United Food and Allied Workers Union, delivered an undated notice of appeal described as on behalf of "National Foods Junior Workers and Departmental Heads". He was present at the hearings before the senior labour relations officer but he is not an employee of applicant. Thereafter matters developed as follows -

The first respondent using a questionnaire carried out some interviews at the Mutare Depot (branch) of applicant from 22 to 27 February 1989. These involved some fifty employees of applicant "randomly picked" from the company's various departments, and three management staff. The appeals hearings were then held on 2 and 4 April attended by (including its legal adviser) five representatives of applicant, four workers committee representatives, one departmental heads representative, three trade union officials and second, third and Fourth respondents. Thereafter on 10 April first respondent made five determinations. These were received by applicant on 17 April together with annexure A to applicants founding affidavit - a summary of the proceedings recording the allegations made, comments made by management and first respondent's observations, recommendations and conclusions. The determinations were as follows:

(i) "Because workers in the weighbridge department are engaged in shift work in which two shifts per day perform their duties according toe shift roster laid down by the employer, they should be regarded as 'shift - workers' with immediate effect and work the hours stipulated in s 6(2) of SI 668 of 1983. A copy of the aforesaid Determination is annexed hereto marked 'L'."

(ii) "The employer is instructed to: (a) Pay with immediate effect an acting allowance to any of his employees (including salaried staff) who is required to perform work in a grade higher than his grade. (b) Fix a minimum entry salary scale to salaried staff grades by 30 June 1989."

(iii) "National Foods should pay to Mr Musiiwa the salary of a confirmed Security Officer with effect from January 1988."

(iv) "The employer should pay Mr Kusena the difference between whatever was his salary and $900,00 from 1 January 1988 to 30 June of the same year. The Determination is made in terms of s 109(2)(b) of the Labour Relations Act."

(v) "To recognise and appreciate the additional responsibilities which Mr Benyu currently has the employer should pay him a monthly responsibility allowance of $100,00 (One Hundred Dollars) with immediate effect until he is up graded."

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MTAMBANENGWE J

The question whether this court has jurisdiction to entertain this application was raised in first respondent's counsel's submission. Mr *Musakana* argued that the High Court's review jurisdiction is ousted by s 9 of the Labour Relations Act 1985 which, he said, "clearly and by necessary implication precludes the jurisdiction of the High Court ". I fail to find anything in the said section implying let alone clearly referring to the Court's jurisdiction or the ouster thereof.

His next point, however, raises the issue of jurisdiction more seriously. His argument was that the Labour Relations (Labour Relations Tribunal) Regulations 1985 (SI 369/85) in s 24 thereof, specifically provides for review proceedings in another forum and that this Therefore, so the submission went, necessarily means the High Court's review jurisdiction is ousted. This section provides as follows:

> "Review of decisions of lower authorities
>
> 24. (1) The Chairman may appoint a day or period of days within each year for the review of any decisions, determinations or orders made by any labour relations officer, hearing officer, regional hearing of ricer or the Board, and such review may be conducted by the Chairman himself or by a member delegated by him:
>
> Provided that on such review the Chairmen or the member delegated by him shall not have the power to vary, set aside or remit for rehearing any decision, determination or order made by a lower authority."

Subsection (2) provides that a written report may be made by the chairman or member delegated by him to the Minister and the chairman of the Board embodying any observations or recommendations he deems necessary; and subs (3) provides that the chairman may authorise the circulation of any such report to any regional hearing officer, hearing officer or labour relations officer.

The point taken by counsel has previously been considered by this Court in a number of recent decisions notably *Art Printers Ltd v Regional Hearing Officer & Anor* HH-168-87 (not reported) at 5-7; *Ntini* v *Jongwe Printing & Publishing Co (Pvt) Ltd* HH-623-87 (not yet reported) at 2-3. The point is settled and I need not dwell on it further except to make the further point that, the review powers provided by s 24 of SI 369/85 are so limited, and clearly meant merely to afford guidance to lower authorities, that no intention of the Legislature can be extracted from that section to oust the review jurisdiction

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of the Court; secondly it is inconceivable that the Legislature would have provided for an ouster of the High Court's jurisdiction by means of subsidiary legislation without expressly saying so. See also *Photocircuit SA (Pty) Ltd v De Klerk NO & De Swardt NO & Ors* 1989 (4) SA 209 (C) at 214H to 261H where submissions were made along similar lines as those made in this case were advanced and disposed of. Although our Act and the Regulations made thereunder may not be identical in every provision to the South African Act, the reasoning and principles there applied would seem to be equally applicable to the argument advanced in the present case. They are instructive.

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First respondent's determinations are attacked by applicant on various grounds. The first concern the locus stand) of Mr Musekiwa, the trade union official who noted the appeal on behalf collectively of the junior workers and departmental heads of applicant. At the hearing before the regional hearing officer the point was apparently raised in *limine* by applicant's legal representative but no ruling seems to have been made on it and it seems it was not pressed further. Before melt was argued that whereas s 112(1) of the Act says any person who is aggrieved by an order made by a labour relations officer may appeal to the regional hearing officer, s 17(1) of the Regulations makes it clear that this refers to a person on whom an order or determination has been served. Of course that appears to be the position but the section goes on to say the person may do so in form LT 27 and that form envisages what happened in this case. It is framed as follows:

> "I note this appeal on my own behalf/on behalf of . . ."

and further requires the person noting the appeal to state the capacity in which he notes the appeal and to -

> "specify interest in the appeal."

The appeal noted by Mr Musekiwa complies with these requirements.

Taking the forms as integral parts of the Regulations the necessary implication follows that a person who has an interest in the appeal can note an appeal on behalf of a person on whom an order or determination has been served. If the question of sufficiency of Mr Musekiwa's interest in the appeal had been raised (it was not), I would say that the scheme of the legislation in question being the protection of the interests of workers he, being a trade union official whose activities in connection with worker's interests are protected by penal provisions in the Act (see s 7 of the Act), had a clear interest in the appeal.

The second objection by the applicant concerns the first and second

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determination by first respondent when the latter describes the parties as "The State - Ministry of Labour Manpower, Planning and Social Welfare" end the applicant. The applicant regards this as evidence that first respondent "misconstrued his function by trying to unilaterally raise an issue and make a determination in this matter" because neither the State nor any government department was or had been a party to any dispute involving the applicant. I accept the explanation by first respondent that this was an error of citation. Neither the notice of appeal by Mr Musekiwa nor the notice to attend proceedings, though so inelegantly framed as to suggest that the appeal only concerned "back payment of wages to some employees at National Foods" suggests such a misconstruction by first respondent of his function in the appeal or of the parties involved.

The conclusion drawn from the above, and it was so argued for the applicant, is that the only issue validly before first respondent on appeal are the two matters on which applicant itself had noted an appeal.

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In its affidavit the applicant states that "there is no organisation known as 'National Food Junior Workers and Departmental Heads' although there are a number of individual employees of applicant who could be described as falling into such categories". It should be noted that Mr Musekiwa's notice of appeal is all embracing, and by that collective description brings all the persons to whom the regional hearing officer's five determinations relate. Nor has it been argued, let alone suggested, that any of these persons did not fit the collective description. Furthermore three of the determinations themselves ie relating to Musekiwa, Kusena and Benyu do not repeat the citational error though two repeat it.

If I am correct in accepting that Mr Musekiwa had locus stand in noting the appeal as he did it would, therefore, follow that Mr Musiwa, the second respondent, was covered by that notice, he being one of the individuals who could be described as falling into the categories generally described in the notice as above, and the argument that he did not appeal falls away.

The next objection strongly advanced for the applicant is that the regional hearing officer was completely wrong and had no competence to make a general inquiry or investigation; as he clearly did. Mr *de Bourbon* argued that on this basis alone the determinations made by the regional hearing officer must be set aside. The powers of the regional hearing of ricer are conferred upon him by the Act and the Regulations made thereunder and it is necessary to examine the relevant provisions to see if this argument is sustainable.

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Appeals from determinations of a labour relations officer to a regional hearing officer are governed by s 112 of the Act and s 17 of the Regulations. Subsection (2) of s 112 provides as follows:

> "(2) on an appeal in terms of subsection (1) the regional hearing officer may confirm, vary or set aside the decision appealed against"

Section 17(4) of the Regulations provides:

> "(4) In the hearing of an appeal in terms of this section a regional hearing officer may confirm, vary or set aside the determination or order appealed against, and in doing so he shall have the same powers, mutatis mutandis, in relation to the master on appeal as a labour relations officer under section 15"

which provides:

> "*Powers of labour relations officer to settle disputes or unfair labour practices*
>
> 15. After due inquiry, a labour relations officer may in respect of any matter arising from a dispute or unfair labour practice -
>
> (a) attempt to redress or rectify the matter through conciliation between the parties; or
>
> (b) - to - (i) (not relevant)"

In terms of s 16 of the Regulations where reference of a matter is made in terms of s 15(e) to a regional hearing of ricer the same provisions is made as to the powers of a regional hearing officer as is made in s 17(4) with the proviso that he may not refer the matter back to a labour

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relations officer for determination, as is also the case in terms of proviso (ii) to s 17(4).

The Regulations are made in terms of s 141 of the Act which in subs (1) empowers the Minister to "make regulations prescribing anything which, in terms of this Act, is to be prescribed or which, in his opinion, is necessary or convenient to be prescribed, for carrying out or giving effect to the provisions of this Act" and in subs 2(S) provides:

> "(2) Regulations made in terms of subsection (1) may provide for -
>
> (a) . . .
>
> (b) the procedures to be followed in making applications or appeals

MTAMBANENGWE J

> and the procedures to be followed by any official, board, tribunal or authority upon which functions are conferred in terms of this Act."

It seems, therefore, that in terms of the Regulations, the regional hearing of ricer is empowered to make an enquiry whether the matter comes to him by reference in terms of s 109(2)(d) read with s 111 of the Act or by way of appeal in terms of s 112 of the Act and in terms of s 17 of the Regulations; and that no valid ground for review can be raised on the basis that on appeal as in this matter, the regional hearing officer conducted an enquiry (as he did) and should not have done so. As FRIEDMAN J pointed out in the *Photocircuit* case *supra* at p 221F:

> "The procedures before the industrial court are more in the nature of an enquiry than a trial and there is nothing to prevent the court *mero motu* carrying out an investigation into any particular facet of the proceedings before it. (See *Kloof Gold Mining Co Ltd v National Union of Mineworkers and Others* 1987 (1) SA 598 ("I) at 605 - 6."

That *dictum* is based on a long line of authorities and the rationale of it was comprehensively discussed by MILLER JA in *South African Technical Officals Association v President of the Industrial Court & Ors* 1985 (1) SA 597 (A) - see in particular at 611-612. The procedures provided for appeal under the Act, to a regional hearing officer and to the Board at least clearly envisage a re-hearing of the matter or matters appealed against in the same way as stated in such cases as *SA Boradcasting Corp v Transvaal Township Board & Ors* 1963 (4) SA 169 (A at 176D-H and the cases cited thereat is the functions of the regional hearing of ricer are "to conduct a re-hearing of an administrative matter, taking fresh evidence if necessary" and not an appeal in the strict legal sense. See also *Edwards and Sons (Pvt) Ltd v Stumbles NO & Anor* 1963 (2) SA 140 (SR) at 143D.

Finally s 17(2)(a) of the Regulations is, in my view, decisive on this point:

> "(2) The labour relations officer or hearing officer with whom an appeal is noted in terms of subsection (1) shall within fourteen days of such noting -
>
> (a) endeavour to clarify the issues in the appeal; . . ."

That is exactly what first respondent did in carrying out the inquiry that he conducted before the hearing of the appeals.

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MTAMBANENGWE J

Another point raised by counsel for the applicant which is, in my view, also answered by the provisions of s 17(2)(a) of the Regulations, concerns the vagueness of Musekiwa's notice of appeal is the grounds of appeal. It was argued that the grounds are vague, and render the appeals invalid. Sight must never be lost of the general scheme of the Labour Relations Act and the Regulations made thereunder. In enacting the provisions of the Act and the Regulations the Legislature must have been aware that the majority of the workers whose interests were sought to be protected are men and women with little education and largely unsophisticated, and would not, by and large be able to state their grievances clearly. Had it not been so envisaged one would expect to find in the Act and the Regulations such provisions as would require appellants to state for example their grounds of appeal "clearly and precisely". Instead one finds provisions like s 17(2)(a) requiring an officer hearing the appeal to "endeavour to clarify the issues in the appeal".

Therefore, to argue that the vagueness of a notice or the grounds of appeal makes the appeal invalid is, I consider, to seek to interpret the Act and the Regulations in a way that would defeat their purpose. In my view such an interpretation cannot be accepted as a correct interpretation.

I must turn now to a consideration of the various determinations. The invitation to this court to upset the determinations made by the first respondent cannot be accepted if it amounts to requiring the court to sit upon the merits of these determinations. In *Minister of Labour Manpower Planning and Social Welfare & Ors v PEN Tranpsort (Pvt) Ltd* S-45 - 89 (not yet reported) at p 4 of the cyclostyled judgment it was stated:

> "Under its inherent right at common law to review proceedings of inferior Courts and tribunals the High Court does not exercise an appellate jurisdiction. Unless, therefore, the averment was made, which advisedly it was not, that the determination that the employee had not been engaged for a period of fixed duration was unreasonable to so striking a degree as to be inexplicable except on the assumption of something else, of *mala fides* or ulterior motive or failure by the labour relations of ricer to apply his mind to the matter - a formidable onus - any examination by way of judicial review was not open to the employer. It is not enough simply to show that the decision was wrong or unreasonable. Special grounds must exist before a court will enquire into the merits. One does not readily impute dereliction of duty to a responsible quasi-judicial body or official."

Rose Innes in his work *Judicial Review of Administrative Tribunals in South Africa* at p 215 had this to say:

MTAMBANENGWE J

> "The frequency with which the Courts have refused to sit upon the merits of decisions which are entrusted to the determination of extra-judicial bodies, precludes unreasonableness by itself, from being a ground for review at common law."

The applicant states at para 16 of its founding affidavit:

> "Although applicant's main complaint is in respect of the aforementioned two determinations I verily believe that there was no basis for the 1st Respondent to reach the Determination which he did in respect of the remaining three Determinations (Annexure 'N', 'O' and 'P'). On the evidence which was led at the appeal he ought not to

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have interfered with the original hearing officer's Determination in respect of the 2nd Respondent and should also have found for the Applicant, in respect of the Applicant's appeal regarding 3rd and 4th Respondents. For him to have done otherwise in these three Determinations was grossly unreasonable."

This statement, in my view sums up the main ground on which those three determinations, at least, are attacked, that is that the first respondent was wrong or unreasonable in making them. The remedy open to the applicant in that case was by way of appeal and not by way of judicial review. Section 27 of the High Court of Zimbabwe Act, 1981, provides the grounds upon which any proceedings or decision of inferior Courts or tribunals may be brought on review as:

"(a) absence of jurisdiction on the part of the Court, tribunal or authority concerned;

(b) interest in the cause, bias, malice or corruption on the part of the

person presiding over the court of tribunal concerned or on the part of the authority concerned as the case may be;

(c) gross irregularity in the proceedings or the decision."

I find nothing in this maker that fits the above requirements in the *dicta* in the case of *Minister of Labour, Manpower Planning and Social Welfare & Ors* v *PEN Transport (Pvt) Ltd* (*supra*) save as regards the first two determinations. Here it seems the point made by applicant that the determinations relate to matters that were outside the appeals is well taken. The complaint before the senior labour relations officer related to discrimination. The allegations of discrimination were specifically directed against two managers of the applicant. The senior labour relations officer found them not proved. My

view is that first respondent should have confined himself to those allegations. However, in his determinations, the subject matter bears no relation to the original complaint or determination. Even accepting that he had the competence to re-hear the complaints it cannot be said that right allowed him to determine matters that were not the subject of the appeals. For him to have done so was grossly irregular and for that reason the two determinations cannot be allowed to stand.

The first respondent opposed the application and has been successful as regards three of his determinations. The applicant has also succeeded as regards two of the determinations. In the circumstances it is fair that each party beans its own costs.

In the result I make the following order:

1. That the first two of the five determinations relating to applicant made by first respondent on 10 April 1989 be and are hereby set aside;

2. That each of the parties bear its/his own costs.

Kantor & Immerman, applicant's legal practitioners

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

S v MAUWA 1990 (1) ZLR 235 (SC)

Court **Supreme Court, Harare**

Korsah JA

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

3 April 1990

Flynote

Criminal Law - traffic offences - culpable homicide - negligence - what constitutes - sudden emergency - whether exculpates driver from negligence.

Headnote

The accused was charged with culpable homicide in that he overtook a heavy vehicle which had previously overtaken him and suddenly stopped in front of his omnibus and in so overtaking had collided with an on coming motorcyclist who was accompanying a Presidential motorcade. The accused did not hear or see the motorcade prior to his overtaking the vehicle ahead of his omnibus. The accused was convicted by the magistrates court of culpable homicide. On appeal:

Held, that the test of negligence in criminal cases is the same as in civil cases - that of reasonable forseeability.

Held, further, that it is not every wrongful act on the part of a person which constitutes negligence. Where a person or a third party is placed in danger by the wrongful act of another, that person is not negligent if, in the agony of the moment, he exercises such care as may be reasonably expected of him in the reasonable apprehension of the danger in which he is so placed. He is not to blame if he does not do quite the right thing in the circumstances.

Held, further, that it is not every emergency that may exculpate a driver of a vehicle from negligence. Each case must depend on its own facts.

Held, further, that the conviction should be quashed and sentence set aside.

Cases cited:

R v *Botha* 1940 SR 59

KORSAH JA

R v *Wells* 1949 (3) SA 93 (A)

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Stoomvart Maatschappy Nederland v *Peninsular and Oriental Steam Navigation Co* (1880) 5 AC 876 (HL)

Brandon v *Osborne, Garrett & Co* [1924] 1 KB 548

Parkinson v *Liverpool Corporation* [1950] 1 All ER 367 (CA)

Southerland v *Glasgow Corporation* [1940] SC LT 388

S v *Crockart* 1971 (1) RLR 260 (A); 1971 (2) A 496 (RA)

MJ Gillespie for the appellant

Mrs SC Mavangra for the respondent

Judgment

Korsah JA: The appellant was charged with culpable homicide arising out of a motor traffic accident which occurred on 6 June 1987. He was on 10 June 1988, convicted of that offence at the Southerton Traffic Court, and sentenced to pay a fine of $600 or, in default of payment, undergo imprisonment with labour for a period of six months. He appeals against his conviction only.

On the day of the accident the appellant was driving his omnibus in an easterly direction towards Zengeza on the new Chitungwiza Road. Around the same time unbeknown to him, there was a Presidential motorcade approaching him in the opposite direction. The leading motor cycle escort for the motorcade signalled a military vehicle, a puma, in lead of the appellant's omnibus to stop off the road. The military vehicle complied and stopped abruptly in front of the appellant's vehicle. The appellant swung his omnibus out to avoid running into the rear of the military vehicle just after the leading motor cycle escort passed him. The appellant's omnibus then collided with the second motor cycle escort who was riding 35 to 40 metres behind the leading motor cycle escort, killing him instantly. The estimated speed of the motorcade was approximately 100 kph. The State alleged, and the trial court held, that the appellant's negligence was the cause of the death of the deceased.

The trial court conducted an inspection of the scene of the accident. It was observed that approaching the stretch of road where the accident occurred, if one were driving towards Zengeza, there is a long gradual curve to the right, this curve straightens out and one gets a whole stretch of the road where the incident took place at a point on the curve about 400 metres from the approximate point of impact. From this point on the curve to a crest of the hill in the distance, which is the last visible point on that stretch of road, is in excess of a kilometre. There is a considerable area of dead ground caused by

a depression in the road in between the curve and the crest of the hill. The depression is such that, viewed from the point in the curve mentioned, a vehicle as large as an omnibus driving from the Zengeza side towards the viewer is completely out of sight in the depression for

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approximately fifty-six seconds. From the point where a vehicle emerging from the deed ground first becomes visible to the estimated point of impact is a journey of approximately twenty-nine seconds for a saloon car travelling at the speed above mentioned.

The point of impact was estimated as a result of indications made by the appellant. He pointed to a storm water culvert, which leads water under the road, as being the obstacle which prevented him from avoiding the military vehicle as it stopped abruptly in front of him, by overtaking it on the left. He indicated that the military vehicle stopped about nine paces beyond this culvert. He told the court that the front of his vehicle had already passed the front of the military vehicle at the time of the collision. When viewed from this estimated point of impact, an ordinary saloon vehicle is out of sight in the depression for twelve seconds, and even an omnibus is completely obscured from view for a short period.

The appellant testified that just before meeting the motorcade escorts the military vehicle overtook his omnibus, cut in in front of him and then stopped abruptly in front of his omnibus in such a manner that he was compelled to take evasive action or run into the rear of the military vehicle. Two options were open to him: either to veer left and run into the culvert by the side of the road or, to swerve to the right and overtake the military vehicle. In the dilemma of the moment he chose the latter option resulting in the disastrous consequences giving rise to his prosecution.

The appellant at the time of the accident had a full load of passengers on his omnibus. It is a notorious fact that the greater the load carried by a vehicle the greater will be the distance within which it can come to a halt. If, therefore, the military vehicle pulled up abruptly in front of the appellant's omnibus immediately after overtaking it, then the fully loaded omnibus is unlikely to be able to stop behind the military vehicle without ramming the rear of that vehicle because its breaking distance has been increased by the load it was carrying. This adds credibility to the testimony of the appellant that he was placed in a dilemma.

The prosecution witnesses conceded that an act of overtaking by the military vehicle could have occurred prior to the vehicles coming into their view. The

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prosecutor's cross-examination of the appellant also appeared to accept that the military vehicle did overtake the appellant's omnibus before the accident.

He said:

> "I put it to you that at the time the army car was overtaking you you could see for about 400 metres",

to which he received the response -

> "At the time the army motor vehicle was in front of me I could not see what was ahead of me."

In spite of the concession by the prosecution witnesses and the acceptance by the prosecution that an act of overtaking did take place, and in the absence of evidence to the contrary, the trial

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magistrate reasoned thus:

> "Between the leading escort and Sango the second State witness, there was the army vehicle and the bus. In between them the army motor vehicle did not overtake the bus and it is between them that the accident took place. Their evidence excludes all possibilities of the army motor vehicle overtaking the bus at all."

With respect to the learned trial magistrate, such reasoning disregards the evidence that, having regard to the terrain, the overtaking of the bus by the army vehicle occurred immediately prior to the motorcade escorts having sight of the two vehicles. The conclusion that because the two escort outriders did not witness the army vehicle overtaking the bus, such overtaking did not occur is, therefore, clearly fallacious and not in accord with the evidence.

It was submitted by Mr *Gillespie* in the heads of argument on behalf of the appellant that the learned magistrate in finding that the appellant must have heard the sirens of the approaching motorcade and, or seen, the motorcade, betrays a closed mind.

The appellant sits at the front of the bus directly above the engine. Any person acquainted with omnibuses in this country knows that they can make a not inconsiderable noise. Not only was the engine of the bus making a noise, but the puma which was overtaking the bus was making a noise as well. The combined din created by these two heavy vehicles could have been enough to drown out the sound of the distant motorcade. Add to this din the screams

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of fright of a full load of passengers alarmed by the prospect of their bus colliding with a puma which on overtaking cut suddenly in front of the bus and stopped. It may then be appreciated that the appellant may well not have heard the sirens of the motorcade above this cacophony, noisy though the sirens may be.

As regards seeing the motorcade, a puma is a heavy vehicle with no canopy but with angled armoured sides so high that a man standing in the rear has only his head and shoulders in view. At all times in between when the puma was overtaking the omnibus there was a varying degree of obstruction ranging from slight to almost total. Indeed, if the escort outriders did not see the puma overtaking the omnibus because of the terrain, how could the appellant be expected to have seen the motorcade at that juncture? It was only after the puma had cut across the path of the omnibus that the first escort outrider could have become visible to the appellant as attested by him. There was thus no foundation for the finding that the appellant saw the motorcade, in particular the deceased, before taking the evasive action necessitated by the emergency created by the sudden braking of the puma soon after it had cut across the path of the appellant. This defence, far from being improbable, was a perfectly reasonable explanation of how the accident occurred, and ought not to have been dismissed with contempt by the trial Court.

Once it is accepted that the cutting across the path of the omnibus by the puma and the sudden braking in front of the bus created a dilemma for the appellant then the finding that the appellant acted deliberately throughout, as Mr *Gillespie* puts it, is as illogical as it is injudicious.

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I agree with Mr *Gillespie*, as indeed does Mrs *Mavangira* for the respondent, that the only way to determine the guilt of the appellant is on the basis that he did not see the motorcade; that he did not hear the sirens; and was unaware of any impending collision until it was too late to avoid one, and thereafter to enquire whether this failure to avoid the collision was caused by his negligence.

As Mr *Gillespie* succinctly put it, one cannot be negligent in failing to hear some thing unless one is negligently producing a rival din; as the appellant was not negligently creating a rival din, his failure to hear the motorcade was not due to negligence on his part. And the failure to see was not for lack of a proper look out, but because the appellant's vision of the scene ahead was obscured by the military vehicle and the terrain. It follows that there was no evidence supportive of the finding that the appellant was negligent in failing

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to advert to the approach of the motorcade.

Culpable homicide is defined in Hunt's *South African Criminal Law and Procedure* vol II 2 ed at 401 as consisting in the unlawful negligent killing of another person. The test of negligence in criminal cases is the same as in civil cases - that of reasonable foreseeability. AS HUDSON J observed in *R* v *Botha* 1940 SR 59 at 60:

> "In criminal as in civil law if a person fails to observe that standard of care and skill which would be observed by a reasonable man then he is guilty of negligence. And if as a result of that negligence he causes the death of another then the homicide for which he is responsible is culpable."

See also *R* v *Wells* 1949 (3) SA 93 (A) at 88.

It is, therefore, permissible on a charge of driving negligently to refer to civil cases.

It was incumbent upon the prosecution to prove that the appellant should have foreseen the likelihood of harm arising from the act which caused the death of the deceased, and that the accident was due to the negligent act on the part of the appellant. But it is not every wrongful act on the part of a person which constitutes negligence. As LORD BLACKBURN said in *Stoomvart Maatschappy Nederland* v *Peninsular and Oriental Steam Navigation Co* (1880) 5 AC 876 (my) at 891:

> "... a man may not do the right thing, may even do the wrong, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill; and I agree that when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too much. If, to take the example Lord Justice James gives, the driver of a van cracking his whip makes the horses of a carriage suddenly unmanageable, the fact that the driver of the carriage pulled the wrong rein would be much less cogent evidence of want of reasonable skill or reasonable care on his part, than if he did the same thing when driving along in the ordinary way, but it would still be evidence."

The question is: how much allowance should be made for the suddenness of the thing when determining whether there was a want of reasonable care and reasonable skill?

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In *Brandon v Osborne, Garrett & Co* [1924] 1 KB 548 at 552, SWIFT J expressed the view that if a person does something which a reasonable person in the circumstances ought not to have done that person would not be entitled to damages, but if what that person did was done instinctively and was in the circumstances a natural and proper thing to do, then she would be entitled to recover. I infer from this dictum that where a person or third party is placed in danger by the wrongful act of another, that person is not negligent if, in the agony of the moment, he exercises such care as may be reasonably expected of him in the reasonable apprehension of the danger in which he is so placed. He is not to blame if he does not do quite the right thing in the circumstances.

I also derive support for the view I have expressed from the English case of *Parkinson* v *Liverpool Corporation* [1950] 1 All ER 367 (CA), where the driver of an omnibus applied his brakes with some suddenness to avoid running over a dog. The dog came Tom the nearside and the driver saw it about 20 yards away. It appeared to be crossing in front of the bus and the driver took his foot off the accelerator and passed behind the dog. Having cleared the bus the dog changed its mind and suddenly came back across the front of the bus when the bus was some five or six yards away, whereupon the driver applied his brakes with some suddenness and stopped. The nature of this stopping was such as to throw the Plaintiff, Mr Parkinson, a man of some sixty five years of age, off his balance to the floor as he was walking along the gangway in readiness to alight at the next stop. He broke two ribs. It also threw the conductor of the omnibus to the floor, but did not inconvenience the seated passengers. In that state of affairs, if there had been no explanation of what had caused the driver to pull up with that degree of suddenness, the trial court would certainly have been entitled to draw the inference that *prima facie* there had been negligence on the part of the driver. But the driver was called and he gave the explanation recited above.

It was held "that the driver, faced with a sudden emergency caused by the dog's appearance in front of the omnibus, acted as an ordinary and careful driver ought to act in such circumstances, and, therefore, he was not guilty of negligence or failure to take care of his passengers, and the Plaintiff was not entitled to recover".

In the instant appeal, the appellant testified before the trial court and no successful challenge was made to the truth of his testimony. Had he not given a reasonable explanation regarding the circumstances surrounding the occurrence the trial court would have been entitled to infer negligence from his actions. But he offered what, in my view, was a plausible explanation, which

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was conceded by the State witnesses and appears to have been accepted by the prosecutor. He acted with the reasonable care and skill which any ordinary driver confronted with such a dilemma may employ.

Let me, however, add a rider to what I have said above. It is not every emergency that may

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exculpate a driver of a vehicle from negligence. As the LORD JUSTICE CLERK (LORD THOMPSON) said in *Southerland* v *Glasgow Corporation* [1940] SC LT 388 at 391:

> "In the course of an interesting debate we ranged over a number of topics connected with the difficulties the drivers of vehicles may be placed in by the presence of animals on roadways. As the problems which may arise are infinitely various, I am averse to attempting any general statement of the law. This is one of the occasions when one is well justified in saying that each case must depend on its own facts."

See for example *S* v *Crockart* 1971 (1) RLR 260 (A); 1971 (2) A 496 (RA) where Lewis AJP referred to the following passage in the *American Restatement of the Law of Torts, Negligence:*

> "In determining whether the actor is to be excused for an error of judgment in a sudden emergency, importance is to be attached to the fact that many activities require that those engaged in them shall have such natural aptitude or special training as to give them the ability to cope with those dangerous situations which are likely to arise in the course of such activities."

In that case the learned judge held that "the sudden emergency created by the flaring match-head (between the driver's legs) did not excuse the fact that the applicant allowed his car to veer off across the path of the oncoming car. He knew the other car was approaching him, and he could and should, by the exercise of reasonable care and skill, have coped with the emergency while, nevertheless, maintaining his car on its proper course." (Headnote).

In the instant case, accepting the appellant's explanation, if the appellant had not taken the evasive action that the agony of the moment dictated, the risk to life may have been much greater. There was no question of the want of the exercise of reasonable care and skill to avoid the accident.

In the result the State quite properly refused to support the conviction.

KORSAH JA

The conviction is accordingly quashed and the sentence imposed is hereby set aside.

Gubbay JA: I agree.

Gill, Godlonton and Gerrans, appellant's legal practitioners.

S v CHIN'ONO 1990 (1) ZLR 244 (HC)

Court **High Court, Harare**

Smith J

Criminal trial

4, 5 & 6 April 1990

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Flynote

Criminal law - sentence - accused found guilty of murder with constructive intent - accused's state of diminished responsibility of mind sufficient to establish extenuating circumstances.

Headnote

The accused was charged with murder arising out of his stabbing the deceased during a traditional funeral ceremony. He was convicted of murder with constructive intent to kill. In his defence the accused alleged that at the time he was suffering from a mental disorder or defect in that he was not aware of his actions at the time. Psychiatric evidence was led as to the accused's mental condition which indicated that he was fit to stand trial but was suffering from a state of diminished responsibility owing to a combination of factors such as his genuine belief in witchcraft and the nature of the ceremony itself with people dancing and drums beating in an enclosed area.

Held, that the accused was not mentally disordered or defective as defined in the Mental Health Act 1976 but that he suffered from a state of diminished responsibility so as to reduce his moral blameworthiness.

Held, further, that the accused was guilty of murder with constructive intent but that there existed extenuating circumstances which precluded the passing of the sentence of death. *Held,* further, that the state of diminished responsibility reduced the moral, not the legal, liability of the accused for his act and for this reason it would not be appropriate to find the accused guilty of culpable homicide.

Cases cited:

R v *Mawonani* 1970 (1) RLR 41 (A); 1970 (3) SA 448 (RA)

1990 (1) ZLR p245

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S v *Mahlinza* 1967 (1) SA 408 (A)

Attorney-General v *Senekal* 1969 (2) RLR 368 (A); 1969 (4) SA 478 RA)

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

S v *Makaka* S-24-87 (not reported)

S v *Taanorwa* S-43-87 (not reported)

S v *Chitiyo* S-83-87 (not yet reported)

S v *Chiwambutsa* S-113-87 (not yet reported)

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

J Muganhu for the State

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M Madzivanzira for accused

Judgment

Smith J: The accused is charged with the murder of his uncle (hereinafter referred to as "the deceased") on 14 October 1988. His defence is that he suffered from some mental disorder or defect at the time. He says that he can remember what happened during the earlier part of the evening on which the deceased was killed but he cannot remember any of the events immediately before or after the killing of the deceased.

The sequence of events on the night in question are not in dispute. There are some disparities between the evidence of the various witnesses but they are not of any great significance. Peter, a brother of the accused, was killed in an accident involving a motor vehicle sometime in 1987. On October 14 1988 the accused's family held a ceremony at its home in the communal lands as part of the obsequies for Peter. The accused, who was working in Kwekwe at the time, arrived at the village at about 5 pm. He appeared to be quite normal and helped to prepare the food. The eating and drinking started after sundown and about midnight the dancing and singing began. The accused said that he drank two mugs of traditional beer. They were not large mugs. He remembers the events leading up to the dancing and that he danced for a few hours but remembers nothing thereafter until he awoke the next morning when he was told that he had stabbed the deceased.

The sequence of events as related by the various witnesses is as follows. After he started dancing the accused was given a ceremonial axe, which had belonged to Peter and then later a walking stick which was hollowed out at one end and acted as a sheath for a metal blade that was attached to the handle of the walking stick. The blade was approximately 15" long, with a width of 11/2" at the base and tapering to a sharp point. Both edges were sharpened and there was a ridge running along the middle of both sides of the blade. It was a formidable dagger. The accused brandished first the axe then the walking stick as he danced. Sometime between 2 and 3 am the accused approached

the deceased's sister, grabbed her arms and started to shake her. She feared that be would become violent so ran out of the hut in which the people were dancing. The rest of the dancers followed her example. The accused also left the hut and started pushing people who crossed his path. According to one witness, the accused was crying. The deceased's son, Solomon, asked the accused why he was assaulting people. This caused the accused to turn on Solomon. He knocked Solomon to the ground and then tried to throttle him. Some people intervened and pulled the accused off Solomon. The accused then went back to the hut in which the people had been dancing. The deceased had remained in the hut because he had sore feet. As he was leaving the hut he met the accused. The accused stabbed him twice with the dagger. One blow landed on the face and pricked out the deceased's right eye. The other was on the chest and the blade penetrated the heart. The deceased died almost instantaneously from haemopericardium due to injury to the myocardium. The accused then left the hut and called out "Solomon, Solomon, I have killed your father; I have killed the wizard." The accused then went

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round one of the huts to a fire around which three men were sitting. He asked each his name. When he got to the third person, Sebastian Mupawana, for no reason he struck him twice on the top of his head using the flat side of the blade of the dagger. The ridge along the blade inflicted a laceration which had to be treated at the clinic the following day and required 3 stitches. When the accused hit Sebastian he said "We don't want wizards here". Great force was used in delivering the blows and the blade bent after the second one. The wound bled profusely. Sebastian woke the accused's father who was asleep beside the fire and told him that the accused was killing him. The accused's Other asked him what was the matter. The accused then slapped his father across the face, using his open hand. He was holding the dagger in his right hand. He then said "I don't want anyone bad here, I don't want witches or wizards here, I have killed your brother." The father reprimanded the accused and then went to see how the deceased was. The accused said he was going to sleep and went off to the hut which he was sharing with his younger brother. The accused was arrested the following day. On October 17, after being duly warned and cautioned, he made a statement to the police. In the statement he admitted stabbing the deceased but said that he did not know how or where he had stabbed him. He remembered dancing but could not remember from whence he had obtained the dagger. It was when he woke the following morning that he was told that he had killed the deceased.

