

MALABA v TAKANGOVADA 1991 (1) ZLR 1 (HC)

Court High Court, Harare

Greenland J

Opposed motion

8 & 21 December 1988

(OMITTED IN ERROR FROM EARLIER REPORTS)

Flynote

Contract - sale of immovable property - condition precedent - effect - benefit of one party - waiver - failure of condition precedent.

Contract - interpretation - intention of parties.

Headnote

The respondent, in terms of a written agreement of sale, sold immovable property to the applicant. The sale was conditional on the purchaser obtaining a bond within a specified period. This condition was not fulfilled. The applicant sought specific performance of the contract.

Held, the requirement of a bond was a condition precedent, and the failure to fulfil that condition was fatal to the enforcement of the contract.

Cases cited:

Leo v Loots 1909 TS 366

Provident Land Trust Ltd v Union Government (Minister of Mines) 1911 AD 615

Corondimas & Anor v Badat 1946 AD 548

Wacks v Goldman 1965 (4) SA 386 (W)

Cotton Tail Homes (Pty) Ltd v Palm Fifteen (Pty) Ltd 1977 (1) SA 264 (W)

Mitchell's Piano Saloons v Theunissen 1919 TPD 392

R v Katz 1959 (3) SA 408 (C)

Harris v Trustee of Buissinne (1840) 2 Menz 105

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Quirk's Trustees v Assignees of Liddle & Co (1885) 3 SC 322

Harvey & Anor v Martin (1888) 5 HCG 167

Jacobs v Petersen & Anor 1914 CPD 705

Birkback and Rose-Innes v Hill 1915 CPD 687

Horne v Hutt 1915 CPD 331

Hansen, Schrader & Co v de Gasperi 1903 TH 100

Lanfear v du Toit 1943 AD 59

Bon Accord Irrigation Board v Braine 1923 AD 480

Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934 AD 458

Union Government v Smith 1935 AD 232

Hughes NO v The Master & Anor 1960 (4) SA 936 (C)

Blaikie-Johnstone v Holliman 1971 (4) SA 108 (D)

Jonnes v Anglo-African Shipping Co (1936) Ltd 1972 (2) SA 827 (A)

Glyphis v Tuckers Land Holdings Ltd 1978 (1) SA 530 (A)

MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd 1924 AD 573

Koenig v Johnson & Co Ltd 1935 AD 262

Laskey v Steadmet (Edms) Bpk 1976 (3) SA 696 (T)

Leal v Johnson 1978 (4) SA 706 (W)

Margo v Seegers 1980 (3) SA 708 (W)

Roberto v Bandeiro & Anor 1982 (1) SA 880 (W)

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

Meyer v Barnardo & Anor 1984 (2) SA 580 (N)

Mekwa Nominees v Roberts 1985 (2) SA 498 (W)

Phillips v Townsend 1983 (3) SA 403 (C)

Hanomag SA (Pty) Ltd v Otto 1940 CPD 437

Robertson Municipality v Jansen 1944 CPD 526

van Diggelen v de Bruin & Anor 1954 (1) SA 188 (SWA)

Borstlap v Spangenberg en andere 1974 (3) SA 695 (A)

A N H Eastwood for the applicant

No appearance for the respondent

Judgment

Greenland J: In this case the applicant seeks to enforce a contract of sale. Though respondent has not appeared he has filed a notice of opposition and the papers reveal the basis thereof.

That basis can be formulated thus: applicant, as purchaser, can have no right to enforcement of the contract for the reason that the contract failed for lack of fulfilment of a condition precedent.

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The contract's potential for existence reposes in a written agreement. It is in standard form with various numbered and un-numbered sections setting out details, terms and conditions. The relevant portion of the agreement is reproduced as follows:

"PURCHASE PRICE AND TERMS OF PAYMENT: \$60 000 (SIXTY THOUSAND DOLLARS) payable in cash to the sellers conveyancers in order to effect transfer

See Special Conditions overleaf

1. **THE SELLER** shall give vacant possession of the property hereby sold to the Purchaser on **TRANSFER OR EARLIER ON MUTUAL AGREEMENT** possession should be made to it. The Seller cedes to the Purchaser all his rights under any Lease or Leases which may be in existence in respect of the said property.

CONVEYANCERS: STUMBLES & ROWE (MR MEYBURGH)

SPECIAL CONDITIONS:

THIS Sale is subject in all respects to the following special conditions and to the general conditions annexed hereto and if there shall be any special conditions applicable to the sale which differ in any respect from such general conditions such special conditions shall prevail.

1. ...
2. This sale is conditional upon the purchaser being offered a loan in principle or otherwise on the usual terms and conditions from a Building Society or other financial institution in the sum of **\$60 000 (SIXTY THOUSAND DOLLARS)** or such lesser amount as may be acceptable to the purchaser by not later than the 9th July 1988, unless an extension of this period is agreed to by both parties; such loan to be secured by means of a first mortgage bond registered over the property sold. The purchaser undertakes to apply for such loan by not later than the 8th June 1988, and further agrees not to withdraw such application once

made, and agrees to accept such loan when offered.

GENERAL CONDITIONS;

1. The Agent's Commission on this Sale shall be paid by the Seller...
2. The Seller shall tender transfer of the property ... within a reasonable period ...

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3. The rights of the Seller ... shall not in any way be prejudiced by any extensions of time ...
4. The risk and profit ... shall pass ...
5. The property is sold as it stands ...
6. The Purchaser acknowledges that he has acquainted himself fully with the property ...
7. Should either party fail to remedy any serious breach of this agreement within 14 days of demand ...
8. The Seller is not responsible for ... any representations ..."

Thereafter the agreement bears the signatures of the parties and the date of signing being 7 June 1988.

There can be no doubt that Clause 2 under the heading of "**SPECIAL CONDITIONS**" takes the form of what is known as a condition precedent.

Such condition:

"suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event ..."

per Christie The Law of Contract in South Africa p 126. In the present matter the "future uncertain event ..." requiring fulfilment before a contract of sale came into being was to be a building society loan being granted to applicant as purchaser.

For the sake of clarification and in order to put the central issue in perspective it is appropriate to set out the following:

The first point to be made is that in such circumstances neither party can claim to have a sale, ie that a contract of sale is actually in force. As Christie, *supra*, states at p 128-9:

"Undoubtedly the contract is binding in the sense that what binds the parties to each other is no more and no less than the contract (ie agreement) into which they have entered, but we are precluded by authority from saying that a contract of sale subject to a condition precedent that has not been fulfilled is a sale."

See *Leo v Loots* 1909 TS 366 at 370-1; *Provident Land Trust Ltd v Union Government (Minister of Mines)* 1911 AD 615 at 627; *Corondimas & Anor v Badat* 1946 AD 548 at 551 and 558-9; *Wacks v Goldman* 1965 (4) SA 386

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(W) at 388; *Cotton Tail Homes (Pty) Ltd v Palm Fifteen (Pty) Ltd* 1977 (1) SA 264 (W) at 269E and 273E.

Fixing the date on which a sale comes into existence is often important, eg for purposes of fixing the date when transfer duty is due - see *Provident Land Trust, supra*, or in relation to the running of prescription - see *Mitchell's Piano Saloons v Theunissen* 1919 TPD 392, or on the question whether a prohibited or criminal sale has occurred - see *Corondimas & Anor v Badat, supra*, and *R v Katz* 1959 (3) SA 408 (C). In all these situations the date of the sale would not precede the date of fulfilment of the suspensive condition for the simple reason that no sale exists until fulfilment thereof. Christie, *supra*, goes on to point out several other implications which are necessarily present eg - delivery before fulfilment does not pass ownership - *Harris v Trustee of Buissinne* (1840) 2 Menz 105; *Wolf v Richards* (1884) 3 HCG 102 at 116; *Quirk's Trustees v Assignees of Liddle & Co* (1885) 3 SC 322, *Harvey & Anor v Martin* (1888) 5 HCG 167; the risk remains with the Seller - *Jacobs v Petersen & Anor* 1914 CPD 705; *Birkback and Rose-Innes v Hill* 1915 CPD 687 but see *Horne v Hutt* 1915 CPD 331.

To my mind the above-stated propositions accord with logic, common sense and the fundamental principle that a court is required to give effect to the intention of the parties as expressed in the contract. This is made clear by SOLOMON J in *Hansen, Schrader & Co v de Gasperi* 1903 TH 100 at 103:

"Now, it is not for this Court to speculate as to what the intentions of the parties were when they entered into the contract. That must be gathered from their language, and it is the duty of the Court as far as possible to give to the language used by the parties its ordinary grammatical meaning."

In this respect CENTLIVRES JA concludes at p72 of the report on *Lanfear v du Toit* 1943 AD 59:

"The intention so gathered is presumed in law to be the common intention of the parties."

See *Bon Accord Irrigation Board v Braine* 1923 AD 480 at 490; *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465; *Union Government v Smith* 1935 AD 232 at 240-1; *Hughes NO v The Master & Anor* 1960 (4) SA 936 (C) at 939H; *Blaikie-Johnstone v Hollimans* 1971 (4) SA 109 (D) at 114 C: *Jonnes v Anglo-African*

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Shipping Co (1936) Ltd 1972 (2) SA 827 (A) at 834E; *Glyphis v Tuckers Land Holdings Ltd* 1978 (1) SA 530 (A) at 536-7 in support of the proposition stated by SOLOMON J, that intention is to be gathered from the language employed.

Adopting this approach it is clear to me that Clause 2 under the heading of "**SPECIAL CONDITIONS**" constitutes a condition precedent proper. The clauses under the heading of "**GENERAL CONDITIONS**" constitute terms of the would be contract. These are the conclusions that must be reached in the light of the general lay out of the agreement and the

plain meaning of the words employed. In particular:

- (a) the words employed generally under and including the heading of "**SPECIAL CONDITIONS**" reveal a clear intention to suspend the operation of the sale contract and render its coming into being conditional on applicant, as purchaser, securing a loan in order to finance the purchase price;
- (b) applicant was required to achieve this facility by the 9th of July, 1988;
- (c) applicant was obliged to
 - (i) make application for the loan by the day following upon signature, ie the 8th of June 1988;
 - (ii) accept a loan, if offered, in such amount as would be needed to finance the purchase price.

To my mind the relevant clause has a dual character. It constitutes a condition precedent and imposes obligations of a contractual nature upon the purchaser to ensure as far as the purchaser is able fulfilment of the condition.

Try as I might I am unable to find anything in the words employed which lead to Clause 2 being construed as being "for the benefit of the purchaser" a proposition advanced by Mr *Eastwood* appearing for applicant. Although the word "undertakes" is used in the last sentence of Clause 2 it is clear from a reading of the whole sentence that the obligation is contractual.

Essentially the agreement constitutes a contract to bring into being a contract of sale. Once signed neither party could unilaterally resile or frustrate what was intended without exposing that party to a claim for damages as envisaged in precedents such as *MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573, *Koenig v Johnson & Co Ltd* 1935 AD 262. Simply put a party to a conditional contract may not frustrate that contract by designedly preventing fulfilment of the condition.

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Mr *Eastwood*, to whom I am indebted for a very helpful submission, relies heavily on a line of South Africa decisions starting with *Wacks v Goldman supra*. See also *Laskey v Steadmet (Edms) Bpk* 1976(3) SA 696 (T); *Leal v Johnson* 1978 (4) SA 706 (W); *Margo v Seegers* 1980 (3) SA 708 (W); *Roberto v Bandeiro & Anor* 1982 (1) SA 880 (W); *Design and Planning Service v Kruger* 1974 (1) SA 689 (T).

The principles that may be abstracted from these cases is that where an agreement relating to the sale of immovable property is subject to a condition that the purchaser obtain a bond such condition:

- (a) is for the benefit of the purchaser;

- (b) may be fulfilled or frustrated at the whim of the purchaser;
- (c) may be waived by the purchaser;
- (d) when so waived by the purchaser still leaves the purchaser with the right to enforce the contract; and
- (e) " ... the failure to obtain a bond envisaged within the period laid down cannot be relied upon by the Seller in order to avoid ... obligation under the document ..." per KUMLEBEN J in *Meyer v Barnardo & Anor* 1984 (2) SA 580 (N) at 583C.

Fortunately it is only necessary to hold that all the precedents relied on by Mr *Eastwood*, cited above, *Meyer, supra*, excepted, are distinguishable on the facts. In none of these precedents was the court faced with a clause so worded as to give it the dual character referred to above.

I prefer the approach of KUMLEBEN J in *Meyer v Barnardo, supra*, at p 585 where he lucidly and instructively advocates that the intention of the parties must be gathered from the plain meaning of the words in the relevant clause and such meaning must prevail. Like KUMLEBEN J, I too conclude that on the wording of the present clause it is not possible to hold that the condition was for the exclusive benefit of the purchaser. To my mind it was the seller who benefitted from the contractual obligation imposed on the purchaser to ensure, as far as the purchaser would, the successful realization of the sale. See also *Mekwa Nominees v Roberts* 1985 (2) SA 498 (W) and *Phillips v Townsend* 1983 (3) SA 403 (C).

It is common cause that -

- (a) applicant did not secure the loan by the stipulated date;
- (b) applicant, in no way prior to that date, indicated that she had waived the condition;
- (c) the date was not extended by mutual agreement; and

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- (d) applicant did not, by stipulated date, offer or tender the purchase price.

Had she done so this court would have accepted that the condition had been fulfilled, not *informa specifica* but, *per aequipollens*. See *Hanomag SA (Pty) Ltd v Otto* 1940 CPD 437 at 443; *Robertson Municipality v Jansen* 1944 CPD 526 at 542; *van Diggelen v de Bruin & Anor* 1954 (1) SA 188 (SWA) at 193A and *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A). This is because plain common sense dictates that the common intention was not so much that the building society would provide a loan but that the purchase price would be raised by the stipulated date.

In my view the contract of sale failed to come into existence because the condition precedent

was not fulfilled. The condition itself was not for the exclusive benefit of the purchaser but a term of the agreement which, in part, the purchaser was contractually bound to ensure fulfilment of.

As no contract of sale ensued applicant has no enforceable rights in such sale. The application is dismissed with costs.

Kantor & Immerman, applicant's legal practitioners

George Seirlis & Associates, respondent's legal practitioners

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GOODHOOD ENTERPRISES (PVT) LTD v CAPS HOLDINGS LTD & ANOR 1991 (1) ZLR 9 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Manyarara JA

Civil appeal

1 June & 11 June 1989

(OMITTED IN ERROR FROM EARLIER REPORTS)

Flynote

Company - winding-up - failure to pay debts - inability due to acts of creditor - discretion of court.

Headnote

The respondents had financed the importation of scooters and spare parts by the appellant. The goods were pledged to the respondents as security. The respondents refused to release the goods until an outstanding debt was paid. The appellant contended that it needed the goods in order to trade and pay its debt to the respondents. The respondents sought the winding up of the appellant on the grounds that it was unable to pay its debts. The rule *nisi* was confirmed by the High Court. On appeal the appellant contended that the judge of the High Court had not properly exercised his discretion in the matter.

Held, the refusal by the respondents to release the goods to the appellant should have led the High Court to refuse the grant of a winding-up order.

Held, further, the judge of the High Court exercised his discretion on a wrong principle as the respondents were fully secured creditors.

Cases cited:

Ebrahim(Pty) Ltd v Pakistan Bus Services (Pty) Ltd 1964 (4) SA 146 (N)

Ex parte *Neetling & Ors* 1951 (4) SA 331 (A)

Clarke v Protein Foods (Pvt) Ltd 1970 (2) RLR 278 (A)

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J B Colegrave, with him *E Chatikobo*, for the appellant

M R D Stonier for the respondent

Judgment

Dumbutshena CJ: On 19 January 1987 Goodhope Enterprises (Pvt) Ltd, hereinafter referred to as the appellant, on the one hand and Caps Holdings Limited and its subsidiary Executive Freight (Pvt) Ltd hereinafter referred to as respondents, on the other hand, entered into an agreement. By this agreement the respondents agreed to finance the appellant and to pay money for customs clearance of the appellant's scooters held in customs bond pending payment of customs dues. The appellant pledged the goods to be customs cleared and other goods as security for monies due to the respondents. By 14 March 1988 the appellant was indebted to the respondents in the sum of \$522 361,00 for costs of goods, costs of shipping, sea freight, handling charges, customs clearing, storage, interest and other charges. The appellant averred that if the value of the pledged goods was taken into account the balance owing it itself was \$148 887,98.

The material parts of the agreement, Annexure C to the Petition are paras 4, 5 and 6. They read as follows:

"4. Pledge

That immediately upon clearance of the remaining goods held in customs bond Goodhope hereby undertake to deliver the hereby pledge to Caps and/or Executive Freight all of such goods to be held in their possession pending settlements of all sums due by Goodhope to Cape and/or Executive Freight. Such goods are as described in Annexe 'A' hereto.

5. Further Pledge

That Goodhope further undertakes to deliver to Caps and/or Executive Freight certain goods previously cleared and assembled being delivery scooters as listed in the attached schedule marked 'B' and hereby pledges such vehicles to Cape and/or Executive Freight as further security for its indebtedness to such companies.

6. Release of Goods

That Caps and/or Executive Freight agree that they will from time to time release to Goodhope some of the goods as and when same are sold provided however that arrangements satisfactory and acceptable are made for payment towards the outstanding amount."

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Besides the goods that were cleared through customs by the respondents and pledged to them, the appellant agreed to deliver to the respondents scooters that were previously cleared

and assembled. These were also held as security by the respondents. They were to be released from their possession upon payment of all monies due to the respondents.

In terms of para 6 of the agreement the respondents agreed to release to the appellant some of the goods when they had been sold on condition that satisfactory arrangements were made for payment money towards the liquidation of the outstanding loan.

It appears from the papers that the terms of the agreement were not strictly followed. Consequently the respondents suspended the operation of para 6. They stopped releasing goods they held as security to the appellant. The conditions of the agreement were not fulfilled. The appellant did not pay money towards the satisfaction of the amount of money advanced to him by the respondents.

The respondents applied to the High Court for the winding up of the appellant company in terms of s 179(f) of the Companies Act [Chapter 190]. A rule *nisi* was issued. On the return day the court *a quo* confirmed the rule. The appellant now appeals to this court. One of the grounds of appeal reads:

"[T]he learned judge erred in failing to appreciate that the respondents prevented the appellant from fulfilling the terms of the agreement; ..."

Mr *Colegrave* for the appellant did not argue that the appellant was able to pay its debts because of the deeming provisions of s 178(a) of the Companies Act. He conceded that the learned judge *a quo* was empowered to wind up the appellant company in terms of s 179(f) of the Act on the ground that the appellant company had failed to pay its debts. He, however, contended that the learned judge *a quo* misdirected himself or exercised his discretion wrongly when he said in his judgment.

"Respondent's stance that the Petitioners are authors of the prejudice in that by refusing to release the goods pledged they are incapacitating respondents from marketing the goods and paying out of the proceeds therefrom is without merit. The written agreement between the parties stipulates the arrangements and there can be no basis for departing therefrom. In fact it would be inequitable to expect Petitioner to part with their security. It could also be dangerous."

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It was contended for the appellant that in terms of para 6 of the agreement the respondents were bound to release to the appellant some of the goods so that they could be sold and the proceeds paid to the respondents to off-set the debt. What went wrong, Mr *Colegrave* argued, was that the purport of para 6 was changed and altered by the respondents. This change, or more precisely the suspension of the release of goods to the appellant, prevented the appellant from fulfilling the terms of the agreement. It was this point and this particular ground of appeal which the learned judge *a quo* did not consider. In my view the learned judge *a quo* did not appreciate appellant's contention that it had been "incapacitated" "from marketing the goods" and thereafter paying the respondents. This was so because respondents had suspended para 6.

The reason proffered by the respondents in support of the suspension of the terms of para 6

was that the value of the kits under pledge appeared to be insufficient to meet the balance outstanding. Mr *Stonier*, for the respondents, argued that the respondents were entitled to withhold the release of the goods. He said they did not, by suspending the earlier arrangements, depart from the terms of the agreement. It seems to me the respondents breached the agreement because the operational part of the agreement was contained in para 6. It enabled the appellant to sell the goods released to it by the respondents. And, what is more important, with the proceeds of the sale, the appellant would have been able to pay the respondents.

In my judgment the respondents must have appreciated when they agreed to take as security goods which were the means of realizing money for paying back the monies they loaned to the appellant, that without selling those goods, the appellant would be unable to raise money for repaying the loan. The appellant was in the business of selling three-wheel pick-up vans and delivery vans. I cannot say without any evidence before me that the appellant was able to raise any other form of security. Once the terms of para 6 were suspended both the respondents and the appellant were bound to encounter difficulties.

It is clear from a reading of the judgment of the court *a quo* that the learned judge did not apply his mind to the question raised on appeal. The question in issue is: Whether by refusing to release the goods to the appellant the respondents were not preventing him from doing business by selling the goods held as security by them? In my opinion they contributed to the appellant's inability to pay his debts. The court *a quo* should have asked whether by refusing to release the goods for sale and thus rendering the appellant incapable of generating funds with which to liquidate its indebtedness -

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ness to them, they were entitled to a winding up order. In my opinion these circumstances would make the court form the opinion that it should not grant a winding up. I say this because by departing from the terms of para 6 of the agreement and by withholding the release of the goods the respondents kept readily realizable assets which would have been available to the appellant and out of which or the proceeds of which the appellant would pay its debts. See *Ebrahim(Pty) Ltd v Pakistan Bus Service (Pty) Ltd* 1964 (4) SA 146 (N) at 147F.

Although this point was referred to in the papers before him, the learned judge *a quo* seemingly ignored it or he ignored it because counsel did not draw his attention to it.

The point I have referred to above is not one and the same with that considered by the learned judge in his judgment when he said:

"It is also well established in law that the fact that a debt is secured does not disentitle a creditor from bringing an application for the liquidation of a debtor. *Visser v Bruce and Company* 1925 CPD 1, *National Bank v Munnich's Estate* 1925 EDC 77, *Malk v Ring and Gelvan* 1929 WLD, 224, *R v Hohls* 1959 (2) SA 656 (N) 657, *Duminy v Beukes* 1923 OPD 64, *Cohen & Sons v De Beer* 1924 WLD 29."

The cases referred to above dealt with a different situation from the instant one. In those cases the question that was considered was whether a fully secured creditor had *locus standi* to apply

for the sequestration of his debtor's estate. The decisions make it clear that a fully secured creditor can apply for the sequestration of his debtor's estate.

The real issue in this case was whether it would be a proper exercise of discretion to liquidate this particular company at the instance of these particular creditors in these particular circumstances. The goods pledged as security in this case are the very goods with which the appellant would generate money with which to pay the respondents. A reading of para 6 shows that both the appellant and the respondents appreciated this point. That is why in the instant case it was wrong to suspend the releasing of the goods to the appellant. Those goods were real assets from whose proceeds of sale the agreement would be honored by the appellant. By refusing to release the goods the respondents frustrated the appellant. In my judgment it was not just and equitable to confirm the rule.