Although some of the witnesses said that there was no bad blood between the accused's family and the deceased, this was denied by others. Solomon's wife, Silibasiso gave her evidence extremely well. She appeared to be

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willing to tell the whole truth, whereas with most of the other witnesses one got the impression that they were holding something back. Where their evidence conflicts with that of Silibasiso we accept her evidence as being more creditworthy. She said that the accused's father and members of his family believed that the deceased was a wizard and had cast an evil spell over their family. A number of children of the accused's father had died whereas none of the deceased's children had died and, in addition, the children, both male and female, of the deceased were all married whereas the children of the accused's father were not. It was believed by the accused's father end at least some other members of his family that this series of misfortunes was due to a spell cast by the deceased. The accused said that he did not believe in witchcraft because he had never seen a wizard or the actions of a wizard. It was clearly established, however, that he said that he had killed the deceased because he was a wizard and also that when he hit Sebastian over the head he said it was because he did not want any witches or wizards at the village. He also told his father that he did not want witches or wizards and so had killed the deceased. It is difficult to believe that he would have said these words if he did not believe in witchcraft or wizards.

Dr Vermeulen, who has qualifications in psychiatry, has practised for 14 1/2 years full-time and 4 years part-time in the field of psychiatry and is a medical practitioner designated in terms of s 78 of the Mental Health Act 1976 (No. 23 of 1976) as having special knowledge of psychiatry, examined the accused on 8 and 28 December 1989. He had obtained an affidavit from the

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accused's father to the effect that the accused had no history of any mental disorder or defect and that he appeared in a normal state of health and his behaviour was normal on the evening and night of 14 October 1988 until he started assaulting the deceased's sister. As a result of his examination of the accused and the statements of the various witnesses that were shown to him, Dr Vermeulen concluded that the accused, at the time the offence was committed, was either drunk or in a state of diminished responsibility. If the latter, he was unable to determine what had caused the accused to be in that state because the accused claimed that he could not remember what had taken place and therefore his state of mind at the time could not be investigated. Dr Vermeulen was further of the opinion that the accused does not suffer from mental illness and was fit to stand trial. When Dr Vermeulen was advised that the accused had drunk only two mugs of beer on the night in question he said that that quantity would not have made the accused so drunk as to explain his behaviour. He therefore ruled out the possibility that drunkenness was a causative factor to explain the accused's behaviour.

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In *R* v *Mawonani* 1970 (1) RLR 41 (A); 1970 (3) SA 448 (RA) the Appellate Division considered the liability of an accused person who was not aware that he had stabbed another. The appellant in that case acted as a medium for the purpose of contacting the ancestral spirits of his family when advice was sough concerning family affairs. During such a ceremony, and whilst acting as a medium, he stabbed and killed his brother. A psychiatrist described the condition of the appellant as a state of hysterical dissociation. The evidence indicated that the appellant was not aware of what he was doing. At p 43 BEADLE CJ said -

> "The circumstances of this ceremony (ie consulting the spirit) taken in conjunction with the tribal beliefs, and with the appellant's own beliefs, were such as to induce in the appellant a condition which the psychiatrist called one of 'hysterical dissociation'. A person, while in this condition, would not know what he was doing."

The trial court there accepted that the appellant did not remember a thing about what had happened. It had also found that the appellant, when he committed the stabbing, was not aware of what he was doing. The case therefore, as BEADLE CJ expressed it, started off on the basis that, though the appellant committed the act charged, he was "not ... responsible according to law for his action" when he committed it. That, on the facts, was clearly established. However, to justify a special verdict in terms of s 28 of the Mental Health Act, 1976, it is necessary, as has been pointed out in numerous cases, for the court to find that the reason why the accused was not responsible in law for his actions when he committed the act was due to some mental disorder or defect.

The psychiatrist who gave evidence in *Mawonani*'s case was of the opinion that the appellant was not suffering from any mental abnormality whatever. At first, looking at the matter from a psychiatric point of view, he was not prepared to concede that the appellant, when he was in the state of hysterical dissociation, was suffering from any disability of the mind at all. Eventually, however, he was prepared to concede that, to a degree, the appellant was suffering at the time from some disability. In considering the question of when an accused person can be said not to be responsible in law for his actions because of some mental disorder or defect BEADLE CJ referred to *S* v *Mahlinza* 1967 (1) SA 408 (A) and *Attorney-General* v *Senekal* 1969 (2) RLR 368

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(A); 1969 (4) SA 478 (RA). At pp 45 and 46 of the judgment he said -

> "It appears clearly, from these two decisions, that the following principles emerge: The finding, in terms of s 31, of guilty of the act charged is a pure

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> finding of fact that the accused committed the act, and is not a finding which imputes any moral blame whatsoever to the accused. It is not a finding which contains any moral concept et all. It is nothing more than a finding that the accused did the act, and the special verdict that the accused was mentally disordered or defective at the time is not a verdict that he was insane when he committed the act. In this regard, the approach of our courts is somewhat different from the English courts. A special verdict of 'not guilty by reason of insanity'. It is nothing more than a verdict that the accused committed the act charged but was not at the time responsible in law for his actions because of some mental defect or disorder. It is further pointed out in these two cases that the mental defect need not be one of a permanent nature. It may be one of a fleeting nature, and one which may never be likely to reoccur; and, furthermore (this appears especially from the judgment in the *Senekal* case), the cause of the mental defect is not of significance. The court is concerned with the state of mind of the accused at the time he commits the act, and not particularly concerned with what caused that state of mind . . .
>
> If, therefore, an accused's lack of responsibility is due to a disability of his mind, then he may properly be regarded as having suffered from some mental disorder or defect, within the meaning of s 31 of the Act, when he committed the act charged.
>
> It seems to me that a person who is suffering from a state of hysterical dissociation and, because of this, is unable to appreciate the nature and qualities of his acts must be suffering at the time from some disability of the mind. His mind, as the psychiatrist has pointed out, is not functioning normally, and, whatever the reason for its not functioning normally may be, it is certainly a disabled mind while it is not functioning normally. I am satisfied, therefore, that, in this instance, there is no doubt that, when the appellant was in this state of hysterical dissociation, he was suffering from some disability of mind; and, that being so, he was entitled to a special verdict in terms of s 31 of the Act."

In the later case of *S* v *Sulpisio* AD-104-71 (not reported), the Appellate Division considered circumstances where a person may not be mentally disordered but yet suffered from a diminished sense of responsibility. At p 4 of the cyclostyled judgment BEADLE CJ said -

> "A man may not be certifiable under the Mental Disorders Act and he may not be mentally disordered within the meaning of the criminal law but,

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> nevertheless, his mentality may be that of a man who suffers from a diminished sense of responsibility and such a condition, while it may not be relevant in considering verdict, may be very relevant indeed in determining whether or not in a case such as this, a proper sentence should be the death sentence. If the court was satisfied that the appellant suffered from some unusual state of mind such as having a genuine persecution manta or that he was suffering from some diminished sense of responsibility at the time when he committed this offence, this would be a most important factor to be taken into consideration in deciding what the appropriate sentence should be."

This statement of the law has been quoted with approval in a number of cases - see *S* v *Makaka* S-24-87 (not reported); *S* v *Taanorwa* S-43-87 (not reported); *S* v *Chitiyo* S-83-87 (not yet reported -)*;* and *S* v *Chiwambutsa* S-113-87 (not yet reported). In *Chitiyo*'s case *supra*, at p 7

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of the cyclostyled judgment, DUBUTSHENA CJ said -

> "in a murder trial a successful plea of diminished responsibility reduces the crime of murder to one of culpable homicide. Besides, such personality change diminished the appellant's moral guilt, thus affording him a finding of extenuating circumstances."

The learned CHIEF JUSTICE then went on to refer to *S* v *Sibiya* 1984 (1) SA 91 (A) and the following statement by HOEXTER JA at p 97:

> "Looking both at the nature of the appellant's crimes and at Dr Ramsundhar's assessment of the appellant's mental condition I conclude that in the instant case it has been established on a balance of probabilities (1) that when he murdered the deceased the appellant, although he knew what he was doing, suffered from a mental defect which was substantial and (2) that such mental defect diminished his moral as opposed to his legal culpability for the crime. It follows, in my view, that the appellant discharged the *onus* of showing extenuating circumstances."

In that case, as HORSIER JA pointed out, the mental defect diminished the appellant's **moral** as opposed to his **legal** culpability for the crime. Thus the verdict of murder was appropriate but with extenuating circumstances. The crime was not reduced to culpable homicide.

In *Chiwambutsa*'s case *supra* at p 4 of the cyclostyled judgment DUBUTSHENA CJ said -

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

Clearly it was considered by the learned Chief Justice that a "sense of diminished responsibility" was a moral or personality defect short of insanity. Consequently a special verdict in terms of s 28 of the Mental Health Act 1976 would not be appropriate.

In *Mawanoni*'s case *supra* BEADLE CJ said that the evidence of the psychiatrist, as was so often the case with expert psychiatrists, was not always easy for a layman to appreciate and some aspects of his evidence, to a layman, certainly appeared somewhat conflicting and confusing. He accepted, however, the psychiatrist's opinion that at the time the appellant committed the offence in question he was in a condition called "hysterical dissociation". Although he found that that condition justified a special verdict in terms of s 28 of the Mental Health Act 1976, he did not indicate what "hysterical dissociation" actually meant and the scope or parameters of that condition. Dr Vermeulen conceded that psychiatry was not an exact science and was developing all the time. He said that the concept of "hysterical dissociation ", whatever it may mean or have meant, was now being replaced in the psychiatric field by the concept of diminished responsibility. He said that "hysterical dissociation" was a form of trance, the causes of which were self induced. In his opinion, the accused, at the time he stabbed his uncle, was in a state of diminished responsibility. This was probably caused by a combination of factors. The nature of the ceremony itself, with the drums beating, the singing and dancing in an enclosed area, could have induced a semi-trance-like state. In addition there were the emotional factors that could have worked on the accused's mind. The obsequies related to the

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death of his brother and there was a belief that that death could have been caused by a spelt cast by a wizard who was the deceased. There was also the belief that the deceased had caused other misfortunes for the family by casting a spell on the family. He said that in cases of diminished responsibility the person concerned acted as if he knew what was happening around him. He would not appear to be in a state of trance. Often he or she would have a motive for doing what had been done but would not be fully responsible for what he or she did. He pointed out that the accused was obviously in an aggressive frame

of mind at the time and behaved in a threatening manner towards a number of people. There was obviously an underlying emotion of anger. However, the accused knew at the time what he was doing and remembered that, at least for a few minutes, because he shouted out to Solomon that he had killed his father, the deceased, and why he had done so, and then a minute or two later the accused also told his own father that he had killed the deceased and why.

With regard to the accused's amnesia, Dr Vermeulen said that the condition could be genuine or simulated. It was impossible to say which. However, it was not uncommon in cases where someone who had committed murder for that person to be unable to face the memory of what he or she had had done. The memory would be automatically suppressed and a state of amnesia would develop. In this case I do not consider it necessary to make a finding as to whether or not the amnesia of the accused is genuine.

This case is distinguishable from *Mawanoni*'s case *supra*. There the appellant was on good terms with his brother whom he killed, there was no possible motive, the appellant was in a state of trance and he was not aware of what he had done. In this case the accused did have a motive to kill the deceased and he knew what he was doing and shortly thereafter proclaimed twice that he had killed the deceased, who was a wizard. The factors which induced the court to find that the accused was in a state of diminished responsibility at the time are as follows. He needlessly assaulted the deceased's sister and then the deceased's son Solomon before he killed the deceased. Then immediately after the stabbing of the deceased he asked the three men around the fire what their names were and he hit one of them over the head, without any reason, with the dagger. Then when his father questioned him he slapped him across the face. Thereafter he did not try to run away. He went off to his room to sleep.

The court considers that the accused was not mentally disordered or defective as defined in the Mental Health Act 1976 and therefore a special verdict in terms of s 28 of that Act is not appropriate. The state of diminished responsibility reduces the moral, not the legal liability of the accused for his act. Therefore it would not be appropriate to find the accused guilty of culpable homicide.

The verdict of the court is that the accused is guilty of murder with constructive intent but with extenuating circumstances.

Gambe, Chinyenze & Associates, accused's legal practitioners

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S v ARAB 1990 (1) ZLR 253 (SC)

Court **Supreme Court, Harare**

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

Criminal appeal 7 November 1989 & 12 April 1990

Flynote

Constitutional law - mandatory minimum sentences - not contrary to s 15 (1) of the Constitution if court allowed to find special reasons for not imposing minimum sentence

Legislation - Precious Stones Trade Act 1978 s 3 (2) - mandatory minimum sentence not contrary to s 15 (1) of Constitution - purpose for mandatory minimum sentence no longer applicable.

Headnote

The appellant was convicted of dealing in emeralds. No special reasons were found and the minimum sentence of 3 years' imprisonment was imposed. On appeal against both conviction and sentence, the appellant raised the argument that the mandatory minimum sentence under s 3 (2) of the Precious Stones Trade Act 1978 was unconstitutional, as being an inhuman and degrading punishment contrary to s 15 (1) of the Constitution.

Held, dismissing the appeal, that the provision imposing the mandatory minimum sentence was not inhuman and degrading, nor did it create a punishment which was disproportionate to the offence. The power of the trial court to consider and if appropriate find special reasons allowed for a sentence which was not necessarily disproportionate. Accordingly, the provision was not unconstitutional.

Held, further' that the need for the mandatory minimum sentence under the Precious Stones Trade Act 1978 should be re-examined.

DUMBUTSHENA CJ

Cases cited:

S v *Ncube & Ors* 1988 (2) SA 702 (ZS)

S v *Anand* S-205-88 (not yet reported)

Smith v *R* [1988] LRC (Const) 361 (SCC)

Pugsley v *Hunter* [1973] 1 WLR 578; [1973] 2 All ER 10 (QB)

S v C*hisiwa* 1981 ZLR 666 (HC)

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Da Costa Silva v *R* 1956 R & N 369 (SR); 1956 SA 173 (SR)

S v *Kamtande* 1983 (1) ZLR 302 (HC)

S v *A Juvenile* S-64-89 (not yet reported); 1990 (4) SA 151 (ZS)

S v *Mugangavari* 1984 (1) ZLR 80 (SC)

AP de Bourbon SC for the appellant

IJ Houston for the respondent

Judgment

Dumbutshena CJ: The appellant was convicted of contravening s 3(1) of the Precious Stones Trade Act No. 8 of 1978 as amended by s 3(2)(2a) of the Precious Stones Trade Amendment Act No. 1 of 1982. The State alleged that the appellant and his co-accused were dealing in or were in possession of rough and uncut emeralds weighing 47.22 carats and valued at $30 without a licence or permit. He was arrested trying to sell the emeralds to someone at a restaurant in Harare. His co-accused was acquitted. He was sentenced to a minimum mandatory sentence of three years' imprisonment with labour.

He now appeals against both conviction and sentence.

At the hearing of the appeal Mr *de Bourbon*, for the appellant, applied to amend the grounds of appeal against sentence by the addition of the following ground:

> "(g) the mandatory sentence of imprisonment imposed in terms of s 3(2) of the Precious Stones Trade Act 1978 is an inhuman or degrading punishment, and thus in conflict with s 15(1) of the Constitution of Zimbabwe, and therefore invalid and unenforceable."

Mr *Houston*, for the respondent, did not oppose the application which we duly allowed.

Section 3 of Act No. 8 of 1978 as amended reads as follows:

> "3. (1) Except as provided in this Act, no person shall deal in or possess precious stones unless he is -
>
> (a) a licensed dealer; or

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> (b) a permit holder; or
>
> (c) the holder of a mining location or a tributor who has lawfully recovered such precious stones in terms of any enactment; or
>
> (d) the employee or agent of any person referred to in paragraph (a), (b) or (c) who is authorised by his employer or principal to deal in or possess on his behalf precious stones;
>
> and deals in or possesses the precious stones in accordance with the provisions of this Act.
>
> (2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and, on conviction, shall be sentenced to imprisonment for a period of not less than three years and not more than five years and, in

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addition, be liable to a fine not exceeding ten thousand dollars, unless the convicted person satisfies the court that there are special reasons in the particular case, which reasons shall be recorded by the court, why such a sentence should not be imposed, in which event he shall be liable to a fine not exceeding five thousand dollars or imprisonment for a period not exceeding three years or to both such fine and such imprisonment."

The above ground of appeal raises a number of issues which are: (a) whether the imposition of a mandatory minimum sentence of imprisonment prescribed by s 3(2) is an inhuman or degrading punishment which is proscribed by s 15(1) of the Constitution; (b) whether the legislative restrictions on the power of the sentencing court, both with regard to "special reasons", and the inability to suspend the mandatory minimum sentence, result in a sentence which is so grossly disproportionate to the offence which the appellant has committed as to constitute an inhuman or degrading punishment; and (c) whether the offences created by s 3(1) of the Act being extremely wide in their nature and variety, do not all merit the imposition of a sentence of imprisonment for a minimum period of three years. The other issues raised by Mr *de Bourbon* while important in themselves, do not materially affect the determination of the constitutionality of s 3 of the Act. The question which this Court must answer is this: Is a sentence of three years' imprisonment with labour mandated by the Legislature contrary to the provisions of s 15(1) Of the Constitution? Section 15(1) of the Constitution reads:

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

In *S* v *Ncube & Ors* 1988 (2) SA 702 (ZSC) this Court decided that the whipping of an adult offender was inhuman or degrading punishment which

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infringed s 15(1) of the Constitution. At 715 G-H GUBBAY JA discussed the import and effect of s 15(1). He said:

"On its face s 15(1) is aimed primarily at the quality or nature of punishment. Certain types of punishment are acknowledged to be inherently inhuman and degrading. Those involving the rack, the thumb screw, the pillory, burning alive or at the stake, prolonged periods of solitary confinement and starvation, fall unquestionably into this category. But s 15(1) is not confied to punishments which are in their nature inhuman, or degrading. It also extends to punishments which are 'grossly disproportionate; those which are inhuman or degrading in their disproportionality to the seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty - the punishment being so excessive as to shock or outrage contemporary standards of decency."

In *S* v *Award*, S-205-88, (as yet unreported), a case concerning the contravention of subs (1) of s 3 as read with subs (2) of s 3 of the Precious Stones Trade Act this Court did not come to a definitive opinion on the constitutionality of s 3(2) of the Precious Stones Trade Act. Being of the view that there were special reasons we set aside the mandatory minimum sentence of three years and imposed a sentence of a fine. I, however, had occasion to say at 5-6:

"The question to be answered in this appeal, that is if it is necessary to do so, is whether s 3(2) is in violation of s 15(1) of the Constitution. As I see it a sentence of three years' imprisonment with labour in a country in which a sentence of imprisonment is not generally held to be inhuman or degrading cannot, standing alone, be said to violate s 15(1) of the Constitution. What Mr de Bourbon is challenging, however, is not simply the punishment of three years imposed by the magistrate but the fact that it is a mandatory sentence. Because it is mandatory, the court which imposes it has no discretion. It is the absence of the exercise of a judicial discretion in sentencing the

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appellant in this case that tends to suggest that the mandatory punishment of three years prescribed by s 3(2) may be an inhuman or degrading punishment. In imposing such a sentence the judicial officer is not permitted to discriminate between a person who has committed a minor infringement of s 3(1) and one who has been convicted of a serious contravention of the section. It is the arbitrary manner in which a mandatory sentence is imposed that may offend against the prohibition in s 15(1) of the Constitution."

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In *S v Anand supra* passing reference was made to the decision of the Canadian Supreme Court in *Smith v R* [1988] LRC (Const) 361. In that case the appellant pleaded guilty to importing seven and a half ounces of cocaine into Canada contrary to s 5(1) of the Narcotic control Act. The constitutionality of a mandatory minimum sentence of seven years' imprisonment prescribed by s5(2) of the Narcotic Control Act for contravening s 5(1) of that Act was challenged. Section S of the Narcotic control Act reads as follows:

"(1) Except as authorised by this Act or the regulations, no person shall import into Canada or export from Canada any narcotic

(2) Every person who violates subsection (1) is guilty of an indictable offence and is liable to imprisonment for life but not less than seven years."

In *S v Anand supra* at p 7 I pointed out that s 3(2) of the Precious Stones Trade Act is different from s 5(2) of the Canadian Narcotic control Act because s 5(2) leaves no room for the Court's exercise of its judicial discretion whereas s 3(2) of the Precious Stones Trade Act does. It allows for the exercise by the court of its juducial discretion upon a finding of special reasons. The process of evaluating factors that constitute special reasons before arriving at the decision that there exist special reasons or that there are no special reasons arising either out of the commission of the offence or peculiar to the offender requires the making of a value judgment. The court has the liberty to think as it sees fit within the limits set by the evidence before it. This is another marked difference between our s 3(2) and s 5(2) of the Canadian Narcotic control Act which does not permit the court the opportunity to make a value judgment.

Upon a finding of special reasons the court can impose any sentence it considers appropriate after taking into account both aggravating and mitigatory factors including the value of the emeralds and the accused's antecedents. If the court finds no special reasons it must impose the mandatory penalty whether or not the uncut emeralds are of no value. As I perceive it the purpose and intention of the Legislature was not to punish by the imposition of a mandatory sentence every person who contravenes s 3(1) of the Act.

It seems to me that the fact that a man picks up what he thinks is a green stone, which unknown to him turns out to be an uncut emerald and is found in possession of it by the police, should be sufficient to constitute a "special reason". For instance lack of knowledge about the amount of spirit one is

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drinking, either from inexperience or deliberate "lacing" was held to amount to a "special

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reason" in *Pugsley v Hunter* [1973] 1 WLR 579 at 584H.

In this case, however, no special reasons exist. Counsel are agreed that a sentence of three years' imprisonment is *per se* not an inhuman or degrading punishment. Mr *de Bourbon* did say, however, that because Parliament mandates a mandatory minimum sentence that sentence is rendered unconstitutional. I do not agree. He further submitted that he accepted that a mandatory minimum sentence is not unconstitutional simply on the ground that some element of discretion of the sentencing court has been removed. In the instant case through subsection (2) of s 3 the Legislature has to some extent removed the court's sentencing discretion. This is so once the court finds that no special reasons exist. - It must be accepted that Parliament has power to fetter in some cases the discretion of the sentencing court. For instance it fixes the maximum sentence beyond which a sentencing court cannot exceed. The presiding magistrate or judge may wish to impose a lengthier term of imprisonment than that prescribed by the Legislature but cannot do so because his sentencing jurisdiction is limited.

Mr *de Bourbon* urged the court to give a liberal interpretation to the concept of special reasons such as is given to the concept of extenuating circumstances in murder cases. He contended that in its present form the concept of special reasons undermines the Court's sentencing discretion. I do not believe that the Courts of this country can disregard the parameters set out in numerous judgments dealing with special reasons and special circumstances. See *S v Chisiwa* 1981 ZLR 666; *Da Costa Silva v Regina* 1956 R & N 369; *S v Kamtande* 1983 (1) ZLR 302 (HC).

It is true that a mandatory sentence without more cuts across the traditional consideration of the exercise by the court of its sentencing discretion. While this is correct in circumstances in which a court finds no "special reasons" it is not correct of a case in which the Court finds special reasons. In my view the Legislature intended to retain to some extent the position prevailing before the enactment of the Precious Stones Trade Amendment Act No. 1 of 1982 while at the same time removing the court's sentencing discretion in those cases where no special reasons existed which are "out of the ordinary, either in their extent or their nature" and which "arise from the commission of the offence, or the facts and conditions affecting the offender" see *S* v *Chisiwa supra* at 671A-B.

Section 3(2) of the Precious Stones Trade Act No. 8 of 1978 before the

amendment to s 3(2) by the Precious Stones Trade Amendment Act No. 1 of 1982 did not restrict the Court's sentencing discretion. A person who contravened subs (1) of s 3 was liable to a fine not exceeding ten thousand dollars or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment. That was before the Legislature became aware of the increase in the unlawful dealing in emeralds.

The amended s 3(2) was introduced because it was the intention of the Legislature to stamp out the increase in the dealing in and possession of precious stones by people who were not licensed as dealers and who were not permit holders. The Legislature introduced in subs (2) of

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s 3 of Act No. 1 of 1982 the mandatory minimum sentence of three years and retained the maximum sentence of five years and the maximum fine of ten thousand dollars contained in the amended subs (2). Because of the increase in the illicit dealing in precious stones especially Sandawana emeralds the Legislature to some extent deprived the Courts of their sentencing discretion by prescribing a mandatory minimum sentence of three years. The first pert of subs (2) of s 3 makes this clear. It says:

> "Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and, on conviction, shall be sentenced to imprisonment for a period of not less than three years and not more than five years ..."

It is clear, however, that it was not the intention of the Legislature to prescribe a minimum sentence of three years for every contravention of the subsection. The Legislature, in order to prevent a certain category of offender from suffering the unmitigated and rigorous sentence of three years, ordained that those, for want of a better expression, with sufficiently unusual reasons to justify the imposition of a lesser sentence should not suffer the mandatory minimum sentence. It said in the second part of subs (2) that:

> "... unless the convicted person satisfies the court that there are special reasons in the particular case, which reasons shall be recorded by the court, why such a sentence should not be imposed, in which event he shall be liable to a fine not exceeding five thousand dollars or imprisonment for a period not exceeding three years or to both such fine and such imprisonment."

Mr *de Bourbon further* contended that the mandatory minimum sentence of three years was grossly disproportionate to other offences which are more

prevalent, and which have a far greater adverse effect on the country. He said the crime of possessing rough and uncut emeralds is at best economic, but in a case where the value of the emeralds was only $30 the effect on the overall economy is negligible. In my view the Legislature is in a better position to determine the class of crimes which endanger the economic fabric of the nation and the extent of the damage caused by that particular criminal activity.

Is the mandatory minimum sentence of three years prescribed by s 3(2) so disproportionate to the seriousness of the offence as to be an inhuman or degrading punishment or even cruel and unusual? Does it violate s 15(1) of the Constitution? LAMER J in *Smith* v *R supra* laid down in his judgment the criterion to be applied in order to determine whether a punishment was cruel end unusual within the meaning of s 12 of the Charter (Canada). He set down the criterion which determines whether punishment prescribed was so excessive as to outrage standards of decency. He said at 380a-c:

> "... though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.
>
> In imposing a sentence of imprisonment, the judge will assess the circumstances of the case in order to arrive at an appropriate sentence. The test for review under s 12 of the Charter is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. Section 12 will only be infringed where

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the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate."

The minimum penalty prescribed by s 3(2) can only be inhuman or degrading punishment if it is grossly disproportionate. I do not believe that a sentence of three years can, in a country where greater terms of imprisonment are generally imposed, be categorised as grossly disproportionate especially when regard is had to the nature of the crime created by s 3(1) and the mischief sought to be remedied. Of course if a sentence is grossly disproportionate it offends against society's standards of decency and infringes s 15(1) of the Constitution. A minimum mandatory sentence of three years' imprisonment is not in and of itself inhuman or degrading or a cruel and unusual punishment.

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It cannot generally be said to be grossly disproportionate when one considers the prohibition placed by s 3(1) against the unlawful dealing in or possession of precious stones.

The position would be different had the Legislature not amended subs (2) of s 3 of the Emergency Powers (Maintenance of Law and Order) (Amendment) Regulations 1981 (No 3), Statutory Instrument 219 Of 1981 which imposed for the first time the minimum sentence of three years. Subsection (2) of s 3 of Statutory Instrument 291 reads:

"(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and on conviction, shall be sentenced to imprisonment fore period of not less than three years and not more than five years and, in addition, be liable to a fine not exceeding ten thousand dollars."

The Legislature in its wisdom mitigated the harshness of such a minimum mandatory sentence by introducing the element of special reasons. In 1982 Parliament enacted subs (2) of s 3 of Act No. 1 of 1982. This amendment makes it virtually impossible for a sentence to be so unfit haying regard to the offence and the offender so as to be grossly disproportionate and violative of s 15(1) of the Constitution.

It is my view that a mandatory minimum sentence of three years is not grossly disproportionate especially having regard "to the range of offences, the variety of ways the offence may be committed, and the great disparity of the sentence with that imposed on others who have committed offences identical in gravity and nature." - per LAMER J in *Smith* v *R supra* at 370C. I agree with WILSON J who, in *Smith* v *R supra* said at 403b of her judgment:

"And by that I mean that they are cruel and unusual in their disproportionality in that no-one, not the offender and not the public could possibly have thought that that particular accused's offence would attract such a penalty. It was unexpected and unanticipated in its severity either by him or by them. It shocked the communal conscience. It was 'unusual' because of its extreme nature."

While it is true that a punishment which is not *per se* inhuman and degrading may become so if it is excessive or disproportionate so as to outrage society's standards of decency, I find a sentence of three years' imprisonment neither *per se* inhuman and degrading nor disproportionate.

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DUMBUTSHENA CJ

How then is proportionality to be assessed? Is it to be assessed on the basis of each case that comes before the court? Where the constitutionality of s 3(2) is challenged on the ground of proportionality it must be assessed generally. The court's ruling must apply to every case brought for sentence in terms of s 3(2). In this respect I agree with the approach of McINTYRE J in his dissent in *Smith* v *R supra* at 391 d-h of his judgment. The learned Supreme Court judge said:

> "The test of proportionality must be applied generally and not on an individual basis. The question is not whether the sentence is too severe, having regard to the particular circumstances of offender 'A', but whether it is cruel and unusual, an outrage to standards of decency, having regard to the nature and quality of the offence committed, and therefore too severe for any person committing the same offence. This approach is necessary, in my view, if we are to recognise and give effect to the very special nature of the prohibition contained in s 12 of the Charter. Constitutional effect to the prohibition in s 12 cannot be given if its application is to vary from case to case end person to person. What is unconstitutional for one must be unconstitutional for all when charged with the same offence. The constitutional question posed in this case, in the absence of a uniform application of the prohibition, could only be answered: 'sometimes yes, and sometimes no'. This would not provide an acceptable basis for constitutional determination. Section 12 establishes an outer limit to the range of permissible sentences in our society; it was not intended - and should not be used - as a device by which every sentence will be screened and reviewed on appeal and fitted to the peculiar circumstances of individual offenders. This desirable purpose may be served in the actual sentencing process by the exercise of judicial discretion within the wide range of sentencing options not coming within the s 12 prohibition. As I have tried to show, s 12 was not designed or intended to fit the individual sentencing requirement for each individual; it was intended as an absolute right to all to be protected from the degree of excessive punishment and treatment which would outrage standards of decency."

This is the approach followed and applied by this Court in relation to s 15(1) of the Constitution in *S* v *Ncube & Ors supra*, and *A Juvenile* v *S* Supreme Court Judgment No. 64/89 (as yet not reported) *(2). It would be wrong to decide the unconstitutionality of s 3(2) on an individual basis, that is, as it applies to each case and each offender.

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I cannot say with any conviction that the mandatory minimum sentence prescribed by s 3(2) is arbitrarily imposed because the court in the exercise of its sentencing discretion has to find out whether in a given case there exist special reasons. And if they do exist, albeit the value of the precious stones may be high or low, the minimum sentence of three years may not be imposed.

It is for the reasons stated above that in my judgment three years is not grossly disproportionate as to offend against s 15(1) of the Constitution.

I would dismiss the appeal against conviction and sentence.

Having dismissed the appeal it is proper to give a studied comment on the usefulness of the mandatory minimum sentence imposed on people convicted of contravening s 3 of the Precious Stones Trade Act, as amended. For some time now this Court has agonised over the appropriateness of the minimum mandatory sentence of three years' imprisonment which the Courts have to impose in the absence of a finding, of special reasons, on those who are convicted of possession of and dealing in precious stones without a licence or a permit.

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After this appeal was argued and in the light of the concession, that there were no special reasons, made by Mr *de Bourbon*, the Court decided to find out the numbers of people who are prosecuted and convicted for contravening s 3 of Act No. 8 of 1978. The Attorney-General kindly agreed to research the figures for us. We are indebted to him and to those who personally carried out the research and compiled the figures. We regret the inconvenience caused to the appellant by the delay in the delivery of this judgment. We hope, therefore, that the suggestions that we are going to make, if accepted by the Executive and the Legislature, will benefit those who, in the future, will fall foul of s 3. We publish below a schedule of the number of people prosecuted and convicted of illegal possession of and dealing in emeralds from 1981 to 1989. Here are the figures: -

HARARE & MASHONALAND PROVINCES

Year	Number of Convicted
1981	17
1982	15
1983	12
1984	9
1985	10

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1986	13
1987	7
1988	8
1989	4
Total	95

MATABLELAND NORTH & SOUTH PROVINCES

Year	Number of Convicted
1981	100
1982	35
1983	43
1984	18
1985	25

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1986	17
1987	17
1988	19
1989	7
Total	281

MIDLANDS PROVINCE

Year	Number of Convicted
1981	35
1982	26
1983	50
1984	82
1985	5
1986	16
1987	4
1988	4
1989	2
Total	224

MANICALAND PROVINCE

Year	Number of convicted
1981	-
1982	-
1983	-
1984	-
1985	-
1986	-

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1987	4
1988	-
1989	-
Total	4

MASVINGO PROVINCE

Year	Number of Convicted
1981	6
1982	6
1983	2
1984	3
1985	3
1986	6
1987	6
1988	1
1989	1
Total	35
GRAND TOTALS	639

The figures show a progressive decline. As judges of this Court we ask ourselves whether, in the circumstances now prevailing, the minimum mandatory sentence of three years' imprisonment for this offence has not outlived its purpose. We do not question Parliament's intendment when the provisions of s 3 were enacted. The Legislature intended no doubt to prohibit sternly the illegal possession of and dealing in emeralds without a licence or permit. The prohibition was intended to put an end to the economic drain caused to the country by illicit dealing in precious stones. The offence was then prevalent. It is no longer prevalent. The above figures do show that the numbers of people prosecuted and convicted for contravening s 3 have progressively declined. This offence is now less prevalent than other offences of a similar and an economic nature.

It might be proper for the Legislature to amend s 3 and to leave the sentencing process to the discretion of the Courts. The Courts will, in the exercise of their sentencing discretion, deal severely with persons who commit serious infringements to s 3. We as a court can only suggest. The legislative process is not ours to determine.

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McNALLY JA

Gubbay JA: I agree.

Manyarara JA: I agree.

Korsah JA: I agree.

McNally JA: I agree that on the facts of this case the mandatory minimum sentence was correctly imposed. I agree that the constitutional argument fails. I agree also with the recommendation that the mandatory minimum sentence be reconsidered, not only because of the significant decline in the number of cases, but also because many of those convicted were in possession of worthless stones which were only in a technical sense emeralds. The axe, it seems to me, has been falling largely on the wrong necks.

I wish merely to record my respectful dissent on the question of the role of value in the assessment of special reasons. We are dealing with legislation designed to punish and prevent economic sabotage. In these circumstances, it seems to me wrong to impose a mandatory minimum sentence on persons found in possession of pieces of rock, technically emeralds, which are officially found to be "of no commercial value".

I appreciate that this is a minority view - see *S v Mugangavari* 1984 (1) ZLR 80. But I would not wish it to be thought that my agreement in the present decision involves a departure from my previously stated opinion.

Muvingi & Muchaya, appellant's legal practitioners.

S v CHIDEME 1990 (1) ZLR 267 (HC)

Court **High Court, Harare**

Smith J

Criminal review 25 April 1990

Flynote

Criminal procedure - charge - Mines and Minerals Act [Chapter 165] s 408 - correct offence is theft.

Criminal procedure (sentenced - prohibition from entering precious metals mining area - only permissible for contravention of certain sections of Gold Trade Act [Chapter 164].

Headnote

The accused stole some gold concentrates from the mine where he was employed. He was convicted of contravening s 408 of the Mines and Minerals Act [*Chapter 165*], fined and prohibited from entering any precious metals mining area for 5 years. On automatic review:

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Held, that s 408 of the Mines and Minerals Act [*Chapter 165*] does not create an offence, but allows an offender to be charged with theft. Charge accordingly altered to one of theft.

Held, further, that an order prohibiting a convicted person from entering a precious metals mining area follows automatically upon conviction for certain offences under the Gold Trade Act [*Chapter 164*]. It cannot be imposed upon conviction for theft or of a contravention of the Mines and Minerals Act [*Chapter 165*].

Judgment

Smith J: The accused was employed at a gold mine as a mineworker and as nigh/watchman. Early one morning he took some gold concentrates from the mill and hid them in the bush. He was seen and was arrested. Subsequently he was charged with contravening s 408 of the Mines and Minerals

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SMITH J

Act [*Chapter 165*]. He pleaded guilty and was convicted and sentenced to pay a fine of $400. He was also ordered not to enter any precious metals mining area within the next 5 years.

Section 408 of the Mines and Minerals Act [*Chapter 165*] reads as follows:

> "408. Any person who breaks, severs or removes any mineral from any mining location, reef or deposit, or who takes, removes or conceals any mineral, slags, slimes, amalgam, residues, tailings or concentrates, the product of any mining location, reef or deposit, with intent to deprive the lawful owner or holder thereof, shall be guilty of theft and liable to be prosecuted and punished accordingly."

That section does not crease an offence. It provides that any person who does any of the things specified therein with intent to deprive the lawful owner or holder of the thing in question shall be guilty of theft and liable to be prosecuted accordingly. Consequently, in this case the accused should have been charged wide theft and not with contravening s 408 of the Act.

Having regard to the value of the gold concentrates ($178,80) and the fact that the accused is a first offender aged 23 years, the sentence imposed by the magistrate is appropriate. However, his order that the accused is prohibited from entering any precious metals mining area for 5 years is invalid. The Mines and Minerals Act [*Chapter 165*] does not authorize the making of such an order. Section 25 of the Gold Trade Act [*Chapter 164*] provides that if any person is convicted of an offence in terms of certain specified sections of that Act the conviction shall have the effect of prohibiting that person from entering or being upon any precious metals mining location for a period of 5 years unless the court orders otherwise. Even that section, therefore, does not authorise the making of an order of prohibition by the court - the prohibition follows automatically upon conviction unless the court orders otherwise. Theft of gold is not an offence which brings into effect the said prohibition - the person must be convicted of a contravention of the particular specified section of the Gold Trade Act [*Chapter 164*]. The accused must have possessed the gold when he took it from the mill. Accordingly be could have been charged with contravening s 3(1) of the Gold Trade Act [*Chapter 164*]. Had he been so charged and convicted he would automatically have been prohibited from entering a precious metals mining location for 5 years unless the court ordered otherwise. However, he was not

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charged with contravening the said s 3(1).

SMITH J

There will be no prejudice to the accused if the charge is amended so as to refer to a charge of theft. The charge is amended by the deletion of the words "contravening section 408 of the Mines and Minerals Act" and substitution of "theft as defined in section 408 of the Mines and Minerals Act".

The sentence of a fine of $400 is confirmed but the order that the accused shall not enter any previous metals mining area for 5 years is set aside.

Reynolds J: I agree.

S v MBANO 1990 (1) ZLR 270 (HC)

Court **High Court, Harare**

Mtambanengwe J

Criminal review

25 April 1990

Flynote

Criminal law - Parks and Wild Life Act 1975 s 47(2) (a) - hunting - no offence to follow and retrieve game lawfully shot from neighbouring land.

Criminal procedure (sentence) - special reasons - Firearms Act [Chapter 308] s5(2) - no sinister purpose - delay.

Headnote

The accused shot a kudu with permission on his uncle's farm. The kudu crossed into a neighbouring farm where the accused found it. The accused was also in unlawful possession of a rifle. On review:

Held, that although following after game or searching for game constitutes 'hunting', a person who lawfully shoots game may retrieve it from a neighbouring farm without committing an offence.

Held, further, that since the accused had permission to hunt and exhibited no sinister purpose in using the firearm or having it in his possession, he had established special reasons for the imposition of a fine. Furthermore, because of the delays in dealing with the matter whilst the accused was in custody, the whole of the fine should be suspended.

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Cases cited:

S v *Chalwe* HH-47-88 (not reported)

R v *Carter* 1954 (2) SA 371 (E)

S v *Chisiwa* 1981 ZLR 666 (HC)

S v *May* HB-21-82 (not reported)

S v *Vundhla* HB-63-82 (not reported)

MTAMBANENGWE J

S v *Ndebele* HB-71-82 (not reported)

S v *Mhiripiri* HH-163-88 (not reported)

Judgment

Mtambanengwe J: The accused in this master was referred to the High Court for sentence. The facts of the matters on which he was charged and convicted are briefly stated in the Attorney-General's minute dated 29 May 1989, as follows:

> "I attended before His Lordship Mr Justice Mtambanengwe in the High Court in Harare on 26 May 1989. I indicated that the State did not support the conviction in respect of an offence contrary to s 47(2)(a) of the Parks and Wild Life Act 1975. Further, that the State conceded that special reasons existed in respect of an offence allegedly committed contrary to s 5(2)(b)(i) of the Firearms Act (and not s 5(2)(a) of the Act as pleaded in the charge-sheet). His Lordship ordered that I submit a review opinion and, hence, my reasons follow.
>
> Mbano was charged with an offence contrary to s 47(2)(a) as read with s 115(1)(a) of the Perks and Wild Life Act 1975. In short, it was alleged that he hunted various animals near Kadoma farming area without the permission of the owner or occupier of Brompton Farm. He was also charged with an offence contrary to s 5(2)(a) of the Firearms Act [*Chapter 308*]. In short, it was alleged that he was in possession of a 303 rifle and three rounds of 303 ammunition without holding the requisite firearm certificate. (As a matter of law, the styling of the charge was incorrect and ought to have alleged a contravention of s 5(2)(b)(i) of the Act: see *S* v *Chalwe* HH-47-88*).*
>
> These matters (and others not relevant to this opinion proceeded to trial on 1 August 1985.
>
> A perusal of the judgment of the learned magistrate reveals that the State and the accused were agreed that the accused had the permission of his uncle to bunion his uncle's farm. However, the kudu which was shot by G the accused on his uncle's farm crossed the boundary of that farm and was found by the accused in Brompton Range. The learned magistrate held:
>
> > 'That very act of following after it, or searching for it, constitutes "hunting" on a proper interpretation of the word "hunt".'
>
> Transcript: Page 51, lines 18-20.

MTAMBANENGWE J

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I quite agree. This dictum is in accordance with *R* v *Carter* 1954 (2) SA 371 (E). However, the searching or 'flushing out' of the kudu took place not only on the uncle's farm but in Brompton Range **after** the kudu was shot. In *Criminal Law of Scotland*, GH Gordon, the learned author suggests at p 1031-2 of this text:

> 'It is not a contravention of the Act to enter on land in order to retrieve game lawfully shot which has crossed into that land and there fallen either dead or so seriously wounded as to be unable to escape further.'

Having regard to this authority, it may therefore he sensibly submitted that Mbano was entitle to pursue the kudu beyond his uncle's farm onto Brompton Range without being in contravention of the Parks and Wild Life Act. In a civil sense, he may have committed a trespass but the Parks and Wild Life Act would appear to sanction his behaviour in this instance.

In respect of the offence under the Firearms Act, the operating permission given to Mbano by his uncle may be regarded as a special reason having regard to the dictum of SQUIRES J in *S* v *Chisiwa* 1981 ZLR 666 (HC) at 671. See also *S* v *May* HB-21-82; *S* v *Vundhla* HB-63-82; S v *Ndebele* HB-71-82; *S* v *Mhiripiri* HH-163-88. The accused exhibited no sinister purpose in using the firearm or having it in his possession. Therefore, he ought to be entitled to the saving clause which 'special reasons' must afford him.

In conclusion, therefore, the conviction in respect of the offence in contravention of the Parks and Wild Life Act ought to be quashed. In respect of a re-styled offence in contravention of the Firearms Act, the accused ought to be granted the option of a fine.

Lastly, the within transfer of this matter pursuant to s 58(2) of the Magistrates Court Act [*Chapter 187*] requires rectification. Please find enclosed the appropriate notice."

The accused's trial took place on 1 August 1985 and when the matter came before me on 26 May 1989 it appeared that he had been in custody since his trial date. Since the Attorney-General had made the above indications, to avoid further prejudice to the accused, I granted him free bail.

The long delay before this matter came up before me and thereafter (though in the latter case the accused was out on bail are considerations which I feel

MTAMBANENGWE J

I must properly take into account in acting on the Attorney-General's opinion with which I agree fully). The accused has been more than adequately punished by the period he remained in custody pending sentence and I feel the interests of justice will not be served by any further effective sentence.

In the result the conviction in relation to the offence contrary to s 42(2)(a) of the Parks and Wild Life Act 1975 is quashed. The conviction in relation to the contravention of s 5(2)(b)(i) of the Firearms Act [*Chapter 308*] (as accordingly amended) is confirmed and the accused is fined $200,00 in default of payment 50 days i w l. All of this is however suspended for 3 years on condition that the accused is not convicted of any offence involving contravention of the Firearms Act [*Chapter 308*] committed within the period of suspension.

Greenland J: I agree

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MUNICIPALITY OF KWEKWE v MULLINS & ANOR 1990 (1) ZLR 274 (HC)

Court **High Court, Harare**

Greenland J

15 January 1989 & 9 May 1990

Flynote

Statutes - Arbitration Act [Chapter 12] - s 12 (1) - misconduct - meaning of - means misconduct in the ordinary sense - power of court to set aside award - court will set aside award if the arbitrator misconstrues the submission - award will not be set aside if the argument is misconducted.

Headnote

Section 12(1) of the Arbitration Act [*Chapter 12*] is concerned with misconduct in the ordinary sense; that is misconduct to which moral turpitude attaches or which public policy or notions of justice will not sanction. It cannot encompass a situation where an arbitrator arrives at an award *bona fide*, after procedural observance of the Act and adherence to the rules of natural justice.

If an arbitrator misconstrues his task, as for instance misinterpreting a phrase in the submission, then, in effect, there has been no arbitration and purported award must be set aside (*dicta in Cone Textiles (Pvt) Ltd* v *May & Anor* HH-883-87 *per* BLACKIE J followed). If, however, an arbitrator misconstrues arguments which are addressed to him, this will not be fatal to the arbitration.

Cases cited:

Cone Textiles (Pvt) Ltd v *Redgment & Ors* 1983 (1) ZLR 88 (SC)

Clark v *African Guarantee and indemnity Co Ltd* 1915 CPD 68

Dickenson & Brown v *Fisher's Executors* 1915 AD 166

Abrahams v *Derbyshire Stone (Pvt) J Ltd & Anor* 1988 (1) ZLR 418 (HC)

Monticello (Pvt) Ltd v *Edgerton (2)* 1981 ZLR 561 (SC)

Cone Textiles (Pvt) Ltd v *Ayers & Anor* GS-16-80 (unreported)

Schneier and London Ltd and Ors v *Gluckmann (1)* 1925 WLD 42

GREENLAND J

Donner v *Ehrlich* 1928 WLD 159

Cone Textiles (Pvt) Ltd v *May & Anor* HH-683-87 (unreported)

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Russell NO & Loveday NO v *Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A)

MT O'Meara, with him *C Mutzuris,* for the applicant

ANH Eastwood for the respondents.

Judgment

Greenland J: In this case applicant, "the Municipality", seeks to have an award by first respondent, "the arbitrator", in favour of second respondent, "the company" set aside.

The relevant background is that the municipality and the company entered into a written contract in terms of which the latter undertook to lay certain pipes to be supplied by the former. The contract was subsequently cancelled before fulfilment. The parties were unable to agree as to the extent, if any, the company was entitled to be compensated in respect of aspects arising prior to cancellation.

They referred five aspects to arbitration. These were:

(i) **Standing time** - payment of $570 099,78 in respect of time, ie periods, when the companies machinery and labour stood idle and work could not proceed because the municipality either failed to supply pipes or supplied defective pipes;

(ii) **Disruption** - payment of $288 087 in respect of extra expenses incurred by the company in having to work simultaneously on three different sections of the pipeline as a result of the fault particularised in (i) above;

(iii) **Penalty** - a refund of a penalty calculated at $367,50 per day withheld by applicant and a determination of what penalty, if any, applicant was entitled to withhold;

(iv) **Day Works** - payment of $38 816 in respect of work done over and above that called for in term s of the contract such extra work having been occasioned by unforeseen difficulties and circumstances;

(v) **Interest -** payment of interest on the sums determined or awarded in respect of the above claims.

The arbitrator, on 28 November 1984 made the following awards:

GREENLAND J

(i) **Standing time** - $37 866

broken down

(a)	20/3/81 - 11/7/81 ($171 883,35 claimed)	$23 545
(b)	11/7/81 - 1/3/82 ($299 875 claimed)	8 751

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(c) 1/3/82 - 6/9/82 ($263 890 claimed) 5 569

Total award $37 866

(ii) **Disruption** - $30 510 of the $288 087 claimed.

(iii) **Penalty** - $68 722,50 to be refunded from the amount deducted as penalties by the Municipality.

(iv) **Day Works -** No award in respect of the $38 815 claimed.

(v) **Interest -** interest on the sums so awarded at the rate stipulated in terms of "pare 62 (5) of the General Conditions of the Contract".

This paragraph stipulates that such interest shall be at: "minimum commercial bank rate for overdrafts plus 2% per annum" on all overdue payments.

Applicant submits that, save in respect of aspect (iv) above (Day Works), the other four awards be set aside for the reason that the arbitrator misconducted the proceedings. The awards are thus susceptible to being set aside, so the submission goes, because of the provisions of s 12(2) of the Arbitration Act [*Chapter 12*], which reads:

> "12. (1) The Court may at any time, upon motion, remove any arbitrator or umpire against whom a just ground or recusation is found to exist or who has misconducted the proceedings in connexion with the arbitration.
>
> (2) Where an arbitrator or umpire has misconducted the proceedings or en arbitration or award has been improperly procured, the Court may set the award aside and may award costs against any such arbitrator or umpire personally."

Looking at the section as a whole and at subs (2) in particular and giving due weight to the reference to recusation and the words "award ... improperly procured ...", it is clear to me that the section is concerned with misconduct in the ordinary or usual sense, ie conduct to which moral turpitude attaches or which public policy or notions of justice will not sanction. It simply cannot encompass a situation where an arbitrator arrives at an award *bona fide,* on evidence, after procedural observance of the Act *supra* and adherence to the rules of natural justice.

This would appear to be the effect of giving the words employed in the section

their ordinary meaning after recognising that the words, so employed, are unambiguous. Not surprisingly the above interpretation has been arrived at by our Supreme Court and is therefore our law. To quote from *Cone Textiles* (Pvt) *Ltd* v *Redgment & Ors* 1983 (1) ZLR 38 (SC) at 92-93:

> "There was little dispute as to the law. The starting point is that the parties have chosen to go to arbitration instead of resorting to the Courts, they have specifically selected the personnel of the tribunal, and they have agreed that that award shall be final and binding: *Clark* v *African Guarantee and Indemnity Co Ltd* 1915 CPD 68 at 77. It is for these reasons that a court will always be most reluctant to interfere with the award of an arbitrator . . . It is therefore safe to follow the line that has been established by a case such as *Dickenson & Brown* v *Fisher's*

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Executors 1915 AD 166. In the words of SOLOMON JA at p 176:

> ' Now if the word "misconduct" is to be considered 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 SCR, at p 34), 'the mistake is so gross or E 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 really be 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 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.'

And in *Clark v African Guarantee and indemnity Co Ltd supra* (coincidentally decided on precisely the same date as *Dickenson*'s case *supra* GARDINER J said at p 78:

GREENLAND J

> 'No case in our Courts was quoted in argument in which an award was actually set aside on the ground that there was no evidence to support the arbitrator's finding, and I am satisfied that, before the Court would interfere, it would be necessary to show that the lack of evidence established a total want of that judicial capacity which is required even of an ordinary fair-minded layman appointed to adjudicate by the parties to a dispute. If the arbitrator has taken evidence and has fairly considered it, the Court will not set aside the conclusion he has come to upon that evidence, because he has drawn inferences which, though possible, are not acceptable to the Court.'

See too McKenzie *NO* v *Basha* 1951 (3) SA 783 (N)."

The approach in *Cone supra* is binding on me and there is simply no room for countenancing a "wider" meaning to the word "misconduct" employed in s 12 *supra*. Compare the approach of REYNOLDS J in *Abrahams* v *Derbyshire Stone (Pvt) Ltd & Anor* 1988 (1) ZLR 418 (HC).

The first step is to recognise that the arbitrator was a highly qualified and skilled engineer. This was common cause. So too was the fact that he was therefore supremely qualified to adjudicate on this matter which requires specialist knowledge and skill for a proper appreciation of the facts, factors, aspects and circumstances pertaining which knowledge and skill this Court does not possess.

Secondly it is a fact that the arbitrator made a lengthy investigation of the matter raised. The transcript of the proceedings runs to over 1013 pages. As said he adhered to the provisions of the Act *supra* and was faithful to the rules of natural justice.

These two preliminary points are completely inconsistent with any suggestions of misconduct. A clear and contrary impression is indicated and supported. That impression is of a professional task conscientiously executed.

Not surprisingly this impression is supported by the third factor to be recognised and that is that

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no allegation of *mala fides* or misbehaviour on the part of the arbitrator is alleged. Neither is any procedural irregularity claimed.

What is alleged is "legal misconduct" particularised as errors in approach, fact and law. Put more specifically it is claimed that, on the evidence, "no

reasonable man could have made the awards". To be even more specific, analysis of the complaints (grounds for review) reveals that it is alleged that the arbitrator had insufficient or no evidence on crucial aspects of the various matters and therefore his decisions cannot be regarded as reasonable for lack of being founded on or teased on fact. Applicant's counsel has made a valiant effort to demonstrate this alleged lack of evidence in the record.

To my mind it is simply not enough to complain of a lack of evidence. It is not enough to say that the evidence fails to support the arbitrator's findings. See the dictum of GARDINER J quoted above in which he says, *inter allia*, that:

> "it would be necessary to show that the lack of evidence established **a total want of that judicial capacity** which is required even to an ordinary fair-minded layman appointed to adjudicate by the parties to a dispute" (emphasis added).

As already pointed out the arbitrator was completely qualified to act as such and acted thoroughly and conscientiously. Judicial capacity was very much present and in its exercise the arbitrator was simply not found to be wanting. Accepting that he may have been in error on matters of detail or on particular aspects this does not constitute grounds, in law, to vitiate the proceedings or the awards.

That is my understanding of the law and not surprisingly Mr Eastwood submits:

> "6. An application to have an award set aside is not in the nature of an appeal, nor is it a review of the merits of the decision. The parties have agreed not to submit their disputes to the courts, but to be bound by the decision of an arbitrator, agreed upon by them and chosen, usually, as in this case, for his special expertise in the areas raised in the dispute. If the arbitrator has conducted the arbitration without regard to the principles of natural justice, the courts may readily intervene, for instance where he has denied one party the right to be heard, or has an interest in the outcome of the proceedings himself. However, subject to such boundaries, the courts do not enquire into the merits of the decision, whether in law or fact, as the courts would do if the matter were on appeal from a lower court. By agreeing upon arbitration, the parties have removed the merits of the dispute from consideration by the court.

> 7. The *locus classicus* on the meaning to be given to the word 'misconduct' in Section 12 of the Arbitration Act, is the word of SOLOMON JA in *Dickenson and Brown* v *Fisher's Executors* 1915 AD 166 at 175 and 176, which has been followed in our courts in Cone Textiles (Pvt) *Ltd* v *Redgment & Ors* 1983 (1) ZLR 88 . . . Although 'misconduct' in arbitration proceedings is viewed in a similar way under English law and under our law, there are exceptions which are peculiar to English Courts to set aside an award where there has been a mistake on the face of the award which is admitted to by the arbitrator: such an exception appears not to be part of our law: *Cone Textiles (Pvt) Ltd* v *Redgment*, already referred to above. See also

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Monticelo (Pvt) Ltd v *Edgerton(2)* 1981 ZLR 561 at 564H-565B; *Cone Textiles (Pvt) Ltd* v *Ayers & Anor* G-S-16-80*; Schneier&London Ltd & Ors* v *Gluckmann(1)* 1925 WLD 42 at 51; *Donner* v *Ehrlich* 1928 WLD 159 at 161; *Russell on arbitration* 20 ed at pp 401 and 402; *Jacobs Law of Arbitration in South Africa* pp 141 and 143.

8. Accordingly it is submitted that the contentions of mistakes of fact or law made by the applicant do not constitute grounds for setting aside of the award. This is particularly so in the present case where it is not contended that there is any error on the fact of the award nor are any of the errors contended for admitted by the First Respondent."

With respect I am in complete agreement with Mr *Eastwood's* submission which is difficult to improve upon.

It follows that insofar as applicant seeks to have the awards set aside on the basis of evidence or lack thereof the application must fail.

However applicant goes further. It alleges that in certain important respects the arbitrator misconstrued his task. I agree with Mr *Eastwood* that if this is true then, in effect, there has been no arbitration and the purported award must be set aside. See *Cone Textiles (Pvt) Ltd* v *May & Anor* HC-H-683-87 where BLACKIE J puts the matter very clearly at p 9:

"It is not misconduct for an arbitrator to misconceive or mis-state the arguments addressed to him. In *Macpherson Train & Co Ltd v J Milhem & Sons* [1955] (2) Lloyds Reports, 59 at p 66, the Court of Appeal approved the following statement of McNAIR J**:**

GREENLAND J

'As to the suggestion that an award is to be remitted because the umpire has mix-stated the arguments addressed to him by the legal representatives of the parties, it seems to me that that is a ground which is entirely without substance or support by any decision at all. It would indeed be hard on an umpire if his award is liable to be attacked merely because he has mis-conceived or mis-stated the arguments addressed to him.

See *Russell on Arbitration, supra,* p 423.

On the other hand,

'the effect of an incorrect interpretation of a phrase in the submission on which the award depends would entitle the Court to set the award aside, not because the arbitrators have made a mistake on a matter of law, but because they have wrongly construed the submission and so have not decided the question submitted to them.' *The Law of Arbitration in South Africa,* Jacobs, p 143.

McKenzie v Basha 1951 (3) SA 783 (N) at 787H."

It is now necessary to refer to the complaints specifically:

(i) **Standing time.**

The complaint starts off:

"(a) The arbitrator wrongly construed the submission and did not decide

the questions submitted in that he was asked, but failed, to decide:

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(i) the rate per week at which compensation should be paid ..."

and thereafter particularises the complaint further.

I agree with Mr *Eastwood* that the complaint is without substance. Even if the arbitrator misconstrued the arguments put to him such failure on his part is not fatal in terms of the authorities. He was obliged only to arrive at the award honestly. That he did so is conceded and apparent from the record. The fact that the award does not stipulate the basis thereof does not mean such basis was non existent. He must have found such basis before arriving at the award and this conclusion is supported not only by general probability but also by the careful and considerate way he conducted very lengthy proceedings. Moreover the company did set out in para 1 of the preamble to its claims the rate per week at which standing time should be calculated. ($11 995,00

GREENLAND J

per week). It is inconceivable that the arbitrator misconstructed anything. His reduction of the claim from $735 653,35 to an award totalling $37 866 broken down to cover three different periods admits of an inference of very rigorous, if not severe, scrutiny of the claims and basis thereof. Lastly the record reveals clear evidence on this issue, evidence which the arbitrator was better qualified to evaluate and interpret.

(ii) **Disruption**

Exactly the same observations pertain to this issue.

It need only be added that there was evidence of disruption, what plant and machinery was involved and of costs relating thereto. It is possible to agree with Mr *O'Meara* that the evidence on the issue is somewhat vague and even perhaps confusing. The point is it may not have been to an expert such as the arbitrator. It is not possible to conclude that his award was not supported by the evidence and therefore was arbitrary and unconsidered, quite the contrary. Here again the claim was substantially reduced, ie from $288 067 to $30 610. There has been no misconduct in relation to this claim.

(iii) **Penalties**

In this respect Mr *O'Meara* claimed that there had been a clear mistake which can be summarised thus:

- The municipality was entitled to penalise the company for each day the contract was overdue at $367,50 per day;
- the company was, on the evidence and in terms of its claim, entitled to 180 days extension;
- the award of $68 722,50 represents a sum computed in relation to 187 days and is therefore clearly wrong on this simple showing.

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The argument is not borne out on the facts. A perusal of the companies statement Declaim to the arbitrator reveals that it is alleged that it was entitled to 80.81 weeks extension, ie 565, 67 days and was therefore claiming a refund of all penalties deducted.

The fact that the award was drastically downgraded to a figure of $68 722 in respect, it would seem, of 87 days is in keeping with a fair, if not rigorous or severe, approach by the arbitrator.

Whilst it is true that the award could have been detailed and particularised so as to reveal the exact basis on which it was computed it is not possible to say

it does not represent a decision rationally arrived at and honestly granted. No misconduct is proved in respect of this award.

(iv) **Day Works** - no complaint

(v) **Interest**

The complaint here is that the arbitrator erred in awarding interest to run from dates prior to the date he made the award in breach of the law which permits interest only on liquidated amounts. As the amounts/awards represent compensation, so the submission goes, they were not liquidated until the date of the awards and no interest was due thereon until such date. See *Russell, Loveday NO* v *Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A) at 145D-145H which decision equates compensation determined by contract with damages not liquidated until awarded.

It may be therefore that the arbitrator has committed an error of law. As indicated above that is not enough. His decision must be so irrational as to constitute a complete failure of justice.

In this case it is patent that in fixing the dates from which interest was to run on the amounts awarded the arbitrator acted rationally. He was of the view that as the municipality was obliged to pay these amounts at specific dates logically interest should run from such dates. This is apparent from the fact that, save in two instances, he ordered interest to run from different dates, ie from dates on which he felt payment became due.

Such an approach on his part does not represent misconduct.

In the result therefore the application is dismissed with costs.

Brighton & Cole Bowen, applicant's legal practitioners

DW Aithen & Co, first respondent's legal practitioners

Kantor & Immerman, second respondent's legal practitioners

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MUSHAISHI v LIFELINE SYNDICATE & ANOR 1990 (1) ZLR 284 (HC)

Court **High Court, Harare**

Greenland J

Notice of motion

14 December 1989 & 16 May 1990

Flynote

Administrative law - administrative decisions of a quasi judicial nature - appeal against - effect of - whether suspends operation of decision pending appeal

Appeal - administrative decision of a quasi - judicial nature - whether operation suspended pending appeal - whether High Court will exercise jurisdiction over matters pending before Supreme Court

Costs - declaratory order - when costs ordered against applicant despite success on declaratory order

Legislation - Mines and Minerals Act [Chapter 165] s 254 - s 384(1) - s 384(4) - s 384(6) - s 384(7)

Mines and Minerals Act [Chapter 165] s 254 - forfeiture of certificates of registration - such decision not appealable - proper procedure is by review.

Practice - declaratory orders - measures of - when to seek - High Court of Zimbabwe Rules 1971 r 257 and r 259 - effect of non - compliance - failure to seek condonation - effect of

Review - grounds for - time limits - High Court Rules r 257 and r 259 relating thereto - effect of non - compliance - effect of failure to seek condonation.

Headnote

The second respondent had, in terms of s 384 (1) of the Mines and Minerals Act [*Chapter 165*], imposed an injunction in favour of the first respondent, preventing the applicant from operating certain mining claims.

GREENLAND J

The applicant had noted an appeal to the Supreme Court against this decision and had applied to the High Court for an order reviewing the injunction.

Held, that the noting of an appeal against an administrative decision of a quasi judicial nature suspends the operation thereof pending the appeal.

This was declaratory of the applicant's pre-existing rights.

Held, further, that the High Court will not entertain matters which are pending before the Supreme Court.

Held, further, that since no appeal lay in terms of the Act against the decision to forfeit the

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certificates of registration under s 25(c) of the Act, the present proceedings purported to be a review of the second respondent's administrative act.

Held, further, that, as such, the purported review was irregular for want of compliance with the relevant High Court Rules. Further there had been no attempt to condone the breach of these rules. Accordingly the application was refused.

Held, further, that without the certificates of registration, the applicant's success on the declaratory order was merely academic. Since he had been substantially unsuccessful he had to pay the costs of the proceedings.

Cases cited:

South Cape Corporation (Pvt) Ltd v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A)

Chilwanha v *Chilwanha* HH-40-86 (not reported)

Van t'Hoff v *Van t'Hoff & Ors (2)* 1988 (1) ZLR 335 (HC)

Gondongwe v *Mandaza* HH-369-88 (not reported)

F. Hoffman - La Roche & Co AG & Ors v *Secretary of State for Trade and industry* [1975] AC 295 (HL)[1974] 2 All ER 1128 (HL)

LC Diamond Cutting Works (Pty) Ltd v *Diamond Cutting Board* 1983 (2) SA 760 (W)

Clan Transport Co (Pvt) Ltd v *Road Service Board* 1956 (4) SA 26 (R)

Azania Defence and Aid Fund v *Registrar of Welfare Organisations & Anor* HH43-88 (not reported)

Mtetwa v *Moyo & Anor* H-22-89 (not reported)

WJ Mutezo for applicant

No appearance for first respondent

RM Fitches for second respondent

Judgment

Greenland J: The first issue to be decided in this matter is whether or

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not an appeal to the Supreme Court against a decision of second respondent, "the Commissioner", suspends the operation of that decision pending appeal.

The background to the matter is that first respondent, "the syndicate", applied to the

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Commissioner for an injunction against the applicant in terms of s 384 of the Mines and Minerals Act [*Chapter 165*]. This section reads:

> "384. (1) Any person claiming to be legally interested in any mining location, or in any servitude appertaining to a mining location, or complaining that he has been obstructed or interfered with in the enjoyment of his rights in respect of the premises aforesaid, may make application to the mining commissioner for an injunction in terms of this section."

The section thereafter prescribes a procedure for a functional and fair determination of the application. It is common cause that the Commissioner proceeded to determine the application in terms of this section and, after hearing the parties in evidence, granted the syndicate an injunction against applicant thereby effectively dispossessing applicant of the right to work certain mining claims. The Commissioner derives his power to grant the injunction from subs (4) of the section *supra* which reads:

> " (4) The mining commissioner may in his discretion and upon such terms as he may consider just, by order under his hand, enjoin any person named in such order to refrain from encroaching upon, occupying, using or working such mining location or servitude as aforesaid, or from prospecting thereon or extracting or removing any mineral or other substance to which the provisions of this Act apply from such mining location, or from selling or disposing of or otherwise interfering with such mining location, servitude, mineral or other substance or any share or interest therein, or from doing any act whereby the right, title or interest of such applicant in or to the same might be affected, or from obstructing or interfering with such applicant in the enjoyment of his rights in respect of the premises aforesaid."

It is common cause that Ordinarily an appeal suspends the operation of a judgment or order. *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H-545A; *Chikwanha* v *Chikwanha* HH-40-86; *van t'Hoff* v *van t'Hoff & Ors* (2) 1988 (1) ZLR 335 (HC); *Gondongwe* v *Mandaza* HH-369-88 (not reported).

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Mr *Fitches* submits that the common law rule does not apply to administrative decisions which remain in force pending appeal. This is because of the presumption of validity expressed in the maxim *omnia praesumuntur rite esse acta.* It was on this basis that the House of Lords refused to grant interim relief to a party who attacked the validity of a price fixing order. *F. Hoffmann - La Roche& Co AG & Ors* v *Secretary of State for Trade and Industry* [1975] AC 295 (HL). South African Courts, however, are prepared to grant an interdict *pendente lite* in order to preserve an individual's interest while the administrative act is challenged in the Courts. *LC Diamond Cutting Works (Pty) Ltd* v *Diamond Cutting Board* 1983(2) SA 760 (W) is an example. See Baxter *Administrative Law* at p 686.

Section 384(7) of the Act *supra* specifically provides that this court is not divested of its "power of granting injunction in any matter arising under this Act".

To my mind it would be anomalous if an administrative decision of a quasi-judicial nature, as is the case here, were to be put on a different footing from court judgments and orders. In the absence of anything provided to the contrary in the relevant Act such decisions must be treated as suspended pending appeal.

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In the present case applicant was operating claims in terms of mining licences granted under the Act *supra*. The decision to interdict him in respect of these claims represents a complete negation of rights hitherto enjoyed. The decision is in the nature of a judgment or order consequent on quasi-judicial proceedings. In the absence of an application to enforce that decision or order, pending appeal, I hold that it is suspended by operation of law.

This does not end the matter because applicant seeks an order reversing the Commissioner's injunction. He relies on s 384(6) of the Act *supra* which reads:

> "(6) Every such order shall be in force for such period as is named therein unless it is sooner discharged by the mining commissioner making it or by the High Court."

This prayer must fail for the simple but good reason that this Court will not exercise jurisdiction over a matter which is *sub judice* the Supreme Court. As said it is the applicant's stance that the injunction is now the subject matter of an appeal to the Supreme Court. It is simply not possible for this Court to, in effect, intervene. The prayer therefore fails.

1990 (1) ZLR p288

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Applicant also seeks an order nullifying a decision by the Commissioner to forfeit applicant's certificates of registration in respect of the said claims which cancellation was actioned after the granting of the injunction.

As I understand it this administrative act is not the subject matter of appeal. What then is the nature of the proceedings before me in respect thereof? The Commissioner acted in terms of s 254 of the Act which authorises such forfeiture if the holder of a mining lease, as was applicant, fails to obtain an "inspection certificate within the period prescribed therefore..." As the Act, *supra*, does not provide for an appeal to this Court against such forfeiture order the present proceedings can only purport to be a review of the Commissioner's administrative act.

Mr *Fitches* therefore makes the point that, whatever the merits of the matter, the application for review of this order is irregular and not properly before me for want of compliance with Rules 257 and 259 of the High Court of Zimbabwe Rules 1971.

The submission is sound. There has been no compliance with Rule 257 as the grounds for review have not been "shortly and clearly" stated in the notice of motion. Also the application was filed on 15 March 1989 in excess of eight weeks after the forfeiture order of 7 December 1988 in breach of Rule 259.

No grounds for condonation of these breaches of the Rules have been pointed to and none are self-evident. See *Clan Transport Co (Pvt) Ltd* v *Road Service Board* 1956(4) SA 26 (R); *Azania Defence and Aid Fund* v *Registrar of Welfare Organizations & Anor* HH43-88. This Court will regard persons in the position of applicant as non-suited: See *Mtetwa* v *Moyo & Anor* HH-222-89 at p 4. The application therefore fails in respect of this prayer.

As regards costs it is the position that applicant has been successful only one first issue. However as regards this issue all that is prayed for is an order that the Commissioner's

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injunction is suspended pending appeal.

My ruling is, in effect, declaratory, ie to declare what the law provides. The applicant now enjoys nothing that he did not enjoy before launching the proceedings except the comfort of having had the court confirm his legal opinions. Still, as the facts reveal a competition for rights in respect of the claims, justice, common sense and good order require judicial confirmation on this issue and the seeking of a declaratory order was indicated. Ordinarily success in this respect would also ensure success on the question of costs.

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The problem really is that, for applicant, that success is academic. As he has failed on the question of forfeiture the declaratory order is of no use to him for the reason that until he is in possession of certificates of registration in respect of the claims he has no lawful right to possession or working thereof. He has been substantially unsuccessful because he is still unable to secure possession of the claims.

In the result therefore I order as follows:

(a) it is declared that the noting of appeal suspended the operation of the Mining Commissioner's injunction;

(b) the application to discharge the Mining Commissioner's injunction is refused as the matter is *sub judice* the Supreme Court;

(c) the application to set aside the Mining Commissioner's forfeiture order is refused for irregularity;

(d) the temporary order granted on 14 December 1989 interdicting applicant and first respondent from working the claims in question is discharged;

(e) applicant is to pay the costs of these proceedings.

Mugabe, Mutezo & Partners, applicant's legal practitioners

The Civil Division of the Attorney General's Office, second respondent's legal practitioners

CRUNDALL BROS (PVT) LTD v LAZARUS NO & ANOR 1990 (1) ZLR 290 (HC)

Editor's Note:(3)

Court **High Court, Harare**

Smith J

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Notice of motion

27 March & 16 May 1990

Flynote

Exchange control Regulations - whether trust regarded as person for purposes thereof - no express or implied provision to such eject

Exchange control Regulations s 10(1) - refers to transfer, not sale, of securities registered in Zimbabwe - aimed at person having right to transfer security

Practice and procedure - postponement of return day of rule nisi ipso facto extends rule to date postponed.

Practice and procedure - order of court - a court may amend earlier order even if such order made by consent of parties

Contract - double sales - when second sale set aside

Costs - when de bonds propriis costs ordered

Headnote

A trust is not a separate *persona* for the purposes of the Exchange control Regulations 1977. The Regulations contain no express or implied provision altering the rule of the law of persons that a trust is not a separate legal *persona.* Section 10(1) of the Exchange control Regulations 1977 is aimed at the person possessing the right to transfer any security registered in Zimbabwe. In the case of an ordinary trust the person possessing such right will be the trustee in whom *dominium* of the trust properly vests. In terms

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of s 10 certain restrictions are imposed on the transfer - but not the sale - of securities registered in Zimbabwe. Parties are not prevented from negotiating or concluding an agreement for the sale of such securities even where one of the parties is not a Zimbabwe resident.