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While it is easy for me to understand why the respondents refused to release the goods in their possession, I find myself unable to accept Mr *Stonier's* contention that the full amount of the debt outstanding would not be paid and would no longer be secured were the goods to be released to the appellant. The parties entered into this agreement well aware of the fact that the respondents would release to the appellant the goods held by them as security and the appellant would sell them and pay the proceeds to the respondents in order to reduce or even liquidate the appellant's indebtedness. As I have remarked before I fail to appreciate why the respondents agreed to accept the goods as security.

Mr *Stonier* further submitted that even if the respondents were to release the goods and even if they were sold, not sufficient money would there be realized to off-set the outstanding amount. That might be true. The appellant however contends that the amount of \$469 283,92 said to be still outstanding and which the respondents say would be increased by storage charges, interest and sundry other charges, would be paid off because of the "likelihood of any seller of these kits being able to take advantage of the increasing worth or value of these kits. In other words, while the value of the kits in March 1988 may have been just over \$400 000,00 they would probably sell for very much more today". There is force in this argument. It is a notorious fact that prices of scarce commodities in Zimbabwe rise at phenomenal rates. The appellant believed that the kits would fetch much more than the price they would have fetched in March 1988. The respondents do not believe so.

Mr *Colegrave* sought to reinforce the appellant's contention by producing the report prepared by Mr Beazley, the liquidator of the appellant company. Mr *Stonier* objected to the production of the report. He said the figures in that report would be new evidence and in any event Mr Beazley had not sworn an affidavit. Speaking for myself, I thought it would be fair and proper to look at the report. The court allowed itself the privilege of seeing the report. Mr Beazley had now sworn an affidavit. His report is of interest to this court because of the view I have expressed on the suspension of the releasing of the appellant's assets held by the respondents. These assets may have been the appellant's only means of generating income for the liquidation of its indebtedness to the respondents. Let me point out that I would have arrived at the conclusion I am about to make without Mr Beazley's report. The report does confirm, in my view, that the

goods are sufficient to realise enough income to offset the outstanding amount. The appellant will pay interest on that sum at the rate of 15%. If the amount of interest is not covered by the

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proceeds of the sale of goods, the appellant will have to raise the amount somehow.

Be that as it may, Mr *Stonier* further submitted that this court ought not to interfere with the learned judge's exercise of his discretion unless it is shown that he exercised it capriciously, or upon wrong principle, or that he failed to bring to bear an unbiased judgment on the question at issue or did not act for substantial reasons. See *Ex parte Neethling & Ors* 1951 (4) SA 331 (A) at 335 and *Clarke v Protein Foods (Pvt) Ltd* 1970 (2) RLR 278 (A) at 281-282. In *Ex parte Neethling & Ors*, *supra*, GREENBERG JA asked the following questions at 335D-E:

"Can it be said in the present case that the court *a quo* has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons?"

In the instant case it is not easy to say that the judge *a quo* did not act on a wrong principle. On the question of fully secured creditors the learned judge failed to distinguish the cases he cited and which I have referred to above from the circumstances and principles governing the determination of this case. He did not apply his mind to the question in issue which is the refusal by the respondents to release reliable assets to the appellant. It may be he failed to apply his mind to that question because counsel did not draw his attention to it. From a reading of the learned judge's judgment I find no ground for saying he exercised his discretion capriciously. All I can say is that he exercised his discretion on a wrong principle, that is the entitlement of a fully secured creditor to apply for a sequestration order against the debtor's estate.

I appreciate Mr *Stonier's* other submission that this court should determine whether the court *a quo* exercised its discretion in the light of the situation then pertaining at the dates the rule *nisi* was obtained and confirmed. In support of his submission Mr *Stonier* relied on a passage in *Clarke v Protein Foods (Pvt) Ltd*, *supra*, at 280H-281A. In that case BEADLE CJ said:

"For one reason or another, some 12 months have elapsed since the delivery of the judgment appealed against. In matters of this sort, it is absolutely essential that, if the order of the court *a quo* is to be reversed on appeal, it must be reversed as soon as possible after judgment has been given, because the affairs of a commercial company may change from

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day to day. Even on the assumption that, under the circumstances existing a year ago, it may have been desirable to place the respondent company under judicial management, it by no means follows that the same circumstances exist today. It would be highly artificial if this court, acting on the assumption that the circumstances were unchanged from what they were a year ago, reversed the judge's order, and now ordered that the respondent company be placed under judicial management, only for it to emerge that circumstances had changed and the respondent company had overcome its difficulties, because the respondent company would then be placed in the position of having to apply forthwith to have the order of judicial management discharged before it

ever became operative."

There is a difference between the circumstances in *Clark's* case, *supra*, and the instant case. In this case the appellant in answer to the allegation that it was unable to pay its debts within the meaning of s 178(a) of the Act asserted, in its replying affidavit, that the selling price of the scooters was more than sufficient to settle the respondents' claim. To this the respondents say whether the selling price of the scooters will settle their claim can only be determined after the scooters are sold some time in the future. It must be remembered that they suspended the release of the goods to the appellant and thus suspended their sale. They were not concerned with the future selling price of the goods because the important issue to them was that the appellant had committed an act of insolvency within the meaning of s 178(a) of the Act and what is more they refused to release the goods to him.

What is at issue in the determination of this appeal is the fact that the respondents effectively, by their suspension of the release of the goods to the appellant, stopped the appellant trading in these goods and thus prevented it from raising money with which to pay the respondents. Had the learned judge *a quo* applied his mind to this particular issue he would have refused to confirm the rule. In my opinion for this reason alone the appeal should be allowed.

As far as costs are concerned it seems fair to me that they should follow the event. Mr *Stonier* argued that since the appellant conceded that it had committed an act of insolvency, should the appeal succeed, the respondents should not be ordered to pay costs. The only matter that worries me is that the respondents prevented the appellant from trading in the goods they refused to release to it, thereby stopping him from raising money with which to pay them. It is for this reason that I hold the view that it would be just and fair

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DUMBUTSHENA CJ

for the respondents to pay the costs of appeal and for each party to pay its own costs in the court below. Admittedly the appellant committed an act of insolvency. The respondents were therefore entitled to apply for a sequestration order.

Accordingly the appeal is allowed with costs. The order of the court below is altered to read:

"The rule *nisi* is discharged. Each party to pay its own costs."

McNally JA: I agree.

Manyarara JA: I agree

Chirunda, Chihambakwe & Partners, appellant's legal practitioners

Candy, Chadwick & Elliot, respondents' legal practitioners

1991 (1) ZLR p18

SECRETARY FOR TRANSPORT & ANOR v MAKWAVARARA 1991 (1) ZLR 18 (SC)

Court **Supreme Court, Harare.**

Annotations [Link to Case Annotations](#)

Manyarara JA, Korsah JA & Ebrahim JA.

Civil appeal

15 October & 4 December 1990.

Flynote

Review proceedings - *audio alteram partem* - right to legal representation.

Headnote

The *audio alteram partem* rule requires no more than an opportunity to make representations, to place one's own version before a tribunal and to rebut evidence against oneself. A person entitled to the benefit of the *audio alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing; or allowed legal representation; he need not be given a right to cross-examine; and he is not entitled to discovery of documents.

The appellant appealed from a decision of the High Court that the dismissal of the respondent from his post as Principal Executive Officer in the Ministry of Transport in terms of the Public Service (Officers) (Misconduct and Discharges) (Amendment) Regulations (No. 1) of 1988 should be set aside. The respondent had been appraised of the case that he had to answer; had been given ample opportunity to make representation and had been given sight of all relevant documents. He had argued *a quo*, however, that he had been denied the right to legal representation.

Held, that the rules of natural justice had not been breached, accordingly the respondent's dismissal was proper and that the appeal should succeed to that extent.

Cases cited:

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 All ER 935 (HL)

PF-ZAPU v Minister of Justice, Legal & Parliamentary Affairs 1985 (1) ZLR 305 (SC);

1991 (1) ZLR p19

KORSAH JA

1986 (1) SA 532 (ZS)

Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor 1980 (3) SA 476 (T)

Public Service Commission & Anor v Tsomondo 1988 (1) ZLR 427 (SC)

Public Service Commission & Anor v Mutsonziwa S-40-89 (not reported)

Mukono v Minister of Health & Anor S-99-90 (not reported)

R v Deputy Industrial Injuries Commission, ex parte Moore [1965] 1 QB 456; [1965] 1 All ER 81 (CA)

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014; [1976] 3 All ER 665 (CA)

Oskil Properties (Pty) Ltd v Chairman of the Rent Control Board & Ors 1985 (2) SA 234 (SE)

M R D Stonier for the appellant

D P Carter for the respondent

Judgment

Korsah JA: The Secretary for Transport and the Chairman of the Public Service Commission appeal against the decision of the High Court dated 15 June 1989 -

- (a) ordering that the dismissal of the respondent as stated in the Public Service Commission's letter dated 3rd March 1989 be and is hereby set aside;
- (b) declaring that the respondent is entitled to his salary and allowances from the date of suspension until the matter of his alleged misconduct is properly resolved; and
- (c) that the appellants bear the costs of suit jointly and severally, the one paying the other to be absolved.

The application in which the High Court made this order was preceded by another application in case No. HC 1144/86 wherein the relief sought by the respondent was, by consent, granted, and a consent order made to the effect that the suspension of the respondent by the first appellant as Principal Executive Officer in the Ministry of Transport on "the 19th day of August 1987 be and is hereby declared null and void". The effect of this consent judgment setting aside the suspension of the respondent was to give the respondent full entitlement to his salary and allowances, minus any amount paid by way of a suspension allowance, from the date of suspension, 19th August 1987, to 3rd March 1989, when he was served with a letter of dismissal.

1991 (1) ZLR p20

KORSAH JA

[The learned judge dealt with the facts and then continued:]

Administrative action, it was conceded by both counsel, is subject to control by judicial review under three heads:

- (a) **Illegality**, where the decision-making authority has been guilty of an error in law;

- (b) **Irrationality**, where the decision-making body has arrived at a decision "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"; per LORD DIPLOCK in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; [1984] 3 All ER 935 (HL) at 951A; and
- (c) **Procedural Impropriety**, where the decision-making authority has failed in its duty to act fairly. See *PF-SCAPE v Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC) at 326-7; 1986 (1) SA 532 (ZS) at 548-549.

In this matter, there was no suggestion of illegality insofar as the determination by the second appellant was concerned. And with regard to procedural impropriety, Mr *Stonier* submitted, rightly in my view, that despite the respondent's allegations of bias and malice in his founding affidavit, he was unable to justify or substantiate such claims, and the learned trial judge cannot be faulted for disregarding them.

Likewise, the respondent's claim that the *audi alteram partem* rule was not observed was also dismissed by the learned trial judge who, adopting the words of counsel for the appellants in the court below, said:

"The *audi alteram partem* rule required no more than an opportunity to make representations, to place one's own version before the tribunal and to rebut evidence against oneself. The applicant in this matter was given all those opportunities, and in addition was given the chance to go through all the documents that he required in order to present his case."

In *Heatherdale Farms (Pty) Ltd & Others v Deputy Minister of Agriculture & Anor* 1980 (3) SA 476 (T) at 486D COLMAN J also noted that:

"It is clear on the authorities that a person who is entitled to the benefit of

1991 (1) ZLR p21

KORSAH JA

the *audi alteram partem* rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. He need not be given an oral hearing; or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine; and he is not entitled to discovery of documents."

The respondent in the present appeal was granted ample opportunity to make representation and admitted to having sight of all the relevant documents of account upon which the charge of failing to account for the sum of \$312, was grounded. In the circumstances, the court of first instance rightly concluded that his right to a fair hearing was not infringed.

It was contended by Mr *Carter* for the respondent that in terms of s 7 of SI 161 of 1986 where there was a material dispute of fact which the second appellant could not resolve on the papers before it, the second appellant was obliged to refer such dispute to a Commission of Enquiry which would determine whether or not the officer was guilty of misconduct, and that the denial by the respondent that he had failed to account for the sum of \$312 raises such a material

dispute, which should have been submitted for determination by a Commission of Enquiry.

Mr Carter sought to derive support for this submission from the words of McNALLY JA in *Public Service Commission & Anor v Tsomondo* 1988 (1) ZLR 427 (SC) at 441 reciting that:

"In the present case there is a dispute of fact: the Commission says the officer took bribes; he says he did not. The dispute could hardly be more material."

In *Tsomondo's* case, *supra*, the charge against the respondent was one of bribery. In such a case, where there is a denial on the part of the officer of having received bribes, in the absence of conclusive evidence in support of the charge there arises a need for the officer to confront his accusers to establish how, where and when such bribes, if any, were received by him, and from whom. Such disputes of facts could obviously not be resolved on the papers without an opportunity being afforded the officer to challenge his accusers.

Likewise, in *Public Service Commission & Anor v Mutsonziwa* S-40-89, where charges of theft were being denied by the respondent, there could not, on the facts, have been a resolution of the material dispute without an

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KORSAH JA

opportunity being afforded the officer to confront his accusers at an enquiry. This is a far cry from saying that where someone alleges an act of misconduct and the accused person denies it, then there is a material dispute of fact which cannot be resolved on the papers.

McNALLY JA at page 8 of his judgment in the *Mutsonziwa* case, *supra*, posed the question: "When can the Commission resolve such a dispute on the papers before it?" and proceeded to answer it as follows:

"Generally speaking and for the reasons set out at pages 17-19 of *Tsomondo*, *supra*, questions of credibility cannot normally be decided by looking at pieces of paper and believing one as against the other. There may be exceptions. The defence put forward may be so utterly ridiculous that no reasonable tribunal can be expected to accept it. Or there may be cases where the defence case refers to witnesses who will support the allegations of the accused officer. If, then, statements are taken from those witnesses, and they wholly fail to support the officer's allegations, it may be reasonable for the Commission to say that the dispute can be resolved against the officer without the holding of an enquiry."

In the instant appeal, the respondent was charged with the failure to take reasonable care of or to account for public funds which he had handled. He was given every opportunity to reply to the charge and to inspect all the books of accounts and receipts. He did not deny receiving the original sum of \$1 012,00. After going through the accounts books and receipts, he said he recalls that the balance of \$312 was collected by the late Mr Mushayademo and that he recalls making him sign for it. Mr Mushayademo being dead and there being no evidence of his having signed for the sum of \$312, what would it avail the respondent to have a Commission of Enquiry set up to investigate the matter?

The respondent also explained that he had instructed his staffing officer to ensure that when the paysheets were eventually received from Harare International Airport Mr Mushayademo must sign for the full May 1985 salary as he had received it in full. However this instruction was

overlooked until Mushayademo passed away after another illness. The truth of the matter was that all the material incontrovertible documentary evidence available was before the Commission and setting up a Commission of Enquiry was unlikely to be productive of further intelligence regarding the amount of \$312 which, admittedly, had passed through the respondent's hands and could not be accounted for.

1991 (1) ZLR p23

KORSAH JA

As in *Mukono v Minister of Health & Anor* S-99-90 at 7, the real issue is whether or not the Commission acted reasonably in purporting to resolve the material dispute of facts without resorting to a Board of Inquiry in terms of ss 16 and 17 of the Regulations?

Accepting that the Commission acts as a quasi-judicial body in the exercise of its function of resolving disputes of fact on the papers, the strict rules of evidence do not apply to it, even though it is bound to apply the rules of natural justice.

In the words of DIPLOCK LJ in *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456; [1965] 1 All ER 81 (CA) at p 94E-G:

"The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer; but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his."

On the papers before it, could the second appellant be accused of being unreasonable in concluding that the respondent had failed to take reasonable care of or to account for public funds.

In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1025-1026; [1976] 3 All ER 665 (CA) at 671e-h LORD DENNING MR cautions that:

"No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view.

All the more so when a man - be he a judge or a Minister - is entrusted by Parliament with the task of deciding whether another person has

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KORSAH JA

acted, is acting or is proposing to act unreasonably. Especially when the one who has to decide has himself his own views - and perhaps his own strong views - as to what should or should not be done. He must be very careful then not to fall into the error - a very common error - of thinking that anyone with whom he disagrees is being unreasonable. He may himself think the solution so obvious that the opposite view cannot reasonably be held by anyone. But he must pause before doing so. He must ask himself: "Is this person so very wrong? May he not

quite reasonably take a different view?' It is only when the answer is: 'He is completely wrong. No reasonable person could take that view', that he should condemn him as being unreasonable."

On his own admission to the second appellant, the respondent could not account for the sum of \$312. What the court should do in such a case is to put itself in the shoes of the second appellant and consider the evidence that was placed before the Commission, and no other evidence, and then determine whether the Commission, on that evidence, acted unreasonably in resolving the dispute of fact.

Mr *Stonier* submitted, rightly in my view, that, having been accorded access to all relevant documents, the respondent still could not show what had happened to the sum of \$312, and that in the premises the determination by the second appellant was reasonable and should not have been interfered with. See *Oskil Properties (Pty) Ltd v Chairman of the Rent Control Board & Others* 1985 (2) SA 234 (SE) at p 237E.

The learned judge in the court of first instance sought to draw some distinction between "failing to account" and "failing to properly account". With respect, if the duty on the respondent was to account, if he fails to properly account then he has not accounted - either you account in full or you have not accounted, there is no halfway house of "failing to properly account".

Again, the learned trial judge alluded to an assertion in the respondent's answering affidavit alleging that when Mr Mushayademo signed the short receipt for the sum of \$312 he (the respondent) gave the original of the receipt to Mr Mushayademo and kept the copy and that he now suspects that the copy has been tampered with.

I stated earlier that the High Court, in the exercise of its review powers over the determinations by quasi-judicial bodies, must place itself in the position

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KORSAH JA

of the tribunal whose determination is being reviewed and assess the reasonableness or otherwise of the determination on the basis of the evidence actually put before the tribunal.

Before the resolution of the facts alleged to be in dispute by the second appellant the respondent never alleged that he **suspected** that someone had tampered with the receipt for \$312. In fact no such allegation was made by the respondent in any of his several communications with the second appellant prior to the determination by the second appellant. Not even in his founding affidavit does the respondent raise the issue. He makes the point that he **suspects** that the receipt had been tampered with only in his answering affidavit. So that his **suspensions** were not before the second appellant as evidence for consideration - that is if such vague suspicions can affect the determination of the second appellant in a matter of this nature. The learned trial judge, in determining the reasonableness of the second appellant's determination, fell into error by considering material which was not placed before the second appellant for its consideration in its resolution of the dispute of fact.

On the facts actually placed before the second appellant, that the respondent had perused all relevant documents and still could not account for the sum of \$312 which he admitted receiving,

I do not think that the second appellant's resolution of the material dispute of fact on the papers can properly be categorised as being "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"; *CCSU v Minister for the Civil Service, supra*.

In the result, the decision of the High Court -

- (a) Ordering that the dismissal of the respondent as stated in the Public Service Commission's letter dated 3rd March 1989 be and is hereby dismissed, is set aside and in its place is substituted the following:

"The application to have the determination of the second respondent contained in its letter of 3rd March 1989 set aside is hereby dismissed";

- (b) The declaration that the appellant is entitled to his salary and allowances from the date of suspension, 19th August 1987 to 3rd March 1989, together with costs, subject to the deduction of any suspension allowance paid to him, is upheld.

1991 (1) ZLR p26

KORSAH J

- (c) As each party partially succeeded in the court of first instance and in this court, each party is to bear its own costs in both courts.

Manyarara JA: I agree.

Ebrahim JA: I agree.

Civil Division, Attorney-General's Office, appellant's legal representatives

Chirunda, Chihambakwe & Partners, respondent's legal representatives

1991 (1) ZLR p27

MARUMAHOKO v CHAIRMAN OF THE PUBLIC SERVICE COMMISSION & ANOR 1991 (1) ZLR 27 (HC)

Court High Court, Harare

Adam J

Notice of motion

14 June & 19 December 1990

Flynote

Constitutional Law - Public Services (Officers) (Misconduct and Discharge) Regulations 1986 - whether exclusion of any obligation to inform affected parties as to facts determined or to render reasons for the decision, to permit them to be heard thereon in person and to make representations prior to the imposition of a penalty and the right to legal representation render the same ultra vires s 18 of the Constitution of Zimbabwe to this extent.

Administrative Law - Public Services (Officers) (Misconduct and Discharge) Regulations - extent of effect of rules of natural justice thereon - when dispute of fact arises - procedures to be adopted under the Regulations - need to afford affected party adequate notice of hearing - whether decision valid if correct regardless of non observance of vires of natural justice - need for affected party to be apprised of any information to be used against him.

Headnote

The applicant, a public servant, had been charged with misconduct pursuant to the Public Services (Officers) (Misconduct and Discharge) Regulations 1986 it having been alleged that he had used his position to acquire a motor vehicle directly from the manufacturer and had thereafter sold it at a price considerably greater than that originally paid by him and that his conduct was unbecoming, blemished the image of the Public Service and was inconsistent with and prejudiced to the discharge of applicant's duties.

Applicant, in response to an invitation to do so had made written represen-

1991 (1) ZLR p28

tations regarding these charges. The Commission however, relying upon the record of evidence and findings of an earlier Commission of Enquiry found applicant guilty and directed that he be dismissed.

Applicant sought to have these decisions set aside on review, *inter alia*, on the grounds that the decision to discharge him was grossly unreasonable because the findings of the Commission of Enquiry did not constitute evidence or, of they did, the first respondent ought not to have acted upon them without first affording applicant an opportunity to deal therewith.

Held, that there were procedural irregularities in that the letter informing the applicant of the charges was not drafted by the appropriate official as required by the Regulations and also because it spoke of "charges of misconduct" in contravention of the Regulations.

Held, further, that whereas ss 7 and 9 of the Regulations require the Public Service Commission to determine objectively, whether or not a dispute of fact has arisen, capable of resolution on the papers before it, and to hold an inquiry in the event of it finding that a dispute has arisen, in either event the Regulations suggest that there is no need to advise the officer concerned of the findings of fact or to afford him an opportunity to respond to such findings before a determination of guilt be made.

Held, further, that under s 18 of the Constitution of Zimbabwe a person is entitled to a fair

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hearing which entitlement includes 'procedural fairness' which, in this particular case includes the right of the person concerned to be heard in person upon the findings of fact.

Held, further, that such procedural fairness includes generally, an entitlement to adequate notice of the impending hearing and requires that the person concerned be apprised of the information which is to be relied upon against him.

Held, further, that the Regulations are also *ultra vires* the Constitution of Zimbabwe to the extent that they preclude an officer from legal representation.

Held, further, that whereas it has been held that the rules of natural justice do not require a tribunal to supply reasons for its decisions, the exclusion of the necessity to do so renders the Regulations *ultra vires* the Constitution to this extent.

Held, further, that once there has been a violation of the principles of natural justice, it is immaterial whether the same decision would have been attained notwithstanding this departure, the decision reached being nonetheless void.