There is no merit in the argument that because a court order was issued with the consent of the parties it must be treated as a contract between them and must be amended by a subsequent court order.

The seller and second purchaser of certain shares completed the sale and transfer of such shares under the belief that a first purchaser no longer had any rights thereto. They did not act clandestinely or in deliberate disregard of the first purchaser's rights. In such circumstances the first purchaser was not entitled to step into the shoes of the second purchaser and claim transfer of the shares.

Cases cited:

CIR v *MacNeillie's Estate* 1961 (3) SA 833 (A); (1961) 24 SATC 282 (A)

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Estate Kemp & Ors v *McDonald's Trustee* 1915 AD 491

McCullogh v *Fernwood Estate Ltd* 1920 AD 204

Owsianick v *African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310(A)

Director of Hospital Services v *Mistry* 1979 (1) SA 626 (A)

Release Mandela Campaign & Ors v *State President & Ors* 1988 (1) SA 201 (N)

De Jager v *Sisana* 1930 AD 71

Ridler v *Gartner* 1920 TPD 249

Reynders v *Rand Bank Bpk* 1978 (2) SA 630 (T)

Dhayanundh v *Narain* 1983 (1) SA 565 (N)

Kazazis v *Georghiades en Andere* 1979 (3) SA 886 (T))

Associated South African Bakeries (Pty) Ltd v *Oryx & Vereiningte Backerein (Pty) Ltd en Andere* 1982 (3) SA 893 (A)

Spes Bona Bank v *Portals Water Treatment* 1981 (1) SA 618 (W)

BEF (Pty) Ltd v *Cape Town Municipality & Ors* 1990 (2) SA 337 (C)

MJ Gillespie and *GS Wernberg* for the applicant

AP de Bourbon SC for the first respondent

JS Sayce for the second respondent

Judgment

Smith J: The first respondent is the trustee of Harwest Trust (hereinafter referred to as "the Trust"). The Trust owned the entire issued share capital of two private companies (hereinafter referred to as "the Shares"). In terms

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of letters dated 31 March and 4 April 1989, the applicant offered the first respondent four million dollars for the Shares. By fetter dated 21 April 1989 the first respondent on behalf of the Trust, accepted the offer but the acceptance was conditional. The first respondent, in terms of an undertaking which had been incorporated in an order of this Court issued on 9 November 1976, was required to refer the matter to the second respondent which had a right of first refusal over the Shares. In term s of the said court order, any offer for the purchase of the Shares was to be referred to the second respondent. If the second respondent wished to exercise its right, it was to give notice of acceptance in writing within fourteen days of being advised of the offer. Such acceptance could be made conditional on the second respondent obtaining any Exchange

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control or Stock Exchange consent applied for within the fourteen day period but the condition was to be fulfilled within six weeks of the offer having been advised. However the first respondent agreed that the six week period would run from the date the second respondent gave notice of the exercise of its right of pre-emption. After some discussion it was agreed that the second respondent would have to obtain the consent from the Exchange control authorities on or before 5 July. There was a miscalculation by the parties because by fixing the final date as 5 July, the period was in fact extended to seven weeks.

By letter dated 16 May 1989 the second respondent exercised its right to purchase the Shares. In that letter the second respondent said that it appeared that Reserve Bank approval was not required but an application had been submitted for any "Exchange control consent" that may be necessary and accordingly the exercise of the right of first refusal was conditional upon the grant of such consent. Certain aspects of the offer by the first respondent to the second respondent required clarification and, according to the applicant, it was common cause that it became necessary for the second respondent to procure final "Exchange control approval" for the exercise of its right of preemption on or before 5 July 1989.

The applicant submitted that if the second respondent failed to obtain the necessary approval on or before 5 July, its right to acquire the Shares would have lapsed and the agreement between the applicant and the first respondent would have become effective immediately after 5 July. On 4 July, the second respondent filed a petition (case No. HC 2777/89) seeking an extension of the six week period to one of six months. A rule *nisi* was issued in this regard, returnable on 26 July. In terms of that rule the first respondent was interdicted from selling or transferring the Shares to any person pending the outcome of the litigation in Case No. HC 2777/89. Although the applicant had a

substantial interest in the outcome of the proceedings in case No. HC 2777/ 89, it was not cited as a party therein. Accordingly it made an application in case No. HC 3317/89 to be joined as a party to the former case. It wanted to intervene so that it could oppose the confirmation of the rule *nisi* extending the six week period to one of six months and so that it could present its claim to purchase the Shares. The basis of the applicant's intended opposition was that the court was not competent to extend the time limit in question as that was simply a term of the contract between the first and second respondents and therefore not a matter in which the court could interfere.

According to the parties, the rule *nisi* in case No. HC 2777/89 lapsed on 9 August. The circumstances surrounding the lapsing are as follows. The petition of the second respondent in case No. HC 2777/89 was heard on 4 July 1989. The respondents were Harry Weinstock, the settler of the Trust, and the first respondent. The rule *nisi* was issued with the return day being 26 July 1989. It operated as a temporary interdict preventing the first respondent from selling or transferring the Shares. It was ordered that a copy of the order was to be served on the applicant. As the first respondent was on holiday at the time, his legal practitioners requested that the rule be extended to 9 August so that instructions could be taken. The second respondent agreed and the rule was accordingly extended. The application of the applicant to

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be joined as a party was filed on 4 August.

Thereafter on 9 August, which was the extended return day of the rule *nisi*, the applicant applied for a further postponement. The second respondent opposed that application and sought confirmation of the rule. The judge who heard the case postponed the matter to 21 September The second respondent's legal practitioner wrote to the registrar of the High Court several times after 9 August asking for a copy of the court order. It was eventually sent to him on 8 September, with a date stamp of 7 September. The order postponed the matter to 21 September without extending the rule *nisi* accordingly.

When the second respondent exercised its right of first refusal it employed a bank to apply for the necessary Exchange control approval. That necessitated obtaining the approval of the Foreign Investment Committee, which has subsequently become the Foreign Investment centre. The approval of the said committee was notified by letter date 21 July 1989. Thereafter application was made to the Reserve Bank of Zimbabwe for its approval of the sale of the Shares to the second respondent. Formal "Exchange Control" approval was given by the Reserve Bank in a fetter dated 8 August 1989 and

the second respondent's legal practitioner was advised accordingly on 18 August. On Friday 8 September the first respondent transferred the Shares to the second respondent.

Mr Russell Crundall, a director of the applicant, who made the founding affidavit in this case, said that the actions of the respondents in the transfer of the Shares could only be regarded as having been *mala fide*. He submitted that it was most improper for the first respondent to transfer the Shares to the second respondent and for the second respondent to receive them. Accordingly the applicant sought an order that the agreement between the applicant and the first respondent regarding the sale of the Shares be declared enforceable, that the respondents cause the Shares to be transferred to the applicant, against payment of four million dollars, that the second respondent account to the applicant for any profit made by it arising from its possession of the Shares from 8 September, 1989 to the date of transfer of the Shares to the applicant and that its costs be paid on a legal practitioner-and- client scale.

The first and second respondents took greet exception to the allegations that they had acted *mala fide* and improperly. The first respondent said that he, as well as applicant and the second respondent, believed that when the hearing for the confirmation of the rule nisi had been postponed to 21 September, the rule *nisi* had also been extended to that date. Accordingly he was interdicted from selling the Shares to the applicant or to any other person, other than the second respondent. Neither he nor any of the other parties, believed at that time that any rights which the second respondent had acquired had lapsed. On 1 September in a telephone conversation he advised the second respondent's legal practitioner that he intended to oppose the confirmation of the rule *nisi* because he had certain objections to the proposed sale of the Shares He also informed an employee of the bank, a Mr dos Remedios who had originally approached him on behalf of the applicant with its offer to purchase the Shares, of his decision to oppose the confirmation of the rule. He said that he spoke to Mr dos Remedios because in all

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his negotiations with the applicant for the sale of the Shares Mr dos Remedios had represented the applicant. He had had no dealings with any other representative of the applicant. When he wrote to the second respondent's legal practitioner on 1 September a letter confirming the telephone conversation, he sent a copy of that letter to Mr dos Remedios. Subsequently, on 5 September, the second respondent's legal practitioner told the first respondent that the second respondent had agreed to meet the objections raised by the first respondent. Accordingly the first

respondent's objections to the sale of the Shares to the second respondent fell away. Because the first respondent could not get in touch with Mr dos Remedies, he asked his accountant to do so and to inform him that the first respondent intended to go ahead with the sale of the Shares to the second respondent.

On 7 September the applicant's legal practitioner, Mr Passaportis, telephoned the first respondent about the sale of the Shares. As both persons are registered legal practitioners of long standing one would expect agreement as to what was said by both parties. Unfortunately that is not the case. The versions given by each party as to what was said differ to a marked degree.

The first respondent's version is that he said that arrangements had been made for the transfer of the Shares to the second respondent on receipt of a cheque covering the total amount outstanding on the following day, being 8 September . Mr Passaportis' reaction was that his client, the applicant, had certain rights and therefore he might institute proceedings forthwith to interdict the first respondent from concluding the sale. The first respondent wanted to accommodate Mr Passaportis and said that if the latter felt that the applicant had rights which would be prejudiced, he would delay transferring the Shares in order to give Mr Passaportis time to prepare his application to Court. Mr Passaportis expressed his appreciation and undertook to telephone the first respondent the next morning to advise him whether he intended to proceed with the application after he had considered the applicant's position. On 8 September the first respondent telephoned the second respondent's legal adviser to tell him about the discussions with Mr Passaportis and the undertaking to delay the transfer of the Shares. Thereafter, he telephoned Mr Passaportis who said that he had given the matter careful thought and concluded, "Mr Lazarus, in all conscience I cannot ask you to delay concluding with PG". Although Mr Passaportis said that he had some misgivings, he did not intend to proceed with an application for en interdict.

Mr Passaportis' version is as follows: When he spoke to the first respondent on 7 September the latter was very upset because the sale had not been concluded. When Mr Passaportis said that in his view it would be wrong for the first and second respondents to conclude the sale in total disregard of the rights of the applicant, and also broached the possibility of an interdict, the first respondent suggested that he should speak to the second respondent's legal practitioner and indicated that he would not take any steps to conclude the transaction until Mr Passaportis had phoned him the following day. Mr Passaportis made frequent reference during the

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telephone conversation to the

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applicant's claim that it had a valid contract with the fast respondent for the transfer of the Shares, which had become effective on 5 July. However he did not demand or insist that the Shares should be transferred to the applicant in view of the competing claims of the applicant and the second respondent and the fact that the dispute was before the court for determination. The following day, 8 September, he again spoke to the first respondent. As a result of extreme pressure of work he was not able to prepare an urgent application for an interdict so he resorted to stating his misgivings about the propriety of the proposed transfer. He emphasised that "if the transfer proceeded, the applicant would impeach it". He denied that he had told the first respondent that "in all conscience I cannot ask you to delay concluding with PG", as that would have contradicted what he had previously said and would have negated his attempts to stop the transaction. He merely said that "I was not in a position immediately to prevent the transfer, but that the applicant reserved its right to challenge it at a later stage". The first respondent then indicated his intention to proceed and said that he had sought an indemnity from the second respondent against possible claims by the applicant.

It is not possible to say which version is correct. Only the two legal practitioners themselves were parties to the conversations. It is most surprising to find such a divergence of opinions as to what was actually said.

The first respondent has denied vehemently that he acted *mala fide* and has submitted that the application should be dismissed with costs to be paid *de bonds propriis* on a legal practitioner-and-client scale.

Mr dos Remedios filed an affidavit in which he confirmed that the applicant had initially approached the bank for which he worked regarding the procurement of finance for the purchase of the Shares. He had then negotiated on behalf of the applicant with the first respondent's accountant for the purchase of the Shares. At a later stage he had met the first respondent who indicated that he wished to conduct dealings through the bank as he had no knowledge of the applicant. The second respondent's legal practitioner advised the first respondent that in his opinion the Trust would have to obtain approval from the Exchange control authorities for the sale of the Shares to the applicant. Although the first respondent was not convinced that such approval was necessary, he asked Mr dos Remedios, on or about 15 June, to write and obtain such approval should it be necessary.

Mr dos Remedios said that from that time he represented in effect both the applicant and the first respondent in different capacities. He said that when

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the first respondent communicated with him via his accountant to advise that he was selling the Shares to the second respondent he did not specifically request that the applicant or its legal

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practitioner be appraised of the situation. After the accountant advised him that the sale to the second respondent was going through he decided to notify Mr Russell Crundall, a director of the applicant, but he did that on his own initiative. Mr dos Remedios tried to telephone the first respondent on 8 September but the latter was not available and so on 12 September he wrote a letter to the latter in which he said that he had advised the applicant of the first respondent's intention to transfer the Shares to the second respondent because he was uncertain whether the first respondent had intended him to notify the applicant of the position.

Both the first respondent and his accountant averred that they had at all times regarded Mr dos Remedios as being the agent of the applicant and had fully expected that whatever they told him would have been passed on by him to the applicant.

It seems to me that there are three issues to be decided. Firstly, was the agreement between the applicant and the first respondent valid or was it invalid because the approval of the Exchange control authorities had not been obtained. Secondly, was it competent for the six week period within which the second respondent was required to obtain approval from the Exchange Control authorities to be extended to six months by way of an order of court and what was the effect of the failure to extend the interim rule? Thirdly, did the first and second respondents act improperly and *mala fide*?

The relevant provision of the Exchange control Regulations 1977 (RUIN No. 399 of 1977) (hereinafter referred to as "the Regulations") is s 10(1) which provides as follows -

> "10. (1) Subject to the provisions of section 23, unless otherwise authorized by the Minister, no person shall transfer any security which is registered in Zimbabwe unless -
>
> (a) he or the person, if any, for whom he is a nominee is a Zimbabwean resident; and
>
> (b) he delivers to the transferee at or before the time of the transfer a declaration in the form set out in the Second Schedule as to his residence and that of the person, if any, for whom he is a nominee; and
>
> (c) the transferee or the person, if any, for whom he is to be a nominee is a Zimbabwean resident."

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The term "nominee" which is used in subs (1) is defined in s 2 of the said Regulations as follows -

> "'nominee', in relation to any security, coupon or policy of insurance, means a person who is not entitled to exercise any rights in relation to that security, coupon or policy of insurance except in accordance with instructions given by some other person."

Mr *Sayce* submitted that whilst a trust was not a "person" according to the law of persons - *CM* v *MacNeillie's Estate* 1961(3) SA 833 (A) at 840E-G - it was a "person" for the purposes of s 10(1) of the Regulations. He argued that because three of the four beneficiaries of the Trust were not Zimbabwe residents the Trust itself was not a Zimbabwe resident and therefore, according to s 10(1)(a) of the Regulations, the Trust could not transfer the Shares to anyone unless authorised to do so by the appropriate Minister. He further argued that although the first

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respondent had the formal *dominium* in the Shares he was not the beneficial owner thereof. The beneficial ownership vested in the beneficiaries. With regard to the settler, once he had executed the trust deed his rights of control over the trust property ceased. Mr *Sayce* submitted that the object of s 10(1) of the Regulations would be defeated if it were to be held that the residential status of a trust depended on the residence of the settler or of the trustee.

I can see no reason why a trust should be regarded as a "person" for the purposes of the Regulations, when it is not regarded as a "person" for other purposes. There is no specific provision in the Regulations which provides that a trust shall be treated as a separate *persona.* Nor can I find any evidence of a "manifest but unexpressed intention", as STEYN CJ expressed it in *CIR v MacNeillie's Estate supra* at 840H, to introduce a persona separate from that of the trustee. Section 10(1) of the Regulations is aimed at the person who has the right to transfer any security which is registered in Zimbabwe. In the case of an ordinary trust, that would be the trustee, because he is the person in whom the actual dominium in the property vests and who is therefore capable of transferring the ownership thereof - see *Estate Kemp & Ors* v *McDonald's Trustee* 1915 AD 491 at 499 and 508 and *McCullogh* v *Fernwood Estate Ltd* 1920 AD 204 at 209. Ordinarily he is not required to act in accordance with instructions given by the beneficiaries. He acts in his own discretion, though subject to any restrictions imposed in the trust deed Section 15 of the Regulations makes it clear that it is the trustee that is the person referred to in s 10(1) of the Regulations. Section 15 provides that a person shall be deemed to transfer a security if he executes any Instrument

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of transfer thereof, whether effective or not. In the case of the Shares, it was the first respondent who executed the instrument of transfer. The settler and the beneficiaries played no part in the transaction. It would appear that throughout the first respondent acted on his own initiative.

It is not disputed that the Shares are securities which are registered in Zimbabwe and that they were transferred by the first respondent who is a Zimbabwe resident. Once that is settled, it is not necessary to ascertain whether or not the first respondent is a nominee and where any person for whom he is a nominee is resident. Paragraph (a) of s 10(1) of the Regulations is worded in the alternative, if the person who transfers the security or the person for whom he is nominee is a Zimbabwe resident the authority of the appropriate Minister is not required. Thus a person who is not a Zimbabwe resident could transfer a security which is registered in Zimbabwe to a Zimbabwe resident without having to obtain Ministerial authority if he were the nominee for a person who was a Zimbabwe resident. Likewise, a Zimbabwe resident could transfer a security which is registered in Zimbabwe to another Zimbabwe resident without having to obtain Ministerial authority even if he were a nominee for a person who was not a Zimbabwe resident, because his status as a Zimbabwe resident would suffice for the purposes of pare (a) of s 10(1) of the Regulations. That provision does not require that where a Zimbabwe resident who is the nominee for another who is not a Zimbabwe resident wishes to transfer a security registered in Zimbabwe he must obtain Ministerial authority.

In this connection I would observe that s 10(1) of the Regulations prohibits the transfer of any

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security registered in Zimbabwe in certain circumstances unless otherwise authorised by the Minister. The subsection refers to transfer not sale. Subsection (3) of s 10 then provides that, unless otherwise authorized by the Minister, no person shall do any act which involves, is in association with or is preparatory to, the transferring of any security which is prohibited by subs (1) thereof. It seems to me that it is the transferring of any security registered in Zimbabwe or acts involving, associated with or preparatory to, the transfer which require Ministerial authority. Therefore parties may freely negotiate and reach agreement on the sale of any security which is registered in Zimbabwe where one of the parties is not a Zimbabwe resident. However when it comes to the actual transfer of the security or anything preparatory thereto, then Ministerial authority must be obtained.

Thus, in the present case, if the first respondent had not been a Zimbabwe resident, he could still have accepted the offer from the applicant to purchase the Shares. However he could not have transferred the Shares to the applicant without Ministerial authority.

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I find therefore that the offer made by the applicant to purchase the Shares was validly accepted by the first respondent, it was not a transaction which in terms of s 10(1) of the Regulations required Ministerial authority.

Mr *Gillespie* submitted that a right of presumption must be restrictively interpreted - see *Owsianick* v *African Consolidated Theatres (Pty)Ltd* 1967 (3) SA 310 (A) at 317D. In the present case the second respondent, which held the right of pre-emption, was required to give notice to the first respondent of the exercise of that right within fourteen days of being informed of the offer and to fulfil the condition regarding approval of the Exchange control authorities within six weeks of the date of the notice of the exercise of the right. As that notice was given on 16 May, the final date for the fulfilment of the condition was 27 June. Because of a miscalculation on the part of the first and second respondents the period was extended to 5 July. However, it was not competent for the first respondent to agree to such an extension in the circumstances since the benefit was no longer, if ever it had been, his to waive. The applicant had an interest in the matter and had a right to insist upon due compliance with the condition. Accordingly, he argued, the failure on the part of the second respondent to comply with the condition by 27 June resulted in the discharge of the right of pre-emption and from that date the applicant was entitled to enforce its agreement with the first respondent. In my view the applicant cannot raise this point in argument In *Director of Hospital Services* v *Mistry* 1979(1) SA 626(A) at 635H-636B DIEMONT JA said:

> "When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a judge will look to determine what the complaint is. As was pointed out by KRAUSE J in Pountas' *Trustee* v *Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases:
>
> > ' ... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.'

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Since it is clear that the applicant stands or falls by his petition and the facts therein alleged,

'it is not permissible to make out new grounds for the application in the replying affidavit.'

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(per VAN WINSEN J in *SA Railways Recreation Club & Anor* v *Gordonia Liquor Licensing Board* 1953(3) SA 256 (C) at 260). It follows that the applicant in this matter could not extend the issue in dispute between the parties by malting fresh allegations in the replying affidavits filed on 8 June 1977 or by making such allegations from the Bar."

See also *Release Mandela Campaign & Ors* v *State President & Ors* 1988 (1) SA 201 (N) at 211D-E.

In the applicant's founding affidavit it was stated that '`it is common cause that it became necessary for the second respondent to procure final Exchange control approval for the exercise of its right of pre-emption on or before 5th July 1989". The applicant is bound by that averment.

The next argument advanced by Mr *Gillespie* was that the failure by the second respondent to fulfil the condition by 5 July or to obtain a right to secure compliance with the condition within an extended period meant that the applicant was entitled to enforce its agreement to purchase the Shares. He submitted that the rule *nisi* did not provide for any interim relief other than a restraint on the alienation of the Shares. The important point was that it was not confirmed and accordingly no extended period for compliance was agreed. In its founding affidavit the applicant stressed that the rule nisi had lapsed on 9 August although at the time none of the parties were aware of that fact. That was because when the judge postponed the return day for the rule *nisi* to 21 September he omitted to extend the rule accordingly.. In my view, the postponement of the reborn day must have had the automatic effect of extending the rule. To hold that this was not the case and that the rule lapsed because it was not expressly extended would render the postponement nugatory because there would be no rule to confirm on the postponed return day. Accordingly I consider that the rule nisi did not lapse on 9 August. The postponement of the return day *ipso facto* extended the rule nisi to the new return day.

One matter that causes concern is that the second respondent's legal practitioner was not able to obtain the order of court issued on 9 August until 8 September. He said that he wrote to the registrar of the High Court on several occasions asking for the order but to no avail. He eventually received it on 8 September. It was date-stamped 7 September. This failure on the part of the registrar to issue the court order timeously is to be deprecated. There can surely be no valid reason why it should take almost a month for the registrar to issue an order which consists of a printed form on which has to

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be typed the name of the parties, the date of the hearing, the name of the judge who presided and an order consisting of two short sentences.

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The rule *nisi* obtained by the second respondent in case No. HC 2777/89 called on Mr Weinstock, the first respondent and the applicant (which was at a subsequent stage joined as a party so that it could oppose the confirmation of the rule) to show cause why the six week period for obtaining the approval of the Exchange control authorities should not be extended to six months. The return day, after two postponements, was 21 September. On that day the matter, by consent, was struck from the roll and therefore the rule was not confirmed. The second respondent had obtained the approval of the Exchange control authorities on 8 August and the Shares had been transferred to it on 8 September and so the second respondent's legal practitioner considered that it was unnecessary to obtain confirmation of the rule. He was of the opinion that the first respondent's acceptance of the applicant's offer to purchase the Shares was not valid because the first respondent had not obtained Ministerial authority in terms of s 10 of the Regulations. Therefore there was no bar to the first respondent accepting the second respondent's offer. For the reasons I have given earlier, I consider that s 10 of the Regulations did not affect the applicant's offer and it was therefore a valid offer. Consequently the first respondent, as he had accepted the applicant's offer, subject to the second respondent's right of pre-emption, was obliged to sell the Shares to the applicant if the second respondent did not exercise its right of pre-emption. I consider in an order of court, this court has authority to amend the right in the manner sought by the second respondent in case HC 2777/89. I cannot see any merit in the argument that because the court order dated 9 November 1976 was issued with the consent of the parties, it must be treated as a contract between the parties and cannot be amended by a subsequent court order. The second respondent filed an affidavit in case No. HC 2777/89 from a senior official of a merchant bank who had been employed by the Reserve Bank of this country for 28 years, having retired in 1985. He deposed that in 1976 a period of six weeks would have been more than adequate for obtaining a decision on any matter relating to Exchange control as all such decisions were made within the Reserve Bank. However, in 1989 certain applications, especially those involving foreign investment in local companies, had to be referred to various committees made up of Government and Reserve Bank officials. His experience was that, on average, a period of between four w five months was required for any application involving foreign investment and thus the six week period referred to in the court order of 1976 would be completely inadequate. This evidence was not disputed. It is to be hoped that the establishment of the new

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Investment centre will mean that such delays are a thing of the past and that similar applications will be dealt with much more expeditiously.

On 8 September when the first respondent sold and transferred the Shares to the second respondent the rule *nisi* was, in my opinion, still operative. There was also a temporary interdict preventing the first respondent from selling or transferring the Shares to the applicant "or any other" pending the adjudication by the court on the application to extend the six week period to six months. The first respondents interpreted the interdict as precluding the sale of the Shares to any other excluding the second respondent. In my view this was not a legitimate interpretation. The right of pre-emption held by the second respondent required that the condition relating to obtaining approval of the Exchange control authorities was to be fulfilled

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within six weeks. Because it was not possible to fulfil the condition within the six week period, the second respondent applied for a court order to extend the period. Until such extension was granted by the Court, the right of pre-emption remained in the form it was granted in the court order issued on 11 November 1976. Therefore it was perfectly proper that the first respondent should be re strained from selling or transferring the Shares until the court had made an adjudication on the application to extend the six week period. If it refused to confirm the rule, the right of pre-emption would have lapsed.

In my opinion, the first respondent should not have sold and transferred the Shares to the second respondent. There was an interdict which said that he should not and the rule *nisi* seeking to extend the six week period for the fulfilment of the condition had not been confirmed. However he did so. Did he and the second respondent's legal practitioner act *mala fide* and improperly as averred by Mr Crundall on behalf of the applicant? Mr *Gillespie* argued that the decision to sell and transfer the Shares to the second respondent was taken by the parties with full knowledge of the applicant's prior right and its interest in the strict exercise of the right of pre-emption. Whilst the opinion advanced by the second respondent that the first respondent was prohibited by s 10 of the Regulations from accepting the applicant's offer without prior Ministerial approval may have been genuinely held by the legal practitioner concerned, it was not shared by the first respondent or his adviser. It was not entertained on reasonable grounds and it was acted upon unilaterally, reckless as to whether the opinion was true or false, in order to defeat the applicant's right or to limit it to claim for damages. Accordingly the actions of the first and second respondents were *mala fide*, as that term is used to describe the state of mind of a subsequent purchaser in a double sale, and the applicant was accordingly entitled to step into the shoes of the subsequent purchaser, namely the second respondent.

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Both *Messrs de Bourbon* and *Sayce* have strenuously attacked the allegations that the first and second respondents had acted *mala fide* and improperly.

The Shares have been sold and transferred to the second respondent. The applicant is seeking an order that the Shares be transferred to it because, so it alleges, the first respondent and second respondents completed the sale and transfer of the Shares despite their knowledge of the prior right of the applicant to purchase the Shares. In *De Jager v Sisana* 1930 AD 71 CURLEWIS JA at p 74 said:

> "Various decisions of the Courts of South Africa were quoted to us in which the principle was laid down that a purchaser of any property, movable or immovable, who buys with the knowledge of the rights of a third party to or in such property, is bound thereby, and that it will be a species of fraud on his part if he attempted to defeat such third party's rights."

In the earlier case of *Ridler v Gartner* 1920 TPD 249 at pp 259-260 WESSELS J said -

> "There must be an element of deceit, an element of chicanery in the transaction, before the Court will set it aside on the ground of knowledge. It must be perfectly clear to the Court that the person who alleges that he bought a clean transfer knew perfectly well and did not expect that he would get a clean transfer except by his fraud. Any other view of the law would be extremely dangerous and would dig away the very foundations upon which our

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whole system of registration is based."

In *Reynders v Rand Bank Bpk* 1978(2) SA 630 (T) NESTADT J, after referring to the above two cases and others, said at p 637 that in the case of a second sale, the seller and the *mala fide* second purchaser having knowledge, whether at the time he purchases or when he takes delivery, voluntarily enter into a type of fraudulent conspiracy, the necessary and inevitable result whereof is to deprive the first purchaser of his contractual claim to the property. In considering this doctrine, PAGE J in *Dhayanundh v Narain* 1983(1) SA 565 (N) at p 572 A-C said -

"There has, of recent times, been a tendency to query the correctness of the proposition that the doctrine finds its origin in fraud and to maintain that the conduct of the purchaser need be no more than a wrongful and culpable deprivation of the third party concerned of his right to the

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servitude. See Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* at 262 et seq; Van der Merwe THRHR vol 25 (1962) at 155; *Kazazis v Georghiades en Andere* (*supra* at 893) and *Grant & Anor v Stonestreet & Ors* (*supra* at 24D-E). The acceptance of fraud as a basis for the doctrine has, however, been enshrined in our law so authoritatively and for so long that it would take considerable persuasion to convince us that it is incorrect. In the view which we take of the present matter, in any event, the nature of the basis of the doctrine is immaterial."

In the case of *Kazazis v Georghiades en Andere* 1979(3) SA 886 (T), which PAGE J referred to, SPOELSTRA AJ said that it was unnecessary to prove any intention or motive on the part of the later purchaser to frustrate the rights of the previous purchaser. The mere fact that he was aware of the existing rights and the fact that he, despite the knowledge, continued to enforce his own rights by which the earlier rights were defeated or infringed upon, was regarded as a species of fraud upon the party holding the earlier rights. At p 894 (according to the official translation at p 1020) he said -

"The idea forming the basis of the principle does not, however, form part of the principle itself. It is therefore unnecessary to look any further than

(a) does any earlier right of action (personal right) exist?

(b) did the later receiver of the right have knowledge of the earlier right of action?; and

(c) did the later holder of the right infringe the earlier right of action?

If these facts are certain, the inference of fraud can be drawn and preference is afforded to the earlier right above the later right of action. If such a second purchaser, when he purchases, believes that the first right of action has ceased to exist and such belief is reasonable and founded, the position may be different."

According to the 1983 *Annual Survey of South African Law* at p 156 the traditional explanation of the so-called doctrine of notice, namely that it constituted a "species of fraud", was criticised and in fact rejected by the Appellate Division in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backerein (Pty) Ltd en Andere* 1982(3) SA 893 (A) at 910E-H and 911 A The notice of fraud in this context, it was said there, was a mere fiction, and therefore redundant. Liability flowed from the knowledge of the existence of prior rights to the asset in question and not from the fact that the successor, by subsequently denying that those rights were binding on

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him,

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could be said to be acting in bad faith in the extended sense connoted by the *exceptio doli generalist.*

In this case both the first and the second respondent were well aware that the applicant had offered to purchase the Shares and that the first respondent had conditionally accepted that offer. The second respondent's legal adviser genuinely believed from the outset that the acceptance of that offer by the first respondent was not valid because s 10(1) of the Regulations prohibited the transaction concerned unless prior Ministerial approval had been obtained. His belief was not only *bona fide*, it was reasonable. A former senior official of the Reserve Bank of Zimbabwe stated in his affidavit filed in case No. HC 2777/89 that -

> "I have also confirmed with the head of Exchange Control that Exchange Control still regard a trust, whose beneficiaries are non-resident, as non-resident controlled and Exchange Control approval is required for any payment to such a trust arising from the sale of shares."

As far as the first respondent was concerned, it was of no interest to him whether the Shares were purchased by the applicant or the second respondent. He accepted the offer by the applicant because, he regarded it as reasonable. He then advised the second respondent of the offer because the latter held a right of pre-emption. After the second respondent had obtained the approval of the Exchange Control authorities the first respondent had reservations about selling the Shares to it. Subsequently, however, having received assurances on the points at issue (certain rights of employees, and payment of interest and costs), he agreed to go ahead with the sale of the Shares to the second respondent. On 5 September he tried to telephone Mr dos Remedios, who was in Harare, whilst he was in Bulawayo, to inform him that he intended to transfer the Shares to the second respondent. He could not do so. However he was able to speak to his accountant, who was in Harare, and he told him of his intention to transfer the Shares and asked him to inform Mr dos Remedios. The accountant said that he informed Mr dos Remedios on 5 September whilst Mr dos Remedios and his accountant regarded Mr dos Remedios as the banker and agent of the applicant and therefore whatever they told him would be passed on to the applicant. Mr dos Remedios said that he represented the first respondent and the applicant in different capacities and that when he told the applicant that the first respondent had said that he intended to sell the Shares to the second respondent he did so on his own initiative. He was uncertain whether the first respondent intended him to notify the applicant of the position so, of his own accord, he told the applicant

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and then wrote to the first respondent to tell him what he had done. Needless to say, as soon as Mr Crundall heard from Mr dos Remedios on 7 September he contacted his legal practitioner and the legal practitioner telephoned the first respondent and discussed the matter with him on the same day and again on 8 September. I consider that the first respondent and his accountant

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were quite justified in regarding Mr dos Remedios as the applicant's agent and in expecting that he would inform Mr Crundall forthwith of the intention to go ahead with the sale of the Shares to the second respondent. Therefore when the first respondent took steps to inform Mr dos Remedios of the intended transaction he was in fact intending to inform the applicant.

The applicant knew on 7 September that the first respondent intended to transfer the Shares to the second respondent on 8 September. His legal practitioner spoke to the first respondent on 7 September. Although the two legal practitioners do not agree as to what was said during the telephone conversation, they do agree that the first respondent undertook not to take further steps to finalise the transaction until the applicant's legal practitioner had spoken to him the following day, after giving the matter further consideration.

As I have mentioned earlier, the two legal practitioners also differ as to what was said during their discussion on 8 September. It is clear, however, that the applicant had a clear opportunity, before the Shares were transferred to the second respondent, to apply for an interdict prohibiting the transfer until the legal position was clarified. The applicant's legal practitioner said that he was not in a position, as a result of extreme pressure of work, to prepare an urgent application for an interdict so he resorted to stating his misgivings about the propriety of the proposed transfer and emphasised that, if the transfer went through, the applicant would impeach it. He confirmed that he said that he was not in a position immediately to prevent the transfer but the applicant reserved its right to challenge it at a later stage. If the applicant thought that it had a right to claim the Shares because the second respondent's right of pre-emption had not been exercised strictly within the six week period, it seems strange that its legal practitioner should tell the first respondent that the applicant was not in a position to prevent the transfer. The applicant could have applied for an interdict to restrain the transfer. It did not do so. The fact that its legal practitioner failed to do so because he was under such pressure of work that he was unable to prepare an urgent application for such an interdict cannot be a valid excuse. As far as the first respondent is concerned, the applicant was well aware of his intention to sell the Shares to the second respondent, because he had told the applicant. Despite an

invitation to do so, the applicant took no steps to obtain an interdict to prohibit the sale. Therefore he went ahead with the sale. The *bona fides* of the respondent in this regard are to my mind established by the letter he wrote to Mr dos Remedios. That letter, which is dated 15 September, some two weeks before this action was instituted, reads as follows -

> "Thank you for your letter of the 12th instant. After a flurry of many telephone calls, the transaction was finalised between myself and PG last Friday afternoon. I did endeavour to keep yourself and Mr Passaportis fully informed. I even went so far in one discussion with Mr Passaportis to tell him that I was prepared to delay the transfer of the Shares to PG if he felt that he needed additional time, having regard to the legal position of his clients. Having considered this he telephoned me last Friday morning and told me that he really did not believe that there was any basis upon which he could ask me to delay the finalization between myself and PG."

In my opinion, the first and second respondents acted *bona fide* when they completed the sale and transfer of the Shares. The first respondent believed that he was required to sell the Shares

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to the second respondent because the latter had properly exercised its right of pre - emption. The applicant had been given en opportunity to delay the safe by obtaining an interdict but had failed to do so. The second respondent believed that the applicant's offer to buy the Shares was invalid because prior Ministerial authority was required in terms of s 10(1) of the Regulations and had not been obtained. Thus the test propounded by SPOELTRA AJ in *Kazazis*' case *supra,* at 894B from which an inference of fraud could be drawn is not applicable because the second respondent, when it purchased the Shares, believed that the applicant's right of action had ceased to exist and such belief was reasonable and well founded.