Held, further, that there had been a dispute of fact incapable of resolution on the papers and, in addition, that the Public Service Commission had taken account of factors of which applicant had not been made aware.

1991 (1) ZLR p29

Cases cited:

Clan Transport Co (Pvt) Ltd v Swift Transport Services (Pvt) Ltd & Ors 1956 R&N 120 (SC); 1956 (3) SA 480 (FSC)

SA Medical and Dental Council v Lipron 1949 (3) SA 277 (A)

WC Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board & Ors 1982 (4) SA 427 (A)

Errington & Ors v Minister of Health [1935] 1 KB 249; [1935] All ER Rep 154 (CA)

Public Service Commission & Anor v Makorovodo S-187-89 (not reported)

Lee v Public Service Commission HH-440-87 (not reported)

Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor 1984 (1) ZLR 274 (SC)

Dube v Public Service Commission & Anor 1990 (2) ZLR 181 (HC)

Public Service Commission & Anor v Tsomondo 1988 (1) ZLR 427 (SC)

Ramhewa v Secretary of the Public Service Commission 1988 (1) ZLR 257 (HC)

Chairman of the Public Service Commission & Ors v Hall S-49-89 (not yet reported)

Metsola v Chairman of the Public Service Commission & Anor 1989 (3) ZLR 147 (SC)

Minister of Home Affairs & Anor v Fisher & Anor [1980] AC 319; [1979] 3 All ER 21 (PC)

Waddington v Miah [1974] 2 All ER 377 (HL)

S v Ncube & Ors 1988 (2) SA 702 (ZS)

S v A Juvenile 1989 (2) ZLR 61 (SC); 1990 (4) SA 151 (ZS)

R v Secretary of State for the Home Department, Ex parte Phansopkar & Anor [1976] QB 606; [1975] 3 All ER 497 (CA)

Don v Hoboken Land and Improvement Co (1856) 18 How 272; 15 L Ed 372 (US Sup Ct)

Hurtado v California (1884) 110 US 516; 28 L Ed 372 (US Sup Ct)

Goldberg v Kelly (1970) 397 US 254; 25 L Ed 2d 287 (US Sup Ct)

Perry v Sindermann (1972) 408 US 593; 33 L Ed 2d 570 (US Sup Ct)

Board of Regents of State Colleges v Roth (1972) 408 US 564; 33 L Ed 2d 548 (US Sup Ct)

Railway Express Agency v New York (1949) 336 US 106; 93 L Ed 533 (US Sup Ct)

Griffin v Illinois (1956) 351 US 12; 100 L Ed 891 (US Sup Ct)

Douglas v California (1963) 372 US 353; 9 L Ed 2d 811 (US Sup Ct)

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

Jeewa v Dönges NO & Ors 1950 (3) SA 414 (A)

1991 (1) ZLR p30

Cole v Commonwealth of Australia (1961) 106 CLR 653 (HC of Aust)

Administrator, Transvaal & Ors v Traub & Ors 1989 (4) SA 731 (A)

Duke v The Queen (1972) 28 DLR (3d) 129 (SCC)

Singh et al v Minister of Employment and Immigration et al (1985) 14 CRR 13 (SCC)

Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180; 143 ER 414

Kanda v Government of Malaya [1962] AC 322 (PC)

Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor 1980 (3) SA 476 (T)

Cassem en 'n ander v Oos - Kaapse Komitee van die Groepsgebiederaad en andere 1959 (3) SA 651 (A)

R v Judge Amphlett [1955] 2 KB 223

Bramdaw v Union Government 1930 NLR 324

R v Deputy Industrial Injuries Commission, Ex parte Moore [1965] 1 QB 456; [1965] 2 All ER 81 (CA)

Bushell & Anor v Secretary of State for the Environment [1981] AC 75; [1980] 2 All ER 608 (HL)

Maynard v Osmond [1977] QB 240; [1977] 1 All ER 64 (CA)

Minister of National Revenue v Wright's Canadian Ropes Ltd [1947] AC 109 (PC)

R v Gaming Board of Great Britain, Ex parte Benaim and Khaida [1970] 2 QB 417; [1970] 2 All ER 528 (CA)

Townships Board Transvaal v Garner NO 1961 (3) SA 437 (A)

Osmond v Public Service Board of New South Wales & Anor [1985] LRC (Const) 1041(SC of NSW)

Public Service Board of New South Wales v Osmond [1987] LRC (Const) 681 (HC of Australia)

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 (HL); [1968] 1 All ER 694 (HL)

Zimnat Insurance Co Ltd v Chawanda 1990 (2) ZLR 143 (SC); 1991 (2) SA 825 (ZS)

General Medical Council v Spackman [1943] AC 627; [1943] 2 All ER 337 (HL)

John v Rees [1970] Ch 345; [1969] 2 All ER 274 (ChD)

Bishi v Secretary for Education 1989 (2) ZLR 240 (HC)

Zinyemba v Ministry of the Public Service & Anor HH-45-90 (not reported)

Public Service Commission & Anor v Mutsonziwa S-40-89 (not reported)

1991 (1) ZLR p31

ADAM J

Goldfields Investment Ltd & Anor v City Council of Johannesburg & Anor 1938 TPD 551

Virginia Land & Estate Co Ltd v Virginia Valuation Court & Anor 1961 (4) SA 479 (O)

I Chatikobo for the applicant

G S Wernberg and B P Q Simelane for the respondents

Judgment

Adam J: The applicant seeks to set aside the finding of the Public Service Commission that he was guilty of misconduct, as well as the decision to discharge him and that he receive no salary from the date of his suspension October 5 1989 and that he be reinstated to his position with full salary and other benefits from date of suspension to date of reinstatement. By letter of October 5 1989, from "O Tungwarara for Secretary, Ministry of the Public Service", addressed to the

applicant at the Ministry of National Supplies, Central Mechanical Equipment Department, headed "Re: Charge of Misconduct", the applicant was charged with contravening paras 7 and 24 of the First Schedule to the Public Service (Officers) (Misconduct and Discharge) Regulations, 1986 - Annexure 'B' to the applicant's Founding Affidavit. It was there alleged that -

"being a Senior Administrative Officer in the Central Mechanical Equipment Department you acquired directly from Leyland (Zimbabwe) a vehicle being a Nissan PG 720 pick up truck for \$22 087,20 and resold it at the much higher price of \$55 000.

Your conduct in that respect was unbecoming and it blemished the image of the Public Service. Your conduct was also inconsistent and prejudicial to the discharge of your official duties."

That letter also told him that in terms of s 4 of the same Regulations he was required to reply to the allegations within fourteen days of its receipt and advised him that if he wished to scrutinize the evidence that would be used to substantiate the charge he was to contact the writer.

I should indicate the belated Certificate of Authentication, filed on the date of this hearing and forming part of the record, from the Public Service Commission discloses that the evidence solely relied upon was the conclusion of the Sandura Commission Report of August, 1989, photocopy of Chapter 12 being attached as Annexure "A" to the first respondent's affidavit.

1991 (1) ZLR p32

ADAM J

[The learned Judge set out the evidence and the relevant Regulations, and continued:]

In his heads of argument the applicant submits that the Public Service Commission's decision to discharge the applicant was based on the findings of the Sandura Commission and that this decision was unreasonable because there was no evidence to controvert the detailed explanation given by the applicant as the findings of the Sandura Commission did not constitute evidence since it is opinion upon which the Public Service Commission should not have acted. Also, he argues that in any event if it were permissible to act on the findings of the Sandura Commission, or even if the findings constituted evidence it was still unreasonable to act on them without giving the applicant an opportunity to deal with those findings. He maintains that by brushing aside the applicant's explanation and adopting the findings of the Sandura Commission, the Public Service Commission failed to apply their mind to the issue thereby making the decision invalid on account of unreasonableness. *Clan Transport Co (Pvt) Ltd v Swift Transport Services (Pvt) Ltd & Ors* 1956 R&N 120 at 133; 1956 (3) SA 480 (FSC); *SA Medical and Dental Council v Lipron* 1949 (3) SA 277 (A) at 283 and *WC Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board & Ors* 1982 (4) SA 427 (A) at 448. He submits that the Public Service Commission took into account evidence which was not before it - *Errington & Ors v Minister of Health* [1935] 1 KB 249 at 268; [1935] All ER Rep 154 (CA) 173. As to the penalty he states that the applicant's conduct did not warrant the penalty imposed and that the response made by the first respondent in his affidavit was not substantiated by the evidence. Also, he submits that the vehicle in question was not controlled so it was stressed that its resale at a higher price did not attract any disrepute on the applicant or the Public Service. Further, he argues that since the applicant seeks a return into employment with the Public Service, if the decision of the Public Service Commission as to

misconduct is upheld then the award of penalty should be remitted to the first respondent to reconsider afresh.

In his heads of argument the first respondent submits that the issue was whether the Public Service Commission was entitled on the evidence before it to conclude that the applicant bought the vehicle for resale at a profit and whether it was entitled to determine that this constituted a breach of paragraph 7 and/or 24 of the First Schedule. He argued that *WC Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board & Ors, supra*, did not support the applicant as it was clear that the decision maker in that case had ignored facts which were uncontroverted and therefore not in

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issue. Whereas in this case, the Sandura Commission, after hearing detailed evidence, including that of the applicant, reached the basis for its conclusions not only upon the improbability of this testimony before them but also upon the Sandura Commission's assessment of the applicant as a witness. He submits that the contention that the applicant was not given an opportunity to comment or contradict the evidence before the Sandura Commission is untenable since the complaint was not made by the applicant in his affidavit - *Public Service Commission & Anor v Makorovodo* S-187-90 (not reported) at 4, and this is not accepted evidence "from one side in absence of the other side" - *Errington v Minister of Health, supra*, at 264. He argues that no gross unreasonableness can be attributed to the Public Service Commission's decision. Further, he asserts that whereas the applicant in his Statement in Reply to the charge denied that he lied to the Sandura Commission, it must be noted that this was not repeated by him in his affidavit. He argues that with the Public Service Commission faced with the applicant's bland and improbable assertion regarding his intentions and the fact that he lied on oath to the Sandura Commission, no gross unreasonableness can be said to exist. He maintains that a reviewing court will only interfere with a tribunal's decision where it has acted with such gross unreasonableness as to bespeak of *mala fide* - *Lee v Public Service Commission* HH-440-87 (not reported) and *Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor* 1984 (1) ZLR 274 (SC). He asserts that the same principles apply to the penalty imposed by the Public Service Commission, which is also best qualified to deal with the penalty.

It was submitted on the applicant's behalf that there was no good reason for the Public Service Commission to reject the applicant's explanation and also it was wrong of the Public Service Commission to rely on the findings of fact of the Sandura Commission. Alternatively, it was argued by Mr *Chatikobo* for the applicant that there was not enough before the Public Service Commission, since it relied solely on Annexure "A" to the first respondent's affidavit, to compare with the applicant's explanation and that failure to test the applicant's explanation amounted to a failure to direct the Public Service Commission's mind to the matter. Further, it was stressed that the findings of fact by the Sandura Commission were disputed in the applicant's explanation which meant this could only be resolved by an enquiry.

As I have noted, the misconduct alleged was that of the contravention of paras 7 and 24 of the First Schedule in that the applicant, a Senior Administrative Officer, acquired directly from Leyland (Zimbabwe) a Nissan PG 720 pick-up truck for \$22 087 and resold it at a much higher

price of \$55 000. It was

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this conduct which was unbecoming and it blemished the image of the Public Service and it was also inconsistent and prejudicial to the discharge of his official duties.

It is not disputed that the applicant did acquire directly the motor vehicle for \$22 087 from Leyland (Zimbabwe) and resold it for \$55 000. But the misconduct levelled against the applicant did not allege at all that "he had bought the motor vehicle with the sole intention for resale at a profit". Nor did it allege that when the applicant, under a plan with Bertram, had purchased the vehicle directly from Leyland (Zimbabwe) he had done so with the sole intention of reselling at an inflated price to make a substantial profit. Nor did it allege that the applicant had acted improperly in using his position as Senior Administrative Officer in obtaining the motor vehicle with the sole intention of reselling it at a profit.

The specific wording in the present allegation of misconduct would, in my view, cover countless numbers of transactions carried out routinely by many civil servants who legitimately acquire things and occasionally subsequently resell at a higher price. To now categorise such conduct as "unbecoming" in that it blemishes the image of the Public Service and that it is "inconsistent and prejudicial to the discharge of official duties" would at least require the Public Service Commission to explain why and how this has come about.

It becomes necessary at this stage to relate what actually was required to be done in terms of the 1986 Regulations. The applicant was with the Central Mechanical Equipment Department of the Ministry of National Supplies and the letter of 5 October 1989 addressed to him talks of "Charge of Misconduct" and reveals that it was signed "for: Secretary, Ministry of the Public Service". In terms of the 1986 Regulations the "head of office shall forthwith inform the officer in writing of the nature of the allegation", although following the same Regulation "head of department", "head of Ministry" and others could also do so. That letter of 5 October 1989 is flawed in that it was not from the applicant's "head of office, department or Ministry". It is true reliance could be placed on s 24(1) of the 1986 Regulations but unlike *Dube v Public Service Commission & Anor* 1990 (2) ZLR 181 (HC), there is no confirmation in the first respondent's affidavit that either the Public Service Commission itself had assigned, or the applicant's "head of office" had delegated, disciplinary functions to the "Secretary, Ministry of the Public Service" who shall, and the papers filed must clearly specify this, himself delegate it to the author of the letter, being the signatory "O Tungwara". The provisions of s 24(1) are most explicit and require nothing less. Further the

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letter is also defective when it speaks of a "Charge of Misconduct" - *Public Service Commission & Anor v Tsomondo* 1988 (2) ZLR 61 (SC) at 440. The same requirement applies to the Public Service Commission's determination and penalty as it relates to the letter of 16 November 1989

- Annexure "A" to the applicant's affidavit.

Turning to ss 7 and 19 of the 1986 Regulations, which provide that unless there is a material dispute of fact insoluble on the papers, the Public Service Commission must determine whether the officer is guilty of misconduct. This means that on the issue of material disputes of fact the Public Service Commission must apply an objective test - *Ramhewa v Secretary of the Public Service Commission* 1988 (2) ZLR 61 (HC) at 264. Having resolved that there is no material dispute of facts the Public Service Commission has to make what its findings of facts are. But where it resolves that there is a material dispute of fact it must have an inquiry to be held, and it is only after the inquiry's finding of facts and it would also seem that he is not given a chance to address the Public Service Commission before the determination of guilt - *Chairman of the Public Service Commission & Ors v Hall* S-49-89 (not reported) at p 6. Also, pursuant to s 19(3) of the 1986 Regulations, where misconduct is found, the Public Service Commission must proceed with the imposition of the penalty which seems to suggest that the officer again is deprived of the opportunity to make representations on penalty.

CONSTITUTION OF ZIMBABWE

The Constitution of Zimbabwe under ss 3; 18(1); 18(9); 18(10); 18(11); 18(12); 18(13) and 75(1)(d), (e) and (f) provides as follows:

"3. This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of inconsistency, be void.

18 (1) Everyone is entitled to the protection of the law.

...

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

(10) Except in the case of a trial such as is referred to in subsection (14) or with the agreement of all the parties thereto, all proceedings for the determination of the existence or extent of any civil right or obligation before any adjudicating authority, including the announcement

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of the decision of the court or other authority, shall be held in public.

(11) Nothing in subsection (10), shall prevent -

- (a) the court or other adjudicating authority from excluding from the proceedings, except the announcement of its decision, persons other than the parties thereto and their legal representatives to such extent as the court or authority -
 - (i) may be law by empowered so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings; or in the interests of public morality, the welfare of persons under the age of twenty - one years or the protection of the private lives of persons concerned in the proceedings, or
 - (ii) may by law be empowered to required so to do in the interests of defence, public safety, public order

or the economic interests of the State;

or

- (b) the court from excluding proceedings preliminary to trial in respect of a criminal offence persons other than the accused person and his legal representative when so required by law, unless the accused person otherwise requests.

(12) Notwithstanding anything contained in subsection ...; (10) or (11), if in any proceedings before such court or other adjudicating authority as is referred to in subsection ... (9), ..., a certificate in writing is produced to the Court or other authority signed by a Minister that it would not be in the public interest for any matter to be publicly disclosed, the court or other authority shall make arrangements for evidence relating to that matter to be heard *in camera* and shall take such other action as may be necessary or expedient to prevent the disclosure of that matter.

(13) Nothing contained in or done under the authority of any law shall be held to be in contravention of -

- (a) subsection ... (9) to the extent that the law in question makes reasonable provision relating to the grounds of privilege or public policy on which evidence shall not be disclosed or witnesses are not competent or cannot be compelled to give evidence in any proceedings;

75. (1) The functions of the Public Service Commission shall be -

...

- (d) to exercise disciplinary powers in relation to persons employed

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in the Public Service or the Prison Service and to remove such persons from office;

- (e) to ensure the general well-being and good administration of the Public Service and the Prison Service and the maintenance thereof in a high state of efficiency;
- (f) to make regulations for the purposes stated in paragraph (e) and for the conditions of service of members of the Public Service and Prison Service, which may include provision for the punishment of members of the Public Service found guilty of misconduct ..."

Initially in *Public Service Commission & Anor v Tsomondo, supra*, at 439 McNALLY JA said:

"It does not seem to me that it is even necessary to consider the officer's constitutional rights under s 18(9) of the Constitution. His rights are defined in the Statutory Instrument."

However, in *Chairman of the Public Service Commission & Ors v Hall, supra*, at 7 McNALLY JA went on to observe:

"It may be that in a country with a justiciable Bill of Rights one cannot apply the *dictum* of STRATFORD ACJ in *Sachs v Minister of Justice* 1934 AD 11 at 38 where he said: 'Sacred though the maxim (*audi alteram partem*) is held to be, Parliament is free to violate it.' Even if Parliament were free to violate it, one might ask whether a subordinate authority such as the Commission is free to do so. It may be also that the denial of legal representation under the 1986 Regulations will have a bearing on the question whether a fair hearing is provided for under the Regulations."

In light of the foregoing observation of McNALLY JA it cannot now be maintained that what he said in *Public Service Commission & Anor v Tsomondo, supra*, at 439 has foreclosed consideration of the officer's constitutional entitlement under s 18 of the Constitution of Zimbabwe.

Also, it is true that GUBBAY JA (as he then was) in *Metsola v Chairman of the Public Service Commission & Anor* 1989 (3) ZLR 147 (SC) said at 154E:

"The *audi* maxim is not a rule of fixed content, but varies with the circumstances. In its fullest extent, it may include the right to be apprised

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of the information and reasons underlying the impending decision; to disclosure of material documents; to a public hearing and, at that hearing, to appear with legal representation and to examine and cross-examine witnesses. See generally, Baxter *Administrative Law* at pp 545-547. The criterion, as I have noted, is one of fundamental fairness and for that reason the principles of natural justice are always flexible. Thus the 'right to be heard' in appropriate circumstances may be confined to the submission of written representations. It is not the equivalent of a 'hearing' as that term is ordinarily understood. This was stressed by COLMAN J in *Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor* 1980 (3) SA 476 (T) ...at 486."

But GUBBAY JA (as he then was) was concerned with a case under both the 1979 and 1986 Regulations and COLMAN J was dealing with the South African Animal Diseases and Parasites Act and a confiscatory ministerial order under that Act, provisions of which did not in express terms allow the aggrieved party an opportunity to be heard. However, GUBBAY JA (as he then was) in that same case went on to observe at 157B-158A:

"...The hearing occupied four days and was conducted on the lines of a criminal trial with patience and impartiality. The appellant was ably represented by counsel, a facility permitted under s 16(4)(b) of the 1979 Regulations but denied under s 17(2) of the 1986 Regulations. Witnesses were examined and cross-examined by both sides. The whole matter was canvassed thoroughly and expertly and not just confined, as under the 1986 Regulations, to material disputes of fact referred by the Commission. The verbatim record of evidence is over 300 pages and at the close of testimony both legal representatives were heard in argument. The inquiring authority thereupon submitted a full and well-constructed judgment which set out cogently the reasons for the finding of misconduct. That finding seems to be to be unassailable, but of course, since the Commission had to apply the 1986 Regulations the determination of guilt lay with it. Nonetheless, the fact that it was presented with an analytical judgment, in which the points advanced in favour of the appellant were discussed, is of significance. For the existence of such judgment, prepared after a full hearing at which the appellant was legally represented (which features I stress), taken in conjunction with the detailed written represen-

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tations made by the appellant in answer to the charge, the verbatim transcript of all the evidence, in particular that of the appellant, and the documents produced, in my opinion justified the Commission in not inviting the appellant to make any further representations. To have done so would have added nothing of any relevance to what was already before the Commission. See *Glynn v Keele University & Anor* [1971] 2 All ER 89 (ChD) at 97F; *Cinnamond & Ors v British Airports Authority* [1980] 2 All ER 368 (CA) at 376J-377a.

I am satisfied that, in the circumstances of this case, the fact that the Commission did not afford the appellant a specific opportunity to be heard does not mean that he was treated unfairly, or that there was a failure to observe

basic rules of natural justice. In short I hold that he had no legitimate expectation of being heard before his guilt was finally determined by the Commission.

This conclusion makes it unnecessary to decide whether in a case falling entirely under the 1986 Regulations, the view expressed by the learned Judge President that the application of the *audi alteram partem* principle is excluded by implication from the provisions of s 19(1)(d) is sound. As is apparent from the remarks of my brother McNALLY J in *Hall's case*, *supra*, at p 7, the point is of some difficulty and I prefer to leave it open, especially as I understand it is soon to come crisply before this court."

Basically, the right guaranteed under s 18(9) of the Constitution of Zimbabwe is:

- (a) a fair hearing;
- (b) within a reasonable time;
- (c) by an independent and impartial court or other adjudicating authority established by law;
- (d) to determine the existence or extent of the person's civil rights or obligations.

Section 18(10) and 18(11) makes provisions for such proceedings, including announcement of the decision, to be held in public.

The approach of superior courts to the constructions of Constitutions has been authoritatively laid down by LORD WILBERFORCE in *Minister of Home Affairs & Anor v Fisher & Anor* [1980] AC 319; [1979] 3 All ER 21 (PC) at 25-26:

"Here, however, we are concerned with a Constitution, brought into force certainly by an Act of the United Kingdom Parliament; the Bermuda Constitution Act, 1967, but established by a self-contained document set out in Sch 2 to the Bermuda Constitution Order 1968. It can be seen that

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this instrument has certain special characteristics. (1) It is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality. (2) Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individuals'. It is known that this chapter as similar portions of other constitutional instruments ... was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

... It was in turn influenced by the United Nations Universal Declaration of Human Rights 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to ...

When therefore it becomes necessary to interpret 'the subsequent provisions of' Chapter I ... the question must ... be asked whether the appellant's premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts ...

The second would be more radical: it would be to treat a constitutional instrument such as this as *sui generis*, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law. It is possible that, as regards the

question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

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INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Similar terminology as in s 18(9) of the Constitution of Zimbabwe is found in a number of international human rights instruments. The Universal Declaration of Human Rights 1948 in Article 8 states:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations."

Also, Article 14.1 of the International Covenant on Civil and Political Rights 1966 indicates:

"14.1 All persons shall be equal before the courts and tribunals. In determination of ... his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

While Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 provides:

"In the determination of civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Further, Article 8 of the Inter-American Convention on Human Rights 1969 indicates:

"Every person shall have the right to a hearing with due guarantee and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law ... for the determination of his rights or obligations of a civil, labour, fiscal or any other nature."

Also, Article 7.1 of the African Charter on Human and People's Rights 1981 specifies:

"Every individual shall have the right to have his cause heard"

and elaborates that the right to an appeal to competent national organs against acts violating that person's fundamental rights must also be provided.

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These universal developments seem to articulate in some measure the "due process of law" of the Fifth and Fourteenth Amendments to the United States Constitution. It hardly needs to be mentioned that courts have taken such international and regional rights instruments into

account as an aid to interpretation - *Waddington v Miah* [1974] 2 All ER 377 (HL) at 379. In *S v Ncube & Ors* 1988 (2) SA 702 (ZS) at 714 GUBBAY JA (as he then was) relied on the interpretation given by the European Court of Human Rights to Article 3 of the European Convention on Human Rights when he considered s 15(1) of the Zimbabwe Constitution, which approach was approved by DUMBUTSHENA CJ in *S v A Juvenile* 1989 (2) ZLR 61 (ZS) at 155; 1990 (4) SA 151 (ZS) at 155. Also, it has been held that regard ought to be placed on such instruments, where it was relevant: *R v Secretary of State for the Home Department, Ex parte Phansopkar & Anor* [1976] QB 606 at 626; [1975] 3 All ER 497 (CA).

AMERICAN AUTHORITIES

The Constitution of the United States of America under the Fifth Amendment provides -

"No person shall ... be deprived of life, liberty, or property, without due process of law ..."

and under the Fourteenth Amendment in Section 1 specifies -

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

It was only well after the Civil War that the US Supreme Court began significant developments under these Amendments. The "due process" clause governed both procedure and also what came to be known as "substantive due process". At first, on procedural content the US Supreme Court in *Don v Hoboken Land and Improvement Co* (1856) 18 How 272; 15 L Ed 372 (US Sup Ct) spoke of due process of law as having the same meaning as "by the law of the land" in the *English Magna Carta* and sought guidance from English practice. Subsequently after *Hurtado v California* (1884) 110 US 516; 28 L Ed 372 (US Sup Ct) it was not English practice itself but "principles of liberty and justice" that determined due process. It was over quite some time that the US Supreme Court under substantive due

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process evolved what formed constitutionally protected "liberty" and "property" under these Amendments. Beginning with *Goldberg v Kelly* (1970) 397 US 254; 25 L Ed 2d 287 (US Sup Ct) the US Supreme Court acknowledged the rise of government as an important source of wealth that dispensed money, benefits, services, contracts, franchises and licences which usually also involved claims by individuals and so to adjudication. In a number of cases involving claims the US Supreme Court upheld that the due process mandated some form of adjudicatory hearings and dealt at length with the kind of hearings that was required under those Amendments - *Perry v Sindermann* (1972) 408 US 593; 33 L Ed 2d 570 (US Sup Ct).

In *Board of Regents of State Colleges v Roth* (1972) 408 US 564; 33 L Ed 2d 548 (US Sup Ct) STEWART J at 572 pronounced on "liberty" and "property" in the following manner:

"'Liberty' and 'property' are broad and majestic terms ... the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."

The Court has also made clear that the property interests protected by procedural due process extends well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by criminal process ... For the words 'liberty' and 'property' in the Due Process Clause of the 14th Amendment must be given some meaning.

While this Court has not attempted to define with exactness the liberty ... guaranteed (by the 14th Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men. *Meyer v Nebraska* 262 US 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed... There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated."

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At the same time the equal protection clause of the Fourteenth Amendment was also touched. Initially it merely played a marginal role in judicial intervention - *Railway Express Agency v New York* (1949) 336 US 106; 93 L Ed 533 (US Sup Ct). But during the era of the Warren Court a dynamic period of equal protection scrutiny unfolded with the US Supreme Court identifying appropriate areas for intervention - *Griffin v Illinois* (1956) 351 US 12; 100 L Ed 891 (US Sup Ct). It was under the "fundamental rights or interests" element, which allowed the US Supreme Court, just as in the case of substantive due process, to articulate that certain protected constitutional rights could be derived directly from the equal protection clause - *Douglas v California* (1963) 372 US 353; 9 L Ed 2d 811 (US Sup Ct).

SCOPE OF SECTION 18 OF THE ZIMBABWE CONSTITUTION

It is accepted that the notion of "fair hearing" includes "procedural fairness" and from this the courts have generally formulated a sort of code of fair-play akin in some measure to the due process of the United States Constitution. It was by speaking of natural justice, as found in the two Latin maxims *audi alteram partem* ("hear the other side") and *nemo iudex in causa sua* ("no man a judge in his own cause"), that the courts imposed upon other adjudicating authorities the duty to act fairly. The form that natural justice took varied, as was clearly recognised by TUCKER LJ in *Russell v Duke of Norfolk & Ors* [1949] 1 All ER 109 (CA) at 188E, when he said:

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

In other words, it is true that under the maxims *audi alteram partem* and *nemo iudex in causa sua* adjudicating bodies did not necessarily have to adopt all those important principles so fundamental to court proceedings - *Jeewa v Dönges NO & Ors* 1950 (3) SA 414 (A) at 422 - 3.

It is correctly pointed out that the words "civil rights" are wide and their ambit is not easily defined - *Cole v Commonwealth of Australia* (1961) 106 CLR 653 (HC of Aust) at 656 - 657. Suffice to say that "civil rights and obligations" would certainly include, not only, the prejudicial effect on "property" and "liberty" set forth by STEWART J in *Board of Regents v Roth, supra*,

but also, the recently extended use of what is said to be the reasonable and legitimate expectations of the aggrieved person - *Administrator, Transvaal & Ors v Traub & Ors* 1989 (4) SA 731 (A).

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In *Duke v The Queen* (1972) 28 DLR (3d) 129 (SCC), the Canadian Bill of Rights was dealt with, s 2(e) of which reads:

"... no law of Canada shall be construed or applied so as to ... deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."

In considering those words FAUTREUX CJ said at 134:

"Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity to adequately to state his case."

In *Singh et al v Minister of Employment and Immigration et al* (1985) 14 CRR 13 (SCC) the Canadian Charter of Rights and Freedoms in the Constitution Act, 1982 was considered, s 7 of which states:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

WILSON J observed at 46-47 and 53:

"It seems to me that in attempting to decide whether the appellants have been deprived of the right to life, liberty and security of the person within the meaning of s7 of the Charter, we must begin to determine what rights the appellants have under the Immigration Act. As noted earlier, s5(1) of the Act excludes from persons other than those described in s4 the right to come and remain in Canada. The appellants therefore do not have such a right ...

We must therefore ask ourselves whether the deprivation of these rights constitutes a deprivation of the right to life, liberty and security of person ...

Certainly, it is true that the concept of the right to life, the right to liberty, and the right to security of person are capable of a broad range of meaning ...

All counsel are agreed that at a minimum the concept of 'fundamental justice' as it appears in s7 of the Charter includes the notion of

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procedural fairness articulated by FAUTREUX CJ in *Duke v The Queen* [1972], *supra*, ...

Do the procedures set out in the Act for adjudication ... meet this test of procedural fairness? Do they provide an adequate opportunity for a refugee claimant to state his case and know the case he has to meet? ... I am prepared to accept ... that procedural fairness may demand different things in different contexts. Thus it is possible that an oral hearing before the decision - making is not required in every case in which s7 of the Charter is called into play. However, I must confess to some difficulty in reconciling ... that an oral hearing is not required in the context

of this case

... If 'the right to life, liberty and security of the person' is properly construed as relating only to matters such as death, physical liberty and physical punishment, it would seem on the surface at least that these matters are of such fundamental importance that procedural fairness would invariably require an oral hearing."

It may well be true that under s 18(9), the constitutional entitlement to a fair hearing minimally includes the procedural fairness alluded to by WILSON J But in order to consider whether this will suffice for purposes of the Constitution of Zimbabwe, this court is obliged to construe subs (9) in conjunction with the other relevant subsections of s 18. When that course is adopted, particularly in light of s 18(1), civil rights and obligations in the manner in which they apply to this case are, in WILSON J's words "matters of such fundamental importance that procedural fairness would invariably require an oral hearing". I should indicate that nothing prevents regulations made under s 75(1)(f) of the Zimbabwe Constitution giving the affected individual the choice of an in person hearing or making a written response.

Also, in connection with "fundamental importance" there are certain essential principles which must be observed. These are, firstly, that prior adequate notice of the contemplated action against the affected party must be given. In *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180; 143 ER 414 ERLE CJ stated:

"I think the board ought to have given notice to the plaintiff and allowed him to be heard. The default in sending ... the intention to build, is a default which may be explained. There may be a great many excuses for the apparent default. The party may have intended to conform to law. He may have actually conformed ... I cannot conceive any harm that could

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happen to the district board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice."

Secondly, the aggrieved party must be apprised of the information that is being relied upon against her so that she can effectively prepare, properly answer and make representations. There is a duty of adequate disclosure. In *Kanda v Government of Malaya* [1962] AC 322 (PC) LORD DENNING said at 337:

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

Also, as COLMAN J in *Heatherdale Farms (Pty) Ltd & Ors v Deputy Minister of Agriculture & Anor* 1980 (3) SA 476 (T) at 486 observed:

"... the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations."

Thirdly, as mentioned previously a proper construction of s 18(9) of the Zimbabwe Constitution mandates an in person hearing, although it has been held by courts that an oral hearing is not a necessary requisite for natural justice - *Cassem en 'n andere v Oos-Kaapse Komitee van die*

Groepsgebiederaad en andere 1959 (3) SA 651 (A) at 660 and *R v Judge Amphlett* [1955] 2 KB 223 at 240. However, in *Bramdew v Union Government* 1930 NLR 324 TATHAM AJP at 332 said:

"... indeed, natural justice requires that the accused officer shall be present at the enquiry and be heard by the person who makes the recommendation. The word 'heard' means something more than the production of evidence. It includes comment on the evidence and argument."

Further, in *R v Deputy Industrial Injuries Commission*, *Ex parte Moore* [1965] 1 QB 456; [1965] 1 All ER 81 (CA) DIPLOCK LJ at 488 and 490 stated:

"... the rules of natural justice which he must observe can, in my view, be reduced to two. First, he must base his decision on the evidence ...

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In the context of the first rule, 'evidence' is not restricted to evidence which could be admissible in a court of law ...

These technical rules of evidence [however] form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial function must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. ...

Where, however, there is a hearing ... the second rule requires the deputy commissioner (a) to consider such 'evidence' relevant to the question to be decided as any person entitled to be represented wishes to put before him; (b) to inform every person represented of any 'evidence' which the deputy commissioner proposes to take into consideration, whether such 'evidence' be proffered by another person ... or is discovered by the deputy commissioner as a result of his own investigations; (c) to allow each person represented to comment upon any such 'evidence' and, where the 'evidence' is given orally by witnesses, to put questions to those witnesses; and (d) to allow each person represented to address argument to him on the whole of the case. This, in the context of the Act and regulations fulfils the requirement of the second rule of natural justice to listen fairly to all sides."

While in *Bushell & Anor v Secretary of State for the Environment* [1981] AC 75 at 116; [1980] 2 All ER 608 (HL) at 627-8 LORD EDMUND-DAVIES said:

"The general law may, I think, be summarised in this way: (a) in holding an administrative enquiry ... the inspector was performing quasi-judicial duties; (b) he must therefore discharge them in accordance with the rules of natural justice; (c) natural justice requires that objectors ... be allowed to cross-examine witnesses called for the other side on all relevant matters, be they matters of fact or matters of expert opinion; (d) in the exercise of jurisdiction outside the field of criminal law, the only restrictions on cross-examinations are those general and well-defined exclusionary rules which govern the admissibility of relevant evidence ... beyond those restrictions there is no discretion on the civil side to exclude cross-examination on relevant matters. ... And there is massive

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body of accepted decisions establishing that natural justice requires a party be given an opportunity of challenging by cross-examination witnesses called by another party on relevant issues: see, for example, ... *Errington & Ors v Minister of Health* [1935] 1 KB 249, ...per MAUGHAN LJ, [at p 272] ... *Reg. v Deputy Industrial*

Injuries Commission, Ex parte Moore [1965] 1 QB 456 per DIPLOCK LJ, [at pp 488A, 490 E-G], *Wednesbury Corporation v Ministry of Housing and Local Government* (No 2)... [1966] 2 QB 275, per DIPLOCK LJ, [at pp 302G-303 A]."

On the right to legal representation, LORD DENNING on *Maynard v Osmond* [1977] QB 240 at 252; [1977] 1 All ER 64 (CA) at 79 observed:

"On principle, if a man is charged with a serious offence which may have grave consequence for him, he should be entitled to have a qualified lawyer to defend him. Such has been agreed by the government of this country when it adhered to the European Convention on Human Rights. But also, by analogy, it should be the same in most cases when he is charged with a disciplinary offence before a disciplinary tribunal, at any rate when the offence is one which may result in his dismissal from the force or other body to which he belongs; or to loss of his livelihood; or, worse still, may ruin his character forever.

I gave the reason in *Pett v Greyhound Racing Association Ltd* [1969] 1 QB 125, 132:

'If justice is to be done, he ought to have the help of some one to speak for him. And who better than a lawyer who has been trained for the task?'

He should, therefore, be entitled to have a lawyer if he wants one. But, even if he should not be entitled as of right, I should have thought that as a general rule the tribunal should have a discretion in the matter. Legal representation should not be forbidden altogether. The tribunal should have a discretion to permit him to have a lawyer if they think it would assist."

As for a duty to give reasons for decisions, it has been held that as an aspect of natural justice there is no such obligation as a general rule *Minister of National Revenue v Wright's Canadian Ropes Ltd* [1947] AC 109 (PC) at 123; *R v Gaming Board of Great Britain, Ex parte Benaim and Khaida* [1970] 2 QB 417 at 431; [1970] 2 All ER 528 (CA) and *Townships Board Transvaal v Garner* NO 1961 (3) SA 437 (A) at 445. However, the New South Wales Court of Appeal in *Osmond v Public Service Board of New South Wales &*

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Anor [1985] LRC (Const) 1041 (SC of NSW) through KIRBY P at 1048-1052; 1057-1061 and 1063-1064 observed:

"To address the question whether the common law in a case such as this requires the Board to give the appellant reasons for its decision, it is appropriate to review the steps by which the common law in England, Australia and elsewhere has been developing the notion of natural justice and the duty to act fairly. Specifically it is useful to review the authorities with reference to the content of those notions as they relate to the entitlement to have reasons stated for decisions affecting the person seeking those reasons. ...

Regina v Gaming Board of Great Britain, Ex parte Benaim and Khaida [1970] 2 QB 417 was a decision of the English Court of Appeal ... [which] held that the Board had acted fairly and in accordance with natural justice ... whilst the Board had to give the applicant a sufficient indication of the objections against them to enable them to answer the objections, it was not obliged to give reasons for forming the opinion that the certificate should be refused. ...

In *Breen v Amalgamated Engineering Union & Ors* [1971] 2 QB 175 EDMUND-DAVIES LJ (at p 195) and MCGAW LJ (at p 200) made it clear that they agreed with LORD DENNING that Breen was entitled to be accorded natural justice. It was in this connection that LORD DENNING suggested at least in some circumstances, the common law imposed a duty upon some decision-makers to state reasons for decisions adversely affecting others ... It is to be noted that the criterion remains the same as before: namely the variable

concept of fairness. The point of variance suggested to distinguish the Gaming Board case from Breen was the notion of 'legitimate expectation'. The possession of this expectation was said to entitle the claimant to have the rules of natural justice complied with in his case and , to have reasons afforded him ... In *Alexander Machinery (Dudley) Ltd v Crabtree* [1914] 1 CR 120, 122 SIR JOHN DONALDSON, the President of the Industrial Relations Court, had to consider the right to reasons. Interestingly, he expressed the rationale for such a right in terms of the impossibility of otherwise determining whether there has been an error of law ... These observations were considered most recently by LORD CHIEF JUSTICE LANE (with whom ACKNER and OLIVER LJ agreed) in *R v Immigration Appeal Tribunal ex parte Khan (Mahomed)* [1983] 2 All ER 420, 423 LORD LANE CJ added his own gloss:

'Speaking for myself, I would not go so far as to endorse the proposition set forth by DONALDSON P that any failure to give reasons means a

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denial of natural justice and is itself an error of law. The important matter which must be borne in mind by tribunals in the present type of circumstances must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties, and they should indicate the evidence on which they have come to their conclusions.

Where one gets a decision of a tribunal which either fails to set out the issue which tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis on which it is reached its determination on that issue, then that is a matter which will be very closely regarded by this Court, and in normal circumstances will result in the decision of the tribunal being quashed. The reason is this. A party appearing before a tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal; in other cases it may not. Second, the appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it may not'.

In Australia, the developments in the common law reflected in the above line of English authority can also be seen in decisions of the High Court of Australia and this Court. ...

In India, the Supreme Court of India has elaborated, in a series of recent cases, a general requirement for administrative tribunals to give reasons for their decisions. Sometimes the requirement has been founded on the 'elementary requirements' of a 'quasi judicial process' (see eg ... *Govindrao v State of Madhya Pradesh* AIR 1952 SC 1222, 1226); sometimes in the Indian Constitution special leave to appeal to the Supreme Court (see eg *Mahabir Prasad v State of Uttar Pradesh* AIR 1970 SC 1302 ... *Bhagat Raja v Union of India* AIR 1967 SC 1606); sometimes in the review and supervisory jurisdiction of the State High Courts (see eg *Ranganath v Daulatrao* AIR 1975 SC 2146); sometimes in the rule of law (see eg *Mahabir Prasad v State of Pradesh* above at 1304), and more recently in the principles of natural justice.

The use of the principles of natural justice ... as a basis for the requirement to state reasons, has received its most notable support in two important decisions of the Supreme Court of India in which the leading judgments were written by BHAGWATI J, namely *Siemens Engineering*

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and *Manufacturing Co v Union of India* AIR 1976 SC 1785 and *Meneka Gandhi v Union of India* AIR 1978 SC 597.

In *Siemens* BHAGWATI J, said that the rule requiring reasons to be given was 'like the principle of *audi alteram partem* a basic principle of natural justice ' (id 1789).

The role of 'natural justice' in administrative law as an important principle intended to 'invest law with fairness and to secure justice' was stressed by BHAGWATI J in *Meneka Gandhi* (id. 625) ... In that case the Supreme Court of India held that the Passport Authority was obliged to supply reasons for impounding the Passport of Mrs Meneke Gandhi. ...

Numerous arguments of principle have been proposed in favour of a right to reasons for the decisions of administrative tribunals. Some of them are helpfully collected at p 87 of Dr G A Flick's Book 'Natural Justice'. In abbreviated form, they include: first, the assurance which a reasoned opinion provides that the decision has been properly thought out. Tribunals, such as the Board in the present case, presumably have reasons for their decisions. The obligation to think out and articulate those reasons, justifying them in a public way, is likely to provide a discipline that will ensure that the decision is better as a consequence. Secondly, if the person has a right to appeal, the facility of reasons will enable him to determine whether he should do so, and on what basis. Thirdly, reasons will make the tribunal more amenable to the supervisory jurisdiction of the courts and provide assurance that it has acted within its limited powers. Fourthly, reasoned decisions will promote public confidence in the administrative process. Reference is made by Dr Flick to the comment in *In re Poyser and Mill's Arbitration* [1964] 2 QB 467, 478, that, if a party is not given reasons he may be left with the real grievance that he was not told why the decision has been made. In the words of CHILWELL J in *Connell v Auckland City Council* [1977] 1 NZLR 730, the failure to provide reasons will, in a modern community, result in a litigant who is not only 'disappointed' but also 'disturbed' ... The fifth value of reasons suggested by Dr Flick, is that they constitute a check on the exercise of discretion, prevent arbitrary action and provide guidance for future cases.

Professor Wade, in his discussion of the text, suggests that the courts 'might well have done as much' [as recent legislation in Australia] on their own initiative to ensure the facility of reasons by subordinate tribunals 'since giving of reasons is required by the ordinary man's sense of justice and is also a health discipline for all who exercise power over others' (Wade *Administrative Law* 5 ed. 485) ...

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A number of arguments have been ... advanced against the obligation of subordinate tribunals to give reasons for their decisions. Some of these are also mentioned by Dr Flick, 89 ... First, there is the cost and additional burden on administration involved in the preparation of anything that goes beyond a mere statement of the ultimate reason ... Insofar as a statement of findings and the disclosure of the reasoning process that led to the decision is required, fear is sometimes expressed that such an obligation would pose an impossible burden on busy decision-makers, particularly those with a heavy case load. It could lead to 'canned' reasons (Flick, 89) ie standard statements in stereotype form that expose little of the decision maker's true reasoning process. The second suggested justification for the avoidance of reasons is that some decisions, by virtue of their nature or number, should be unreviewable in the courts. It is said that an obligation to give reasons would promote such review and, in turn, enhance legislation and concentration upon form, to the diminution of effective discretionary decision-making. A third objection is addressed to the manner in which an obligation to give reasons is introduced. Administrative decision-making occurs in enormous variety. If an obligation to proffer reasons when asked were imposed upon decision-makers as an attribute of the rules of natural justice, might it not apply beyond the public offices and statutory bodies ... Would this impose upon an unknown variety of decision-makers a rigidity of action that would make consequences unknown and unknowable to the Court? ...

The overriding duty of public officials ... is to act justly, fairly and in accordance with their statute. Normally, this will require, where they have a power to make discretionary decisions affecting others, an obligation to state the reasons for their decisions. That obligation will exist where, to do otherwise, would render nugatory a facility, however limited, to appeal against the decision. It will also exist where the absence of stated reasons would diminish a facility to have the decision otherwise tested by judicial review to ensure that it complies with the law and to ensure that matters have been taken into account that should have been taken into account or that matters have not been taken into account which ought not to have been taken into account.

The entitlement to reasons exists in any person who is directly affected by such a decision ie has some interest in the subject matter and a legitimate expectation by reason of that interest to have an explanation given when a decision is made adverse to him."

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But on appeal the High Court of Australia over-ruled the New South Wales Court of Appeal in *Public Service Board of New South Wales v Osmond* [1987] LRC (Const) 681 (HC of Australia) GIBBS CJ stated that there "is no general rule of common law, or principle of natural justice, that requires reasons to be given", and said that this was the position that had been recognised by the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1049; [1968] 1 All ER 694 (HL).