With regard to case No. HC 2777/89 which concerned the application to extend the six week period to six months, the applicant had been given leave on 9 August to intervene but it did not file its opposing affidavit until 8 September, thirty days later. The first respondent could well be excused for believing that the applicant did not intend pursuing its application further. When he spoke to the applicant's legal practitioner on 7 and 8 September, he was not told that it was intended to file the applicant's opposing affidavit on 8 September. Therefore when the first and second respondent completed the sale and transfer of the Shares on 8 September they did not believe that the applicant had a prior right to the Shares. They were not acting clandestinely to defeat the rights of the applicant. They were not acting in deliberate

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disregard of the rights of the applicant. Accordingly the applicant is not entitled to step into the shoes of the second respondent and claim that the Shares be transferred to it.

In the applicant's founding affidavit Mr Crundall has questioned the integrity and ethics of two senior members of the legal profession. For the reasons set out above I consider that there is no basis for the allegations of *mala fides* and improper conduct. In his answering affidavit, Mr Crundall has persisted in his allegations. Mr *Gillespie* has tried valianty to persuade me chat Mr Crundall meant to convey merely that the legal practitioners concerned had acted *mala fides* "as the term is used to describe the state of mind of a subsequent purchaser in double sale". I cannot accept his submissions on this aspect. In my view the allegations of *mala fides* and improper conduct against the legal practitioners concerned were entirely uncalled for. In *Spes Bona Bank v Portals Water Treatment* 1981(1) SA 618(W) at 637 A-C RESTADT J after referring to a number of cases, said -

> "These case show that, where dishonest conduct is unjustifiably alleged against a litigant, attorney-and-client costs may be awarded."

He went on to point out that such an award was "a special order not readily made" and, in the exercise of his discretion, declined to award attorney - and - client costs. In this case, however, accepting that such an order is not readily made, I consider that it is fully justified. Had Mr Crundall, in his answering affidavit, retracted the allegations I might have been constrained to decline to make the order. However, he persisted in his answering affidavit in claiming that there was justification for the "accusation of *mala fides*". The fact that Crundall used the word "accusation" indicates to me that he was not using the words "*mala fides*" in the narrow legal sense contended by Mr *Gillespie.*

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Mr *Gillespie* did suggest that the affidavit filed by the first respondent's accountant on 21 March was not necessary and should not be taken into account in any award of costs. I do not agree. AS GROSSKOPF J said in *BEF (Pty) Ltd v Cape Town Municipality & Ors* 1990(2) SA 337(C) at 348H -

> "Once again, as I have said, I do not think that one should be over-meticulous in disallowing affidavits or part thereof."

The application is dismissed. The costs of the first and second respondents are to be paid by Mr Russell Guy Crundall on a legal practitioner and client scale *de bonds propriis*.

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Honey & Blanckenberg, applicant's legal practitioners

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

Atherstone & Cook, second respondent's legal practitioners

S v SHONIWA 1990 (1) ZLR 311 (SC)

Court **Supreme Court, Harare**

McNally JA & Korsah JA

Criminal appeal

20 March & 28 May 1990

Flynote

Criminal procedure - evidence - single witness - careful analysis required - cautionary rule - corroboration - Criminal Procedure and Evidence Act [Chapter 59] - s 188A - circumstances in which adverse inference may be drawn.

Criminal procedure - competent statutory verdict - shift of onus - unrepresented accused - prejudiced by failure to indicate reliance on statute - improper on appeal to substitute verdict.

Appeal - remittal - unjust by reason of delay.

Headnote

The appellant was charged and convicted of theft of a bovine. The State relied on the evidence of a single witness with an interest to serve. The trial court did not carefully analyse such evidence, and failed to warn itself of the danger of false incrimination. Despite describing the witness as a "possible accomplice", the trial court was oblivious of the need to treat his evidence with care, and consequently the conviction could not be sustained. The State, on

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appeal, sought to place reliance on the appellant's failure to give evidence in order to obtain a conviction in terms of s 5(1) of the Stock Theft Act [*Chapter 72*].

Held, that as the appellant had not refused to give evidence or to answer questions, as no questions were asked of him, adverse inferences could not be drawn against him in terms of s 188A of the Criminal Procedure and Evidence Act [*Chapter 59*].

KORSAH JA

Held, further, that as the effect of s 5(1) of the Stock Theft Act [*Chapter 72*] was to shift the onus onto the appellant to establish his innocence, the State's omission to intimate to the appellant who was unrepresented, that it intended to invoke the provisions of that section was fatal to its case in that the appellant would be prejudiced.

Held, further, that it would be improper on appeal to substitute a conviction of an offence which casts the onus on the appellant without the appellant having been given an opportunity of discharging such onus.

Held, further, by reason of the delay of four years since the offence was committed, and but for a little diligence on the part of the prosecution the matter could have been brought to finality, that it would be manifestly unjust to order a retrial, taking into account the seriousness of the offence.

Cases cited:

Ellis v R 1961 R&N 468 (FSC)

S v Bvundura SC-125-82 (not reported)

S v Muranda SC-36-84 (not reported)

S v Mubaiwa 1980 ZLR 477 (A)

S v Makandhla 1981 ZLR 423 (SC); 1981 (4) SA 743 (ZS)

S v Bledig & Anor 1974 (1) RLR 100 (A); 1974 (2) SA 613 (RA)

S v Somciza 1990 (1) SA 361 (A)

R v Saunders (1973) 58 Cr. App R 248 (CA)

GS Wernberg for appellant

Mrs *J Zindi* for respondent

Judgment

Korsah JA: The appellant was at Kadoma Magistrate's Court on 5 August 1987, convicted of theft of a bovine. He was sentenced to serve a term of two years' imprisonment with labour with

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one year suspended on conditions. He appeals against conviction only.

The appellant was the owner of a butchery at Watyoka business centre. On 6 December 1984, Bigboy Chirota visited his father's pen and found that one beast was missing. On 7 December 1984, Constable Sengure, upon information received, called at the appellant's butchery with Joconiah Chirota, the complainant in this case, and Joconiah identified his beast by its skin and hoofs. Constable Sengure inspected the appellant's butcher's shop register and discovered that the meat which was being sold had not been registered.

Since Joconiah had not sold the beast to the appellant, it was evident that the beast had been stolen. This much was common cause.

KORSAH JA

The appellant's explanation for his possession of the carcass of the stolen beast was that it was sold by Alfred Chembere. He led the police to Alfred's place to get confirmation from Alfred of this assertion, but Alfred was not at home when they called. He told the police that Alfred's absence may be explicable by the fact that when he bought the beast Alfred did not have his stock book and so he advised Alfred to go and bring his stock book, which Alfred said he had left at Watyoka, to enable the appellant to register the beast in his butcher's shop register and that Alfred may still be at Watyoka. He said, without waiting for the stock book, he slaughtered the beast and commenced selling the meat because Alfred was a person well known to him and it never crossed his mind that Alfred had stolen the beast.

Alfred, while admitting that he knew the complainant as the owner of a butchery at Watyoka business centre, denied having sold the beast to the appellant. Although the appellant declined to give evidence, he was not questioned by the court or the public prosecutor. It was thus not even the word of the appellant against that of Alfred. There was no evidence whatsoever from the appellant.

Mrs *Zindi* conceded in the Heads of Argument filed on behalf of the respondent that the evidence of Alfred was of a most cursory nature. She pointed out that Alfred was not examined on how well he knew the appellant and for how long; whether he himself owned cattle; whether he had previously sold or agreed to sell cattle to the appellant; whether he had at any time looked after cattle owned by the complainant and if he had ever visited Watyoka business centre, and if so on what occasions and for what purpose.

There is no gainsaying that the State's case rested on the evidence of a single witness and because of the cursory nature of his evidence not even the trial court which saw and heard him could satisfy itself that Alfred was a credible witness. This is borne out by the court's reference to Alfred as "a possible accomplice".

Firstly, taking Alfred's testimony as the uncorroborated evidence of a single witness with an interest to serve "the court must first decide whether the witness is to be believed, and must then satisfy itself that it has not been deceived by an apparently honest witness". His evidence must be clear and satisfactory in every material respect. See *Ellis v R* 1961 R&N 468 (FSC); *S* v

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Bvundura SC-125-82; *S v Muranda* SC-36-84.

Any tribunal of fact confronted with a conflict of testimony must carefully

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analyse the evidence before it, and if it is in any doubt as to the credibility of the witness of the party who bore the burden of proof, in this case the State witness, Alfred, must acquit on the basis that the burden of proof has not been discharged.

The trial court did not proceed along the lines above indicated, but inferred without supportive evidence, not that Alfred was a credible witness, but rather that Alfred was a penniless youth who could not possibly own cattle and, therefore, the appellant was not a witness of truth when he said he bought the bull from Alfred. In so doing, the trial court fell into error; for if a judgment does not demonstrate that the court was alive to the danger of false incrimination and fails to apply the cautionary rule it will be upset on appeal.

Secondly, the trial court by stating that Alfred was a "possible accomplice" clearly intimated that not only was Alfred a single witness with an interest to serve, but that he had possibly colluded with the appellant in the theft of the complainant's beast. Strangely enough, no accomplice warning in terms of s 251 of the Criminal Procedure and Evidence Act [*Chapter 59*] was issued to Alfred. Furthermore, the trial court was clearly oblivious of the *onus* of warning itself of the need to approach the evidence of an accomplice with care. The approach to be adopted in such cases is succinctly stated in *S v Mubaiwa* 1980 ZLR 477 (A) at 481A-B. The evidence of a suspect witness, even though it may receive support in a form capable of providing corroboration could not found a conviction unless it is itself accepted as true. In any case there was no corroboration of Alfred's testimony and the conviction on the charge of theft cannot be sustained.

Mrs *Zindi,* cognisant of the impossibility of supporting the trial court's verdict on a charge of theft, conceded in the respondent's Heads of Argument that the conviction for theft was insupportable on the evidence adduced, but submitted that the appellant could properly have been convicted of contravening s 5(1) of the Stock Theft Act [*Chapter 72*]. The section recites that:

> "Any person who acquires or receives into his possession from any other person any stolen stock or stolen property shall be guilty of an offence **unless he proves** to the satisfaction of the court that he had reasonable cause for believing at the time of acquiring or receiving such stock or produce that it was the property of the person from whom he acquired or received it, or that such person was duly authorised by the owner thereof to deal with it or dispose of it"(emphasis added).

KORSAH JA

That a conviction under s 5(1) of the Stock Theft Act may be a competent verdict on a charge of theft cannot be disputed. But the difference between a charge formulated under the Act and a

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charge framed in terms of the common law must not be overlooked. In the instant case the charge sheet reads:

> "Stock theft
>
> In that upon or about the 7th day of December 1986 and at or near Chirata Village, Chief Mashayamombe, Mhondoro Communal land in the said province, the said Leopard Shoniwa did wrongfully and unlawfully steal one Grey Bull, property of Jokoniya Muzvidwa Chirata, a person there residing."

The difference is this: in the charge as framed the onus was on the prosecution to prove beyond a reasonable doubt that the appellant did steal the complainant's beast; whereas a charge formulated under s 5(1) of the Act presumes the guilt of a person in whose possession stolen stock or stolen produce is found and puts the onus on such person to establish on a balance of probabilities that he had reasonable cause for believing at the time of his acquisition or receiving, that such stock or produce was not tainted with illegality.

As observed earlier, although the appellant gave an outline of his defence denying that he stole the beast and alleging that it was sold to him by Alfred, he declined to testify. There is a cryptic note in the record which reads:

> "Section 188 explained. Refuses to take oath and has nothing to say."

Mrs *Zindi* contended that the appellant was well aware that he was facing a charge of theft, but nevertheless refused to give evidence and declined to say anything, despite being informed of s 188 of the Criminal Procedure and Evidence Act [*Chapter 59*], to answer the charge of theft against him. And as he did not set out sufficient reasons "constituting just cause" for his silence, the trial court was entitled to draw an adverse inference from his silence. See *S v Makandhla* 1981 ZLR 423 (SC); 1981 (4) SA 743 (ZS) at 745F.

Section 188A of the Criminal Procedure and Evidence Act [*Chapter 59*] provides that:

> "188A. (1) **If an accused who gives evidence or is questioned in terms of subsection (5) or (6), as the case may be, of section one hundred and eighty eight refuses to answer any questions,** he shall be asked to

KORSAH JA

> give his reasons for so refusing and, if he persists in his refusal, the court, in determining whether the accused is guilty of the offence charged or any other offence of which he may be convicted on that charge, may, unless satisfied that he had just cause for so persisting, draw such inferences from the refusal as appear proper and the refusal may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.
>
> (2) For the purposes of subsection (1) an accused who refuses to answer any question shall be deemed to do so without just cause -
>
> (a) . . .
>
> (b) in the case of an accused who is questioned in terms of subsection (6) of section one hundred and eighty eight, unless he would be entitled in terms of this Act to refuse to answer the question on the ground of privilege if he were giving evidence on his own behalf" (emphasis added).

It seems to me, with respect, that Mrs *Zindi's* argument, having regard to the record, appears to

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be putting the cart before the horse. In terms of subs (6) of s 188 of the Criminal Procedure and Evidence Act, "if the accused declines to give evidence, the prosecutor and the court may nevertheless question him". This they failed to do. The word "If" with which s 188A commences makes it a prerequisite for the invocation of s 188A, in circumstances such as these, that the prosecutor, or the court, should exercise the right to question the accused, and it is only when the accused refuses to answer such questions may an adverse inference be drawn that his silence is corroborative of the evidence adduced against him. The failure of the prosecutor and the trial court to question the appellant renders impossible the invocation of s 188A (1) and (2).

There is no indication in the record that when the appellant declined to testify, the trial court, as is customary in the magistrates court, asked him whether he adhered to or wished to adopt his "outline of defence" as his evidence. It may be that he thought that his outline of defence was his evidence and he chose to say nothing because he did not want to repeat it all over again.

That the killing of the beast by the appellant before Alfred brought the stock card and the selling of the meat without entering it in the butcher's shop register are suspicious circumstances cannot be doubted, but in his outline of defence he said he acted as he did because Alfred was a person well known to him and it never crossed his mind that Alfred had stolen the beast.

KORSAH JA

It seems to me that where a common law offence for which the onus of establishing the guilt of an accused lies on the State is preferred against an accused person, and the State seeks to have the accused convicted for a statutory offence which casts upon the accused the burden of proving his innocence, unless some indication is given to the accused in the indictment or at the trial, especially when he is unrepresented, that the State is placing reliance on a statutory provision which calls upon him to establish his innocence, grave prejudice will result to the accused. In my view such prejudice as would result to the accused, in such circumstances, would be no less than that envisaged by LEWIS AJP in *S v Bledig & Anor* 1974 (1) RLR 100 (A) at 106F-107C; 1974 (2) SA 613 (RH) at 616F- 617B; and the omission to intimate to the accused the danger confronting him upon an invocation of s 5(1) of the Act would be fatal to the State's case.

An accused is entitled to know at his trial where the *onus* lies; whether it is for the prosecution to prove his guilt beyond a reasonable doubt or, whether it is for him to establish his innocence on a balance of probabilities. The reason as I perceive it is this: if the prosecution assumes the burden of proof, unless it established a *prima facie* case, the accused does not have to testify to give an account which is reasonably probable to exculpate himself, but where the *onus* is placed on the accused by statute to prove his innocence on a balance of probabilities the accused is compelled to give an account to satisfy the court that although the facts as alleged constitute the offence charged he is in all probability devoid of the requisite *mens rea* and innocent of the offence. When, therefore, the accused is not made aware at his trial that he has the burden of proving his innocence, it would be wrong and unjust on appeal, where he does not have a chance to discharge the burden, to substitute a conviction of an offence which casts the burden on him to prove his innocence, for a conviction of an offence where the State failed

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to discharge the burden it had by law assumed.

It follows that the State cannot on appeal seek the substitution of a verdict which it would have been incompetent for the trial court to pronounce.

Mrs *Zindi* submitted that if we were of a mind to quash the conviction then the matter be remitted for retrial.

Section 15(d) of the Supreme Court of Zimbabwe Act, 1981 provides that:

> "15. ... the Supreme Court may, if it thinks it necessary or expedient in the interests of justice -

KORSAH JA

(a) . . .

(b) . . .

(c) . . .

(d) set aside the conviction and remit the case to the Court or tribunal of first instance for further hearing, with such instruction as regards the taking of evidence or otherwise as appears to it necessary."

Considering the view taken by the trial magistrate regarding the evidence adduced at the first trial that

> "Alfred appeared to be a penniless youth . . . It would be gross recklessness for anyone to accept a big thing like a bull from such a youth and fail to make a proper check that such a bull had been obtained by honest means, let alone disposing of it in a hurry",

the appellant is unlikely to feel complacent about his prospects of receiving a fair trial before the same magistrate. See *S v Somciza* 1990 (1) SA 361 (A) at 365H - 366A. If an order of remittal is to be made for a trial *de nova*, as requested by the State, then the matter must be heard by another magistrate. The question is: Is such an order warranted?

This matter arose on 7 December 1986. The appellant was charged and taken before a magistrate on 14 June 1987, and on 18 August 1987. If an order for retrial were made his trial would take place almost four years after his initial arrest. A court of appeal, in deciding whether to order a retrial must take into account the length of time since the commission of the offence. No time scales can be prescribed save to say, in protection of the public interest, the more serious the offence the greater will be the time allowed for a retrial. See *R v Saunders* (1973) 58 Cr App R 248 (A).

It seems to me that a lapse of about four years is an inordinate period for an accused to be called upon to face trial afresh for an offence of this nature. Especially is this so when a little diligence on the part of the prosecution and greater care by the trial court the matter could satisfactorily have been brought to finality.

It would be manifestly unjust, in my view, for a court of appeal to order that an accused be sent back on the same facts to run the gauntlet once more on an offence with which he was not

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charged, but for which he could have been convicted had the proper procedure been followed. I have given anxious

KORSAH JA

thought to the request for a retrial, but have come to the conclusion that the public interest will not be threatened if such an order were refused.

Accordingly the appeal succeeds. The conviction is quashed and the sentence imposed is set aside.

McNally JA: I agree.

Jarvis and Palframan, appellant's legal practitioners

S v GUJRAL 1990 (1) ZLR 320 (HC)

Editor's Note:(4)

Court **High Court, Harare**

Smith J Gibson J & Adam J

Appeal against sentence

16 February & 30 May 1990

Flynote

Criminal procedure - sentence - delay in the hearing of an appeal against sentence - consideration of delay of 17 months in regard to the custodial sentence passed on appellant.

Headnote

The appellant was convicted and sentenced on three counts of fraud involving the misuse of foreign currency in a total amount of $75 000,00 (Zimbabwean). The trial court imposed a cumulative sentence of a fine of $21 000,00 or in default of payment 3 years' imprisonment and in addition 4 years' imprisonment. The appellant lodged a notice of appeal against the severity of sentence. The appeal was heard 17 months later. The delay was through no fault of the appellant. The appellant's counsel argued that the delay warranted the appeal court interfering with the sentence.

The court reviewed cases where there had been a delay in the hearing of the appeal. On appeal:

Held, that an undue delay in the hearing of an appeal cannot be elevated to a principle or rule of

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law that requires a sentence of imprisonment to be set aside or reduced.

Held, further that the period of 17 months' delay in the hearing of appellant's appeal did not warrant a reduction of the sentence of imprisonment.

SMITH J

Accordingly, appeal dismissed, ADAM J dissenting.

Cases cited:

S v Tawengwa HH-607-87 (not reported); on appeal S-28-90 (not reported)

S v Chilimanzi 1990 (1) ZLR 150 (HC)

S v Wood 1973 (2) RLR 11 (A)

S v Mupanduki 1985 (2) ZLR 169 (SC)

S v Dube & Anor SC-169-89 (not reported)

S v Gonese HH-218-89 (not reported)

S v Kaschula HH-220-89 (not reported)

S v Murerswa High Court 27 November 1987 (not reported)

AP de Bourbon SC for appellant

J Samkange for State

Judgment

Smith J: The appellant is a businessman. He owns a brickfield and a transport business. In September, 1987 he applied for a licence to import essential spares for his brick-making plant. He was granted a licence, on 2 October 1987, to import such spares at a cost of $14 700,00. Thereafter he used the licence to import motor vehicle spares which he sold on the open market. Subsequently he again applied for a licence to import spares for use in his business. He was granted a licence on 20 November 1987 to import such spares et a cost of $15 152,00. Again he imported motor vehicle spares which he sold on the open market. Then in February 1988 the appellant applied for, and was granted a licence to import a brick-making machine at a cost of $468 730,00. He used the licence to import the brick-making machine and, in addition, motor vehicle spares at a cost of $45 859,00. The accused, was charged in the court of the regional magistrate at Mutare, with three counts of fraud. He pleaded guilty and was duly convicted on all counts on 12 September 1988. He said that the profit that he made on the sale of the motor vehicle spare parts that he had imported amounted to roughly between $50 000,00 and $60 000,00.

In sentencing the appellant the magistrate considered the offence, the offender and the

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interests of society. He referred to the remarks of EBRAHIM J in *S v Tawengwa* MH - 607 - 87 (not reported) *(5), where the learned judge had sentenced the accused to a fine of $400 000,00 and to imprisonment for 4 years, and said that to some extent he was, in a small way, going to impose

SMITH J

a penalty which had a partial effect of making the appellant discharge his ill-gotten gains. He said -

> "One is tempted to remark that the effective prison term which I impose is the same as the one in *Tawengwa*'s case and one might then conclude that the sentence I impose has resulted in an injustice. This is, however, not so because whilst the the fine levied in *Tawengwa*'s case totalled $490 000,00, this is not going to be the position in this matter."

He then imposed a fine of $7 000,00 and imprisonment for 1 year on each of count 1 and count 2 and a fine of $7 000,00 and imprisonment for 2 years on count 3. Thus the fines totalled $21 000,00 and the imprisonment totalled 4 years.

The appellant's appeal against sentence was dated 20 September 1988. The notice was received at the provincial magistrates court in Mutare on 21 September, and et the regional magistrates court in Harare on 26 September 1988. The regional magistrate who convicted the appellant, in a letter dated 1 June 1989, addressed to the registrar of the High Court, said that the record and notice of appeal had been referred to him and, having carefully perused the grounds of appeal against sentence, he could not make any further useful comments in light of the comprehensive reasons he gave for the sentence he delivered. It would appear that the regional magistrate gave his reply only after the record had been prepared which took some 8 months. In doing so he was remiss in his duties. It was his duty to ensure that his reply was given expeditiously. Arrangements must be made for magistrates to give their responses to notices of appeal soon as possible after the notices are filed and not many months later when the records are transcribed.

Mr *de Bourbon* argued that the sentence of imprisonment was manifestly excessive, both by way of the fact of effective imprisonment and by way of the length of the period of imprisonment. He submitted that the facts in this case could not be distinguished from those in *Tawengwa*'s case save that in the latter the amount involved was $401 409,00, nearly six times the amount involved in this case. Furthermore, he went on, the regional magistrate, instead of referring the matter to the High Court for sentence, clearly decided to impose the maximum financial penalty within his jurisdiction but, since this did not satisfy what he considered to be the proper penalty, he decided to impose imprisonment and then imposed imprisonment as high as that imposed in *Tawengwa*'s case which was far more serious. He argued that the magistrate had sought to compensate for his lack of jurisdiction in the

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quantum of fines by imposing a longer term of imprisonment than was warranted. In fact, so Mr

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de Bourbon argued, no effective term of imprisonment was warranted.

Mr *de Bourbon* also pointed to the fact that some 18 months had elapsed since the appellant was sentenced and said that the delay could not be laid at the door of the appellant. He submitted that the terms of imprisonment should be suspended or at least reduced.

Mr *Samkange* supported the sentence imposed. He agreed that the facts of this case were similar, to some extent, to those in *Tawengwa*'s case. In that case the amount concerned had been substantially higher but in this case the appellant had defrauded the State on three separate occasions, not just once as *Tawengwa* had. He pointed out that the appellant had breached the trust imposed upon him by the officials responsible for granting import licences and allocating the necessary foreign exchange. That breach of trust was caused by the appellant's greed and dishonesty. With regard to the delay in the hearing of the appeal, he pointed out that the appeal was first set down on 13 November 1989 for hearing on 15 February 1990 and when this date was not suitable for the appellant because counsel was not free on that date, it was again altered at the appellant's request to 12 February 1990. The appellant prepared to oppose but did not because a definite date for the hearing of the appeal on 26 February 1990 was agreed by the appellant.

The appeal was heard by ADAM J and GIBSON J As there was a difference of opinion between the two, the papers were referred to me in terms of s 4(2) of the High Court Act 1981 (No. 20 of 1981) for my opinion.

As Mr *Samkange* said, this court cannot interfere with the sentence imposed by the magistrate merely because it would have passed a different sentence had the case been referred to it for sentence. It can only interfere if it is satisfied that the sentence imposed induces a sense of shock or that the magistrate misdirected himself. Despite Mr *de Bourbon*'s submissions, I do not consider that the magistrate misdirected himself. I do not think that there are grounds for arguing that he increased the sentence of imprisonment that he would otherwise have imposed because his jurisdiction with regard to the fine was limited to $7 000. I accept that the amount involved in this case was considerably less than that in *Tawengwa*'s case. However there are factors in this case which are more aggravating. The appellant is a businessman carrying on an essential service. He used this fact to persuade the officials concerned to grant him a licence which he led them to believe was for spare

parts or machinery essential to his business. They trusted him and he abused their oust, not once but on three separate occasions. The system of allocating import licences and foreign exchange is based, and from its very nature must be based, on one of trust. Officials cannot be expected to send inspectors to verify the genuineness of every application for an import licence. The trial magistrate took a very serious view of the offences committed by the appellant, and rightly so. I consider that the sentences he imposed in respect of the three offences were eminently reasonable. I do not consider that it would be right to reduce the total period of imprisonment merely because in *Tawengwa's* cease a sentence of 4 years imprisonment was imposed. Looking at the totality of the sentence in *Tawengwa*'s case, it was much greater than

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in this case because, in addition to the 4 years imprisonment, in that case the accused was also fined $400 000,00..

In *S v Chilimanzi* 1990 (1) ZLR 150 (HC) this Court considered the question of delays in sentencing or concluding the trial of an accused person. In the case reference was made to a number of cases where a sentence of imprisonment had been set aside and replaced by a fine because of the delay in bringing the case to finality. In those cases the concern of the judges who dealt with the matter was that it would be unjust for the accused to be sent to prison for so long after he was sentenced, particularly where the delay was not the fault of the accused. In the cases referred to, the delays ranged from 17 months to over 4 years. As win all over factors that have to be taken into account in assessing sentence, the question of any delay in the proceedings is a factor that has to be taken into account. It cannot be elevated to a principle or rule of law that undue delay in itself requires that a sentence of unprisonment must be set aside or reduced. There are cases where a sentence of imprisonment is fully justified and where it would be wrong to set aside or to reduce the sentence solely by reason of a delay in proceedings. As I said in *Chilimanzi's* case *supra* at p 155, there is a failure of justice where a person who is convicted of an offence which merits a custodial sentence does not go to prison merely because of delays in the judicial procedures. Likewise, there would be a failure of justice if an offender is not punished merely because of delays in bringing him to trial. In this case, the period that has elapsed since the appellant was convicted is just over 17 months. Whilst this is a matter of some concern I do not consider that in the present case it is of such magnitude as to warrant a reduction in the sentence imposed on the appellant.

For the reasons set out above, the appeal is dismissed.

Gibson J: I agree.

ADAM J

Adam J: The appellant was convicted in Mutare on his plea of guilty and sentenced on 13 September 1988 on three counts of fraud. On the First Court, alleged to have been committed on 2 October 1987, the sentence was a fine of $7 000 or in default of payment 1 year imprisonment with labour and in addition 1 year imprisonment with labour; on the Second Count, alleged to have been committed on 20 November 1987, the fine was also $7 000 or in default of payment 1 year imprisonment with labour and in addition 1 year imprisonment with labour; on the Third Count, alleged to have been committed on 5 February 1988, the fine was also $7 000 or in default of payment 1 year imprisonment with labour and in addition 2 years imprisonment with labour. The cumulative sentence is a fine of $21 000 or in default of payment 3 years imprisonment with labour and in addition 4 years imprisonment with labour. On the first offence the amount involved was $14 700, on the second offence the amount involved was $15 152, and on the third offence the amount involved was $45 859. The total amount of foreign currency involved was the equivalent of Zimbabwean $75 711 and offences were committed within a period of about 4 months.

The trial magistrate briefly outlined the agreed facts as follows:

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"On the 2nd October, 1987, the 20th November, 1987 and the 18th February, 1988 accused applied for and was granted an import licence to purchase various brick-making machines. He was awarded as per the import licences, $14 700 in foreign exchange in respect of the first application, $15 152 in respect of the second application and $450 730 in respect of the third application. He utilised the total foreign exchange awarded to him to buy motor vehicle spare parts, that is in respect of the first and second counts. In respect of the third award he utilised $45 859 F to buy motor vehicle spare parts and utilised the balance legally. The total amount of foreign exchange used otherwise than what it was intended for is $75 711. The motor vehicle parts were sold - to established motor vehicle dealers and the accused person says he realised between $50 000 and $60 000 as profit."

Against this sentence an appeal, dated 20 September 1988, was filed with the Provincial Magistrate on 21 September 1988 and with the Regional Court on 26 September 1988 in Harare (according to the date stamp). The record filed in this matter discloses that the trial magistrate submitted his comments on the notice of appeal dated 1 June 1989 and that the transcribed proceedings were submitted to the Clerk of the Regional Court on 30 May 1989 which consisted of 13 typed lines pertaining to the charges and 7 typed pages of the

ADAM J

trial magistrate's very short judgment together with his reasons for sentence. The record of proceedings reveals that the registrar of this Court received correspondence dated 24 July 1989 from the legal practitioner for the appellant advising him that the clerk of the regional magistrates court in Harare had indicated that the record had been forwarded to this Court's registrar's office and that they trusted that he would be in a position to allocate a date for set down for the appeal. The record also reveals that there is a copy of the notice of hewing dated 13 November 1989 addressed to Me appellant's legal practitioner informing him that the appeal had been set down for 5 February 1990 and that particular notice has been crossed out and a further copy of the notice of hearing dated 21 November 1989 similarly addressed indicating that the date of hearing no was 12 February 1990. In addition there is correspondence dated 8 February 1990 to the registrar from the appellant's legal practitioners informing him of the attendance by the appellant's legal practitioner and the legal practitioner for the Attorney-General's office wherein it was agreed that the date of hearing would be changed from 12 February 1990 to 26 February 1990 which seemed to be confirmed by another copy of the notice of hearing in the record of proceedings dated 16 February 1990 addressed to the appellant's legal practitioner. The respondent in its heads of argument asserts that the appeal had been set down for hearing in October 1989, and again in November 1989, however the record of proceedings before this Court does not support this assertion and the respondent has not by affidavit sought leave to amend the record of proceedings.

In his grounds of appeal the appellant indicates that the sentence imposed induces a sense of shock. The appellant also submits that the sentence is manifestly excessive and that the trial magistrate misdirected himself in his approach to the sentences. He stressed that sight cannot be lost that over 18 months had elapsed since the imposition of the sentence and the delay could not be laid with the appellant This had to be taken into account. It was argued that the facts in this case could not readily be distinguished from *S v Tawengwa* HH-607-87 referred to by the trial magistrate. In *S v Tawengwa supra* (which had been remitted from the trial magistrate to this Court for sentencing) there were two counts, one count involving fraud and

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the second count involving corruptly giving $30 000 as a reward contrary to the Prevention of Corruption Act 1985 for which the accused there received on the first count a fine of $400 000 or in default of payment 4 years' imprisonment with labour and in addition 4 years' imprisonment with labour; and on the second count a fine of $90 000 or in default of payment 1 year's imprisonment with labour. *Tawengwa* had Fraudulently obtained foreign

ADAM J

currency equivalent to over Zimbabwean $400 000 and then utilised the equivalent of $323 6190 EBRAHIM J held that the prejudice was irreversible as that foreign currency was no longer available for primly use. the also mentioned that at one stage *Tawengwa* had as much as $739 098 deposited into one of his companies' bank accounts the also said that it was appropriate to impose a very severe punishment of imprisonment anal further to penalise by depriving the accused of his ill-gotten gains. He admonished that it was not his view that offenders should always be imprisoned as well as having fines imposed but in serious cases such as *S v Tawengwa* that would be a correct approach.

The Supreme Court in *S* v *Tawengwa,* SC-28-90 upheld the sentence on the first count but altered the sentence on the second count as fares die additional 2 years' imprisonment with labour was concerned by making it run concurrently with the additional 4 years' imprisonment with labour. McNALLY JA observed at pp3-5:

> "The appellant did not take the court into his confidence as to the extent of his profit. There can be little doubt that it was considerable. It justified a reward for $30 000 to one of the two men who made the fraud possible . .
>
> It is impossible therefore for the court to know the effect of its fine in relation to the profitability of the illegal transaction. Has it merely reduced the profitability of the transaction. Has it eliminated the profit and in addition taken away some of the investment itself? One does not know. Only the appellant knows. In such circumstances die conjoining of a prison sentence may be the only certain way of punishing the offender.
>
> . . . The appellant was able to raise the $401 409 to buy the goods in the first place. He had already made a profit probably amounting to hundreds of thousands of dollars. In July 1987 someone had paid into the bank account of one of his companies the sum of $739 098,40. In these circumstances it is naive to think that the learned judge expected him to pay the fine out of his monthly salary cheque.
>
> . . . In round terms his fine on count one was 125% of his investment. So if he made a profit of 125%, the fine simply removed that profit leaving his investment intact. If his profit was greater than that, which is not impossible, then the fine did no more than reduce his profit. Even if his

ADAM J

> profit was a lowly 25% the fine did no more than remove the profit and the investment. In none of those circumstances could the fine be called excessive.
>
> . . . In any event it seems to me impossible to say that the learned judge was wrong to conclude that the elements of greed and corruption and the extensive scale of the illegal profits potentially to be reaped were such as to warrant a deterrent sentence in this case.
>
> . . . I am satisfied therefore that on Count One the fine was entirely justified and it was entirely proper to conjoin a

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prison sentence with it."

The trial magistrate in this case talked about the amount of prejudice and that the figure was substantial. He did not agree with the accused's contention that he had brought in essential motor vehicle spare parts and accepted what EBRAHIM J had stated that the prejudice was irreversible as the foreign currency no longer was available to the State for priority use. He said that he was aware that motor vehicle parts are in chronic short supply and that the accused's acquisition of motor vehicle spare parts could not possibly have been actuated by a sense of philanthropy. Because of shortages, he maintained, the accused realised that he would make a killing by utilising the foreign currency in the manner he did. That this was so, he said, is evidenced by the enormous profits he made. The record of proceedings disclosed the profit (at $50 000 to $60 000) as being at most over 79% of the investment.

The trial magistrate approved what MACDONALD JP had observed in *S* v *Wood* 1973 (2) RLR 11 (A) at 14:

> "It is the harm which an accused inflicts by his wrong doing which, in the main, is the measure of his moral blameworthiness. In the case of theft, the harm will often be commensurate with the value of the goods stolen. "

But in *S* v *Tawengwa* at p 5, McNALLY JA stated that *S* v *Wood supra* was not a reliable guide here. The trial magistrate considered the aggravating features as well as the mitigating factors but concluded that even though a prison term for first offenders was a vigorous and dehumanising form of punishment, however, according to him "there comes a stage where general principles no longer apply and the facts of a particular case may call for a custodial sentence". He felt that a term of imprisonment was appropriate in this case and then remarked that he was "very much influenced by the reasoning of EBRAHIM J in *S v Tawengwa*" *supra*, and "to some extent" he

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ADAM J

was, "in a small way" depriving the accused of his ill-gotten gains. He imposed the maximum fines that a trial magistrate with his jurisdiction could.

I should stress that EBRAHIM J in *S v Tawengwa supra*, was guided by BECK JA in *S v Mupanduki* 1985 (2) ZLR 169 (SC) which related to 15 counts in contravention of the Foreign Exchange Act involving Zimbabwean $362 565 equivalent in foreign currency with the trial court's sentence (which was a fine of $375 000 or in default of payment 10 years' imprisonment win labour) being reduced by the Supreme Court to a fine of $362 556 or in default of payment 3 years' imprisonment with labour and in addition 4 years' imprisonment with labour.

In *S* v *Mupanduki supra*, the sentence Here was 4 years' imprisonment on 15 counts together with a fine of $362 565 and if the fine was not paid the total imprisonment was 7 years. In *S v Tawengwa*, *supra*, the sentence was 4 years' imprisonment of the two counts together with a fine of $490 000 and if the fine was not paid the period was 9 yews and the amount of foreign currency equivalent involved was $323 619 and $30 000 was given as a reward.

In *S v Mupanduki supra* BECK JA stated at pp 174H - 176E:

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"The selection of 10 years as an appropriate alternative can only have been dictated by the magnitude of the fine and not by the gravity of the offence, particularly since a further period of imprisonment had to be and was imposed.

When considering the gravity of the offence it must be borne in mind that although there was grave prejudice to the state in preventing $363 565,41 worth of foreign currency being subjected to the control of the Government of Zimbabwe, there was no suggestion that any of this foreign currency was acquired by the appellant himself for his external enjoyment ... and what ever monetary benefit he may have gained for himself within Zimbabwe by reason of his activities would seem to have been far less than the amount of the monetary fine, for the State produced no evidence of any dramatic increase to the appellant's patrimony.

Accordingly it is my clear view that die trial court misdirected itself in laying emphasis on the magnitude of the fine rather than the extent of the appellant's culpability as the factor by which to determine the length of the period of imprisonment that should be imposed as alternative to the fine.

ADAM J

Moreover, conjoining to the sentence of 10 years a further 6 years, so as to impose a total of 16 years' imprisonment with labour as the effective sentence that the appellant will have to serve, is to arrive at an overall sentence which in my opinion is manifestly excessive. In this connection I record my own respectful agreement with the following recent observations by NICHOLAS JA in *S* v *Skenjana* 1985 (3) SA 51(A) at 541-560- observations which I consider to be very pertinent to the insidious temptation to judicial officers to resort to sentences of ever - increasing severity in the vain attempt to stem the tide of increasing lawlessness - a tide that requires many forms of endeavour other than just those that are offered by the powers of sentencing if it is to be contained, let alone reversed. The learned Judge of Appeal said -

> ' My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns: a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent effect, so that, for example, the marginal deterrent value of 20 years over one of say 15 years may not be significant.
>
> Similarly in regard to the aspect to retribution. This has tended to yield ground to the aspects of deterrence and reformation, but it is not wrong that, in determining a proper sentence, the Courts should give some recognition to the natural indignation and the fears and apprehensions of interested persons and the community at large (see *R v Karg* 1961 (1) SA 321 (A) at 236A-B). In a case such as the present the court must give heed to the demand of the ordinary citizen for the condign punishment of robbers who invade the sanctity of the home to commit rapine and violent assaults and worse. But that demand may well be satisfied by the imposition of less than the most severe sentence.
>
> Nor is it in the public interest that potentially valuable material should be seriously damaged by long incarceration. As I observed in *S* v *Khumalo* & Ors 1984 (3) SA 327 (A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers 'must not be visited with punishments to the point of being broken' (per HOLMES JA in *S* v *Sparkes and Another* 1972 (3) Sa 396 (A) at 410G)."

ADAM J

It is most clear from *S v Tawengwa supra*, that a fine of $400 000 and above - which deprives an offender of his ill-gotten gains - conjoined with a prison sentence was an appropriate sentence and that the approach of taking away, not only, the ill - gotten profits, but also the

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investment would be approved by the Supreme Court since it maintained the punishment remained a mere business risk. Further, where there is no one who can sue the appellant to recover the unlawful profits the Supreme Court was of the view that it is only the judiciary that can do this. It felt there was a necessity to impose a further penalty to deter businessmen taking such risks.

The respondent in its heads of argument supported the sentence imposed and submitted that for this Court to interfere it must be satisfied that there was a misdirection and it was not sufficient that this Court would have passed a different sentence.

In my view the trial court misdirected itself. In cases of this nature, as the Supreme Court indicated, it is only the courts that can deprive offenders of their unlawful profits. In this case the profit can be said on the first count to be about $11 700; on the second count it was just over $12 000; and on the third count it was over $36 300. Yet, the fine was the same on each count (the maximum that the trial magistrate could impose) which meant that on the first two counts up to 60% of the profit was taken away and on the third count only 19% of the profit was disgorged. The trial magistrate indicated that this case can be distinguished from *S* v *Tawengwa supra*, in two aspects, in the amount of foreign currency equivalent involved and that no bribery was committed. This clearly shows in his view that the aggravating features were far worse in *S* v *Tawengwa supra*, where the foreign currency equivalent was $323 619 five times the foreign currency equivalent in this case of $75 711. Yet, the term of 4 year' imprisonment in addition was the same albeit for Tree counts of fraud committed over a period of about 41/2 months. It follows that the only rational explanation of this sentence is the submission advanced by the appellant's legal practitioner which was that the trial magistrate sought to compensate for the lack of jurisdiction as far as the quantum of fines were concerned by the imposition of the greater term of imprisonment on each count. The term of 1 year's imprisonment each on the first and second counts, where the fine on each count was up to 60% of the unlawful profit cannot be justified when proper account is Fallen that these offences were committed just over six weeks apart and the amount of foreign currency equivalent involved was only close to $30 000 compared to the amount of foreign currency equivalent in *S* v *Tawengwa supra* where as stated the prison term was 4 years. To impose a sentence of 2 year' imprisonment here was most excessive. As for the third count, the fine was merely 19% of the unlawful

ADAM J

profit with the term of imprisonment being 2 years and the amount of foreign currency equivalent involved was close to $46 000. Here the fine can only be described as a token and the 2 years' imprisonment being the major punishment which cannot be sustained compared to the sentence approved in *S* v *Tawengwa supra*.

Accordingly the trial court was in error in not laying greater emphasis on the deprivation of all unlawful profits by imposition of fines and in assessing the appellant's culpability as combined factors by which to determine the length of the period of imprisonment in addition to the fine. The proper approach in accordance with with *S* v *Tawengwa supra* in my view, would have been for him to imagine himself with this Court's jurisdiction and to determine the quantum of the fine on each count. The fine would have, on the first count, been either over $11 600 so as

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to deprive the ill-gotten gains, or over $26 300 so as to deprive the ill-gotten profits together with the investment; on the second count either over $12 000 so as to deprive the ill-gotten gains, or over $26 700 so as to deprive the ill-gotten profits together with the investment; and on the third count either over $36 300 so as to deprive the ill-gotten gains, or over $82 200 so as to deprive the ill-gotten Profits together with the investment. On that basis the term of imprisonment on the first and second count would on each count be 4 months (where the fine deprived the ill-gotten gains together with the investment) or 6 months (where the fine only deprived the ill-gotten gains). On the third count the period would be 9 months (where the fine deprived the ill-gotten gains together with the investment) or 12 months (where the fine only deprived the ill-gotten gains). In my view it would have been contrary to the principles of sentencing if this Court were to have imposed terms of imprisonment which were much higher than the foregoing irrespective of the fines being lower in each instance of the range described above. The trial magistrate should have sought to have this matter remitted to this Court for sentencing.

This Court granted an amendment to the appellant's notice of appeal to allow argument on the issue of the delay in the hearing of the appeal. As is clear from the record of proceedings the date for hearing on 12 February 1990 was allocated on 21 November 1989 - some 14 months after the appellant's sentence and over 3 months after the appellant's legal practitioner had written to the registrar of this Court requesting a set down to be allocated for this appeal. This was altered on 8 February 1990 between the legal practitioners for the appellant and the respondent for a hearing on 26 February 1990. It follows that the delay the appellant caused was the hearing from 12 February 1990 to 26 February 1990. Other than this the appellant cannot be held responsible for the delay.

ADAM J

I have read the judgment of SMITH J and simply put I am not persuaded by the reasons advanced by him. The record of proceedings do not support him that the factors in this case were more aggravating than in *S v Tawengwa supra*. On the contrary the trial magistrate found that this case differed in two important respects - the amount of the foreign currency equivalent involved and the absence of bribery. The factors he mentions that constituted aggravation in this case cannot be said not to have existed in *S v Tawengwa supra*. Tawengwa was a businessman, he used his position not only to persuade, but also, to bribe the officials concerned to give him an import licence. Tawengwa did much more than breach the official's trust, he corrupted him. Surely this factor must have weighed heavily in the trial magistrate's mind, as it did, when determining the aggravating features. It follows that to conclude as SMITH J did, (for the reasons outlined by him) that the sentences imposed by the trial magistrate for the three counts were eminently reasonable cannot be maintained.

As for the issue of delays, DUMBUTSHENA CJ, in *S v Dube & Anor* SC-169-89 most eloquently observed at pp8-9 as follows.

> ". . . the appellants were arrested on 4 September 1985. They first appeared in court on 3 November 1986 . . . The trial was finalised on 15 January 1988, the day they were sentenced. To make it worse, their appeal was only heard on 16 October 1989 . . . While the machinery of justice could be said to work exceedingly slowly, tolerating the slowness works injustice on those who must await for their trials . . . We have repeatedly said that justice delayed is justice denied . . . It is for this reason that I am of the opinion that sending the appellants to prison, after

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> spending many years out of prison awaiting their trial and the hearing of their appeals, would not be in the interest of Justice. For justice lobe seen to be done the machinery of justice, as it grinds on through police stations, the Attorney-General's Department and the Courts of justice, must move expeditiously."

I understand the learned Cam JUSTICE as saying that a prison term may have been an appropriate penalty but in the interest of justice incarceration would not be proper as justice would not be seen to be done.

In *S v Chilimanzi* 1990 (1) ZLR 150 (HC) SMITH J said at p 155:

> "Where persons have been convicted of offences which merit a custodial sentence which is duly pronounced but subsequently set aside merely because of the delays in the hearing of an appeal, there is also, in my opinion, a failure of justice."

ADAM J

With great respect to him this does not accord with what DUMBUTSHENA CJ stated above and approved by SMITH J in *S v Chilimanzi supra* at p 154 that even though a custodial sentence is merited this would not be in the interest of justice as justice would not be seen to be done. It does not follow that to set aside a merited custodial sentence due to unjust delay constitutes a failure of justice. On the contrary as the learned Chief Justice said it best serves the interest of justice to interfere with the custodial sentence. It can be said to be malfunction in administration.

Also SMITH J states in this case:

> ". . . As with all other factors that have to be taken into account in assessing sentence, the question of any delay in the proceedings is a factor that has to be taken into account. It cannot be elevated to a principle or rule of law that undue delay in itself requires that a sentence of imprisonment must be set aside or reduced. There are cases where a sentence of imprisonment is fully justified and where it would be wrong to set aside or to reduce the sentence solely by reason of a dray in the proceedings."

But in *S v Chilimanzi supra* where the appellant had been convicted of fraud of $6 237 and sentenced on 19 august 1987 (to 22 months' imprisonment of which 8 months was suspended on condition of good behaviour) his notice of appeal was dated 27 August 1987 and the appeal was heard on 12 February 1990 by this Court. In his judgment (at p 2), SMITH J stated that he did not agree that the sentence was too harsh and induced a sense of shock since the appellant was a civil servant, who held a position which carried a high degree of responsibility, had attempted to steal considerable sums of public money but for the spot check would have got away with the money and that the trial magistrate acted correctly in imposing the sentence. In short the custodial lean was merited. SMITH J at pp 154 went on to state:

> ". . . In an appeal against sentence, *S v Mureruswa,* which was heard on 27 November 1989, the appeal had been pending for well over 3 years.
>
> Because of that delay, the sentence of 10 months' imprisonment was set aside and a fine of $250 together with a wholly suspended term of 6 months' imprisonment was substituted. In another appeal against sentence, *S v Kuzvarwa,* which was heard on 22 January 1990 there was a delay of 41 years in the hearing of the appeal. Once again the sentence was set aside, **solely on the grounds of the delay in the hearing of the appeal**, and a fine was substituted" (emphasis added).

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ADAM J

SMITH J proceeded to review a number of other cases and concluded in *S v Chilimanzi supra* by setting aside the sentence and substituting a fine of $1 500 or in default of payment 6 months' imprisonment and in addition 12 months' imprisonment suspended for 5 years on good behaviour. I have sought in vain to ascertain what other factors besides the delay of about 30 months induced him to reduce the sentence. With that judgment GREENLAND J agreed and at pp 157 he said:

> ". . . in the cases of delay particularised above the Court accepts that the accused suffers and endures mental anguish. When such a person is placed in a position of not knowing his fate for a long period of time the mental anguish involved assumes a keen and extreme character which a Court of justice will recognise as being incompatible with sacred notions of justice. Included is the notion enshrined in s 10 of the Constitution that every person charged with a criminal offence be afforded 'a fair hearing within a reasonable time by an independent and impartial Court. . .' It is implicit that such person have the matter finalised within a reasonable time. To acquiesce in the present state of affairs is to insidiously render nugatory this Constitutional right and the Court is sworn to uphold the Constitution."

I agree.

As SMITH J indicates that in his review of the cases in *S v Chilimanzi supra* the delays ranged from 17 months to over 4 years. In this case the delay from sentence to 12 February 1990 through no fault of the appellant was 17 months. In *S v Gonese* HH-218-89, where the delay was 17 months the sentence of 12 months imprisonment was reduced by this Court (GIBSON J and GREENLAND J) to a fine of $500 together with a 6 month suspended sentence on good behaviour. Similarly, in *S* v *Kaschula* HH-220-89, where the delay was again 17 months the sentence, in view of the delay and the trial magistrate's misdirection was altered by this Court (GIBSON J and GREENLAND J) from 12 months' imprisonment to that of 12 months' imprisonment of which 9 mont*hs were* suspended on good behaviour.

SMITH J states in this case that where custodial sentences are justified it would be wrong to set aside or reduce such custodial sentences solely by reason of a delay in the proceedings. But, he himself observes in *S v Chilimanzi*, *supra*, that in *S v Mureruswa supra* and *S v Kuzvarwa supra* the sentences were set aside solely on the grounds of delay in the hearing of the appeal. It is my view that in *S v Chilimanzi* he and GREENLAND J also set aside the effective custodial term solely on the grounds of delay.

ADAM J

In light of the foregoing I am of the view that the appeal succeeds. Accordingly, I would set aside the sentences imposed on each count and taking due account of the delay in the hearing of the appeal and since I cannot increase the fines substitute the following sentence:

> Court 1 - "A fine of $7 000 or in default of payment 3 months' imprisonment with labour. In addition 6 months' imprisonment with labour of which 2 months' imprisonment with labour is suspended for 4 years on condition the appellant does not commit during that period fraud involving foreign currency."

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Court 2 - "A fine of $7 000 or in default of payment 3 months' imprisonment with labour. In addition 6 months' imprisonment with labour of which 2 months' imprisonment with labour is suspended for 4 years on condition the appellant does not commit during that period fraud involving foreign currency."

Court 3 - "A fine of $7 000 or in default of payment 3 months' imprisonment with labour. In addition 12 months' imprisonment with labour of which 5 months' imprisonment with labour is suspended for 4 years on condition the appellant does not commit during that period fraud involving foreign currency."

Gargan Brothers & Chadder and/or *Gill, Godlonton & Gerrans*, appellant's legal practitioners

ZEETA MANUFACTURERS (PVT) LTD v ZIMBABWE UNITED FREIGHT COMPANY LTD 1990 (1) ZLR 337 (HC)

Court **High Court, Harare**

Chidyausiku J

Trial action

19, 20 March & 30 May 1990

Flynote

Contract - carriers - "owner's risk" clause - application.

Delict - negligence - "gross negligence" - meaning of.

Headnote

The defendant accepted from the Plaintiff in Bulawayo a consignment of jewellery in a small parcel for carriage to and delivery in Harare. The carriage was at "Owner's Risk" which phrase was defined in the contract as meaning that "the Company shall not be liable for any damage . . . except upon proof by the Trader that such damage . . . was caused by or through the wilful misconduct or gross negligence of the Company . . ." The jewellery was lost when a delivery tricycle belonging to the defendant was left unattended by the defendant's delivery man and stolen. The jewellery was in the locked cargo bin but the tricycle itself was unlocked.

Held, that the owner's risk clause serves to exclude liability for loss caused by the ordinary negligence of the defendant.

Held, further, that gross negligence connotes an entire failure to give G consideration to the consequences of any action and often, but not always, has an element of *mans rea.*

Held, further, that in the circumstances listed objectively or otherwise, gross negligence was not established and the Plaintiffs claim was dismissed.

Cases cited:

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SA Railways& Harbours v Lyle Shipping Co Ltd 1958 (3) SA 418 (A)

CHIDYAUSIKU J

Cotton Marketing Board of Zimbabwe v Zimbabwe National Railways 1988 (1) ZLR 304 (SC); 1990 (1) SA 582 (ZS)

Rosenthal v Marks 1944 TPD 172

Bickle v Joint Ministers of Law and Order 1980 (2) SA 764 (R); 1980 ZLR 36 (G)

AP de Bourbon SC for the Plaintiff

DP Carter for the defendant

Judgment

Chidyausiku J: The facts of this case are virtually all common cause.

These facts are set out in an agreed statement produced by both parties and are as follows. The Plaintiff is a company which manufactures and repairs jewellery in Bulawayo, which fact was known to the defendant. Insofar as this case is concerned, it manufactured and repaired jewellery for two firms in Harare, namely The Golden Cameo and Jewellery Creations.

The defendant is a public carrier which provides a service of collecting consignments in one town or city in Zimbabwe and delivering it to the stated addressee in another town the following day. For this service the defendant charges a fee calculated on the size and weight of the consignment.

On 25 March 1986 the Plaintiff prepared a consignment of gold rings and brooches for delivery to The Golden Cameo in Harare. Details of this consignment, valued at $2253,92 are set out on page 1 of the bundle of documents produced by the parties.

The defendant collected the consignments and took them by road transport overnight from Bulawayo to Harare. They were unloaded from the vehicle at defendant's depot in Harare and handed to an employee of the defendant for delivery to the stipulated addresses as shown on the consignment notes.

The employee of the defendant who was to effect delivery was provided with a tricycle, having on the front thereof a large metal container into which the consignments were placed and which was capable of being locked with a padlock. The large metal container bore the name of the defendant inscribed in large, clear and bold letters. The employee of the defendant had a number of consignments to deliver over and above the two which are the subject matter of this case. Details of the contents of the tricycle's container are set out in the letter from the Zimbabwe Republic Police of 8 April 1986 at page 8 of the agreed bundle of documents.

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CHIDYAUSIKU J

In the course of effecting deliveries of the consignments entrusted to him, the employee of the defendant parked the tricycle at the intersection of Baker Avenue and Angwa Street at approximately 10.30 am on the morning of 26 March 1986. This employee had a delivery to make in the area, and before leaving the tricycle he locked with a padlock the metal container on the front which contained the various consignments, and retained the key to this padlock. He did not lock the tricycle and did not seek in any way to restrain the tricycle.

When he went to make the delivery mentioned above, the employee of the defendant left the tricycle unattended and in its unlocked condition. When he returned, the tricycle had been stolen. The theft of the tricycle and its contents were reported to the police but no arrests were made thereafter and none of the property contained therein, including the two consignments sent by the Plaintiff, were recovered by the police. The total loss sustained by the Plaintiff was the sum of $4276,10, which sum has been paid to it in full by its insurers, Unity Insurance Company Limited, and the Plaintiff now sues for that amount in terms of a subrogation clause in the policy of insurance.

The contract of carriage between the Plaintiff and the defendant was subject to the conditions of carriage of the defendant which are annexed to the defendant's plea. The relevant clause is clause 1 (ix) the definition of owner's risk which reads as follows:

> "'Owner's Risk' means that the transport of the merchandise specified is undertaken by the Company on the special condition that the Company shall not be liable for any damage, shortage or delay except upon proof by the Trader that such damage, shortage or delay was caused by and through the wilful misconduct or gross negligence of the Company's Servants or Agents."

[The learned Judge here set out other clauses not relevant to the final decision.]

The Plaintiff's stance is that the acts of the employee of the defendant in leaving the tricycle unattended and unlocked constituted gross negligence.

The defendant on the other hand contends that the acts of its servant did not constitute wilful misconduct or gross negligence or ordinary negligence and that it used all reasonable foresight and care in the carriage of the merchandise.

CHIDYAUSIKU J

I am satisfied that for the Plaintiff to succeed he has to establish that the conduct of the defendant's employee constitutes gross negligence. It will not be sufficient for him to establish ordinary negligence. Mr de Bourbon in his oral submission conceded that ordinary negligence would be insufficient to attach liability to the defendant. In my view this is the correct position if one has regard to clause 1(ix) of the Conditions of Carriage which defines the conditions of carriage and limits the defendant's liability. The weight of authorities also lend weight to the correctness of the above interpretation.

See South African *Railways and Harbours* v *Lyle Shipping Co Ltd* 1958 (3) 416(A) and Cotton Marketing Board of *Zimbabwe* v *Zimbabwe National Railways* 1990 (1) SA 582 (25); 1988 (1)

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ZLR 304 (SC).

I now turn to decide whether the conduct of defendant, or its employee constitutes gross negligence. Gross negligence is a phrase that has defied precise definition. Some guidance, however, can be derived from examining some decided cases where the meaning of gross negligence has been discussed. The often quoted case in this regard is the case of *Rosenthal v Marks* 1944 TPD 172. In that case MURRAY J had this to say about gross negligence at page 180:

> "Gross negligence (*culpa lata, crassa*) connotes recklessness, an entire failure to give consideration to the consequences of his actions, a total disregard of duty . . ."

This definition of gross negligence was quoted with approval in the case of *Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R). In *Bickle*'s case *supra*, BELIE CJ correctly observed at page 770 D-F that the definition in *Rosenthal*'s case *supra*, has an element of *mens rea.* He held that in certain circumstances, such as in the case before him, the element of *mens rea* is absent and an objective test in such cases must be applied. When an objective test is applied gross negligence is no more than ordinary negligence of an aggravated nature. How aggravated must negligence be before it becomes gross negligence is a matter that can only be decided on the facts of each case.

Whether one applies the subjective test or the objective test in the case before me the result is the same. The conduct of the defendant or its employee does not amount to gross negligence.

The employee's failure to provide his tricycle with a locking mechanism, such as a chain, and his leaving it unattended in the centre of Harare mid-morning can at worst be regarded as ordinary negligence in the light of the

CHIDYAUSIKU J

following factors. The employee had previously left the tricycle in similar circumstances without any mishap. The employee was indeed expected to leave the tricycle unattended as he delivered part of the consignment assigned to him for delivery. The tricycle was fitted with a large container in its front, which container was secured by a padlock. Leaving the container unlocked or with the contents of the container exposed to the view of the public would, in my view, amount to gross negligence. The mere failure to lock a tricycle fitted with a large container on which is inscribed, in bold letters, the name of the defendant is not negligence of an aggravated nature. The conduct of the defendant's employee does not in any way constitute an entire failure to give consideration to the consequences of his actions nor a total disregard of his duty. There was no recklessness in his conduct. He carried out his duties as was expected of him.

In the result I hold that the Plaintiff has failed to establish that the defendant or his employee was grossly negligent and therefore no liability can be attached. The Plaintiff's action is dismissed with costs.

Granger and Harvey, Plaintiff's legal practitioners

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Winterton, Holmes and Hill, defendant's legal practitioners.

MUKUNDADZVITI v MUTASA 1990 (1) ZLR 342 (HC)

Court **High Court, Harare**

Smith J Notice of motion

17 May & 13 June 1990

Flynote

Practice - judgment given by consent - rescission thereof - justus error - instrumentum noviter repertum - stringent test to be applied

High Court Rules - Order 8 r 56 and r 63 considered Costs - legal practitioner and client scale - frivolous and vexatious proceedings

Headnote

The defendant (applicant in the notice of motion proceedings) withdrew her defence and consented to judgment after the close of the *Plaintiffs* case and after the defendant herself had given evidence. In a subsequent application to have the judgment rescinded on the ground of justus error,

Held, that a judgment granted by consent after the evidence has been led can only be set aside on grounds of fraud, discovery of new documents, error or irregularities in procedure.

Held, further, that while default judgments can in appropriate circumstances be set aside on good and sufficient cause being shown, judgments given by consent must satisfy a more stringent test and final judgments given after trial can only be set aside on proof of fraud or in certain exceptional cases based on *instrumentum noviter repertum.*

Held, further, that on the facts of this case there had been no fraud or even *justus error.*

Held, further, that as the conduct of the defendant in bringing this application was frivolous and vexatious, she ought to pay costs on a legal practitioner and client scale.

SMITH J

Cases cited:

De Vos v Calitz & De Villiers 1916 CPD 465

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

New Campbell Collieries v Brown (1904) 25 NLR 71

Watson v Hunter & Anor 1948 (3) SA 1106 (D)

Florence v Florence 1948 (3) SA 71 (D)

Arab v Arab 1976 (2) RLR 166(A)

E Chatikobo for the applicant

DP Carter for the respondent

Judgment

Smith J: In case No. HC 3786/86 the respondent sued the applicant, claiming $15 000 for mining equipment allegedly sold and delivered to the applicant on or about 7 December 1986. The applicant opposed the application and the matter went to trial. The case was heard on 28, 29 and 30 June 1989. The respondent, who was the Plaintiff in that case, was in the witness box for some 51/2 hours on 28 June, during which time she was subjected to intensive cross-examination, and she continued to give evidence for 30 minutes on 29 June, when her case was closed. Thereafter the applicant, who was the defendant, opened her case and gave evidence from about 10.30 am until the court rose. On 30 June the applicant's then legal practitioner told the respondent's legal practitioner that his client was withdrawing her defence because she no longer opposed the claim and would consent to judgment being granted against her. Adam J the judge who presided over the trial, was advised that the applicant wished to withdraw her opposition and to consent to judgment against herself. He asked the applicant whether she understood what her legal practitioner had said and whether she did in fact wish to withdraw her defence and consent to judgment. She answered in the affirmative and the order agreed by the parties was issued on 30 June 1989.

In a letter dated 14 July 1989 the applicant's then legal practitioner wrote to the respondent's legal practitioner about the taxation of costs. In that letter, which was written on the specific instructions of the applicant, he said:

> "Our client has requested us to inquire from yourselves whether your client would be agreeable to a reduction of the capital claim. This, she instructs, is in view of the fact that the equipment delivered at Kupfuma Syndicate Mine was second-hand. This is simply on compassionate grounds and is of course without prejudice to the claim for which your client has obtained judgment

> Our client also instructs us to propose on her behalf the liquidation of the capital debt, interest and costs in instalments. This is in view of her ill health and the fact that her business enterprises are going through a rather lean spell. Her proposals for payment will be forwarded to yourselves as soon as same are to hand."

On 31 August 1989 the applicant instituted this action to rescind the judgment issued against her in case No HC 3786/86. She alleged that she was ill just before and at the time of the trial in

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June 1989. She filed an affidavit from a medical practitioner to the effect that he had examined her on 27 June and found that she was distressed, her blood pressure was 150/90 with a regular pulse and she had severe tenderness in the knee Joints (arthritis). Because she was unwell he referred her to a specialist. She said that she signed an affidavit to the effect that she had received equipment which she in fact had not received but that was because her then legal practitioner told her that if she did not sign it judgment would be entered against her. On the second day of the trial her legal practitioner started to try to persuade her to consent to judgment but she refused to accept his advice. He indicated to her that the judge, AdaM J was cross and that he, the legal practitioner, did not want to proceed with the case. On the third day her legal practitioner again told her that she should consent to judgment. She replied that she was agreeable to stopping the trial but only on the ground of her illness. When her legal practitioner advised ADAM J in open Court, that she was withdrawing her defence and consenting to judgment she was shocked because she wanted the matter to proceed. She tried to explain that some of the items referred to had never been delivered to her but, according to her, the judge was not interested in hearing her story. He simply wanted an answer as to whether she agreed to the matter being stopped. She remembered what her legal practitioner had said about the judge being angry and so she said yes.

The respondent opposed the application. She said that when the applicant gave evidence on the second day of the trial she contradicted her own pleadings, the summary of evidence given by her legal practitioner and her sworn affidavit and as she continued giving evidence she kept contradicting her earlier evidence. As she expressed it , "At the end of the day, it was clear that if the applicant was to continue with her defence, it was going to be easier to resuscitate a dead horse than resuscitate the applicant's defence case." She said about the applicant, "I fail to see how she can now explain herself out of the quandary she now finds herself in". She said that the trial judge went to some lengths to find out from the applicant whether she understood what her legal practitioner had said and the implications thereof end whether she had

anything else to say. The respondent submitted that the applicant had not shown good cause for making the application, which was made merely for the purposes of delay, and that it should be dismissed with costs on a legal practitioner-and-client scale.

The applicant's legal practitioner at the time f led an affidavit in which he denied that he had forced the applicant to consent to judgment or that he had told her that the trial judge was angry with her. He said that the applicant complained that the judge "vigorously asked her questions" when she was giving her evidence and yet he did not do the same when the respondent was giving her evidence. It was she who thought that the judge was cross with hen When he and the applicant were discussing the case after the second day of the trial he told her what options were open to her and she elected to throw in the towel in order to avoid incurring further legal costs.

Although the applicant consented to the judgment concerned it was not issued in default. Evidence was led and the Plaintiff in the case had given evidence and concluded her case. The defendant (who is the applicant in this case) then gave evidence in defence. Mr *Chatikobo*

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submitted that judgment was given before a full assessment of the facts could be made because the defendant consented to judgment before her case was concluded. It seems to me, however, that the trial judge must have been satisfied that the Plaintiff had established her claim. He would not have given judgment in favour of the Plaintiff unless he was so satisfied.

The Rules of Court provide for the setting aside of a judgment given by consent under the Rules (Rule 56) or of a judgment given in default under the Rules (Rule 63) on good and sufficient cause being shown. There is no provision in the Rules for setting aside a judgment given after trial. The judgment to which this application relates was not given by consent in terms of Order 8 of the Rules of Court neither was it given in default. Accordingly the power of this Court to set aside the judgment must be found in the common law. In Herbstein & van Winsen The *Civil Practice of the Superior Courts in South Africa* 3 ed at p 469, the learned authors say:

> "A final judgment being *res judicata* is not easily set aside, but the court will do so on various grounds, such as fraud, discovery of new documents, error and irregularities in procedure."

The four grounds mentioned above are each dealt with separately by the learned authors and no other grounds are mentioned. Mr *Chatikobo* has

SMITH J

based his submissions on the grounds that the applicant is not in any way to blame and that she has good and sufficient cause warranting the grant of relief. There is no suggestion that there has been any fraud, discovery of new documents or irregularities in procedure. Has there been any *justus error* or mistake? I think not. The applicant does not allege that she was misled by her legal practitioner or by the judge. She was aware of what she was doing and the consequences thereof, but alleges that because of her state of health at the time and, presumably, her fear of the judge who was "angry" with her, she consented to judgment being given against her.

Mr *Chatikobo* referred me to a number of cases dealing with the setting aside of a judgment but virtually all of the cases concerned default judgments. In *De Vos v Calitz and De Villiers* 1916 CPD 465 judgment given by consent was set aside because the attorney had consented to judgment under the mistaken belief that his client had authorised him to do so. There had been no trial. Although the applicant had consented to judgment in case No HC 3786/86, it was only after the trial had started and the *Plaintiff*'s case had been closed. In *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 DE VTRS JP analysed the Roman-Dutch law on the subject of rescission of judgments, as expounded by Voet, Grotius, Huber and Schorer and concluded that *justus error* was not a good ground for setting aside a judgment save in certain exceptional cases based on *instrumentum noviter repertum.* In *New Campbell Collieries v Brown* (1904) 25 NLR 71 the court refused to set aside a consent judgment upon the allegation by one of the parties that he did not understand what he was signing. In *Watson v Hunter & Anor* 1948 (3) SA 1106 (D), CARLESL E J referred to *Childerley*'s case *supra*, as the leading case in regard to *restitutio in integrum* by setting aside a judgment which had been applied and followed in all the Courts in Soup Africa. One of the cases in which that case was considered was *Florence v Florence* 1948 (3) SA 71 (D) where BROOME J had refused an application to

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set aside a judgment upon the ground that he had not been able to find any case in which extra-judicial fraud had been mentioned as a ground for rescission.

In *Watson*'s case *supra*, CARLISLE J said at p 113:

> "In *Childerley*'s case DE VILLIERS JP remarked that it seemed clear that Voet, in stating that judgments may be set aside on the ground of fraud, intends impliedly to exclude any other ground *ejusdem generis* for setting aside judgments delivered in defended cases after both parties have been heard and the action has been fought to a finish. This shows how very narrow the Common Law rule is. It is true that the applicant did not defend this case, but it is clear from his affidavit that his reason

> was that he then had no valid grounds for doing so, and the judgment as I have said was a final judgment."

As LEWIS AJP said in *Arab* v *Arab* 1976 (2) RLR 166 (A) at 172E:

> "It is a fundamental principle, dictated by public policy, that, as far as possible, there should be finality in litigation."

The courts have accepted that in the case of default judgments circumstances do arise where the judgment should, in the interests of justice, be set aside.

In such cases the applicant must show good and sufficient cause. In the case of consent judgments, the occasions on which rescission has been granted have been fewer and the applicant must satisfy a more stringent test. With regard to final judgments given after trial, the test is even more stringent. Such judgments may only be set aside on the ground of fraud or, in certain exceptional cases mentioned by DE VILLIERS JP in *Childerley*'s case *supra*, on the ground of *instrumentum noviter repertum.* At p 168 he said:

> "But I must say that I know of no such further general application of the doctrine of *justus error* to judgments as would entitle the vanquished party to bring an action to set aside a judgment on the ground that the Court gave the judgment in *error*, even if such error was just and was induced by a non-fraudulent misrepresentation made by the other party to the case. And no attempt has been made by the Plaintiff's counsel in this case to produce any authority which would justify such an extensive application of the doctrine. On the contrary it seems clear that Voet, in stating that judgments may be set aside on the ground of fraud and (in the exceptional cases) on the ground of *instrumentum noviter repertum* (42.1.28) intends impliedly to exclude any other grounds *ejusdem generis* for setting aside judgments delivered in defended cases after both parties have been heard and the action has been fought to a finish. The same may be said of Huber (5.37.7-11) and Schorer (Notes 527 et seq. to Grotius)."

In the *New Campbell Collieries* case *supra*, FINNEMORE ACJ said at pp 72-73:

> "Cases occur daily where the defendant puts in a written consent, sometimes on terms, and these are acted upon, and it is new to me that a defendant can come afterwards to the Court and say 'I did not know what I was signing, I made a mistake, I want the judgment set aside.' I think that the reasons given by the applicant are wholly unsatisfactory and insufficient, and that we should not disturb the judgment."

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In this case the applicant knew what she was consenting to. To agree to her application would be to undermine completely the principle that there should be finality to litigation. Mr *Chatikobo* suggested that if the application were granted the matter should be referred back to the trial judge so that the case could be re-opened and the applicant could conclude her defence. It would be extremely invidious of me to do so. The trial judge was seized of the matter and, after due inquiry, gave his judgment. That disposed of the matter, subject to the applicant's right of appeal. Mr *Chatikobo* submitted that the judgment was not given after a full assessment of the facts because it was given before the conclusion of the case by consent. I do not accept that that distinguishes this case and allows this Court to deal with the judgment as a consent judgment. However, even if I were inclined to treat it as a consent judgment, I think that the reasons put forward by the applicant for rescission are wholly unsatisfactory and insufficient.

The respondent has claimed that the application should be dismissed with costs on a legal practitioner-and-client scale. Mr *Carter* has argued that the application was frivolous or vexatious and made merely for the purposes of delay. I agree with his submissions. After judgment was given in case No. HC 3786/86 the first reaction of the applicant was to ask the respondent if she would agree to a reduction in the capital claim and allow payment by instalments. That was followed by this application some six weeks later. It appears to me to have been the action of a desperate person who could not meet her obligations and was clutching at straws to postpone the day of reckoning.

The application is dismissed with costs on a legal practitioner-and-client scale.

Muvingi & Machaya, applicant's legal practitioners

Chirunda, Chihambakwe & Partners, respondent's legal practitioners.

LERROS MOTORS v MINISTER OF LABOUR, MANPOWER PLANNING AND SOCIAL WELFARE 1990 (1) ZLR 349 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

McNally JA, Manyarara JA & Korsah JA

Criminal appeal.

28 May & 21 June 1990

Flynote

Statutes - interpretation-meaning of 'tine State' - Worker's Compensation Insurance Fund - not separate from the State

Landlord and tenant - Commercial Premises (Rent) Regulations 1983 - do not apply to the Worker's Compensation Insurance Fund

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Headnote

The appellant was a tenant in premises owned by the respondent. The respondent obtained an order evicting the appellant from the premises on the basis that the Commercial Premises (Rent) Regulations 1983 did not apply to the State, and that it was representing the State.