However, this may have been the situation once but principles or standards of fairness necessary for the attainment of justice are never rigid and do indeed evolve and develop to meet changing circumstances and perceptions. This is aptly shown by *Zimnat Insurance Co Ltd v Chawanda* 1990 (2) ZLR 143 (SC); 1991 (2) SA 825 (ZS) when the Supreme Court of Zimbabwe at 153E - 154F said:

"Even if [this was] ... an encroachment upon the discretion reposed in the law-giver to change the law, we would strongly defend the Judiciary's right to do so. Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values and to altering views of justice. If it fails to respond to those needs and is not based on human necessities and experience of the actual affairs of man rather than on philosophical notions, it will ... be cast off by the people because it will cease to serve any useful purpose. Therefore the law must be constantly on the move, vigilant and flexible to current economic and social conditions. ...

Today the expectations amongst people all over the world, and particularly in the developing countries are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The Judiciary can and must operate the law so as to fulfil the necessary role of effecting such development.

It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by the Legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.

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The opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such a course. If judges hold to their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand. In a famous passage LORD ATKIN, referring to judicial precedents, said:

"When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the judge to pass through them, undeterred'."

Further, the approach suggested by KIRBY P clearly accords with what was said as long ago

as 1932 in the Report of the Committee on Minister's Powers (Donoughmore Report, Cmnd.4060) about a third principle of natural justice which was "that a party is entitled to know the reasons for the decision" (referring to *audi alteram partem* and *nemo iudex in causa sua* as the other two principles). Also, as Professor Wade so vividly noted when echoing the words of Administration under Law, A Report of *Justice*, 1971:

"No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions" (*Wade Administrative Law* 4^{ed} at 464).

Related closely to this is the issue of findings of fact. As Professor Baxter indicates:

"However, it is important not to confuse statement of reasons with statement of findings. Indeed, it is conducive to clarity to draw, as is done in the United States, a distinction between 'basic' findings and 'ultimate' findings as well.

...

...From these basic findings ... draw various inferences ... These inferences and conclusions are ultimate findings. In light of all the ultimate findings ... [decision-maker] will then make a choice from among those relevant to the exercise of its discretionary power ... Its choice or choices will be determined by the course of action it considers 'wisest' ... The explanations as to why it settles upon its final choice ... are its reasons.

The decisional process just described is relatively formal and sophisticated. In practice, decisions are often reached less methodically and

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there is not always a clear distinction between objective facts and inferences. But the three basis elements are present in any decision, whether simple or complex or whether discretionary or not.

The distinction between the three elements is not of purely theoretical importance. Failure to distinguish between them will lead to confused decision - making; inferences may be mistaken for objective facts and legal prescriptions may be substituted for reasons." (Baxter *Administrative Law*, 1971 at 228-229.)

As for the contention that a fair hearing would have made no difference. LORD WRIGHT in *General Medical Council v Spackman*[1943] AC 627 at 644-5; [1943] 2 All ER 337 (HL) at 345 disposed of this most admirably when he said:

"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

Again, in *John v Rees* [1970] Ch 345 at 402; [1969] 2 All ER 274 at 309 MEGARRY J forcefully observed:

"It may be that there are some who would decry the importance which courts attach to observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to

influence the course of events."

The 1986 Regulations in s 4 only permits a written reply to the allegations of misconduct. Section 19(1)(a), where the Public Service Commission finds

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no material dispute of fact allows it to determine guilt on the written reply and reports submitted without the Public Service Commission advising the officer concerned of its finding of fact and giving such a person an opportunity to address or make representations on the issue of guilt. Again s 19(1)(b), where upon receipt of the inquiry's findings of fact, the Public Service Commission determines guilt without advising the aggrieved officer of the findings of fact and giving such an individual an opportunity to address or make representations on the issue of guilt. Also under s 19(3) upon the finding of guilt the Public Service Commission proceeds to determine the penalty. On the issue of a finding of guilty in the manner provided by the 1986 Regulations, these certainly offend the provisions of Zimbabwe Constitution as they do not afford an aggrieved person a "fair hearing" as contemplated by s 18(9). As for the penalty provision, with the greatest respect, *Bishi v Secretary for Education* 1989 (2) ZLR 240 (HC) cannot be distinguished in the manner that was done in *Dube v Public Service Commission & Anor, supra*. I do not believe that the fundamental imperatives of s 18(9) constitutional entitlement, let alone the principles of natural justice, can be so easily ousted in the way outlined in *Dube v Public Service Commission & Anor, supra*. As pointed out in *Bishi v Secretary of Education, supra*, even if an express provision had been inserted in the 1986 Regulations this would still constitute a contravention of s 18(9) of the Zimbabwe Constitution. See also *Zinyemba v Ministry of the Public Service & Anor* HH-45-90.

Further, to the extent that s 19(3) of the 1986 Regulations does not mandate reasons for the decision made and penalty imposed it offends, not only against the principles of natural justice, but also, s 18(9) of the Zimbabwe Constitution. Clearly s 17 of the 1986 Regulations, which relates to the inquiry on the issues of fact and expressly denies an aggrieved person legal representation, is also *ultra vires* s 18(9) of the Zimbabwe Constitution, which envisages that an affected party be given an opportunity to have legal representation.

It is only when these fundamental imperatives are met can any legislation, whether in the form of statutes or regulations, be said to be in conformity with the Constitution of Zimbabwe.

The letter of 16 November 1989 - annexure "A" to the applicant's founding affidavit, does not provide reasons for the decision made and the penalty imposed by the Public Service Commission. But the first respondent does disclose what the Public Service Commission took into account. He avers that the applicant had acted improperly in using his position in the Central

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Mechanical Equipment Department to obtain the motor vehicle and that this was done with the

intention of reselling it at a profit. He stresses that the Public Service Commission took into account that there was no price control for this motor vehicle but concluded that the lack of price control was due to an error in drafting and this did not alter the Government's intention to prevent profiteering. If what the first respondent indicates were the factors that formed part of the alleged misconduct, these were not contained in the letter of 5 October 1989, Annexure "B" to the applicant's founding affidavit. In there no reference is made to abuse of position or that the motor vehicle was purchased specifically with the intention of resale at a profit or that the applicant was made aware that although the motor vehicle was not covered by price control this was due to an error in drafting which did not alter the Government's intention of prevent profiteering.

In the applicant's written statement in reply, Annexure "C" to his founding affidavit, he in fact does admit to purchasing the Nissan PG 720 pick up truck for \$22 087,22 and reselling it for \$50 000 but persisted with the denials he made to the Sandura Commission and that he had not lied to the Sandura Commission. He also denied that his conduct amounted to unbecoming or indecorous behaviour and that he committed any act inconsistent or prejudicial to the discharge of his official duties. He maintained he did not commit any criminal offence and was never involved in illegal dealings.

In light of this, as McNALLY JA pointed out in *Public Service Commission & Anor v Mutsonziwa* S-40-89 at 8 that where there is an allegation of an act of misconduct and a denial, there is a material dispute of fact. It is true there was no dispute about the purchase and resale at a higher price. But the same cannot be said about the applicant's denials that his conduct constituted unbecoming or indecorous behaviour and that he committed an act which was inconsistent or prejudicial to the discharge of his official duties unless the Public Service Commission holds that the purchase by a public servant of an article once and its resale at a higher price constituted a contravention of paras 7 and 24 of the First Schedule of the 1986 Regulations. Nor can it apply to his denial that he had committed a criminal offence or was involved in an illegal dealing. As McNALLY JA observed in *Public Service Commission & Anor v Mutsonziwa*, *supra*, generally "questions of credibility cannot normally be decided by looking at pieces of paper and believing one as against another" and he agreed that there may be exceptions. It follows that on what was before the Public Service Commission the dispute could not be resolved on the papers.

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Also crucial is what the first respondent disclosed the Public Service Commission took into account. In *Goldfields Investment Ltd & Anor v City Council of Johannesburg & Anor* 1938 TPD 551 at 560 - 561 SCHREINER J said:

"I ... merely wish to add a few words on ...gross irregularities ... It seems to me, that gross irregularities fall into two classes, those that take place openly, as part of the conduct of the trial - they might be called patent irregularities - and those that take place inside the mind of the judicial officer, which are only ascertainable from reasons given by him and which might be called latent ... The crucial question is whether it prevented a fair trial of the issues. If it did ... then it will amount to gross irregularity ... In matters relating to merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and

therefore failing to afford the parties a fair trial ... But if the mistake leads to the Court's ... misconceiving the whole nature of the inquiry, or of its duties ...therewith ... the losing party has not had a fair trial."

While in *Virginia Land & Estate Co Ltd v Virginia Valuation Court & Anor* 1961 (4) SA 479 (O) at 486, 489 and 491-492 HOFMEYER J stated:

"The attack launched against the first respondent's findings ... is based on two procedural irregularities ... the first respondent took into account matters which it should not have considered and it failed to take into account matters which should have been considered, resulting in findings which no reasonable person could arrive at. ...

I proceed to the applicant's ... complaint, viz. that the first respondent took into account which it should not have considered either because (a) they were irrelevant to the issue which it had to decide or (b) such matters had not been proved in evidence or (c) if relevant and properly cognisable by the first respondent, the applicant had not been told that the first respondent was taking them into account. ...

[I]t is, in my opinion, idle to deny that irrelevant considerations ... were given substantial weight in the first respondent deliberations. ...

[T]he first respondent has not only relied upon entirely irrelevant matter but on information which in the peculiar circumstances of the case operated gravely to the prejudice of the applicant. Its assertion that it considered this factor with all the evidence ...before it and that due and

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proper consideration was given to all aspects before arriving at a decision does not impress me and leaves the substance of the complaint uncontradicted."

The Public Service Commission took into matters which the applicant was not made aware of and which were highly prejudicial to him. This in itself would not allow the decision of the Public Service Commission to be upheld.

To summarise, the 1986 Regulations are *ultra vires* the Constitution of Zimbabwe in that they do not give an affected person an opportunity for an in person hearing in accordance with the relevant provisions of s 18. If I am wrong on this aspect, nevertheless the 1986 Regulations are *ultra vires* the Constitution of Zimbabwe in that they do not make provision for an aggrieved person to be informed of the findings of fact and to be given an opportunity to address or make representation before the determination of guilt and on the imposition of penalty. It is inconsistent with the Zimbabwe Constitution when they deny legal representation at an inquiry on issues of fact and when they do not provide for reasons to be given as to the determination of guilt and the imposition of penalty.

As McNALLY JA correctly observed in *Public Service Commission & Anor v Tsomondo, supra*, at 439:

"As long as he is employed he is *prima facie* entitled to his salary. If he is to be deprived of his salary then that deprivation must be justified."

Accordingly it is ordered:

- 1 That the finding of the Public Service Commission that the applicant was guilty of

misconduct, as charged, be and it is hereby set aside;

2 That the decision of the Public Service Commission to discharge the applicant from the Public Service and directing that he receive no salary or suspension allowance from the date of his suspension on 5 October 1989 be and it is hereby set aside;

3 That the costs of this application be borne by the Public Service Commission.

Coghlan, Welsh & Guest, appellant's legal practitioners

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

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MHORA & ANOR v COMMISSIONER OF POLICE & ANOR 1991 (1) ZLR 61 (SC)

Court **Supreme Court, Harare**

McNally JA (in Chambers in terms of Rule 36(1) of the Rules of the Supreme Court of Zimbabwe)

Application

10 & 17 January 1991

Flynote

Practice and procedure - security for costs on appeal - public officials cited in their personal capacities may be ordered to furnish security for costs on appeal.

Headnote

The Commissioner of Police and the Minister of Home Affairs (respondents in this application) had noted an appeal against a judgment of the High Court. The applicants in the present matter (respondents in the appeal) applied for an order dismissing the appeal by reason of the respondents' failure to furnish security for costs or, alternatively, for an order that such security be furnished.

Held, that since the respondents' reason for refusing to give security was *bona fide* the application for dismissal would not be granted.

Held, further, that in respect of the Minister the order under appeal had been given against him personally and hence he could be ordered to furnish security for the costs of his appeal. In respect of the Commissioner of Police, on the other hand, the order under appeal had been made against him in his official capacity and so, in terms of Rule 46(a) of the Supreme Court Rules, he could not be ordered to furnish security.

A N H Eastwood for the applicants

E W W Morris for the respondents

Judgment

McNally JA: The respondents have noted an appeal against the decision of GIBSON J, in the High Court which was handed down on 29 August 1990

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McNALLY JA

- Judgment No. HH-179-90. The applicants now seek to have that application dismissed by reason of the respondents' failure to furnish security for costs. Alternatively they ask for an order that security be furnished. The application is brought in terms of Rule 36(1) of the Rules of this Court.

The respondents maintain that they are entitled to rely on Rule 46(4) of the Rules, which states:

"No security need be furnished by the Government of (Zimbabwe) or by a municipal or city council or by a town management board."

The applicants' case is that the respondents were sued both in their official capacities and in their personal capacities. Government Ministers or other servants of the State are not protected by Rule 46(4) when sued in their personal capacities.

In any events, says Mr *Eastwood* for the applicants, the respondents have so far shown every inclination to avoid paying the applicants what the court says is owing to them. If the respondents lose their appeal the probabilities are that they will not pay the applicants' costs. Therefore this is a case in which I should exercise the discretion granted to me by the provisions of Rule 4 to "direct a departure from these Rules in any way where this is required in the interests of justice ...".

The contention for the respondents is that the respondents have been cited as "The Commissioner of Police" and "The Minister of Home Affairs". This is the standard formula for proceeding against the State, as prescribed by the State Liabilities Act [*Chapter 54*]. In particular the respondents point to s 3A of the Act:

"Whenever any Minister of the State or public official is cited in any action or other proceedings in his official capacity he shall be cited by his official title and not by name."

This, read together with the provisions of ss 2 and 3 of the Act, make it clear, so the respondents claim, that it is the State which is being sued. And the State does not have to provide security for costs.

I think the applicants are correct when they say that the respondents were sued both in their official and in their personal capacities. Whether the

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McNALLY JA

method of citation of the respondents in the heading of the Notice of Motion is correct or not (and I have my doubts), the matter is put beyond doubt in the founding affidavit. In paragraph 2 it is said:

"First respondent is the Minister of Home Affairs. ... He is cited herein in his capacity as the Minister ... in terms of Section 3 of the State Liabilities Act (*Chapter 54*). ... He is further cited in his personal capacity."

Paragraph 3, in similar vein, states:

"Second respondent is the Commissioner of Police... . He is further cited in his personal capacity."

Moreover, there are two irresistible indications from the very form of the proceedings themselves which support the contention that the proceedings were against the respondents personally.

In the first place, judgment had already been given against the State (represented by the Minister of Home Affairs) in an earlier decision by GREENLAND J His Lordship Mr Justice GREENLAND had ordered the Minister, in case no. 4302/87, to pay the respondents their terminal benefits. It was his failure to do so which led to the later proceedings before Mrs Justice Gibson. Had these later proceedings been merely against the State, exception would have been taken on the grounds of *res judicata*. "You have already got your judgment", the State would have said, "so why are you back in court seeking the same relief?". The reason why the plea of *res judicata* was not raised, one must assume, was that different relief was being sought against a different respondent. The proceedings sought to compel the Minister personally to take the steps necessary to have the payments made from the Consolidated Revenue Fund.

Secondly, the sanction proposed for failure to cause the payments to be made was a personal penalty - the threat of being held in contempt. I am not quite sure why the sanction was worded differently in each case. The sanction proposed against the Minister was that he would be "declared to be in contempt of court". The Commissioner was to be required to obey the court's order under pain of being "committed to gaol for 30 days". In both cases the sanction proposed is against the person of the respondent concerned.

It is true, of course, that the respondents denied the right of the applicants to sue them in their personal capacities. But that very denial of the right is an

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McNALLY JA

admission of the fact. The question of the right was a major issue in the proceedings. But it was an issue precisely because the respondents were being sued in their personal capacities.

I am satisfied therefore that both respondents were sued in their personal capacities.

What is more important is whether judgment was given against them in their personal capacities. If it was, and if they wish that judgment to be reversed on appeal, then they must necessarily be appealing in their personal capacities.

Here, I think, with respect, that there has been some confusion on the part of the respondents' legal advisers. They clearly take the view that judgment should not have been given against the respondents in their personal capacities. They may be right. They may be wrong. That is not for me to decide. I am concerned with whether judgment was given against them in their personal capacities. Not with whether **it should have been**.

It is clear to me that judgment was given against the Minister (the second respondent, confusingly, in these proceedings although he was the first respondent in the court *a quo*) in his personal capacity. He was ordered to comply with the order under pain of being declared to be in contempt. It follows that he personally is the appellant. The State is not the appellant. If the State had wanted to appeal it should have appealed against the judgment of GREENLAND J

The Minister therefore is not covered by the provisions of Rule 46(4).

The Commissioner of Police seems to me to be in a different situation. He was not involved in the previous proceedings so there is no question of *res judicata* in his case. As I understand the passages in Her Ladyship's judgment at pp 6-7, beginning "As regards the relief sought against the second respondent ..." and ending "The question of committal of the second respondent thus falls away", her judgment was directed at the Commissioner *nomine officii*, ie in his official capacity. She ordered him by consent to furnish certain certificates and she declined to make a committal order against him. Accordingly, although he was sued in his personal capacity, the order was made against him in his official capacity, and he appeals in that capacity.

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McNALLY JA

It remains to consider whether I should accede to Mr *Eastwood's* request that I apply the provisions of Rule 4. Should I direct a departure from the Rules on the grounds that the Commissioner has shown every indication that he will not (or the State on his behalf will not) pay the costs of the appeal if he loses?

I do not think I am justified in doing so in regard to the Commissioner. He was not involved in the case before GREENLAND J He has not shown any propensity not to pay what he is ordered to pay. I see no reason therefore to direct a departure from the Rules in regard to security for costs in his case.

There was no dispute over the *quantum* of the security. Mr *Eastwood* asked for \$5 000, and, since he had succeeded in respect of one of the two respondents, I propose to order security in the sum of \$2 500.

As to the costs of this application, it seems to me that it would be proper to reserve the question of costs for decision in the appeal hearing. Only when the whole issue is unravelled will it be possible to decide the appropriate order as to costs as between the appellants, the State, and the Minister personally.

Mr *Eastwood* properly did not press his claim for the dismissal of the appeal, since it was clear that the appellants were refusing to give security for perfectly *bona fide* reasons.

Accordingly I make the following order:

1. That second respondent, the Minister of Home Affairs, is directed in his personal capacity to furnish security to the Registrar of this court for the respondents' costs of appeal in the sum of \$2 500.
2. The said sum is to be lodged with the Registrar within sixty days of the date of this order, failing which the appeal of the second respondent will be dismissed with costs.
3. It is declared that the first respondent, the Commissioner of Police, is exempt from the need to furnish security by reason of the provisions of Rule 46(4).
4. The costs of this application are reserved for decision when the appeal is decided.

Kantor & Immerman, applicants' legal practitioners

Civil Division, Attorney-General's Office, respondents' legal practitioners

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S v CHAWASARIRA 1991 (1) ZLR 66 (HC)

Court **High Court, Harare**

Smith J & Reynolds J

Criminal review

23 January 1990

Flynote

Criminal procedure (sentence) - whether different counts to be treated as one for sentence.

Headnote

The accused was charged with assault with intent to do grievous bodily harm and with contravening s 9(b) as read with s 19(1) of the Dangerous Drugs Act [*Chapter 319*]. The accused had stabbed his wife on the arm and shoulder, causing two small wounds. When he was arrested and searched the police found a cigarette stub of dagga on him. He pleaded guilty to and was convicted on both counts. The magistrate treated both counts as one for sentence and sentenced the accused to a fine of \$260 and, in addition, to three months' imprisonment, all of which was suspended for a period of three years on certain conditions.

Held, that where an accused is convicted of two or more offences it is preferable that he should be sentenced separately for each offence especially where the offences are entirely different.

Held, further, that one globular sentence for two or more offences should only be considered where the offences are of the same or similar nature and are closely linked in time. If these two requirements are not satisfied then a separate sentence must be imposed in respect of each

offence.

Held, further, that the sentences imposed should be set aside and a separate sentence imposed for each count.

Cases cited:

S v Nkosi 1965 (2) SA 414 (C)

S v Leshaba & Ors 1968 (4) SA 576 (T)

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SMITH J

S v Setlhare 1973 (2) SA 488 (O)

S v van Zyl 1974 (1) SA 113 (T)

S v van der Merwe 1974 (4) SA 523 (N)

S v Burger 1975 (2) SA 601 (C)

S v Gumede 1965 (4) SA 257 (N)

S v Chinjekure HH-35-85 (not reported)

Judgment

Smith J: The accused was charged with assault with intent to cause grievous bodily harm and with contravening s 9(b) as read with s 19(1) of the Dangerous Drugs Act [Chapter 319]. The accused stabbed his wife on the arm and shoulder, causing two small wounds. When he was arrested and searched the police found a cigarette stub of dagga on him. He pleaded guilty to both counts and was duly convicted. The magistrate treated both counts as one for sentence and sentenced the accused to a fine of \$260 and, in addition, to three months' imprisonment, all of which was suspended for three years on condition that the accused did not, within that period, commit any offence of which assault was an element for which he was sentenced to a fine exceeding \$50 or imprisonment without the option of a fine.

Where an accused is convicted of two or more offences it is preferable that he should be sentenced separately for each offence especially where, as in this case, the offences were entirely different. In this particular case it is impossible to say what proportion of the fine related to the possession of dagga. In *S v Nkosi* 1965 (2) SA 414 (C) at p 415 BANKS J pointed out that although in South Africa globular sentences had in a number of cases received judicial approval, the practice in England was to enter up judgment and sentence separately on each count. At pp 415-416 he said:

"In the vast majority of cases no practical advantage results from imposing a globular sentence. A reasonable sentence can usually be determined by deciding upon a reasonable sentence for each offence and then by scaling down the sentences if the cumulative effect renders the total unreasonable. An exception would seem to arise in cases where it is decided to impose a reformatory sentence or a sentence of whipping, and there may be other such cases. But as pointed out by VAN DAN HEEVER J (as he then was), in *R v Frankfort Motors (Pty) Ltd* 1946

OPD 255 at pp 267-8, the imposition of a globular sentence often causes difficulties on appeal or on review and this seems to be the reason underlying the practice in England."

At p 416G he continued:

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SMITH J

"Whatever the position is, the practice of taking counts together for the purposes of sentence is an undesirable one and it should only be resorted to in exceptional circumstances."

In *S v Leshaba & Ors* 1968 (4) SA 576 (T) the accused had been convicted of contravening s 9(1) of the Motor Carrier Transportation Act, 39 of 1930, and also ss 77(1) and 78(1) of the Road Traffic Ordinance, 21 of 1966. At p 583H CILLIE J said:

"It seems to me inadvisable to take these offences together for sentence. They are separate, different and independent offences, and it would appear as if a separate sentence on each of the different contraventions, where the accused has been found guilty on them all in one trial, is preferable, because sight will then not be lost of the relative importance of each of the contraventions."