Held, that the Worker's Compensation Insurance Fund was not a separate entity from the State, and accordingly the Regulations did not protect the appellant.

Cases cited:

Cooper v *Matipano* HB-222-86 (not reported)

Banco de Mocambique v *Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T)

EWW Morris for the appellant

AP de Bourbon SC for the respondent

Judgment

Manyarara JA: This is an appeal against a judgment of the High Court (SMITH J) by which it granted with costs the respondent's application for the

MANYARARA JA

ejectment of the appellant from certain business and residential premises and damages for holding over. The sole issue before this Court as in the court *a quo* is whether the appellant is protected from ejectment by the provisions of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983).

The premises which are the subject of this case are situated near Harare. One is described in the lease as "superette together with garage/workshop" and the other as "superette residential house". I shall refer to these as "the superette" and "the house" respectively. Both are registered in the name of the Worker's Compensation Insurance Fund established by the Worker's Compensation Act [*Chapter 269*], since repealed. It is agreed by Mr Morris for the appellant and Mr *de Bourbon* for the respondent that if the Fund is "the State" for the purposes of the Regulations, the learned judge was correct in granting the application.

The lease of the superette was for a fixed period of one year expiring on 31 May 1989. That of the house was a monthly lease terminable by either party on service upon the other of one month's notice. Occupation of the house is conditional upon the lessee having occupation of the superette.

As I have said, the lease of the superette expired by the effluxion of time on 31 May 1989, on which date the lease of the house was also terminated by notice.

It is common cause that the superette is commercial premises in terms of the Commercial

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Premises (Rent) Regulations 1983. Part IV of the Regulations places a limitation on ejectment of the lessee which is based either on the fact of the lease having expired or having been terminated by the lessor, provided the lessee continues to perform his obligations under the original contract of lease.

The dispute arises by virtue of subs (2) of s 2 of the Regulations which provides that the Regulations shall not apply to the letting of commercial premises by the State. The appellant's contention is that the Worker's Compensation Insurance Fund, which "granted" the present leases, is bound by the statutory limitation on ejectment of the appellant as the Fund is "a separate entity" from the State. Mr *de Bourbon* argues that the true position is that the premises leased are the property of the State although they are "purportedly registered" in the name of the Fund.

A similar point was raised but not fully argued in *Cooper* v *Matipano* HB -

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MANYARARA JA

222-86 (not reported) which concerned the National Museums and Monuments of Zimbabwe Act [*Chapter 313*] and the Board of Trustees established by that Act. The statutory provisions in issue were the Employment (Conditions of Service) Regulations 1981 (SI 894 of 1981). The reason why the point was not fully argued was a concession by the Plaintiff's legal practitioner that the Employment Regulations were not binding on the State or the Trustees as its servants or agents. However, the cause which still remained for determination in the case called for a finding which I expressed as follows:

> "I now turn to the question of whether the Board (of Trustees) is a servant or agent of the State and in my view it clearly is. The Board is not only a creature of Statute but even a cursory perusal of the Act will show that it is under the constant direct control of the Minister of Home Affairs both in its composition and in the exercise of its extensive powers.
>
> The Act requires the Board to obtain Ministerial authorization for the exercise of its more important functions in a manner which practically obliterates any distinction between it and any government department."

After setting out the responsible Minister's powers under the relevant Act, I came to the following conclusion:

> "In my view, it is no more than a futile academic exercise to attempt to distinguish the Board from any government department. Statute has stamped on the Board all the attributes of a politico-administrative organ of the State. It has like powers and operates in like manner, eg in respect of the compulsory acquisition of land (s 24) which is a power normally exercised on behalf of the President by various over servants or agents of the State in terms of the Land Acquisition Act, 1985.
>
> Mr *Gillespie* correctly summarized the true position when he said 'Every (conceivable) indication is that the Central Government has delegated to the Board, as its servant or agent, its function of protecting the national heritage'."

The provisions of the Worker's Compensation Act [*Chapter 269*] inevitably lead to the same result in the instant case. Cf *Banco de Mocambique* v *Inter-Science Research and Development Services* (Pty) Ltd 1982 (3) SA 330 (T) Hand see Baxter's article in (1982) 99 SALJ 212 at p 223-6 and Baxter's

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MANYARARA JA

Administrative Law at p 94-96. The Fund is not only a creature of statute but s 89, which establishes the Fund and vests it in the respondent as the responsible Minister, also gives him sole management of the Fund (subject to the provisions of the Act).

Turning to the purposes and State control of the Fund, s 90 details how the Fund shall be utilised by the Commissioner who is appointed by the respondent as is the rest of his staff, subject to the laws relating to the Public Service (s 27). The remuneration of the Commissioner and his officers is paid out of the Consolidated Revenue Fund and reimbursed from the moneys of the Worker's Compensation Insurance Fund. In terms of s 91(a), the Commissioner's power to borrow money for the Fund is subject to the approval of the respondent in consultation with the Minister of Finance. The latter may also lend to the Fund moneys appropriated by Parliament. Section 94 requires the accounts of the Fund to be audited by the Auditor-General as public funds.

In short, nowhere in the Act is the Fund established as a separate entity from the State. of the National Social Security Act 1989, s 4 which establishes the successor to the Fund as a corporate body capable of suing and being sued in its own name.

In terms of s 91(b) of the Act, the Commissioner may acquire and alienate property for the purposes of the Fund, subject again to the approval of the respondent in consultation with the Minister of Finance. However - and this is the crucial point - all property so acquired shall be held in the name of the respondent in trust for the Fund.

It follows that the Fund is merely a beneficiary of ownership by the State of the disputed premises. In this regard, I find merit in Mr *de Bourbon*'s submission that the purported registration of the premises in the name of the Fund did not comply with s 17 of the Deeds Registries Act [*Chapter 319*]. However, the point is now academic in view of the enactment of the National Social Security Act 1989 which has repealed the Worker's Compensation Act as already mentioned.

But it may well be that it is the error to which Mr *de Bourbon* refers which put the appellant on the wrong scent and caused its mistaken reliance on the Commercial Premises (Rent) Regulations, 1983, as entitling it to remain in occupation of the premises as a statutory tenant after the expiry of the lease. I say so because the application for ejectment was correctly brought in the

MANYARARA JA

name of the respondent as it was the State which had *locus standi* in the proceedings in terms of the Act.

The learned judge came to the correct conclusion that the Fund is an organ of Government and must be regarded as "the State" for the purposes of the Rent Regulations. It followed that the

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limitation on ejectment otherwise provided by the Regulations did not apply to the lease of the superette or the house. Accordingly the learned judge granted the relief prayed in the application before him and the decision must be upheld.

The appeal is dismissed with costs which, by agreement of counsel, shall include the respondent's costs of preparing the record.

McNally JA: I agree.

Korsah JA: I agree.

Byron Venturas & Partners, appellant's legal practitioners

Scanlen and Holderness, respondent's legal practitioners

STRACON DEVELOPMENT (PVT) LTD v GRUER 1990 (1) ZLR 354 (HC)

Court **High Court, Bulawayo**

Sansole J

Civil application

22 June 1990

Flynote

Landlord and tenant - lease - cancellation for underpayment of rent - subsequent acceptance of rent - effect.

Headnote

A lessor who, notwithstanding underpayment of rent by a lessee, accepts further underpayments in respect of succeeding months, evinces an election not to cancel the lease on the grounds of the earlier underpayments and cannot thereafter seek to cancel the lease on the same set of facts covering the same period.

Cases citsed:

Masukusa v *Tafa* 1978 RLR 167 (A)

Ngani v *Mbanje & Anor* 1988 (2) SA 649 (ZS)

North Vaal Mineral Co Ltd v *Lovasz* 1961 (3) SA 6(14 (A

DD Naik for the applicant

MJ Gillespie for the respondent

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Judgment

Sansole J: The applicant in this matter is seeking an order of ejectment against the respondent consequent upon a purported cancellation of an agreement of lease between the parties. At the conclusion of the argument I dismissed the application with costs and at the same time I indicated to the parties that my reasons would be set out in a judgment which I would hand down in due course. I now give my reasons.

In June 1984 the parties concluded an agreement of lease in terms of which

SANSOLE J

respondent took on hire applicant's premises which are situate on Stand 66, in the Gweru Township Lands. The lease provided, *inter allia*, for the following terms: *viz*

(i) an initial period of 60 months reckoned Mom June 1984 to 31st of May, 1989 at a monthly rental of $700.

(ii) an option to renew the lease a maximum of five times for a period of twelve months at a time, subject to an agreed escalation in rent.

(ii) a forfeiture clause, which empowered Be applicant to cancel the lease without prior notice for certain breaches, including failure to pay rental on due date.

It is common cause that during Be subsistence of the initial period of five years, Government introduced the Emergency Powers (Control of Prices, Service Charges and Rents) Regulations SI 72A of 1988. The effect of these regulations was to "freeze" rents at a level at which they were at the time when the regulations came into force. Indeed, they remained in force until July, 1989, when they were repealed.

Before the end of die initial period and in terms of paragraph 1.2 of the lease the respondent gave the requisite notice on 2 March 1989 to renew the lease for the first option period. Thereafter on 19 January 1990 there was exercised the option to renew the lease for a further period of twelve months to expire on 31 May 1991. It is beyond dispute between the parties that, but for the embargo on rent increases in terms of the above mentioned regulations, the rental should have been raised to $770 per month an June 1989, the commencement of the first option period. In He result respondent continued to pay $700 per month as was prescribed by the rent regulations. In turn applicant willy-nilly continued to accept that sum in full payment. Thus for the period June and July 1989, the respondent's position is unassailable. This point is, indeed conceded by the applicant. However, notwithstanding the repeal of the rent regulations respondent continued to pay and applicant continued to receive $700 per month until February 1990, when in terms of the lease the rental should have been raised to $770 per month.

The applicant seized upon this situation to found his claim for a cancellation of the lease, it being its contention that the underpayments amounted to a "failure" to pay rent on due date and thus entitled it to invoke the forfeiture clause. Consequently, applicant's legal practitioners, at applicant's instance,

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SANSOLE J

wrote a letter to the respondent on 1 February 1990, advising him that the lease was cancelled with immediate effect for failure to pay rent on due date and at the same time demanded of him to vacate the premises by close of business on 15 February 1990, failing which eviction proceedings would be instituted against him.

Upon becoming aware of the true position, respondent on 13 February 1990, through his legal practitioners sent a cheque of $630 representing the sum total of "the difference between the rent paid and the rent due for the period until the 1 st of February 1990." The cheque was sent under cover of a letter and the last paragraph of that letter reads thus:

> "The said payment should settle matters as, quite clearly, both parties operated under common mistake. Kindly acknowledge receipt and confirm"

In response, applicant's legal practitioners wrote a letter to respondent's legal practitioners which, in part, reads as follows:

> "As far as our clients are concerned, your clients breached the provisions of their lease by not paying the full amount of their rentals. **Therefore, our clients were entitled to cancel the lease which they did and your clients having failed to vacate the premises, will now be issued with legal proceedings**. We shall, in the meantime, without prejudice, hold on to your cheque for $630 without receipting it." (Emphasis my own).

Consequently, applicant launched this application.

Mr *Naik* for applicant argued that in view of the clearness of the forfeiture clause the applicant's case was unassailable. Indeed, he argued that where there was such a clause there was no room for the court to take into account the equities of the situation. Mr *Gillespie* in response conceded that as a matter of law the submission was proper, provided there was a case for cancellation. He submitted that on the facts of this case the applicant had not established its entitlement to cancellation for two reasons: Firstly because the underpayments for the months of June and July 1989 respectively, were legitimate and do not constitute any breach as they were covered by the emergency rent freeze regulations. Secondly, in respect of the other payments, viz for the period August 1989 onwards until applicant purported to cancel, applicant had as a matter of law made a clear election not to cancel by accepting underpayments for each subsequent month. Thus on the basis

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of such clear election applicant could not now seek to cancel on the basis of these past breaches. Counsel cited *Masutusa* v *Tafa* 1978 RLR 167(A) at 172 in support of this proposition.

In that case a query was raised whether it was open to the landlord to accept a timely payment of rent and yet still rely on previous late payments as grounds for cancellation of the lease. LEWIS JP at p 172 D-F of that case had this to say:

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"[There are no authorities] for the proposition that having accepted a timeous payment, and without any subsequent default on the tenant's part, the landlord can then go back in time and rely upon previous late payments in order to cancel the lease. The answer may well be that on the occurrence of the breach entitling him to rescind the landlord must exercise his election whether to abide by the contract or cancel it within a reasonable time (See Cooper, "*South African Law of Landlord and Tenant*", page 288, citing *North Vaal Mineral Co Ltd* v *Lovasz* 1961 (3) SA 604 (T).) and where the rental is payable monthly in advance he should reasonably exercise it before the deadline date for the next month's payment. In other words, by accepting the next month's payment on due date, he loses his right to cancel and must be deemed to have elected to abide by the contract. Another way of looking at it is that an attempt to go back in time to previous months' defaults, after acceptance of subsequent timeous payments, enables the lessee to resist a claim for ejectment by raising the *exceptio doli* against the landlord, notwithstanding the provisions of a clause such as clause 9 in the lease. (Compare the view expressed by Kerr in *The Law of Lease*, second edition, page 98, last line)."

In my view this dictum is apposite in the instant case. For this is indeed, what the applicant was endeavouring to do.

The papers reveal that it did not purport to cancel until 1 February 1990 which was the due date for the February rent. And, indeed, it purported to cancel only after it had accepted payment of $700 as February 1990 rent. In the result Mr *Gillespie* argued and quite properly in my view that the applicant had not acted in accordance with the forfeiture clause. Indeed, I would add that the applicant did not have any cause upon which to found his action. A purported reliance upon past and forgiven breaches did not afford him a cause of action. Thus where there is no cause of action, there is no action. It is a nullity. See *Ngani* v *Mbanje & Anor* 1988 (2) SA 649 (ZS).

SANSOLE J

It is my view that once the applicant had elect to abide by the lease it reined bound by it until a breach justifying reliance upon a forfeiture clause next occurs. And where the rental is payable monthly in advance, a landlord seeking to exercise his right to cancel must do so before the deadline date for the next month's payment. See *North Vaal Mineral Co Ltd* v *Lovasz* 1961 (3) SA 604 by). That is what the applicant failed to do in this case. And by failing to act timeously and within a reasonable time after the acceptance of the January 1990 rent, it was much too late to endeavour to cancel after acceptance of the February 1990 rent. For, once a party to a contract has elected to abide by it notwithstanding knowledge of the breach justifying cancellation, that party cannot on the same set of facts covering the same period seek to cancel it. It is for these reasons that at the conclusion of argument I dismissed the application with costs.

Ben Baron & Partners, applicant's legal practitioners

Lazarus & Sarif, respondent's legal practitioners

S v RUZARIO 1990 (1) ZLR 359 (SC)

Court **Supreme Court, Harare**

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Gubbay ACJ, Manyarara JA & Korsah JA

Criminal appeal 21 May & 25 June 1990

Flynote

Criminal law - culpable homicide - duty of driver when dazzled by lights of oncoming vehicle

Evidence - admissibility of Affidavits - Criminal Procedure and Evidence Act [Chapter 59] s 262B (2)

Criminal procedure (sentence) - culpable homicide from negligent driving - imprisonment appropriate if accused was drunk, reckless or grossly negligent

Criminal procedure (sentence) - delay as a factor in mitigation - responsibility of appellant to take steps to expedite matter

Headnote

The appellant was convicted of culpable homicide and sentenced to four months imprisonment with labour for killing three persons while driving negligently and under the influence of alcohol.

The appellant, a section officer in the Zimbabwe Republic Police, was charged with and convicted of culpable homicide arising out of a collision between a police vehicle of which he was the driver and a truck.

The collision occurred at midnight on the Beit Bridge - Masvingo highway. As a result of the collision three front-seat passengers were killed instantly. The evidence led by the State witnesses established that while under the influence of alcohol the appellant negligently drove into the path of the oncoming vehicle. The appellant's defence of being blinded by the lights of the oncoming vehicle was rejected. He was

GUBBAY ACJ

sentenced to four months imprisonment with labour, prohibited from driving all classes of motor vehicle for a period of six months and all licences held by him were ordered to be cancelled.

Held, that where a driver is dazzled or blinded by She headlights of an oncoming vehicle his duty is to pull up and wait until he can see properly before proceeding further, or reduce his speed so as to be able to stop within the range of his vision.

Held, an affidavit is not admissible under s 262B (2) of the Criminal Procedure and Evidence Act [*Chapter 59*] unless it was a document concerned with the trade of the maker of the affidavit, and came from his business records.

Held, further, that an effective sentence of imprisonment is normally appropriate for the crime of culpable homicide resulting from the drunken, reckless or grossly negligent driving of a motor vehicle.

Held, further, that a delay of four years in bringing the appellant to trial did not minimise the culpability of the appellant. The onus was on the appellant to take the steps necessary to

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expedite both the trial and the hearing of the appeal.

Cases cited:

S v *Nemapare* S-207-88 (not yet reported)

Gumbley v *Cunningham* [1989] 1 All ER 5 (HL)

S v *Strydom* 1980 ZLR 364 (A)

S v *Ngara* S-44-87 (not yet reported)

S v *Van Deventer* 1963 (2) SA 475 (A)

SA Mutual Fire & General Insurance Co Ltd v *Dickson* 1978 (1) SA 692 (A)

S v *Chirisa* S-63-89 (not reported)

S v *Corbett* 1990 (1) ZLR 205 (SC)

Barker v *Wingo* (1972) 407 US 514 (US Sup Ct)

R v *Barnardo* 1960 (3) SA 552 (A)

DP Carter for the appellant

Mrs SC Mavangira for the respondent

Judgment

Gubbay ACJ: The appellant, a section officer in the Zimbabwe Republic Police, was charged with and convicted, in the magistrates court, of the crime of culpable homicide. He was sentenced to undergo four months' imprisonment with labour. In addition, he was prohibited from driving all classes of motor vehicle for a period of six months and all licences held by him were ordered to be cancelled.

GUBBAY ACJ

The charge arose out of a violent collision, which occurred half-an-hour before midnight on 11 February 1984, between a Police Toyota Land Cruiser driven by the appellant in a northerly direction along the Beit Bridge - Masvingo highway (that is, towards Masvingo) and a Scania truck and trailer driven in the opposite direction by one Reuben Jerry Mahlangu. He was being closely followed by a similar vehicle driven by his brother, Petros Japu Mahlangu. These drivers were resident in South Africa and in the employ of a road haulage company registered in that country.

In consequence of the collision three front seat passengers in the Land Cruiser, Constable Robert Marima, Lecture Mandebvu and Gladys Mundoma, were killed instantly. The appellant and another passenger who was seated behind the cab, one Henry Ngindi, were injured. Both

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vehicles were extensively damaged, the Land Cruiser virtually beyond recognition.

On the morning after the fatal collision Section Officer Mashonganyika, who was investigating the accident, recorded sworn statements from the Mahlangu brothers. He did so because they were anxious to return home as soon as possible.

At the commencement of the trial, four years and four months later, the prosecutor made application for these two affidavits to be admitted as evidence of their content. Reliance was placed on the provisions of s 262B (2) of the Criminal Procedure and Evidence Act [*Chapter 59*]. After receiving evidence which proved that, despite enquiries, the deponents could not be traced and their whereabouts were unknown, the magistrate granted the application. In doing so he completely overlooked two of the basic requirements laid down in the aforementioned section of the Act. These were, that the statements of fact contained in the document must relate to a transaction or intended transaction "in the course of any trade, business or occupation of whatsoever kind or to any other matter in connection with such trade, business or occupation"; and secondly, that the document must be part of or that fact has been obtained from records kept in the course of that trade, business or occupation . . ." As was pointed out by McNALLY JA in *S* v *Nemapare* S-207-88 (not yet reported) at p 7 of the cyclostyled copy:

> "The object of the legislation ... is to render admissible as evidence facts recorded by a person in the ordinary course of his trade, business or occupation which may be supposed to be true precisely because they were recorded in the ordinary course of business and not with litigation in mind."

GUBBAY ACJ

In short, the magistrate admitted evidence in a form for which no provision is made. To do so was a fundamental misdirection on his part. For there is no doubt that he attached some weight to the affidavits, holding that their contents were corroborated by Be viva voce evidence of other State witnesses.

The prosecutor also produced to the court, in terms of s 260(1) of the Criminal Procedure and Evidence Act, the affidavit of the Chief Forensic Scientist, in which it was stated that a blood sample taken from the appellant revealed, upon analysis, a concentration of not more than 23 milligrams of ethyl alcohol in 100 millilitres of blood. This was well below the prescribed limit of 80 milligrams. As the specimen had been extracted some seven-and-a-half hours after the accident, it seems to me that the only relevance of this piece of documentary evidence was that it proved that, at some stage, the appellant had partaken of intoxicating liquor - a fact not in issue since he admitted that at about 6.30 pm on the evening in question, and before driving away from Ngundu Police Post, he had drunk Tree glasses of wine.

The magistrate however, expressed the view that the concentration of alcohol detected in the appellant's blood established the falsity of his evidence that he had last consumed alcohol twelve-and-a-half hours prior to the accident. He held that the forensic analysis confirmed the direct evidence of the State witnesses that the appellant drank beer during the period between his departure from Ngundu Police Post and the fatal accident.

This, I consider, was a funkier misdirection. If the State wished the court to conclude from the

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blood analysis recorded, that the appellant must have drunk more alcohol than he claimed, or that his blood alcohol concentration must have been in excess of the prescribed limit at the time of the collision, it was incumbent upon it to adduce expert scientific or medical evidence to show this by means of "back calculation"; that is, by a calculation of the amount of alcohol eliminated in the seven-and-a-half hour period between the accident and the taking of the specimen.

But even in such event, it is to be noted that because back calculations involve a number of [actors, such as individual personal physiology, the amount of any food eaten and the type of alcohol imbibed, the prosecution should only rely on such evidence where it is readily understandable and clearly establishes the presence of excess alcohol at the time when the accused person was driving. See *Gumbley* v *Cunningham* [1989] I All ER 5 (my) at 9e-f.

GUBBAY ACJ

In the light of these misdirections it becomes necessary for this Court to determine whether it appears, in the words of s 11(2) of the Supreme Court of Zimbabwe Act, 1981, "that a substantial miscarriage of justice has in fact resulted". Put simply, the approach which this Court now has to adopt is to consider the evidence on the record before it and the credibility findings, if any, unaffected by the misdirections, and decide whether, if no reliance is placed on the evidence which the trial court wrongly relied on, there is proof of guilt beyond a reasonable doubt. If it does so consider, and the onus is on the State to satisfy it, then there is no resultant miscarriage of justice. See *S* v *Strydom* 1980 ZLR 364 (A) at 367F; *S* v *Ngara* S-44-87 (not reported) at p 6 of the cyclostyled copy.

There were two main areas of contention between the State and the defence.

These were whether the appellant drank beer after departing from Ngundu Police Post, and whether the collision occurred without any fault on his part.

Two State witnesses testified to the first issue. It was the evidence of Constable Kusarawana that he was present at Ngundu Business centre when a Land Cruiser approached at such speed as to cause women vendors, who had gathered there, to take to their heels, screaming in fear. The driver was the appellant. He parked the vehicle near the bottle store. Constable Marima, who was with him, entered the bottle store, to emerge shortly in possession of two quart bottles of beer. One bottle he handed to the appellant, who after visiting the toilet, was observed drinking from it. In the opinion of Constable Kusarawana the appellant and Marima were drunk. Both staggered as they walked. In fact, Constable Kusarawana was so convinced that the appellant was under the influence of alcohol that he declined an invitation from Lecture Mandebvu to accompany the parties in the Land Cruiser to Maringire Hotel. He felt it would be unsafe to do so.

The evidence of Constable Kusarawana reads well. It is consistent and plausible and was properly found by the magistrate to be truthful. It is unaffected by the misdirection. Indeed, the appellant was not able to suggest any reason why this witness should have testified falsely against him. While admitting his presence at the business centre he simply disputed all

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Constable Kusarawana's observations of him.

The other witness to the issue of the appellant's sobriety, was the civilian, Henry Ngindi. He was a nephew of the deceased Constable Marima. Ngindi said that he did not notice whether the appellant was drunk at Ngundu Business Centre, but left there with him, Marima and Lecture Mandebvu, and

remained in their company the entire time. They drove to a bottle store at Museve. Mandebvu purchased four pint bottles of beer and Ngindi bought a second similar round. They sat on stools at a counter and were served by the licensee. Thereafter they proceeded to Maringire Hotel and entered the bar. Ngindi sat next to the appellant. Beers were purchased by Mandebvu for the four of them. While at the hotel they met Gladys Mundoma. The appellant agreed to take her to Chivi. She was much under the influence of alcohol.

Ngindi was a very guarded witness. He admitted to seeing the appellant with bottles of beer in his hand both at Museve and Maringire Hotel yet claimed not to have noticed whether the appellant ever lifted such bottles to his lips. He went on to say that although the appellant did not stagger, "the conversations had increased a bit, I mean, tongues loosened".

It was not the appellant's case that at the Museve bottle store and Maringire Hotel he merely handled bottles of beer but did not drink from them. He averred that at both places he remained seated in the Land Cruiser, because he did not want to go about with his firearm. It was the others who went to drink beer.

The magistrate disbelieved the appellant's proclaimed abstinence. He was right to do so. Ngindi, after all, showed an obvious sympathy for the appellant's predicament, for with little cogency he gave out that he merely assumed that the appellant was drinking without actually seeing him doing so. There was accordingly, no reason for Ngindi to untruthfully assert that the appellant left the Land Cruiser at Museve and Maringire Hotel if he had not done so. On the other hand the appellant's false denial evinces an attempt to underplay the degree of his intoxication.

A determination of whether the appellant was responsible for the deaths of his three passengers must be made, therefore, against a positive finding that he drove the Land Cruiser while under the influence of alcohol to an unspecified degree.

Early on the morning of 12 February 1980 Section Officer Mashonganyika visited the appellant at Masvingo Hospital. He soughs end obtained from the appellant his version of the cause of the fatal accident and wrote it down in his Traffic Accident Book. The relevant entry reads:

> "I was coming from Ngundu going to Chivi where I wanted to phone and

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enquire the condition of my mother whom I had been informed was sick. I was travelling at about 100-120km per hour. I saw the vehicle approach from the opposite direction. I was blinded by the lights of the approaching vehicle. This resulted in the collision."

The appellant said that this entry had been fabricated by Section Officer Mashonganyika since he had offered no explanation whatsoever of the cause of the accident. This was yet another instance of how mendacious a witness the appellant was.

It is significant that in this statement the mention is made of the crucial allegation, later advanced in the defence outline and somewhat inconsistently maintained in evidence (but not in the warned and cautioned statement), that the collision occurred on the appellant's correct section of the road. It also belies the averments in the extra-curia statement, and repeated on oath, that the appellant was travelling at approximately 80 kilometres per hour and was proceeding to Chivi on duty, that is, in the course of investigating the whereabouts of a criminal by the name of Lunga.

It was argued on the appellant's behalf that there was no satisfactory evidence which established that the collision occurred on the appellant's incorrect side of the road. I am unable to agree. In my view the cumulative weight of a number of features proved that the appellant turned the Land Cruiser across the path of the oncoming Scania truck and trailer.

In the first place, Section Officer Mashonganyika, who examined the scene the following morning, observed gouge marks on the surface of the tarmacadam at a distance of 1,1 metres from the centre of the road and on the section for south bound traffic. This he took to be the point at which the two vehicles had come into collision. Although cross-examined generally and at length, he was not challenged on this aspect. It strikes me as improbable in the extreme that these gouge marks, which were at the spot where this accident occurred, could have been caused by other traffic. Secondly, both vehicles came to rest on the verge of the road furtherest away from the appellant's northern lane and nearest to that of the Scania. Thirdly, it is apparent from the photograph taken of the damaged Land Cruiser, and supported in the evidence of Section Officer Mashonganyika, that the Scania impacted against the near side of the Land Cruiser, for the offside door of that vehicle was left virtually intact. This strongly suggests that the appellant must have swung the vehicle to the right of the road. Fourthly, Ngindi was seated in the body of the Land Cruiser directly behind the appellant, with his back to him

and his legs diagonally across the floor, thus facing the near side rear corner of the vehicle. He was jerked awake by a sudden swerve. The lights of a vehicle shone in his eyes immediately before he lost consciousness. In his position he could only have seen the lights of what was the oncoming Scania if the appellant had swerved to the right across the path of that vehicle; for if the appellant had swerved to the left the lights would have been behind Ngindi. Finally, if the collision had occurred on the appellant's side of the road, it seems to me inconceivable that with his considerable experience in the police force, he would fail to relate this fact either to Section Officer Mashonganyika on 12 February 1984, or three months later on making his warned and cautioned statement.

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Accepting that the driver of the Scania truck and trailer had not dipped his headlights, such omission does not, in my view, excuse the appellant's conduct. It does not explain why he should have swerved off to the wrong side of the road. One would have expected him to have moved away from the bright headlights and not into them. Moreover, from the fairly moderate curve in the road as depicted in the photograph produced to the trial court as well as in the plan drawn by Section Officer Mashonganyika and that sketched by the appellant himself, I cannot understand how the appellant could have become *suddenly* and *unexpectedly* dazzled or blinded by the headlights of the oncoming Scania. Had he been paying adequate attention he would inevitably have been aware of the lights of the approaching vehicle for quite some time before the actual impact. And if at that stage he found that his vision was somewhat impaired, his duty was to instantly pull up and wait until he could see properly before proceeding further, or reduce his high speed so as to be able to stop within the range of his vision. See *S* v *van Deventer* 1963 (2) SA 475 (A) at 483A-D; SA *Mutual Fire & General Insurance Co Ltd* v *Dickson* 1978 (I) SA 692 (A) at 699h; Cooper *Motor Law* Vol 2 at p 66.

The fact that the appellant ought to have seen the lights of the approaching Scania much sooner than he did and that when he did so, he lost control of his vehicle and swung across the path of the Scania, satisfies me that his driving skill must have been substantially affected by alcohol. It necessarily follows, that despite the misdirections aforementioned the unaffected evidence proved conclusively that the appellant was guilty of the offence charged.

The appellant's counsel properly appreciated that an effective sentence of imprisonment is normally appropriate for the crime of culpable homicide

resulting from the drunken, reckless or grossly negligent, driving of a motor vehicle. This proposition has been stressed time and again. See *S* v *Chirisa* S-63-89 (not yet reported) and the cases cited at p 4 of the cyclostyled copy. It was submitted, however, that the delay of four years in bringing the appellant (who was not held in custody) to trial was so powerful a mitigating feature as to render incarceration manifestly excessive and warrant this court substituting a monetary penalty. Reference was made to the recent remarks of DUMBUTSHENA CJ in *S* v *Corbett* 1990 (1) ZLR 205 (SC). That too was a culpable homicide case. The appellant, through the driving of a motor vehicle while under the influence of alcohol, caused the death of a baby strapped to the back of its mother who happened to be walking along the road at the time. Because of a five year delay from the date of the appellant's arrest to the prosecution of the appeal, and the added factor that the appellant had served seventeen days' imprisonment, a fine of $600 was substituted for the period of four months' imprisonment imposed by the trial court.

In the present matter it appears that the delay was due in part to the efforts of the State to trace the whereabouts of the missing Mahlangu brothers. But when ultimately it was accepted that they could not be found, which at the latest was in mid-February 1986, the subsequent delay of two years was, on the face of it, inordinate. No explanation has been forthcoming from the State, upon whom the obligation lay, as *dominus litus*, to fix the date of trial. Nevertheless I am prepared to assume that the cause of the delay was mere negligence or inefficiency, and not a

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desire to actively prejudice the appellant in the presentation of his defence.

However in my view it is not to be overlooked that once it became apparent to the appellant that the State was dragging its feet he ought to have asserted his constitutional right to a hearing within a reasonable time. See *Barker* v *Wingo* (1972) 407 US 514 at 531-532. It was his responsibility to do so. Failure to take appropriate steps and simply to adopt a passive attitude, must inevitably affect the weight to be accorded to delay as a mitigating factor. It seems to me somewhat artificial and strained for the appellant to now claim that the length of time over which the trial pended caused him mental anguish when he made no attempt to remedy that situation by seeking to enforce his constitutional right through the courts.

Be this as it may, it is plain from the magistrate's judgment that he took into account Me four year delay in his assessment of punishment and were it not for that feature, would have ordered the appellant to serve a far longer period of imprisonment than four months

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GUBBAY ACJ

There is no question, to my mind, but that the appellant committed a more serious offence than that considered in the *Corbett* case, *supra*. I am satisfied that the trial court was not only entitled, but obliged, in the proper exercise of its judicial function, to punish him severely by sentencing him to imprisonment. It was especially reprehensible for the appellant, a police of ricer of fourteen years standing, to drive a motor vehicle when under the influence of alcohol. His degree of culpability or blameworthiness was high. Moreover, his conduct had calamitous consequences resulting in the death of three persons. The oft-quoted words of SCHREINER JA in *R* v *Barnardo* 1960 (3) SA 552 (A) at 557E are apposite in this regard:

> "The sanctity of human life requires to be emphasised whenever a person is unlawfully killed, and drivers of motor vehicles must again and again be reminded that they are in control of an instrument that takes a dreadful toll of life on our highways."

In my opinion the sentence imposed by the magistrate was such as to strike a balance which did justice to both the appellant himself and the interests of society. It does not permit of interference.

I would dismiss this appeal in its entirety.

Manyarara JA: I agree.

Korsah JA: I agree.

Muvingi and *Machaya*, appellant's legal practitioners

S v BADZE 1990 (1) ZLR 369 (SC)

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Court **Supreme Court, Harare**

Gubbay ACJ, McNally JA & Ebrahim AJA

Criminal appeal 19 & 25 June 1990

Flynote

Criminal procedure (sentence) - delay - not mitigatory where appellant is blatantly guilty

Headnote

The appellant was convicted of assault with intent to do grievous bodily harm. She was sentenced to imprisonment. On appeal, her appeal against conviction was dismissed, but she contended that the sentence of imprisonment should be set aside because of the delays in the appeal procedure. The transcript had taken nineteen months to prepare.

Held, that since the appellant was '*dominus litis*', she should have taken active steps to expedite the preparation of the record.

Held, further, that since the appellant was blatantly guilty of the offence, she could not plead the delay in the trial, since she chose to dispute the charge rather than admit her guilt.

Cases cited:

S v *Kilpin* 1978 RLR 282 (A)

S v *Williams* 1980 ZLR 466 (A); 1981 (1) SA 1170 (ZA)

S v *Kundishora* S-70-90 (not yet reported)

CT Jeche for the appellant

N Sibanda for the respondent

Judgment

Gubbay ACJ: On 5 May 1983 the appellant, a woman then 49 years of age, was convicted in the magistrates court at Bindura, of the crime of assault with intent to do grievous bodily harm. She was sentenced to undergo nine

months' imprisonment with labours of which period five months were conditionally suspended for five years.

The material facts giving rise to the prosecutions all of which are beyond contention, were these: The appellant and the complainant, Tarwireyi Mutandwa, had been lovers for three years but latterly their relationship had begun to sour. Matters came to a head on the evening of 6 November 1987. Following upon a heated argument in which the complainant intimated that he

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was not prepared to increase the level of his financial support of her, the appellant armed herself with the wooden handle of a hoe and went after the complainant as he was walking away. Without warning she shuck him a heavy blow to the head which immediately rendered him unconscious. Then, as her victim lay helpless on the ground another blow to the head and two in the region of the shoulders and upper back were delivered with the same weapon. It seems that two of those blows were struck by the appellant's son at her instigation, but which two it is not clear. However that may be, the blame for the totality of the assault rested with the appellant.

The complainant sustained lacerations and bruising of the head, a perforation of the right eardrum and a fractured right shoulder. He was hospitalised for four days and thereafter was treated for some time as an outpatient. At the date of testifying, which was five months after he had suffered the assaults the complainant was still experiencing stiffness in the right shoulder and arm and partial deafness of the right ear.

Mr *Jeche*, who appeared for the appellant, understandably found himself unable to advance any argument in support of the appeal against conviction. He pursued however, the appeal noted against the propriety of the sentence.