The views expressed in the two cases mentioned above have been cited with approval in later cases. In *S v Setlhare* 1973 (2) SA 488 (O) the accused had been convicted of three separate charges of contravening Ordinance 21 of 1966 (O) and the magistrate had, for the purpose of sentence, taken all three convictions as one and imposed a globular sentence of a fine, portion of which was suspended. On review SMUTS J set aside the sentence and remitted the case to the magistrates court for the imposition of a sentence on each of the three charges. He referred to the *Nkosi* and *Leshaba* cases, *supra*, in support of his action. In *S v van Zyl* 1974 (1) SA 113 (T) COETZEE J reiterated that the practice of imposing only one sentence for more than one offence was undesirable and should only be followed in exceptional cases. He said that even where the offences were created by the same Ordinance and, broadly speaking, belonged to the same *genus*, it was preferable to impose separate sentences.

In *S v van der Merwe* 1974 (4) SA 523 (N) LEON J set aside the single sentence imposed by the magistrate in respect of two separate offences, namely exceeding the speed limit and overtaking on a blind curve, and substituted two separate sentences. In *S v Burger* 1975 (2) SA 601 (C) BAKER J held that one sentence in respect of a number of charges could be imposed not only if they were of the same nature but, furthermore, if they were in point of fact closely linked with each other. However, it was preferable in principle, as far as imposing sentence was confirmed, to deal with each charge separately.

The case of *S v Gumede* 1965 (4) SA 257 (N) concerned an accused who had

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been convicted on two counts of contravening the Game Preservation Consolidation Ordinance 11 of 1955 (N) - namely possession of a snare and hunting without a licence or permit. The magistrate imposed a single sentence for the two offences. When submitting the case for review he drew attention of *Nkosi's* case, *supra*, and said that in the light thereof he was doubtful

whether it was proper for him to have treated the two counts as one for sentence. At p 259C FANNIN J said:

"This Court has, in the past, in many cases confirmed similar sentences passed by a magistrate. It is however unnecessary now to consider whether this Court should follow *Nkosi's* case for, in the present case, the accused was at the same time and place found in possession of the remains of a grey duiker and of a snare, and it seems in the highest degree probable that the snare was used to catch the duiker in question. In those circumstances it was, in my opinion, not improper to take the two counts together for the purpose of sentence. The sentence as passed is therefore in order and is confirmed."

I agree with the views expressed in the *Nkosi* and *Leshaba* cases, *supra*. Separate punishments should, save in exceptional cases, be imposed for each separate charge. One globular sentence for two or more offences should only be considered where the offences are of the same or similar nature and are closely linked in point of time. If these two requirements are not satisfied then a separate sentence must be imposed in respect of each offence.

It is usual in cases of forgery and uttering for the purposes of sentencing the accused to treat the conviction for forgery as one with the conviction for uttering the forged instrument. As the offences are usually so interlinked there is no impropriety in so doing. Likewise, where there are multiple cases of fraud or theft by conversion with the same *modus operandi*, this court has on review confirmed cases where two or more of the offences which are closely related in point of time or the amount involved have been treated as one for the purposes of sentence. These cases are, however, the exception rather than the rule See too *S v Chinjekure* HH-35-85 (not reported).

In the present case the offences are entirely dissimilar. There is no justification for treating them as one for the purpose of sentence.

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

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SMITH J

Count 1. A fine of \$200 or, in default of payment, two months' imprisonment. In addition three months' imprisonment all of which is suspended for three years on condition that the accused does not commit within that period any offence of which assault is an element for which he is sentenced to a fine exceeding \$50 or imprisonment without the option of a fine.

Count 2. A fine of \$20 or, in default of payment, one week's imprisonment.

Reynolds J: agrees.

1991 (1) ZLR p71

PICKERING v ZIMBABWE NEWSPAPERS (1980) LTD 1991 (1) ZLR 71 (HC)

Court High Court, Harare

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Adam J

Opposed motion

30 October 1990 & 6 February 1991

Flynote

Practice and procedure - set down of civil trial - requirements for urgent set - down.

Constitutional law - civil trial within reasonable period - applicable test - requirements - s 18(9) of Constitution of Zimbabwe.

Headnote

The applicant sought an order that his trial action against the respondent for damages be heard as a matter of priority. The applicant relied on the constitutional right to a trial within a reasonable time.

Held, the applicant had failed to show any breach of a constitutional right.

Held, the applicant had failed to establish on the facts that he was entitled to the relief he sought.

Held, delay to infringe s 18(9) of Constitution of Zimbabwe should be inordinate delay of such a lengthy period that public confidence in the administration must be shaken.

Cases cited:

Barker v Wingo (1972) 407 US 514 (US Sup Ct)

Fikilini v Attorney-General 1990 (1) ZLR 105 (SC)

R v Cameron [1982] 1 CRR 289

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

S v Corbett 1990 (1) ZLR 205 (SC)

S v Ruzario 1990 (1) ZLR 359 (SC)

R v Askov & Ors [1990] 2 SCR 1199 (SCC)

Munette Investments (Pty) Ltd & Ors v Administrator, Cape Province & Anor 1973 (4) SA 491 (C)

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ADAM J

A P de Bourbon SC for the applicant

J S Sayce for the respondent

Judgment

Adam J: The applicant seeks by special leave, in terms of rule 225 of the High Court of Zimbabwe Rules 1977, for the matter in Case No. HC 307/90 to be set down for hearing. In his founding affidavit the applicant avers that he had issued summons in that matter on 25 January 1990 and that pleadings were closed and a pre-trial conference has been held and that on 9 August 1990 his legal practitioners had made application for dates of trial. He indicates that he fully appreciates that such trials should normally be heard in the sequence of receipt of application for dates of trial but because of the article published by the respondent on 14 January 1990 he has suffered both socially and in his business, which allegations in the article have put considerable mental and emotional strain on him and his family. He states that on 16 August 1990 the respondent maliciously published what purported to be a report of a debate in Parliament of 15 August 1990 and which he alleges maliciously defamed him. He contends that the continued publication by the respondent is having a detrimental effect not only on himself but also on the public confidence in the banking sector and because of this it is in the interests of the public generally, of the banking sector in particular and in his own interests, that trial in Case No. HC 307/90 should be heard as a matter of urgency. He indicates that until the matter is heard the respondent is likely to continue giving prominence to the allegation against the applicant. He states that should an early trial be ordered a fair hearing within a reasonable time under the Constitution of Zimbabwe, for the determination of his civil rights and obligations would have been met. He indicates that the respondent can suffer no prejudice if this matter is heard as a matter of urgency.

In its opposing affidavit the respondent avers that it believes that insufficient grounds exist for treating the matter in the exceptional fashion desired by the applicant and is opposed to the matter being set down out of normal sequence. The respondent states that it has no knowledge of the effect on the applicant but suggests that any strain upon the applicant and his family is unlikely to be greater than many litigants in other cases awaiting trial. The respondent rejects the assertion that it published the article on 16 August 1990 maliciously and contends that the article constituted a fair and a substantially accurate report of the proceedings in Parliament and was published in good faith. The respondent does not accept that the continued publication of articles is necessarily having a detrimental effect on public confidence in the banking sector. It states that the public may well consider the publication of the articles as showing that the banking sector can bear public scrutiny. The respondent does not accept that the interests of the public generally and of the

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ADAM J

banking sector in particular will be served by granting this application. In his answering affidavit the applicant maintains his assertions in his founding affidavit and indicates that he is advised that nearly seven hundred civil cases are awaiting set down and that Case No. HC 307/90 is unlikely to be heard well before 1993.

In the heads of argument for the applicant Mr *de Bourbon* submits that in considering whether or not to give such special leave for a set down the overriding consideration must be interests of justice and this consideration would include the constitutional right to have the matter

determined within a reasonable time. The applicant argues that in this regard the facilities available for the hearing of civil trials cannot defeat his constitutional right - *Barker v Wingo*(1972) 407 US 514 (US Sup Ct). He further submits that a civil trial of this nature should be set down within one year of its commencement, and certainly within six months of the application for trial dates and suggests that any delay beyond that cannot be treated as reasonable. He argues that this will have to be determined as a matter of principle and that this case cannot be equated to an ordinary commercial claim. He submits that until the claims made by the respondent are adjudicated upon, some doubt must exist in the minds of people who know the applicant as to whether or not there is justification for those comments so the applicant is entitled to vindicate his good name as soon as possible.

In the respondent's heads of arguments Mr Sayce submits that on the papers the applicant has failed to make out a special case for purposes of r 225. He argues that the respondent finds it very difficult to accept that the case is unlikely to be heard before 1993. He further submits that it may well be the case that there was mental anguish for the applicant and his family but such mental anguish was also being suffered by many other litigants in non-commercial cases, occupying their place in the queue of cases for trial and so the applicant is in no worse position than many others. He maintains that the application should be determined as a matter of principle but the applicant was in no worse position than many other litigants yet he asks for favourable treatment. He submits that applicant argues that if the applicant's rights were being infringed then so are those of other litigants and should this court therefore accord favourable treatment to those like the applicant who put themselves forward.

The respondent's contention, strictly as it applied to r 225, without the issue of constitutional entitlement, is that on the papers the applicant has failed to make out a special case. I should state that it is common cause between the

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ADAM J

parties that this court has to consider the provisions of s 18(9) of the Constitution of Zimbabwe. Section 18(9) reads:

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

The Supreme Court in *Fikilini v Attorney-General* 1990 (1) ZLR 105 (SC) stated that for purposes of criminal trials unreasonable delay in terms of s 13(4) of the Constitution of Zimbabwe there has to be an extraordinary delay caused by one reason or another in the prosecution of an accused's trial. The four factors articulated in POWELL J in *Barker v Wingo*, *supra*, were approved by the Supreme Court. In his judgment DUMBUTSHENA CJ also referred to *R v Cameron* [1982] 1 CRR 289 and *Bell v Director of Public Prosecutions* [1985] AC 937; [1985] 2 All ER 585 (PC). Further, the Supreme Court of Zimbabwe held that there are many factors which had to be considered before a court could form the view that the accused had not been tried within a reasonable time and also that the burden of proof was on the person who alleged that the delay was unreasonable. In that case the appellant's detention was challenged under s 13(4) of the Constitution which required that a detained person be brought without

undue delay before a court and if the accused detained for a criminal offence was not tried within a reasonable time then he must be released either unconditionally or upon reasonable conditions to ensure for his appearance for trial at a later date. The appellant was arrested in September 1989 and on the production of a Ministerial Certificate in terms of s 106(2) of the Criminal Procedure and Evidence [Chapter 59] the magistrates court refused bail, which was unsuccessfully challenged before the High Court on 17 November 1989. On 27 November 1989 he was brought for further remand, at which time the magistrate refused a further remand since the prosecution did not have a trial date and released the appellant on a warrant of liberation. The appellant again was arrested and detained in terms of the Emergency Powers (Maintenance of Law and Order) Regulations 1983. The State applied for a review of the magistrate's decision and the High Court on 27 December 1989 held that there was gross irregularity in the proceedings in the magistrates court. An appeal was filed to the Supreme Court and his grounds of appeal were amended to include that the appellant had not been afforded a fair hearing within a reasonable time and so entitled to be released in terms of s 13(4). The Supreme Court in determining whether the appellant's constitutional right to a fair trial by an independent tribunal within a reasonable time had been

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infringed concluded that there had been no delay of any kind in the prosecution of the case. It was the magistrate, without the appellant asking, who decided without more to release the appellant.

In *S v Corbett* 1990 (1) ZLR 205 (SC) the Supreme Court was concerned with an undue delay in the prosecution of an appeal and held that the same principles applied in *Fikilini v Attorney-General, supra*, applied with equal force to an inordinate delay in the prosecution of an appeal. The appellant was arrested on 17 March 1985 and on his conviction for culpable homicide sentenced on 6 August 1987. His notice of appeal was dated 7 August 1987 and the appeal was heard on 7 March 1989. The court was not informed of the circumstances that caused the delay and did not know whether there were problems with the expeditious transcription of the record. DUMBUTSHENA CJ maintained that regard must be taken of the shortage of transcribers and of the relevant equipment but this could not outweigh the need to be fair to both the State and the appellant. The Supreme Court, because of the inordinate delay in the prosecution of the appeal, together with the fact that the appellant had spent 17 months in custody, altered the four month term of imprisonment imposed to a fine of \$600.

But in *S v Ruzario* 1990 (1) ZLR 359 (SC) where the appellant was involved in a violent collision which resulted in the death of three of his passengers where two important State witnesses were resident of South Africa and at some stage affidavits had been obtained from them and they had returned to South Africa. At the trial for culpable homicide some four years and four months later the affidavits were admitted by the magistrate as evidence and there was also evidence from other State witnesses. The Supreme Court held that although the magistrate was wrong in admitting the affidavits as evidence, there was other evidence to support the conviction. The appellant had also attached the sentence of four months' imprisonment with labour due to the delay of four years in bringing the appellant to trial which, it was argued, was

so powerful a mitigating feature as to render the sentence manifestly excessive which had to be reduced to a monetary penalty. The court said that it appeared that the delay in part was due to the State's attempts to trace the two State witnesses from South Africa and it was mid-February 1986 when the State concluded that they could not be found and that for the subsequent two-year delay no explanation was proffered by the State. GUBBAY ACJ was prepared to accept that such delay was due to negligence or inefficiency and not because the State wanted to actively prejudice the appellant in his defence. The Supreme Court held that once the appellant knew that the State was dragging its feet he ought to have asserted his

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ADAM J

constitutional right to a hearing within a reasonable time. So his failure to do so and merely taking a passive position must inevitably affect the weight that would be given to delay as a mitigating factor. The court concluded that the magistrate had taken into account the four year delay in his penalty and so dismissed his appeal in its entirety.

In *R v Cameron, supra*, infringement of s 11(b) of the Canadian Charter of Rights and Freedoms in Part I of the Constitution Act 1982 was considered. Section 11 provides: "Any person charged with an offence has the right ... (b) to be tried within a reasonable time". The accused was charged with a drug related offence on 3 June 1980, a preliminary inquiry was concluded on 3 October 1980 when the accused was committed to stand trial and the trial was set for 31 March 1981 but by consent of the parties adjourned but a new trial date was set for 7 October 1981. On that date the trial commenced but the main Crown witness refused to testify and was sentenced to a six-month term of imprisonment for contempt of court and the Crown entered a stay of the charge. On 12 May 1982 a summons was served upon the accused for his appearance in court on that charge. The accused relied upon the seven months delay from the entry of stay to the service of the summons and offered no evidence that he had suffered prejudice but pointed out that there would be a further lapse of seven months during which memories of all witnesses was bound to suffer. McDONALD J said at 292-95:

"What approach should this Court take to the interpretation of s 11(b) ... In my view considerable assistance to the interpretation of s 11(b) can be afforded by reference to the jurisprudence interpreting the 'right to a speedy trial' guaranteed by the Sixth Amendment to the American Constitution, and the right to be tried 'within a reasonable time', guaranteed by Article 6(1) of the European on Human Rights.... In *Barker v Wingo*, WARDEN, 407 US 514 (1972), the Supreme Court of the United States held that, in deciding whether an accused has been deprived of this right, what is to be applied is 'a balancing test, in which the conduct of both the prosecution and the defendant are weighed (*per* POWELL J). The remedy for the violation of this constitutional right is the dismissal of the indictment or the vacation of the sentence : *Strunk aka Wagner v US* 412 US 434 (1973).

In *Barker v Wingo*, POWELL J (at pp 519-20) pointed out that, apart from the interests of the accused, society has an interest in the accused being tried promptly because a backlog of cases enables accused persons 'to negotiate more effectively for pleas of guilty to lesser offences and

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ADAM J

otherwise manipulate the system, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes ..., the longer an accused is free awaiting trial the more tempting becomes his opportunity

to jump bail and escape ... delay between arrest and punishment may have a detrimental effect on rehabilitation', and the longer an accused is free awaiting trial the longer he is 'disadvantaged by restraint on his liberty and by living under a cloud of anxiety, suspicion, and often hostility' (at p 533).

Moreover, if the accused is kept in custody pending trial, lengthy exposure to overcrowded conditions in local jails (like our urban centres) where there are little or no recreational or rehabilitation programmes 'has a destructive effective on human character and makes the rehabilitation of the individual offender much more difficult, such detention is costly to the state, and incarcerated persons cannot support their families'.

POWELL J also pointed out that delay may work to the accused's advantage and to the weakening of the prosecution's case if prosecution witnesses become unavailable or their memories fade.

POWELL J stressed that the right to a speedy trial is vague and amorphous in that it is impossible to say definitely and with precision 'how long is too long in a system where justice is supposed to be swift and deliberate', and that the remedy of dismissal of the indictment, which is 'the only possible remedy', is 'unsatisfactorily severe' because it may free a person guilty of a serious crime, without trial.

All these policy considerations, it seems to me, are equally appropriate to a determination of whether an accused in Canada has been brought to trial 'within a reasonable time', as are the factors which POWELL J identified as one 'which courts should assess in determining whether a particular defendant has been deprived of his right'. They are (at pp 530-2):

'The length of 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. ... the reason the government assigns to justify the delay ...

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A deliberate attempt to delay the trial in order to hamper the defence 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. ... 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 has 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 the defendants which the speedy trial might be designed to protect. This court has identified three such interests : (i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence 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 defence 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'

These factors, said POWELL J, are related to each other and 'must be considered together with such other circumstances as may be relevant'. These factors (at p 533):

'...have no talismanic qualities; court's must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with the full recognition that the accused's interest in a speedy trial is specifically affirmed in the constitution.'

... 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*

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

In *Bell v Director of Public Prosecutions*, *supra*, the appellant was arrested on 18 May 1977 and convicted on 20 October 1977 of illegal possession of a firearm, robbery, etc. in the Gun Court and sentenced to three concurrent sentences of seven, five and ten years. On 7 March 1979 the Court of Appeal of Jamaica quashed the convictions and ordered a re-trial and the Registrar of that Court of Appeal sent a written notice of this on 12 March 1979. The notice was not received by the Gun Court until 19 December 1979. The original statements of witnesses had to be served on the appellant but these were not traced. The case was mentioned in the Gun Court on 28 January, 8 and 15 February 1980 and again on 21 March 1980 when bail was granted to the appellant. He was represented by counsel on some appearances and thereafter on 10 November 1981 the Crown offered no evidence and the appellant was discharged. On 12 February 1982 the appellant was rearrested and despite objections from the appellant's lawyer, a re-trial was ordered for 11 May 1982. On 5 May 1981 the appellant by notice of motion applied for a declaration that his rights under s 20(1) of the Constitution of Jamaica had been infringed in that the appellant had not been afforded the right to a fair hearing within a reasonable time. His application was dismissed by the Supreme Court on 3 June 1982 and by the Court of Appeal of Jamaica on 19 May 1983. He was granted special leave to appeal by the Privy Council on 11 April 1984. The appellant remained out on bail. On 30 April 1985 the Privy Council held that the operative period of delay began on 7 March 1979 when a re-trial was ordered and although the delay thereafter was 37 months in the Gun Court, this would not amount to an unreasonable delay in a normal trial, given the conditions prevailing in Jamaica, it was unreasonable in the case of the appellant's re-trial and so his rights to a fair hearing within a reasonable time had been infringed. LORD TEMPLEMAN cited with approval *Barker v Wingo*, *supra*, and "acknowledged the relevance and importance of the four factors" discussed in that case. He observed at 591-3:

"The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case. Their Lordships accept

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the submission of the respondents that ... the courts of Jamaica must balance the fundamental right of the individual to 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. The administration of justice in Jamaica is faced with a problem, not unknown in other countries, of disparity between the demand for legal services and the supply of legal services. Delays are inevitable. The solution is not necessarily to be found in an increase in the supply of legal services by the appointment of additional judges, the creation of new courts and the qualification of additional lawyers. Expansion of legal services necessarily depend on the financial resources available for that purpose. Moreover, an injudicious attempt to expand an existing system of courts, judges and practitioners could lead to deterioration in the quality of the justice administered and to the conviction of the innocent and the acquittal of the guilty. The task of considering these problems falls on the legislature of Jamaica, mindful of the provisions of the Constitutions and mindful of the advice tendered from time to time by the judiciary, the prosecution service and the legal profession of Jamaica. The task of deciding whether and what periods of delay explicable by the burdens imposed on the courts by the weight of criminal causes suffice to contravene the rights of a particular accused to a fair hearing within a reasonable time falls on the courts of Jamaica and in particular on the members of the Court of Appeal who have extensive knowledge and experience of conditions in Jamaica. In the present case ... a delay of two years in the Gun Court is a current average period of delay in cases in which there are no problems for witnesses. The Court of Appeal did not demur. Their Lordships accept the accuracy of the statement and the conclusion, implicit in the statement, that in the present circumstances in Jamaica, such delay does not by itself infringe the rights of an accused to a fair hearing within a reasonable time. No doubt the courts and the prosecution authorities recognise the need to take all reasonable steps to reduce the period of delay wherever possible. Thus, their Lordships accept the submission of the respondent that in general the courts of Jamaica are best equipped to decide whether in a particular case delay from whatever cause contravenes the fundamental right granted by the Constitution of Jamaica. The respondents explained, and their Lordships accept, that a particular current problem arises from the difficulty in securing the attendance of witnesses. Witnesses absent themselves through ignorance or fear, sometimes influenced by intimidation, crude or subtle. The courts of Jamaica must

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constantly balance the claim of the accused to be tried, notwithstanding the absence of witnesses, against the possibility, unproved and unprovable in many cases, that the absence of a necessary witness has been procured or encouraged by someone acting in the interests of the accused. The courts seek to prevent the exploitation of the rights conferred by the Constitution and to weigh the rights of the accused to be tried against the public interest in ensuring that the trial should only take place when the guilt or innocence of the accused can fairly be established by all the relevant evidence. The Board will therefore be reluctant to disagree with the considered view of the Court of Appeal of Jamaica that the right of an accused to a fair hearing within a reasonable time has not been infringed. But since no Court is infallible, there remains the power and duty of the Board to correct any error of principle and to reverse a decision which, in the opinion of the Board could only have been reached by a reliance on some irrelevant consideration or by ignoring some decisive consideration. ... Their Lordships have no doubt that the operative period of delay began on 7 March 1979 when the Court of Appeal ordered a retrial. From that date it was the duty of those charged with the administration of justice to ensure that the order for a retrial was obeyed without avoidable delay. For the reasons already advanced, their Lordships would in a normal case accept the view of the courts of Jamaica that a delay of 32 months or thereabouts did not infringe the constitutional rights of an accused.

But their Lordships consider that in the present case the courts fell into the error when they compared the delay which occurred after the order for a retrial with the average delay which occurs between arrest and trial."

In a recent decision the Supreme Court of Canada considered once again s 11(b) of the Canadian Charter of Rights and Freedoms in *R v Askov & Ors* [1990] 2 SCR 1199 (SCC), where three of the four accused were arrested and detained on 19 November 1983 while the

fourth was arrested on 30 November 1983. The other three accused were released on bail on 7 May 1984. The bail terms for all involved reporting to the police and not communicating with their co-accused but these conditions were varied from time to time to the accused's benefit, however, the accused remained under considerable restraint. Askov was re-arrested another charged on 1 October 1984. Prior to this while the three accused were in custody the Crown in December 1983 was prepared to set an early date for the preliminary enquiry but the accused requested that it be put over to 14 February 1984 when preliminary enquiry

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was set for the first week of July and it commenced on 4 July 1984 but could not be concluded so it was set over and was completed on 21 September 1984. On 1 October 1984 the presiding judge set the trial for 15 October 1985 since an earlier date could not be set due to other cases which had priority either because such accused persons were in custody or because the offence date was earlier. On 25 October 1985 when it was clear that the matter could not be heard the legal practitioners for the Crown and the accused appeared and the matter was postponed for trial to 2 September 1986. On 2 September 1986 there was application made to the trial judge to stay the proceedings on the grounds that the trial had been unreasonably delayed and thereby infringed s 11(b) of the Canadian Charter of Rights and Freedoms. The judge of the District court of Judicial District of Peel granted the stay. His decision was upset by the Ontario Court of Appeal but the Supreme Court of Canada reversed the decision of Ontario Court Appeal. CORY J observed at 1208-1209; 1219; 1223-1236; 1238-1241 and 1243-1246:

"In the United States the Sixth Amendment ensures that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial'. The United States Supreme Court considered the issue of *Barker v Wingo* 407 US 514 (1972). In that case Barker, who was charged with murder, was brought to trial five years after the murder was committed. The delay was caused by that necessity of trying an accomplice beforehand. This prerequisite trial was extremely complication; the accomplice was tried no less than six times. During this on going process, Barker initially had agreed to the continuances or adjournments. He only began to assert his right to a speedy trial three and one-half years after the charges were laid.

The court held that a flexible approach should be taken to cases involving delay and that the multiple purposes or arms of the Sixth Amendment must be appreciated, POWELL J, giving the reasons for the court, recognized the general concern that all persons accused with crimes should be treated according to fair and decent procedures. He particularly noted that there were three individual interests which the right was designed to protect. They were:

- (i) to prevent oppressive pretrial incarceration;
- (ii) to minimize the anxiety and concern of the accused; and
- (iii) to limit the possibility that the defence will be impaired or prejudice.

However, POWELL J, went on to observe that unlike other constitutional rights which only have an individual interest, the right to speedy trial involved this added dimension of societal interest ... In order to balance the

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individual right and the communal aspect ... balancing is undertaken by reference to four factors identified by

POWELL J as the test for infringement of the right to a "speedy trial". They are as follows:

- (i) the length of the delay;
- (ii) the reason for the delay;
- (iii) the accused's assertion of the right; and
- (iv) prejudice to the accused.

... I agree ... that s 11(b) explicitly focuses upon the individual interest of liberty and security of the person. Like other specific guarantees provided by s 11, this paragraph is primarily concerned with an aspect of fundamental justice guaranteed by s 7 of the Charter. There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for the accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental level of importance, all accused persons ... should be given the opportunity and to have their name cleared to defend themselves and their reputation re-established at the earliest possible time.

i) The Length of the Delay

It is clear that the longer the delay, the more difficult it should be for a court to excuse it ... very lengthy delays may be such that they cannot be justified for any reason.

ii) Explanation for the Delay ... may be usefully subdivided with the aspects of systemic delay and the conduct of the accused amplified.

(a) The Conduct of the Crown (or Delay Attributable to the Crown)

Generally speaking, this category will comprise all of the potential factors causing delay which flow from the nature of the case, the conduct of the Crown, including officers of the State, and the inherent time requirements of the case. delays attributable to the actions of the Crown or its officers will weigh in favour of the accused ... It is under this heading that the complexity of the case should be taken into account. Complex cases which require longer time for preparation, a greater expenditure of resources by Crown officers and the longer use of institutional facilities will justify delays longer than those that would be acceptable in simple cases.

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(b) Systemic or Institutional Delays

... the question of delays caused by systemic or institutional limitations should also be discussed under the heading of delays attributable to the Crown. This factor will often be the most difficult to assess. A careful and sensitive balancing will be required in order to properly assess the significance of this aspect of delay. Firstly, let us consider the problem from the point of view of society. Section 11(b) applies to all Canadians in every part of our land. In a country as vast and diverse as ours the institutional problems are bound to differ greatly from province to province and from district to district in each province. Differences of climate, terrain, population and financial resources will require different solutions for the problem of providing adequate facilities and personnel. Lack of financial resources may require imaginative answers to difficult problems ... The problems presented and solutions required will vary between heavily populated centre ... and the sparsely populated districts ... Wise political decisions will be required with regard to the allocation of scarce funds. Due deference will have to be given to those political decisions as to the provisions of court room facilities ... must, for example, be balanced against the provision of health care and highways. Yet solutions must be found ... Similarly situated communities can provide a rough comparison and some guidance as to what time period constitutes an unreasonable delay of

the trial of an accused person. That comparison should always be made with the most efficient of the comparable jurisdictions.

The right guaranteed by s 11(b) is of such fundamental importance to the individual and of such significance to the community as a whole that lack of institutional resources cannot be employed to justify a continuing unreasonable postponement of trials. In *Mills*, [*Mills v The Queen* (1986) SCR 863] LAMER J noted at p 935:

'In an ideal world there would be no delays in bringing an accused to trial and there would be no difficulties in securing fully adequate funding, personnel and facilities of criminal justice. As we do not live in such a world, some allowances must be made for limited institutional resources'.

However, the lack of institutional resources can never be used as a basis for rendering the s 11(b) guarantee meaningless ... Where inordinate delays do occur, it is for those who are responsible for the lack of facilities who should bear the public criticism that is bound to arise as a result of staying of proceedings which must be the inevitable consequence -

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quence of unreasonable delay. Members of the community will not and should not condone or accept a situation where those alleged to have committed serious crimes are never brought to trial solely as a result of unduly long delays. It is a serious consequence with potentially dangerous overtones for the community. It is right and proper that there be criticism of the situation when it occurs.

The response to the question of 'how long is too long' as it applies to institutional delays will always be difficult to fashion in our country. The question must be answered in light of the particular facts of each case. There can be no certain standard of a fixed time which will be applicable in every region of the country. Nonetheless, an inquiry into what is reasonable in any region should not be taken in isolation and must, of necessity, involve a comparison with other jurisdiction. Consideration must be given to the geography, the population and the material resources of the province and district. The comparison of similar and this comparable districts must always be made with the better districts and not the worst. ... To summarize, when considering delays occasioned by inadequate institutional resources, the question of how long a delay is too long may be resolved by comparing the questioned jurisdiction to the standard maintained by the best comparable jurisdiction in the country. The comparison need not be too precise or exact. Rather, it should look to the appropriate ranges of delay to determine what is a reasonable limit. In all cases it is incumbent upon the Crown to show that the institutional delay in question is justifiable.

(c) The Conduct of the Accused (or Delays Attributable to the Accused)

It should be emphasised that an enquiry into the actions of the accused should be ... where the accused's acts either directly caused the delay ... or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial. These direct acts ... such as seeking an adjournment to retain new counsel, must of course be distinguished from ... the delay caused by factors beyond the control of the accused or a situation where the accused did nothing to prevent a delay caused by the Crown.

In addition ... the burden of proving that the direct acts of the accused caused the delay must fall upon the Crown. This would be true except in those cases where the effects of the accused's action are so clear and readily apparent that the intent of the accused to cause a delay is the inference that must be drawn from the record of his or her actions.

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(iii) Waiver

The accused should not be required to assert the explicitly protected individual right to trial within a reasonable time. It is now well established that any waiver of a Charter right must be 'clear and unequivocal ... with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on these rights' ... Failure to assert the right would be insufficient in itself to impugn the motives of the accused ... Rather there must be something in the conduct of the accused that is sufficient to give rise to the inference that the accused has understood that he or she had a s 11(b) guarantee, understood its nature and has waived the right provided by that guarantee. Although no particular magical incantation of words is required to waive a right, nevertheless the waiver must be expressed in some manner. Silence or lack of objection cannot constitute a lawful waiver ... If the Crown is relying upon actions of the accused to demonstrate waiver, then the *onus* will lie upon the Crown to prove that a specific waiver can be inferred. It may well be that the setting of the trial dates and the agreement to those dates by counsel for the accused may be sufficient to constitute waiver ...

(iv) Prejudice to the Accused

It should be inferred that a very long and unreasonable delay has prejudiced the accused ... Nevertheless, it will be open to the Crown to attempt to demonstrate that the accused has not been prejudiced ... Furthermore ... accused persons who have suffered some additional form of prejudice are permitted to adduce evidence of prejudice on their own initiative in order to strengthen their position in seeking a remedy ... From the foregoing review it is possible to give a brief summary of all the factors which should be taken into account in considering whether the length of the delay of a trial has been reasonable.

(i) The Length of the Delay

The longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason.

(ii) Explanation for the Delay

(a) Delays Attributable to the Crown

Delays attributable to the action of the Crown or officers of the Crown will weigh in favour of the accused ...
Complex cases which require

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longer time ... will justify delays longer than those acceptable in simple cases.

(b) Systemic or Institutional Delays

Delays occasioned by inadequate resources must weigh against the Crown. Institutional delays should be considered in light of the comparative test referred to earlier. The burden of justifying inadequate resources resulting in systemic delays will always fall upon the Crown. There may be a transitional period to allow for a temporary period of lenient treatment of systemic delay

(c) Delays Attributable to the Accused

Certain actions of the accused will justify delays. For example, a request for adjournment or delays to retain different counsel.

There may as well be instances where it can be demonstrated by the Crown that the actions of the accused were undertaken for the purposes of delaying the trial.

(iii) Waiver

If the accused waives his rights by consenting to or concurring in a delay, this must be taken into account. However, for a waiver to be valid it must be informed, unequivocal and freely given. The burden of showing that a waiver should be inferred falls upon the Crown. An example of a waiver or concurrence that could be inferred is the consent by counsel for the accused to a fixed date for trial.

(iv) Prejudice to the Accused

There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delays.

(i) The Length of the Delay

No matter what standard of measure is used or what test is applied, the trial in this case has been inordinately delayed. Even when the first ... one year prior to preliminary hearing is discounted as being in large part attributable to the request for adjournments by the appellants, there remains a delay period of almost two years. The experienced trial judge

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who has presided for many years in Peel District described the delay as 'clearly excessive and unreasonable' ...

The period of delay in the case at bar is so lengthy that unless there is some very strong basis for justifying the delay ... then it would be impossible for a court to tolerate such a delay.

(iv) Prejudice to the Accused

The trial judge found that the appellants had been prejudiced by the delay ... he noted the lengthy period of incarceration for the three appellants and the restrictions contained in the bail terms ... There has been no attack on these findings. Consequently, it is impossible to say that the Crown has discharged the burden that rested upon it to show that the delay caused no prejudice to the appellants.

(ii) Explanation for the Delay

(a) Delays Attributable to the Crown

It is clear that delays cannot be attributable to any action of the Crown. At no time did the Crown make any request for adjournments or take any step that delayed the trial of the action in any way.

There is nothing in the case that is so complex or inherently difficult to justify a lengthy delay ...

(b) Systematic or Institutional Delays

This trial was to be heard in Brompton, in the District of Peel in Ontario. This district has long been notorious for the inordinate length of time required to obtain a trial date. The delays are said to be caused by lack of facilities. The evidence submitted contained a study done by Professor Carl Baar ... Professor Baar has concluded that the Peel District ... experiences extremely long delays that are out of ordinary compared to the rest of Ontario, the rest of Canada or the United States ... To make matters worse, the situation in Peel District appears to have deteriorated from the time this case was initiated ... It is apparent that the situation in Peel District has been in a deplorable state for many years ... Nonetheless, something must be done. Urgent attention to the situation is required. The response of the Government of Ontario has been neither overwhelming nor particularly successful ... The extent and gravity of the problem in Peel is brought home by reference to the comparative study done on 1987 by Professor Baar. That study illustrated that in Canada, New Brunswick and Quebec were best able to bring

their cases to trial within thirty to ninety-day range. In terms of the time taken to

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completely dispose of a case from committal to disposition, the median total time in New Brunswick's lower courts (provincial courts) was 152 days. The median total time in upper courts was 72 days. By comparison, in Ontario the best district was London with a median total time of 239 days and the median upper court time of 105 days. Toronto, Ottawa and St Catherines were all close together with median total times of between 315 and 349 days, and upper court times between 133 and 144 days.

Professor Baar wrote that '... Brompton District Court ... median total time was 607 days and the median upper court time was 423 days' ... Professor Baar concluded that the Peel District is generally substantially slower than the slowest United States jurisdictions. Further, he noted that the delay in the present case was longer than ninety per cent of all cases in terms of median total time among those heard even in Peel District. This case therefore represents one of the worst from the point of view of delay in the worst district not only in Canada, but ... anywhere north of the Rio Grande. ... A review of the recent statistics kept by the courts in Montreal, Longueuil and Terrebonne by comparison reveals how very unsatisfactory and intolerable is the state of affairs in Peel. ... The average time in the three districts to commence a trial is 84,3 days and if from the total there is deducted those cases where a second trial was directed or defence requested an adjournment, the waiting period is only 63,5 days.

Making a very rough comparison and more than doubling the longest waiting period to make allowance for the special circumstances in Peel would indicate a period of delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable. The usual delays in Peel are more than four times as long as those of busy metropolitan districts in the province of Quebec and the delay in this case is more than eight times as long. The figures from the comparable districts demonstrate that the Peel District situation is unreasonable and intolerable.

The delay in this case is such that it is impossible to come to any other conclusion than that s 11(b) Charter rights guaranteed to the individual accused have been infringed. As well, the societal interest in ensuring that the accused be brought to trial within a reasonable time has been grossly offended and denigrated. Indeed the delay is of such an inordinate length that public confidence in the administration of justice must be shaken. Justice so delayed is an affront to the individual, to the community and to the very administration of justice. The lack of

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institutional facilities cannot in this case be accepted as a basis for justifying the delay.

I am well aware that as a consequence of this decision, a stay of proceedings must be directed. This is, to say the least, most unfortunate and regrettable. It is obvious that the charges against the appellants are serious. Extortion and threatened armed violence tear at the basic fabric of society. ... There can be no doubt that it would be in the best interest of society to proceed with the trial of those who are charged with posing a serious threat to society. Yet, that trial can only be undertaken if the Charter right to trial within a reasonable time has not been infringed ... To conclude otherwise would render meaningless a right enshrined in the Charter as the supreme law of the land.

(c) Delays Attributable to the Accused

At the outset, I would repeat that in this case it is clear that there was no direct action on the part of the appellants which resulted in any delay apart from that which occurred prior to the preliminary hearing. ... The Court of Appeal found that the following actions of the appellants were indicative of abuse of the right to trial within a reasonable time:

- (1) the accused had a concealed plan aimed at waiting until the delay was unreasonable before bringing their

motion;

- (2) that facilities may have existed to accommodate an earlier trial for the accused; and
- (3) that the accused expressed no concern or objection as regards the delay.

These conclusions differed from those of the trial judge, who found that the parties could not be given an earlier date ... The transcript demonstrates that

- (1) counsel attended the trial co-ordinator's office to find out the earliest possible date and were told that it was June, 1986;
- (2) the judge presiding at the assignment court noted that this information was incorrect and told counsel that, with the exception of a week in April, the earliest trial date available was September, 1986;
- (3) at the assignment court Crown called five priority cases ahead of the case at bar, for placement in ... April. Those priority cases were either older cases than the one at bar or involved a detained accused; and
- (4) the Crown estimated that the case at bar would take two weeks while the free days in April amounted to only one week.

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The difference of opinion between the trial judge and the Court of Appeal can be readily understood in light of the explanation that the Court of Appeal was only provided with a partial transcript of the day's proceedings in the Assignment Court. It is the complete transcript filed in this Court that makes it apparent that the trial judge was correct in his assessment that there was no other trial date available. ... The Crown was properly giving priority to other cases and it was absolutely clear that it was impossible to fix an earlier date for the trial of the case at bar. This fact, made known to all in the court room by the judge, made it utterly futile for counsel for the appellants to complain about the delay to the assignment court judge. Quite simply, the appellants had no chance as to the date of their trial; they were assigned the earlier possible date.

The complete transcript also reveals that there was no evidence to even support a finding that the appellants had a concealed plan to wait until the delay was unreasonable before complaining or bringing a motion.

Indeed, the transcript of the proceedings of the Assignment Court indicates that in the presence of counsel for the appellants, while dealing with one of the 'priority cases', there was an objection registered by counsel in that case as to the delay in the trial. To that objection the Assignment Court Judge replied:

All right. I have recorded your objection ... but I don't propose to do anything other than to set a new trial date, without prejudice to your rights to move and seek whatever remedy you consider might be available to you ...' ...In summary, a review of the complete transcript ... makes it clear that there was nothing in the conduct of the accused which could indicate that they were deliberately attempting to use the provisions in an improper manner ...

(ii) Waiver

A consideration of the waiver issue requires that answers be given to two questions. The first is whether the appellants specifically waived their rights to a trial within a reasonable time. The second is whether their actions during the course of the proceedings were tantamount to waiver ...

The first question can be readily answered. On the facts of this case there was no explicit waiver of their rights by the appellants ... The term 'waiver' indicates that a choice has been made between available options. When the entire record of proceedings on the occasion when the last trial date was fixed is read, it becomes crystal clear

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had no choice as to the date of the trial. The first available dates were given and allotted to these appellants. Unless some real option is available, there can be no choice exercised and as a result waiver is impossible.

The silence of the appellants or their failure to raise an objection to a long delay is certainly not enough in the circumstances to infer waiver. Rather the *onus* rests upon the Crown to demonstrate that the actions amounted to an agreement to the delay or waiver of their right."

The foregoing cases all dealt with criminal proceedings. In the instant case civil proceedings are involved and pursuant to r 214 of the High Court of Zimbabwe Rules, 1971, as amended, whenever the pleadings in civil cases are closed, discovery effected and a pre-trial conference in terms of r182 held, the plaintiff or defendant may request the registrar of this Court to place the case on the lit according to r 215 the registrar proceeds to allocate a date for hearing but only when a date for trial has been fixed, after taking into consideration any objections by the parties, by the registrar is a notice of set-down filed and such notice delivered to the opposite party. I should indicate that for Case No. HC 307/90 the documents filed to date reveal that in response to the plaintiff's application for trial dates the registrar indicated on 29 October 1990 that the trial could be held at anytime during 12 to 16 November 1990 but those dates were not fixed for trial and no notice of set down was filed.

It is true that the principles considered in the foregoing cases all related to criminal proceedings, but many of these are also applicable to other fair hearings within a reasonable time for the determination of civil rights or obligations. It is clear that besides the rights of the individual, societal interest is also involved, requiring a balance to be made. The crucial question is "how long is too long" and as the Supreme Court of Canada candidly observed in *Askov's* case, *supra*, that a response to such a question "will always be difficult to fashion" and must be determined in light of the particular circumstances of each case. In that case, the Supreme Court of Canada, did after making allowance for limited institutional resources, hold that when "the delay is of such inordinate length that public confidence in the administration is shaken ... that lack of institutional facilities cannot ... be accepted as a basis for justifying the delay".

The applicant also places reliance on the averments concerning mental anguish as well as continuing publications by the respondent as sufficient

ADAM J

grounds for this court to grant special leave and so in this way the applicant's constitutional rights under s 18(9) would be upheld in that he would have a trial within a reasonable time. He also asserts that he believes that his case is unlikely to be heard before 1993. Further, Mr *de Bourbon* maintains that civil trials of this nature should be set for trial within one year of its commencement and certainly within six months of the application for trial dates and that any delay beyond that cannot be said to be reasonable. A trial in such a case in the first term of

1993 would make it just over 29 months from 9 August 1990 , the date of the application for a trial date.

The *onus* is upon the applicant to show that such delay infringes the provisions of s 18(9) of the Constitution of Zimbabwe. CORY J in *Askov's* case, *supra*, held that the delay should be inordinate delay of such a lengthy period that public confidence in the administration of justice must be shaken. "Justice so delayed is an affront to the individual, to the community and to the very administration of Justice."

Not only has the applicant not established that trial in this case will not be held before 1993, but also that a trial in 1993 or a trial in this case not held within 6 months of the application for a trial date would constitute an infringement of s 18(9) of the Constitution of Zimbabwe. As LAMER J correctly observed in *Mills v The Queen*, *supra*, we do not live in an ideal world, which means allowances must be made.

The general rule, as far as applications for matters to be heard as a matter of urgency, is that this court must be satisfied that if the matter is not heard urgently or if special leave is not granted, substantial injustice would result to the applicant - *Munette Investments (Pty) Ltd & Ors v Administrator, Cape Province & Anor* 1973 (4) SA 491 (C) at 493.

It was correctly pointed out by Mr Sayce that the applicant is in no worse position than other litigants in civil trials of like nature and to accord him favourable treatment ahead of these other litigants would also be an infringement of their constitutional rights. It is no answer to argue that these other litigants have not sought the assistance of this court in order to assert their constitutional rights. Surely a litigant who complies with the Rules of the High Court of Zimbabwe 1971 and makes application for a trial date is asking the Registrar to allocate and fix a date for trial for that person. Such a litigant can only be said to be seeking a date for trial within a reasonable time. To hold otherwise would be to maintain that such a litigant desires that his constitutional rights under s 18(9) be violated.

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ADAM J

It is only in most exceptional circumstances that special leave under r 255 of the Rules of the High Court of Zimbabwe 1971 would be granted by this court. The applicant has not discharged the *onus* placed upon him so that this court may exercise its discretion in his favour. Accordingly the application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

1991 (1) ZLR p95

PACHYDAKIS v MASTER OF THE HIGH COURT & ORS 1991 (1) ZLR 95 (HC) *

Editor's Note:(1)

Court **High Court, Harare**

Smith J

Civil application

26 November 1990 & 13 February 1991

Flynote

Succession - lost will - presumption that will destroyed "animo revocandi" - rebuttable by evidence of testator's conduct or intention.

Headnote

The applicant's late husband had executed a will ten years prior to his death by suicide in terms of which he left his entire estate to the applicant. The will could not be found on his death which gave rise to a rebuttable presumption that the testator had destroyed the will *animo revocandi*.

It having previously been accepted by all parties that the testator had, in this will, left his entire estate to his wife, she instituted proceedings that such will be accepted by the Master.

Held, that the court had to be morally convinced that the will was not destroyed *animo cancellandi*, from evidence of the testator's conduct or intention or by inference from the circumstances of the case.