While accepting that the cowardly and brutal nature of the assault and the resultant injuries sustained by the complainant, fully justified the trial magistrate in imposing the sentence he did, counsel submitted that the factor which permitted interference by this Court to the extent of substituting a fine together with a conditional period of imprisonment (the appellant having been admitted to bail pending the determination of her appeal), was the inordinate delay of twenty-five months which has ensued from the date of sentence to the hearing of the appeal. Expressed in another way, what this Court is being asked to do is to set aside a punishment which at the time of imposition reflected the proper exercise of a judicial discretion, and both fined the crime and the offender, solely on the ground of a procedural delay which, so it is said, has subjected the appellant to mental anguish.

GUBBAY ACJ

Although the appear was noted well within the prescribed time, the transcription of the evidence and the preparation of the record was only completed on 14 December 1989. It was received by the registrar of this Court on 3 January 1990 and a date of hewing was allocated forthwith.

There is of course, a shortage of transcribers in the county, but nonetheless a delay of nineteen months is deserving of stricture. I would point out that under Rule 24 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules 1979, the clerk of court is obliged within twenty-eight days after the noting of the appeal to lodge with the registrar of the Supreme Court the original record together win five typed copies certified as true and correct, and is to deliver a father such copy to the appellant or his legal representative. It is obvious to me that scant regard is being paid to this rule. If it were otherwise the many complaints of delay in the hearing of appeals from the magistrates courts would not be made.

On the other hand, once an, appeal is noted, the appellant is in a sense *dominus litis*. If it is felt

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that the preparation of the record is being unduly delayed, or that the date of set down is too far ahead, and an earlier hearing is desirable, the appellant should at least make his concern known in an attempt to achieve a greater measure of expedition. He cannot, as was done in case, adopt a totally passive attitude and Hen seek to cry foul. In such circumstances the factor of delay ought not to be afforded much effect.

But there is to my mind, a more compelling reason why it would be wrong for this Court to interfere with the sentence solely on account of the delay which has occurred in the hearing of the appeal.

The appellant was unassailably guilty of the offence charged and the sentence she received was eminently appropriate, being beyond any meaningful challenge. There was no prospect of the appeal succeeding and it necessarily follows that the magistrate erred in admitting the appellant to bail after conviction. See *S* v *Kilpin* 1978 RLR 282 (A) at 285H-286F; *S* v *Williams* 1980 ZLR 466 (A) at 468E-H.

In *S* v *Kundishora* S-70-90 (not yet reported) this Court was called upon to consider whether a delay of three-and-a-half years in bringing that appellant to trial on a serious charge of fraud, justified the substitution of a substantial fine, conjoined with a conditional period of imprisonment, for a term of effective imprisonment ordered by the regional Court. In rejecting the contention this is what I ventured to say:

GUBBAY ACJ

> ". . . this was a case in which the appellant was blatantly guilty. He put up a thoroughly dishonest defence and one which had no prospect of success. If he had confessed his guilt when the fraud first came to light, thereby saving the State valuable time and effort, I feel sure he would have been dealt with far more expeditiously. I do not wish to be taken to imply that in all cases where an accused is convicted upon a plea of not guilty, he cannot effectively complain about the State's delay in bringing him to trial, because he ought to have admitted his guilt at the outset. What I am saying is that where it must have been appreciated that there is no defence to the crime charged, yet notwithstanding, the offender denies its commission, it seems to me illogical, and prejudicial to the interests of justice, to allow him to rely on an ensuing delay, largely brought about by his own dishonest approach to the charge, so as to avoid the imposition of a deserved custodial sentence. If this were so, there would be some advantage to persons who had committed crimes which normally attract prison sentences, and who were not being held in custody, to deny guilt in the hope that delay in bringing them to trial would ensure that they were not sent to gaol."

The appellant's situation is analogous. She noted an appeal in what was a hopeless case rather than accept her punishment and put the whole matter behind her. Any prolonged mental anguish which she has suffered flowed from that decision. To allow her at this stage to rely on the subsequent procedural delay to avoid a merited period of incarceration, would amount to a failure of justice. As a precedent, it would give rise to the danger of encouraging convicted persons to note frivolous and vexatious appeals in the knowledge that (provided they were able to secure admission to bail) any undue delay in obtaining determination of their case on appeal would ensure that ultimately they were not deprived of their liberty.

I would accordingly dismiss the appeal in its entirety.

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McNally JA: I agree.

Ebrahim AJA: I agree.

Chirunda, Chihambakwe & Partners, appellant's legal practitioners.

S v MASIRIVA 1990 (1) ZLR 373 (HC)

Court **High Court, Harare**

Smith J Reynolds J & Greenland J

Criminal appeal

19 March & 27 June 1990

Flynote

Criminal procedure (sentence) - factors arising between offence and trial - must be taken into account in sentencing

Road Traffic Act 1976 s 46(4) - driving licence obtained between offence and conviction - must by law be cancelled as part of sentence

Statutes - interpretation - must apply ordinary grammatical meaning unless an absurdity will result

Constitutional law - Constitution of Zimbabwe s 18(5) - provision that requires cancellation of driving licence obtained between the offence and the trial not unconstitutional.

Headnote

The appellant was convicted of drunken driving and driving without a licence. Between the time of the offence and his trial he obtained a driving licence. The magistrate ordered that this licence be cancelled.

The appellant argued that such cancellation was invalid under the Road Traffic Act, 1976.

Held (per SMITH J and REYNOLDS J GREENLAND J dissenting), that the magistrate was obliged in law to cancel the appellant's recently acquired driving licence.

Held, further (per SMITH J and REYNOLDS J GREENLAND J dissenting), that s 46(4) of the Road traffic Act 1976, was clear end unambiguous, and no absurdity is created.

Held, further (per REYNOLDS J GREENLAND J dissenting), that s 18(5) of the Constitution of Zimbabwe is not applicable to the present case, nor to the application of s 46(4) of the Road Traffic Act 1976, to the appellant.

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SMITH J

Cases cited:

S v Hlope 1971 (2) SA 107 (T)

S v *Pledger* 1975 (2) SA 244 (E)

R v *Sillas* 1959 (4) SA 305 (A)

Baker & Anor v *R* [1975] AC 774; [1975] 3 All ER 55 (PC)

S v *Takaendesa* 1972 (1) RLR 325 (A); 1972 (4) SA 72 (RA)

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

Nyemba & Watunga v *R* 1961 R&N 688 (SR)

Director of Public Prosecutions v *Lamb* [1941] 2 KB 89; [1941] 2 All ER 499 (KB)

S v *dos Ramos* 1978 RLR 297 (A); 1978 (4) SA 318 (RA)

Gordon NO & Rennie NO v *Standard Merchant Bank Ltd & Ors* 1984 (2) SA 519 (C)

In re *Mzolo* 1984 (4) SA 491 (N) *R* v *Molomo & Anor* 1952 (4) SA 748 (W)

Ebrahim v *Minister of the Interaor* 1977 (1) SA 665 (A)

S v Xala 1968 (2) SA 667 (A)

Venter v R 1907 TS 910

Volschenk v *Volschenk* 1946 TPD 486

Becke v *Smith* (1836) 2 M&W 191; 150 ER 724

New Rietfontein Gold Mines Ltd v *Misnum* 1912 AD 704

R v *Takawira & Ors* 1965 RLR 162 (A)

Attorney-General v *Robinson* 1975 (2) RLR 12 (A); 1975 (4) SA 438 (RA)

S v *Mpofu* 1978 RLR 435 (G); 1979 (2) SA 255 (R)

Shenker v *The Master & Anor* 1936 AD 136

Savage v *Commissioner for Inland Revenue* 1951 (4) SA 400 (A)

R v *Hickman* 1961 (4) SA 457 (SR)

S v *Manzira* 1972 (2) RLR 155 (A); 1972 (4) SA 418 (RA)

Administrator Natal v *BluffDrive-in Cinema (Pty) Ltd* 1969 (1) SA 415 (D)

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Stellenbosch Farmers' Winery Ltd v *Distillers Corp (SA) Ltd & Anor* 1962 (1) SA 458 (A)

Van Heerden & Ors NNO v *Queens Hotel (Pvt) Ltd & Ors* 1972 (2) RLR 472 (A); 1973 (2) SA 14 (RA)

CT Jeche for the appellant

Mrs *A Guvava* for the respondent

Judgment

Smith J: On 25 August 1989 the appellant pleaded guilty to contravening s 6(1)(a) of the Road Traffic Act, 1976, (hereinafter referred to as "the Act")

SMITH J

and s 46 (1) of the Act. The offences were committed on 11 August 1988. He was duly convicted. When he was asked if there were any special reasons why he should not be prohibited from driving for six months as required by s 46(4) of the Act, he said that after the offence was committed he had owned a driver's licence and that his employment required that he was able to travel around. The appellant was sentenced to a fine of $150 on the first count and $400 on the second. He was also prohibited from driving for 6 months and his driver's licence was cancelled.

The appellant appealed against the prohibition from driving and the cancellation of his driver's licence.

The grounds of appeal were that the magistrate misdirected himself in prohibiting the appellant from driving since the offence was committed before the appellant became a licensed driver and also in cancelling the licence since it was obtained after the offence was committed. Alternatively, the appeal was based on the ground that the fact that the appellant obtained his driver's licence after the commission of the offence constituted special circumstances justifying the court not to prohibit the appellant from driving and cancel his licence.

Mr *Jeche* argued that whereas, in terms of s 46(1) of the Act, the court was obliged to look at all the circumstances that pertained to the appellant, including his personal circumstances, before and at the time of sentencing in order to arrive at an appropriate sentence, for the purposes of s 46(4) of the Act it was only entitled to have regard to the circumstances which pertained at the time of the commission of the offence. Accordingly as the appellant, at the time he was convicted, was not permitted to drive, he could not be prohibited from engaging in an activity that he was not permitted to do. Mrs *Guvava* submitted that s 46(4)(a) of the Act made it mandatory to prohibit a convicted person from driving, unless there were special circumstances, and then, if that person was the holder of a driver's licence, the court was required to cancel it.

The relevant portions of s 46(4) of the Act read as follows:

> "(4) . . . a court which convicts a person of an offence in terms of subsection (1) involving the driving or attempted

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driving of a motor vehicle shall -

(a) if the person has not previously been convicted of a similar offence within a period of ten years immediately preceding the

SMITH J

date of such first-mentioned conviction -

(i) in the case of a first-mentioned conviction which does not relate to the driving or attempted driving of an omnibus, prohibit the person from driving for a period of not less than six months; or

(ii) in the case of a first - mentioned conviction which does relate to the driving or attempted driving of an omnibus, prohibit the person from driving -

A. a motor vehicle other than an omnibus for a period of not less than six months; and

B. an omnibus during his lifetime; or

or

(b) ...

and shall, if the person is the holder of a licence, cancel the licence in respect of motor vehicles of the class to which such prohibition from driving extends."

In my opinion, a proper interpretation of the provisions of s 46(4) of the Act which are set out above does not support Mr *Jeche's* argument. Subsection (1) of s 46 of the Act provides that a person who on a road drives or attempts to drive a vehicle while under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle shall be guilty of an offence. There is no requirement that the person concerned must be the holder of a driver's licence. Consequently in the present case, where the appellant was not the holder of a driver's licence on 11 August 1988 when he committed the offence, he was properly convicted. Subsection (4) of s46 of the Act directs a court which convicts a person of an offence in terms of subs (1) to prohibit that person from driving. Once again there is no qualification that it is only the holder of a driver's licence who must be prohibited from driving. It is accepted that persons who do not hold a driver's licence are automatically prohibited from driving by virtue of s 6 of the Act which makes it an offence for any person to drive a motor vehicle on a road unless he is the holder of a driver's licence. However any person who does not hold a driver's licence may at any time obtain a licence which would authorise him to drive. The intention behind subs (4) of s 46 of the Act is clear. Unless there are special circumstances, a person who contravenes subs (1) of that section must be kept off the roads as a driver of a motor vehicle for a specified minimum period. The Legislature is obviously concerned to ensure that drivers of omnibuses should be of a sober disposition. Thus s 46(4) of the Act provides that if a person, whilst driving an omnibus, is convicted of contravening subs (1) thereof, the court shall prohibit the person

SMITH J

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concerned from driving an omnibus during his lifetime. There can be no justification for treating an unlicensed driver differently from a licensed driver. It was obviously intended by the Legislature that every driver, whether licensed or not, should be treated in the same manner. The prohibition from driving is required for the purpose of protecting other members of the public. The courts should not be astute to find inroads into this measure for protecting the public. Accordingly, I am of the opinion that the magistrate, having found that there were no special circumstances, had no option but to prohibit the appellant from driving for six months.

Subsection (4) of s 46 of the Act provides that the court shall prohibit the convicted person from driving and shall, if he is the holder of a licence, cancel the licence. It seems to me that the relevant time is that when the person is prohibited from driving and not when the offence was committed. Had it been the latter, the Legislature would have used the phrase "if the person was, at the time he committed the offence, the holder of a licence". However the phrase used is, "if the person is the holder of a licence". In my opinion this means that when the court prohibits a person from driving it must also cancel any licence in respect of motor vehicles of the class to which such prohibition from driving extends which is held by that person at that time.

Mr *Jeche* did not press the appeal on the basis that special circumstances existed in that the appellant obtained his driver's licence subsequent to his conviction. I consider that his attitude was justified.

For the reasons set out above the appeal is dismissed.

Judgment

Greenland J: For the reasons set out by SMITH J I agree that the appeal must fail in so far as it attacks the propriety of the prohibition from driving.

With respect however I must hold that the cancellation of the appellant's driver's licence was in competent and must be set aside.

Ordinarily in applying a statutory penal provision, which provision is necessarily worded in the present tense, a court will not impose a penalty whose severity accrues because of the presence of a fact, factor or circumstance which did not exist at the time of the commission of the offence. See *S* v *Hlope* 1971 (2) SA 107(T).

In that case the factor in question was age. Because of the present tense

GREENLAND J

wording of the penal provision of a statute the accused, then aged 18 years, was sentenced, in terms thereof, to a term of imprisonment, despite the fact that the same statute forbade the imprisonment of any person aged 15 years, the age the accused had been at the time of commission. After reviewing relevant authority MYBURGH J as he then was, concluded that the accused could not be visited with a punishment not accruing at the time of commission and the statute should not be interpreted as authorising such punishment.

By parity of reasoning it seems to me proper to hold that the materialisation of a new fact, ie

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appellant's possession of a driver's licence, cannot be used to justify the imposition of a penalty not available at the time of commission.

See also *S* v *Pledger* 1975 (2) SA 244 (E) at 247 F:

> "The views of *Gluck* and *Brunneman*, following the *Digest*, 48.19. 1, as set out in this passage by STEYN, JA, (in *R* v *Mazibuko,* 1958 (4) SA 353 (A) at 356) are clearly that, when sentence is to be passed, regard must be had to the position prevailing at the time of commission of the offence and not to the date of conviction . . ."

See also *R* v *Sillas* 1959(4) SA 305 (A) which makes the point paraphrased in the headnote that:

> "All sentences must be imposed upon conviction. If this is not expressed it is implied. Accordingly there is no reason to treat words in a statute such as 'shall on conviction be punished' or 'shall impose upon the accused on conviction', or the like, as sufficient to negative or override the presumption against retrospectivity."

So too with the relevant words in the present case being:

> "and shall, if the person is the holder of a licence, cancel the licence ..."

These words must not be interpreted to include a person who did not have a licence at the time of commission.

It is patent that the whole intention of this penal provision of the Road Traffic Act, 1976, is to deem the accused person, an account of his irresponsible behaviour, unfit to hold a driver's licence until such time as he satisfies the State of his fitness, in respect thereof. This must be the reason for cancellation. It would be wrong to suppose that the aspect of cancellation was intended by the legislature as a gratuitous make-weight to the severity of the

penalties already provided, ie a severe fine, and/or imprisonment and prohibition.

Where, as is the position in the present case, the accused has obtained a driver's licence after commission, that reason simply does not pertain because the State has, in effect, with notice and knowledge of the accused's irresponsible driving certified him fit to possess a driver's licence and granted him a right to possession thereof.

Lastly and most importantly to uphold the cancellation would be unconstitutional. Section 56(4) of the Act, *supra a* provides:

> "(4) A prohibition from driving and any consequent cancellation of a licence imposed in respect of an offence shall be deemed to be part of the sentence passed on the person convicted."

It is clear therefore that cancellation is part of the sentence or penalty which accrues upon conviction for the offence in question. The question is: does it accrue even if it did not accrue at the time of commission?

The answer is comprehensively given by s 18(5) of the Constitution of Zimbabwe which reads:

> "(5) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the

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> time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maxi mum penalty that might have been imposed for that offence at the time when it was committed."

To my mind the words employed being "no penalty shall be . . . severer in degree or description . . ." are emphatically all embracing, admitting of no qualification, and thus absolutely prohibit the imposition of any sentence which is qualitatively or quantitatively greater than that legally available for imposition at the time of commission. Put simply, as a fine and prohibition was the only penalty (cumulatively) which could have been imposed at the time of commission this cumulative penalty cannot be increased, for what ever reason, by the addition of cancellation because such addition represents an increase in the degree and description of severity.

I have been referred to the Privy Council decision in *Baker & Anor v R* [1975] AC 774 (PC) at 785 A-C; [1975] 3 All ER 55 (PC) at 61f. In this case their

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Lordships, dealing with a section in the Constitution of Jamaica identically worded as s 18(5), *supra*, held that the section was:

> "directed to invalidating laws passed after en offence has been committed which increase retrospectively the penalty that may be imposed for that offence ... not directed to laws which have no retrospective effect but provide prospectively that different penalties for the same offence may be imposed on different categories of offenders."

With respect the constitutional provision does not refer to "laws". It plainly and unambiguously refers to "penalties". It prescribes that "**no penalty** shall be **imposed** . . . severer in degree or description . . .". In the absence of ambiguity it must be taken to mean what it says and say what it means. There is simply no basis for reading anything into the words employed or for putting a particular gloss on a meaning so plain and patent.

> "The rule of construction is 'to intend the Legislature to have meant what they have actually expressed'. The object of all interpretation is to discover the intention of Parliament; 'but the intention of Parliament must be deduced from the language used', for ' it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law'.
>
> Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise . . ."

See *Maxwell on Interpretation of Statutes* 12 ed at p 28, quoted by BEADLE CJ in *S* v *Takaendesa* 1972(4) SA 72 (RA) at 75 G; 1972(1) RLR 325(A) at 332 E-F.

As said s 18(5) of the Constitution refers to penalties. The penalty section of the Road Traffic Act, *supra*, must be read as being subject to the Constitution because all statutes must be so interpreted. *Deary NO* v *Acting President of Rhodesia & Ors* 1979 RLR 200 (G) at 203.

Accepting this approach I would adopt the words of MAISELS J in *Nyemba & Watunga* v *R* 1961 R&N 688 (SR) at 691 C-D and say:

> "In my opinion the meaning is quite plain . . . But assuming the Statute is reasonably capable of two constructions, it is well established in law that the court is obliged to give it the more lenient construction which

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> avoids the imposition of a penally. See *R* v *Milne & Erleigh,* 1951(1) SA 791 (A) at page 823. See too *Jaga* v *Donges NO & Anor* 1950(4) SA 653 (A)."

(In terms of s 56(4) of the Act, *supra* cancellation is a penalty.)

For all the above reasons I hold that the appeal must succeed in respect of the order of cancellation and rule accordingly.

Judgment

Reynolds J: Section 4(2) of the High Court of Zimbabwe Act, 1981, provides that

> "(2) Whenever there is a difference of opinion on an appeal or application or any other matter being heard by an even number of judges of the High Court sitting together and the opinions are equally divided, the decision of the High Court shall be suspended until the opinion of a further judge of the High Court has been obtained, and thereupon the decision of the majority of such judges shall be the decision of the High Court."

SMITH J and GREENLAND J have expressed different opinions in the present appeal, and my opinion has been sought in order to arrive at the necessary majority decision of this Court. I have had the opportunity of reading the judgments of each of the two learned judges.

The point at issue is a simple one, but one which involves apparently conflicting judgments from a variety of Courts. The problem concerns the question of whether a penalty should be assessed as at the date of the commission of an offence, or at the time of the passing of the sentence. It sometimes happens that an accused person's status or situation has changed between the time that the offence was committed and the time that the conviction takes place, and that is exactly what occurred in the present matter. The appellant here committed the two traffic offences which are referred to in the judgment of SMITH J, *supra*, at a time when he had no driver's licence. He did, however, obtain a licence subsequently, before the trial took place. The magistrate presiding at the trial passed a sentence which prohibited the appellant from driving for 6 months, and he also cancelled the driver's licence. This appeal is directed against those orders. It is not necessary to deal with the prohibition from driving for both the learned judges hearing this appeal were agreed that that part of the magistrate's order

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was correct. As to the cancellation of the appellant's driver's licence, SMITH J has come to the conclusion that the magistrate's sentence In this respect was a proper and necessary one, whereas GREENLAND J has formed the opinion that it was incompetent. I am of the view, with respect, that the conclusion reached by SMITH J is the correct one, for the reasons set out in his judgment, *supra*, and for the following additional reasons as well:

The diversity of opinion arises in regard to the interpretation of the section of the Act in question. I repeat the relevant parts of this provision for ease of reference, and these are as

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follows:

> "46. (4) . . . a court which convicts ,a person of an offence in terms of subsection (1) involving the driving or attempted driving of a motor vehicle shall -
>
> > . . . prohibit the person from driving for a period of not less than six months, . . . and shall, if the person is the holder of a licence, cancel the licence."

SMITH J is of the view that, as the appellant was in possession of a driver's licence at the time of the conviction, the magistrate was obliged to cancel that licence.

GREENLAND J, on the other hand considers that the order of cancellation was improper as the appellant had no licence when the offence was committed.

As I understand his judgment, GREENED J bases his conclusion on three main reasons, and these are:

(a) a penal provision should be strictly construed, and a situation which did not exist when the offence was committed should not be taken into account to increase the severity of the penalty that is imposed upon conviction;

(b) the Legislature could not have intended such a construction, and

(c) "to uphold the cancellation would be unconstitutional" in terms of s 18(5) of the Constitution of Zimbabwe.

It is necessary to examine each of these considerations in turn.

(a) It is trite that a penal provision should be strictly construed, but this precept is subordinate to the wider principle that the courts will give effect to the clear intention of the Legislature. In other words, it is only when the enactment in question is ambiguous, or where the meaning intended is obscure, that there is room for the court to construe that enactment 'strictly', and thereby ameliorate the effect of the penalty provided for. *(Director of*

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Public Prosecutions v Lamb [1941] 2 KB 89; [1941] 2 All ER 499 (KB); *S* v *dos Ramos* 1978(4) SA 318 (RA); 1978 RLR 297 (A).

In *Gordon NO & Rennie NO* v *Standard Merchant Bank Ltd & Ors* 1984 (2) SA 519 (C) at 527-8, DE KOCK J said that:

> "the rule only applies where the language used is obscure or ambiguous . . . and . . . the rule has in any event today lost much of its force. It now appears to be recognised 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."

See, too, In re *Mzolo* 1984 (4) SA 491 (N)

It is my view that the language used in the provision in question is clear and unambiguous, and it should be construed accordingly. (*R* v *Molomo & Anor* 1952 (4) SA 748 (W); *Ebrahim* v

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Minister of the Interior 1977 (1) SA 665 (A).)

In *Director of Public Prosecutions v Lamb*, *supra*, TUCKER J said at 104-105:

> "One has to look at the regulation and see what is the language used. When one finds the regulation dealing with what was then an existing and known offence and with a future conviction of a person of that offence, and when it is found to use the simple and clear language that any person convicted of that offence shall be liable to certain penalties, it is clear that the order is applicable to an offence which has already been committed . . . Although I do not, I confess, like the idea of punishment being increased after the offences have been completed, none the less, the language is clear, and I think it is impossible to escape from its consequences."

Although the learned judge was dealing with an amending enactment in that case, the same principle, in my view, applies to the present matter.

(See, too, *S* v *Xala* 1968 (2) SA 667 (A).)

(b) The second point requiring consideration is, in my view, the crux of the matter, and this relates to the true intention of the Legislature. Once again the "primary rule of construction" applies: if the enactment is clear and unambiguous then the plain meaning of the language employed will properly

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convey the intention of the Legislature, and the Courts are bound to give effect to that meaning. As the rule was expressed by INNES CJ in *Venter v Rex* 1907 TS 910 at 913:

> "By far the most important rule to guide Courts in arriving at (the intention of the legislature) is to take the language of the instrument, or of the relevant portion of the instrument, as a whole; and, when the words are clear end unambiguous, to place upon them their grammatical construction and give them their ordinary effect. But it is universally recognised that though this is what some judges call a golden rule, it is subject to certain exceptions."

I believe that the exceptions to which the learned Chief Justice was referring are, with respect, most aptly and succinctly described by MALAN J in *Volschenk* v *Volschenk* 1946 TPD 486 at 487-488, as follows:

> "If . . . a rigid grammatical construction of the language employed leads to a result which is manifestly absurd, unjust, unreasonable, inconsistent with other provisions, or repugnant to the general object, tenor or policy of the statute, the Court will be justified in departing from the literal sense and in modifying or extending it in such a manner as will secure a conclusion which will eliminate such objection and give expression to the true intention of the Legislature."

It may be mentioned that although the "literal rule" is sometimes referred to as the "golden rule", that latter appellation is more often attached to the rule as qualified by MALAN J in the *Volschenk* case *supra*.

In *S* v *Taknendesa supra*, at 75, (332), BEADLE CJ referred to "the elementary rules on the interpretation of statutes", and cited, with approval, the excerpt from *Maxwell on Interpretation of Statutes*, which is included, in part, in the judgment of GREENLAND J in the present case. The quotation adopted by the Chief Justice continues:

> "Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the

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> legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be . . . The duty of the court is to expound the law as it stands, and to 'leave the remedy (if one be resolved upon) to others'."

At p 77A (334C) of *Takaendesa*'s case the Chief Justice stated:

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> "There are cases when the literal meaning of a statute may be departed from, where to insist on the literal meaning of the words would lead to an 'absurdity so glaring that it could never have been contemplated by the Legislature'."

The wording used in these two passages is, with respect, inconsistent. On the one hand it is said that the provision must be enforced "however harsh or absurd or contrary to common sense the result may be". On the other hand it is said that the literal meaning may be departed from if a "glaring absurdity" would otherwise result.

The correct position, with respect, would appear to be as stated by the Chief Justice in the second passage cited, ie the modified rule. (*Becke* v *Smith* (1836) 2 M&W 191 at 195; 150 ER 724 at 726; *New Rietfontein Gold Mines Ltd* v *Misnum* 1912 AD 704 at 710; *R* v *Takawira & Ors* 1965 RLR 162 (A) at 166; *Attorney-General* v *Robinson* 1975 (2) RLR 12(A) at 21; 1975 (4) SA 438 at 442 (RA); and *S* v *Mpofu* 1978 RLR 435 (G); 1979 (2) SA 255 (R).)

To apply the foregoing to the present matter, as already stated, I consider that the language employed "admits of but one meaning", and must be construed accordingly. I accept that no sentence may ever be passed before conviction, and that the words "a court which convicts a person ..." almost automatically precede a penal provision, but I do not consider that this fact permits a court to regard the provision as being ambiguous if the words employed are clear. There is no difficulty in stipulating that the sentence must relate to the time of the commission of the offence if that is what the Legislature intends. Furthermore, it is my view that it is logical that any sentence should be assessed as at the time of conviction, for regard may then be had to the factors existing at all stages up to that point of time. In addition, in the instant case the words go funkier in that the court is required, "if the person is the holder of a licence," to cancel that licence. Had the Legislature intended that only licences in existence at the time of the commission of the offence should be cancelled, there would have been no difficulty in stating this. "Special circumstances", for example, are defined as meaning "special circumstances surrounding the commission of the offence concerned". (See, too, *Baker & Anor* v *R cited by* GREENLAND J, *supra* at 782 B).

The various authorities that I have perused which involve the "golden rule" of statutory interpretation appear to fall into four different categories. (i) Many concern subsequent enactments which increase previous penalties,

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and in this respect various authorities appear to draw no distinction between the retrospective effect of new laws compared to current laws. This distinction is very important, particularly in the

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Zimbabwe context. (ii) Other cases relate to statutory provisions which are readily capable of bearing more than one meaning. (iii) A few, with respect, indicate that the true test of the intention of the Legislature has not been appreciated. (iv) The balance are of instruments which are indeed clear and unambiguous, but in respect of which a literal interpretation of the apparent meaning would lead to manifest absurdities, or at least what the individual court has considered to be an absurdity. It is a valid consideration, as remarked by DE VILLIERS JA in *Shenker* v *The Master & Anor* 1936 AD 136, that "what seems an absurdity to one man does not seem absurd to another" (at 143). (See, too, *Savage* v *Commissioner for Inland Revenue* 1951 (4) SA 400 (A) at 410.) The matter of subsequent legislation will be considered in due course - at this stage it is expedient to determine whether the literal interpretation adopted requires modification as specified in *Volschenk* v *Volschenk, supra*.

The primary object behind this section of the Road Traffic Act, 1976, is surely to protect the public from dangerous or potentially dangerous driving. It also has a punitive purpose. (*R* v *Hickman* 1961 (4) SA 457 (SR); *S* v *Manzira* 1972 (2) RLR 155 (A); 1972 (4) SA 418 (RA). I think that it may also be said that a further object of the particular provision is that after a period of prohibition, all drivers wishing to drive again should be tested in order to ensure that they are fit to cave. There is nothing in the literal construction applied that is at variance with the purposes I have enumerated.

Other provisions in the Act are entirely consistent with this construction as well. I have been unable to find any other section of the Act which suggests that the penalty provided for may only be imposed if the accused was liable to suffer that penalty at the time of the commission of the offence. This factor accords fully with the obvious requirement that the court in passing any sentence will have regard to the existing situation of the convicted person, and not his situation when he committed the offence, possibly years before.

Turning to the remaining qualifications of injustice or absurdity, these are not so readily disposed of. What is clear, however, is that the absurdity or injustice perceived must be so striking, so "glaring" as it is frequently called, that it is quite patent that the Legislature could never have intended such a result. (*Shenker* v *The Master & Anor supra*; *Administrator Natal* v *Bluff Drive-in Cinema (Pty) Ltd* 1969 (1) SA 415 (D); *S* v *Mpofu supra*). As remarked by BEADLE CJ in *S* v *Takaendesa supra*, at 77B (324D-F):

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> " What is such an absurdity is well illustrated by QUENET JP, in *Takawira*'s case, *supra*. The statute concerned, without any qualification or exception, made it an offence to be in possession of subversive material. If interpreted literally this would mean that 'the policeman who took possession of the subversive statement, the public prosecutor who tendered it as evidence, the judicial of ricer who examined it at the trial' would all be guilty of offences and, as a result, it would never be possible to secure a conviction under the statute at all and, as a result, the intention of the Legislature would be completely frustrated."

At first blush, it does seem to be at least an injustice that an accused person should have his driver's licence cancelled when he only acquired it subsequent to the commission of the offence. For one thing, it is said that the individual who commits a crime will want to know what punishment awaits him if he is caught. It may seem to be unfair that he will, upon conviction,

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suffer a penalty that has only come about by virtue of events occurring subsequent to the commission of the crime. In contrast, it is also a factor, in my view, that it is common knowledge that laws and penalties do change, often on changes of government or on policy consideration, and it may be said that the accused person should not be unduly surprised, or consider it unjust should he face a different penalty on conviction to the one he faced when he committed the offence. Most of the authorities that deal with the commission/conviction issue involve different penalties being imposed by virtue of age variations. Extreme cases are cited in which a boy commits an offence and is only brought to trial as an adult. It is said, quite properly, with respect, that it is absurd that he should be subjected to adult-punishment for an offence committed as a boy, particularly bearing in mind the deficiencies of youth. On the other side of the coin, however, would it not be equally absurd to inflict a juvenile punishment on a grown man? In the instant case would it not appear to be equally unjust that a licensed driver who commits this offence should suffer a greater penalty than a person in the position of the appellant, when the latter is potentially the greater menace on the roads?

I consider that unless the statute specifically says otherwise, it is also logical that any convicted person should be sentenced as he is at that time, and not as he was at the time of the commission of the offence. It is trite that the personal circumstances of the accused should be considered when assessing sentence, and these circumstances relate to his past and present situation. Absurdities would certainly arise if this were not the position. Examples that occur to me would include changes in the accused person's status or means, and the loss or destruction of property subject to orders of forfeiture. To

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ignore his background and existing position would be unthinkable.

It is also a valid consideration, I believe, that the appellant here knew - or is assumed to have known - that the Act in question is so worded that it was at least a possibility that any licence obtained before sentence could be cancelled. He voluntarily assumed that risk as a possible consequence, and cannot, therefore, be heard to complain that the order of cancellation was absurd or unjust.

In the final analysis, it is my opinion that, whereas the interpretation placed on the provision by SMITH J could lead to a result that might be subjected to criticism, I do not consider that this interpretation could lead to "a glaring absurdity". I respectfully agree with, and apply here, the sentiments expressed by WESSELS AJA in *Stellenbosch Farmers' Winery Ltd* v *Distillers Corp (SA) Ltd & Anor* 1962 (1) SA 458 (A) at 484A -B:

> ". . . it cannot be said that the consequences which result . . . are so glaringly absurd and repugnant to the scope and purpose of the Act that the Legislature could never have intended the particular provision to have such a wide meaning."

I turn, finally, to consider the constitutional point raised by GREENLAND J The section cited - s 18(5) of the Constitution of Zimbabwe - is, in my view, concerned solely with the promulgation of any **new** enactment, and it provides that the new instrument shall not have a retrospective effect. I would, with respect, agree with the interpretation placed on a similar provision by the

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Board of the Privy Council in *Baker & Anor v R supra* at 785 A- C This passage is cited by GREENLAND J *supra* and need not be repeated.

Suffice it to say that that Board specifically excluded "laws which have no retrospective effect", and this is the position here.

It is well-established that words should not be read into an Act when it is not essential to do so. (*Van Heerden & Ors NNO* v *Queens Hotel (Pvt) Ltd & Ors* 1972 (2) RLR 472 (A) at 494; 1973 (2) SA 14 (RA) at 26). The construction decided upon by GREENLAND J in this matter in effect requires the insertion of the words "on that person" before the words "for any criminal offence" in s 18(5). This provision is intelligible without the addition of such words, and I cannot envisage any absurdity arising should the position be left as it is. In *R* v *Sillas supra* cited in the judgment of GREENLAND J the reference to "the presumption against retrospectivity" applied to "the presumption that a statute operates only on transactions that take place after its enactment", ie

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a **new** law, (at 309H). The statute in question here was not a new one that only came into operation after the offence, and there is no similar presumption against retrospectivity in regard to current laws as far as I am aware. Once again the overriding consideration is the language used in, and the intention behind, the enactment.

S v *Pledger supra* also cited by GREENLAND J, concerned the accused being under 21 years of age when the offence was committed, and thus liable to be sentenced to corporal punishment, but being over 21 at the date of conviction, and liable to a sentence of imprisonment. This case, and others, have held that the operative date to be applied in passing sentence is the date of commission. It seems to me, with great respect, that the learned Acting Judge President in *Pledger*'s case relied on authorities which all fall into one or more of the four categories I have enumerated above.

It is important to bear in mind, in my opinion, that the statutory provision here is:

> " . . . not dealing with criminal responsibility . . . (It is) dealing only with the sentencing of persons whose criminal responsibility has been established at a trial."

(per LORD DIPLOCK in *Baker & Anor* v *R supra* at 780 F) In the light of the foregoing, it is my opinion that the decision of SMITH J is, with respect, the correct one, and I hold accordingly.

Chirunda, Chihambakwe & Partners, appellant's legal practitioners

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Endnotes

1 (Popup - Popup)

An appeal has been noted.

2 (Popup - Popup)

Now reported 1990 (4) SA 151 (ZS) - *Editor.*

3 (Popup - Popup)

An appeal has been noted against this judgment.

4 (Popup - Popup)

Smith J did not sit to hear oral argument but joined the Court in terms of s 4(2) of the High Court of Zimbabwe Act 1981. An appeal was noted in this matter. The sentence was set aside and the matter referred to the High Court for sentence to be passed. See S-138-90 (not reported).

5 (Popup - Popup)

On appeal see S-28-90 (not reported) - *Editor*.

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