Held, further, that the evidence led was sufficient to rebut the presumption in that it was improbable that the testator had secretly destroyed his will with the avowed purpose of disinheriting the applicant.

Cases cited:

Ex parte *Slade* 1922 TPD 220

Ex parte *Warren* 1955 (4) SA 326 (W)

Allan v Morrison & Ors [1900] AC 604 (PC)

Davis v Steel & Eriksen NO 1949 (3) SA 177 (W)

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SMITH J

A P de Bourbon SC for the applicant

No appearance for the first and second respondents

M J Gillespie for the third and fourth respondents

Judgment

Smith J: The applicant is the widow of Emmanuel Peter Pachydakis (hereinafter referred to as "the deceased") who died by suicide on 26 June 1986. On 12 May 1976 each of them had made a will in which the testator left his or her entire estate to the surviving spouse unless the surviving spouse predeceased the testator or died within 30 days after the death of the testator, in which case the testator's estate was left to the applicant's elder brother. On 13 April 1986 the applicant and the deceased entered into a deed of separation. In terms of the typed document the deceased was to leave the matrimonial home within 7 days from the date of signature of the agreement. That provision was, however, altered in manuscript so as to provide that the deceased was to vacate the matrimonial home on or before 30 September 1986. After the death of the deceased his will could not be found. The first respondent and the second respondent, which is the executor of the deceased's estate, refused to accept the applicant as the surviving spouse of the deceased because there was no proof that the parish priest who had married the applicant and the deceased was a properly appointed marriage officer. The second respondent accepted that the third and fourth respondents, who were sisters of the deceased, were beneficiaries of his estate.

On 16 November 1989 an order of court was issued by consent in which it was declared that -

- (a) the applicant and the deceased were lawfully married to each other according to the laws of Southern Rhodesia on 22 September 1962 and remained so married at the time of the death of the deceased;
- (b) the terms of the last will of the deceased were as claimed by the applicant, which will had been duly executed by the deceased on 12 May 1976.

In terms of the order the issue of whether or not the deceased had revoked the abovementioned will was referred for oral evidence in terms of Rule 159 of the Rules of the High Court of Zimbabwe, 1971. The costs of the matter were reserved to be determined by the court receiving the oral evidence.

Three witnesses gave oral evidence. They were Dr Hercher, a medical practitioner who practised in Shurugwi, the town where the applicant and the deceased lived, Mrs Carlsson, who lived in Shurugwi and had known the applicant and the deceased for six years prior to his death and the applicant.

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SMITH J

Dr Hercher said that both the applicant and the deceased had been patients of his since he started his practice in Shurugwi in 1974. He said that he had heard that the applicant and the deceased had separated but despite the separation relations between the two had been good and they remained on friendly terms. When he heard that the deceased had taken his own life he had thought that it was a panic - reaction on the part of the deceased because his separation from the applicant would not be tolerable. One evening, some 4 to 6 weeks before the deceased's death, the deceased had visited him after working hours. The deceased had said that he still loved his wife and wanted to stay with her and that he could not understand

why she wanted the separation. The deceased had shown him his will and said that he was leaving everything to his wife or, if she had predeceased him, to her elder brother. The witness said that the deceased showed his will in order to demonstrate that he still loved his wife. After showing his will and talking about his domestic affairs the deceased had then spoken about his health. Then he had left, putting his will between the covers of a black book in which there were some other loose papers. The witness had thereafter seen the deceased once or twice and on each occasion the latter had not said or done anything which would indicate that his attitude to his wife had changed. The day before his death the deceased had visited the witness seeking accommodation. The witness told the deceased that the flat he owned was already occupied. The deceased then said that he would see if he could find accommodation in Gweru and would go to see his sister, the third respondent. However he did not hold out much hope because he said that his sister did not like him and did not care about him. On the occasion of this visit the deceased had been relatively quiet.

Under cross-examination this witness said that the deceased had suffered from a heart disturbance which had started in 1986. He was being treated for an extra beat of the heart. He took valium, which was a sedative that acted on the central nervous system, slowing down the rate of heart beats and normalising the extra beat. Some five to six weeks before his death the deceased had been asked to visit the surgery and an electrocardiogram had shown that the deceased was under enormous tension and also he had high blood pressure. To prevent complications such as a stroke or myocardial infarction, valium had been prescribed. The separation procedures had contributed to his emotional tension. However, on many occasions the deceased had said that he still loved his wife.

Mrs Carlsson said that she knew the applicant and the deceased for six years prior to the death of the latter. She had learnt of the separation from the

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deceased. From her observations it appeared that the separation did not alter the relations between the two. Certainly the attitude of the deceased towards his wife did not change. After the separation the deceased had discussed with her the question of alternative accommodation. When she said that he should have no trouble in that regard because he had a sister in Gweru his reply was that his sister was not interested in his story. The witness had seen the deceased a week before his death and at that time there was no change in his attitude towards his wife. Under cross - examination she said that she had never seen the applicant and the deceased quarrelling, their relationship had always been harmonious.

The last witness was the applicant. She said that she and the deceased were married on 22 September, 1962 and they lived together until his death on 26 June 1986. Soon after their marriage they had moved to South Africa, where they stayed for four years, then they returned to this country. After staying in Zvishavani then at the Antelope Mine they moved to Shurugwi. In 1976 they had each drawn up a will and the deceased kept both documents. The next time the applicant saw the wills was in April 1986, two months before the deceased's death, when the deceased showed them to her. The applicant said that the separation was her decision. She felt that they were no longer communicating with each other and that they should separate for the

sake of both of them. There was no animosity on the part of either, although admittedly the deceased had not wanted the separation. In fact he often spoke to the applicant's mother about it and asked her to speak to the applicant about a reconciliation. Towards the end the applicant felt sorry for the deceased, he lost weight and was not feeling well. She thought that had it not been for his death, there probably would have been a reconciliation. They continued living in the same house and every day he came to the shop which the applicant had and did deliveries for her. Every week he went to Gweru for her to get supplies for the shop. The applicant and her parents, who lived in the house with them, were the only family he knew and there was always a place set at the table for the deceased. The deceased seldom went out. Earlier in the year the deceased had visited Greece, where he was born, to see whether he would be eligible for a pension if he returned there. Whilst he was away the applicant found that her life was calmer, more peaceful, and that was when she decided on the separation.

They used to phone each other every day whilst he was in Greece and it was then that she told him that she wanted a separation. He pleaded with her but she was adamant. He cut short his holiday in Greece to come back home. She had suggested that he ask his sister, the third respondent, for accommodation

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SMITH J

but the deceased said that his sister had refused his request, saying that he had made his bed and must now lie on to. About two months before his death the deceased had called the applicant to his room one evening before supper and told her that he wanted to give her her will, saying that he had his. He told her that if she wanted to change her will she should do so but she told him that she had no wish to do so, because all that they had had been achieved by their joint endeavours. She likewise said to him that if he wanted to change his will he should do so, especially as regards the property he owned in Greece which he might want to leave to his other sister, the fourth respondent, who lived in Greece. His response was that he might have his faults but he would never do anything like that. He had thought about changing the one paragraph in his will so as to provide that if the applicant predeceased him his estate would go to the children of the applicant's brother, rather than the brother, but on second thoughts he had decided not to change his will. Thereafter the deceased had opened a drawer in his desk and put the will into it. The applicant said that the deceased often sat at his desk and read the newspapers. She had never seen the black book referred to by Dr Hercher and she had not found one after the death of the deceased. After his death she had searched his desk and the rest of the room but had not been able to find the will. She had written to the bank and to the deceased's legal practitioners but neither had the will. Later, when she was looking in her wardrobe, she found the title deeds to their home and to other properties hidden there. They must have been placed there by the deceased because he had kept them in his possession. She felt that the deceased must have put the will somewhere for safe-keeping. If he had destroyed the will he was the sort of person who would have made another to replace it. After giving the applicant her will he had never mentioned the subject again and he had never spoken about going to his lawyer to change his will. She did not think that the deceased had wanted to commit suicide. He had wanted to frighten her and his sister, the third respondent, because they were not there when he needed them. He did not want a separation. It was an accident. He

had told one of their employees that if he had not returned by 5 pm the employee was to come and call him, although he had a watch. That showed that he wanted to be found. In the last two weeks of his life the deceased had not changed in his personality or in his attitude towards her. On the day of his death they had had lunch together and discussed the World Cup football final which was to be played on the Sunday. Thereafter they had played cards on the verandah until the applicant went to the shop. The deceased had phoned her at 3 pm to ask whether there were any deliveries he could do and then said, "fine, I'll see you later". She had not noticed anything strange about his manner.

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SMITH J

In cross-examination the applicant said that when the deceased was in Greece she realized that they had drifted apart and were no longer communicating. Although they had lived together for 24 years she did not fully understand him. She had not gone with him to Greece because they could not both leave the shop. One had to stay behind to mind the business. The deceased's health was not good because of his heart problem. He always felt depressed and very tired. He wanted to sell the business and retire. She herself would be prepared to sell if they got the right price. In terms of the deed of separation she retained the business. She felt they had worked hard to build up the business and it would be a pity to let it run down. As the deceased did not want to continue running the business she felt that she had no option. They had discussed the separation and the deed of separation several times. He had not wanted the separation but she had been adamant. After the deed of separation was signed the deceased had changed and they seemed to get on better and were on friendlier terms. Prior to the separation they had had arguments about financial matters because the deceased was inclined to get too frustrated. Afterwards, however, his attitude changed, he was quieter and did not argue about things where previously he would have. The deceased had told her that he was still fond of her and asked her please to reconsider. The deceased did not want to live alone so they had agreed that he would live in the cottage which was just a few metres from the matrimonial home and which the applicant had furnished for him. She did not pressure the deceased to move into the cottage, telling him he could move when he was ready. He said that he was going to try to find someone to live with him. She had agreed that he could continue to have his meals with her and her parents. He had asked the third respondent for accommodation and she had refused. The applicant said that she was not aware of any thefts or of any property missing from the matrimonial home immediately before or after the death of the deceased. She had searched and done everything she thought necessary or reasonable to find the deceased's will but to no avail.

The legal position in a case such as this is clear and was set out in *Ex parte Slade* 1922 TPD 220. In that case a will, executed by the testator, and which was last seen in his possession, could not be found on his death. The court held that the presumption was that the will had been destroyed by the testator *animo revocandi*. No general rule could be laid down as to the nature of the evidence required to rebut such presumption but each particular case was to be determined on the strength of the evidence laid before the court. At p 222 DE WAAL J said:

"Several factors have to be taken into consideration, such as the magnitude

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or otherwise of the deceased testator's estate; his relations towards his family - in this case towards his wife; that nothing has happened since he made his will to make it probable that he wished to destroy or alter it - as, for instance, the birth of further children; and that the testator had made declarations in his lifetime not only of his intention not to revoke his will, but of his desire to die testate."

At p 225 the learned judge continued:

"What I have to determine is whether on all these facts the Court is morally convinced that the will was not destroyed by the testator *animo cancellandi*."

Mr *de Bourbon* submitted that the applicant had, on a balance of probabilities, discharged the *onus* of rebutting the presumption referred to above. He pointed out the following features. Whereas the typed draft of the deed of separation had provided that the deceased was to leave the matrimonial home within seven days, that provision had been altered in manuscript so as to refer to 30 September, so that at the time of his death the deceased still had three months before he had to leave the matrimonial home. After signing the deed of separation on 13 April the deceased had the matter of his estate on his mind. He showed it to Dr Hercher, in the context of expressing his continued love for the applicant, and said that he had no intention of changing it. Some two weeks later the matter was still on his mind when he gave the applicant her will and discussed the possibility of the parties altering their wills. He then made it clear to her that he had no intention of altering his will. About that time he hid the title deeds to certain properties in the applicant's wardrobe. He submitted that the deceased was clearly a man who wanted his affairs dealt with properly and was not the kind of man who would destroy his will without drawing up a new one.

Mr *Gillespie*, on the other hand, submitted that there were no circumstances from which one could draw a favourable inference to rebut the presumption. After the signing of the deed of separation the deceased was in a state of emotional upset. He had a serious medical condition, he had withdrawn into himself and was no longer able to communicate his feelings. In his state the probabilities were that he would be more likely to act in an uncharacteristic fashion. He destroyed his own life so why should he not destroy his will? Mr *Gillespie* pointed out that there was nothing to suggest that the deceased had hidden or lost his will. No other important documents were known to be lost. The applicant had done everything she could to find the will but to no avail.

SMITH J

Her belief that the deceased had not intended to take his life did not assist her case. If the deceased had been driven to hang himself in order to demonstrate his feelings, he was obviously in a state where he would commit impulsive and uncharacteristic actions.

The witnesses in this case all gave their evidence well and the court has no hesitation in accepting their evidence. Dr Hercher and Mrs Carlsson had no motive to give false evidence. The applicant obviously would be vitally affected by the outcome of this case. She therefore had

a compelling motive to colour or embroider her evidence to support her case. It seems to the court, however, that she resisted any temptation to do so. She gave her evidence clearly and calmly. In giving evidence as to what had happened between her and the deceased she could have manufactured her evidence and no-one would have controverted it. For instance she said that but for the death of the deceased there might well have been a reconciliation between the two of them. When she was asked whether the deceased knew that she said he did not. She could easily have said that she had told him that. Another example is her evidence as to the deceased's words when he gave her her will. She said that that was the only occasion on which he had said that he had no intention of changing his will. She could easily have said that the deceased had mentioned that again on a later occasion. She could have said that other papers were missing or stolen. She did none of these things. I can see no indication of an attempt to bolster the applicant's case with falsehoods. If she had been so disposed, I have little doubt that she could have presented a more unassailable case, knowing that she could not be contradicted directly by any witness. In *Ex parte Warren* 1955 (4) SA 326 (W), the effect of the destruction of the will was that the estate of the testatrix devolved, through intestate succession, on her relatives and not on her former friend who had been heiress in terms of the will. That is not the position in this case. The destruction by the deceased of his will would not have the effect of disinheriting the applicant. In the event of intestacy she would still be entitled to a half share in the deceased's estate. In the case of *Allan v Orrison & Ors* [1900] AC 604 (PC), the testator, because of illness, was confined to his house and his will had been kept in a safe in the house. He was not able to remove the will from the house. When it could not be found after his death, both the court *a quo* and the court of appeal were not morally convinced that the will was not destroyed by the testator *animo revocandi*. In this case not only was the deceased able to leave his house at will but the evidence of Dr Hercher showed that on at least one occasion he removed the will from the house. The book in which Dr Hercher saw the deceased place the will was not found after the death of the deceased.

1991 (1) ZLR p103

SMITH J

In *Davis v Steel & Eriksen* NO 1949 (3) SA 177 (W), at 183 MILLIN J referred to the principle that when a will is traced to the possession of the testator and cannot be found after his death there arises a presumption that it was destroyed by the testator *animo revocandi*. He then went on to say that such presumption was not irrebuttable. It may be rebutted -

"by direct evidence of the testator's conduct or intention or by inference from the circumstances of the case".

The evidence in this case showed that the deceased and the applicant had lived and worked together for almost 24 years and through their joint endeavours had built up a successful business and acquired some property. Although they had entered into a deed of separation, it was against the wishes of the deceased. He still loved the applicant and wanted to carry on living in the matrimonial home. In fact they were still living together and sharing board, though not bed. A cottage next door had been furnished for the deceased to move into. The deceased apparently was not very close to his sisters, the third and fourth respondents. They certainly had played no part in helping him and the applicant to acquire assets that they had. On two occasions shortly before his death the deceased had produced his will and said that in his will he had left everything to his wife and that he had no intention of altering his will. Nothing

happened in the last weeks before his death to alter the relationship between him and the applicant and there was no change in their circumstances. It would appear that in fact they were getting on better than they had before the separation. The deceased regarded the applicant and her parents as his family. He continued to live with them. He had no intention of moving to Greece to live with the fourth respondent and when he had suggested living with the third respondent in Gweru she had rejected him.

As was said by de WAAL J in *Slade's case*, *supra*, what I have to determine is whether on all these facts the court is morally convinced that the will was not destroyed by the testator *animo cancellandi*. The answer to this question must, I think, be in favour of the applicant's contention. I do not think that the deceased secretly destroyed his will with the avowed purpose of disinheriting his wife and incline to the view that it was mislaid and is still in existence or was inadvertently destroyed.

With regard to costs, both Mr *de Bourbon* and Mr *Gillespie* submitted that they should be paid from the deceased's estate. I agree with their submissions.

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SMITH J

It is ordered -

- 1) That the will of the late Peter Emmanuel Pachydakis, as referred to in paragraph 2 of the order issued by the High Court on 16 November 1989, be accepted by the Master of the High Court as the last will and testament of the late Peter Emmanuel Pachydakis;
- 2) That the costs of the applicant and the respondents in respect of this application and of the preceding notice of motion proceedings be borne by the estate of the late Peter Emmanuel Pachydakis.

Condy, Chadwick & Elliott, applicant's legal practitioners

Atherstone & Cook and Danziger & Partners, third and fourth respondents' legal practitioners

1991 (1) ZLR p105

CONJWAYO v MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS & ANOR 1991 (1) ZLR 105 (SC)

Editor's Note:(2)

Court **Supreme Court, Harare**

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

Constitutional application

24th January & 21st February 1991

Flynote

Constitution - violation of s 15(1) of the Declaration of Rights - condemned prisoners' rights - rights to freedom from inhuman and degrading treatment - rights of prisoners to exercise and fresh air.

Headnote

Whereas courts in many jurisdictions, including Zimbabwe, have traditionally adopted a "hands off" attitude towards prison administration, it must nevertheless be recognised that a prisoner does not leave his constitutional rights behind him when he goes to prison.

A policy of judicial restraint cannot encompass any failure to take cognisance of a valid claim that a prison regulation or practice offends a fundamental constitutional protection.

The applicant was a prisoner under sentence of death, and was being held in a windowless cell across the full front of which were a series of mesh covered iron bars with a gate of similar construction. The cell measured 4,6 metres by 1,42 metres and contained a self-flushing toilet, with a low concrete platform covered with a sleeping mat. Meals were provided at 8 am 10.30 am and 1.20 pm. Drinking water was provided on request. An electric light burned in the cell 24 hours a day. The applicant was allowed half an hour's exercise per weekday in the morning, outside in the exercise yard. In the afternoon he was allowed half an hour to wash himself and his clothes inside, in the cell-block. Over weekends and

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GUBBAY CJ

public holidays he was allowed no exercise at all, although he was allowed the half an hour washing period.

During without prejudice negotiations in an exchange of correspondence, the contents of which had nevertheless been placed before the court, the second respondent had offered to allow the applicant exercise outside for an hour in the morning and an hour in the afternoon, during week-days only, excluding the half-hour period for washing.

Held, that the applicant's constitutional rights required that he have a minimum of one hour's exercise outside in the exercise yard per day.

Held, further, however, that in view of the concessions made by the second respondent, the applicant should have an additional hour's exercise in the afternoon on weekdays only.

Cases cited:

Sunil Batra v Delhi Administration (1979) 1 SCR 392 (Sup Ct India)

Charles Sobhraj v Superintendent, Central Jail, Tihar, New Delhi (1979) 1 SCR 512 (Sup Ct India)

Patnaik v Andrah Pradesh (1975) 2 SCR 24 (Sup Ct India)

Rhodes v Chapman (1981) 452 US 377; 69 L Ed 2d 59 (US Sup Ct)

Wolff v McDonnell (1974) 418 US 539; 41 L Ed 2d 935 (US Sup Ct)

Goldberg & Ors v Minister of Prisons & Ors 1979 (1) SA 14 (A)

Hassim & Anor v Officer Commanding Prison Command, Robben Island & Anor 1973 (3) SA 462 (C)

Cassiem & Anor v Commanding Officer Victor Verster Prison & Ors 1982 (2) SA 547 (C)

Nestor & Ors v Minister of Police & Ors 1984(4) SA 230 (SWA)

Estelle v Gamble (1976) 429 US 97; 50 L Ed 2d 251 (US Sup Ct)

Hutto v Finney (1978) 437 US 678; 57 L Ed 2d 522 (US Sup Ct)

McCann & Ors v The Queen (1975) 68 DLR (3d) 661 (Fed Ct Canada)

Collin et al v Kaplan (1982) 2 CRR 352 (Fed Ct Canada)

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

S v Masitere 1990 (2) ZLR 289 (SC); 1991 (1) SA 821 (ZS)

E W W Morris for the applicant

B Q P Simelane for the respondents

Judgment

Gubbay CJ: This is an application direct to this court under s 24 (1) of the Constitution of Zimbabwe for redress in respect of an alleged violation of s 15 (1) of the Declaration of Rights. The applicant is a 57-year-old Class D prisoner, presently under sentence of death. The two main respondents are the Minister of Justice, Legal and Parliamentary Affairs and the Director of Prisons.

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GUBBAY CJ

On 18 November 1988 the applicant and his co-accused, Kevin John Woods and Michael Anthony Smith, were convicted in the High Court of the crime of murder and sentenced to the ultimate punishment. It was found that they, with others, had conspired to kill, by means of a Renault 5 motor vehicle booby-trapped with explosives, six persons believed by them to be members of the military wing of the African National Congress of South Africa, who happened to be residing at 16 Jungle Road, Trenance, Bulawayo. The plan was put into operation on 1 January 1988. The deceased, Obert Mwanza, an unemployed person, was engaged for reward to drive the Renault 5, alone, to the address in question. He was totally unaware that it had been primed with a powerful explosive device. Upon arrival at the front of the premises he

sounded the hooter and then drove to the rear. When the hooter was blown for the second time there was a huge explosion. It resulted in the instantaneous death of Mwanza, whose body was mutilated beyond recognition, and in one of the residents sustaining the loss of an eye. The house was extensively damaged. Adjacent to it was a crater about two-and-a-half metres in diameter and twenty centimetres deep. Pieces of the bodywork of the Renault 5, as well as remnants of human flesh and clothing worn by the deceased, were scattered over a radius of fifty metres.

It was accepted by the trial court that the aim of the applicant and his colleagues was to eliminate, by this operation, personnel of the African National Congress of South Africa, and not to harm the deceased, who had no connection with that political organisation. Hence the convictions were based upon a constructive intent to kill the deceased. An appeal by the applicant, against both conviction and sentence, is pending before this court.

Since the passing of sentence the applicant has been incarcerated in the condemned section of Chikurubi Maximum Security Prison, a Grade IV prison. Pursuant to s 110 of the Prisons Act [Chapter 21] he is being confined in a cell, separately, under constant supervision both by day and by night. The cell is 4,6 metres long by 1,42 metres wide. The side and rear walls are solid and windowless. Across the full front of the cell are a number of closely spaced vertical iron bars; attached thereto is a steel mesh screen or grill in which is a lockable gate of similar construction. Inside the cell is a self-flushing toilet and a low concrete platform covered by a sleeping mat. Drinking water is provided, upon request, by the warders. Meals are served at 8 am, 10.30 am and 1.20 pm. The applicant is permitted to read the Bible, and novels, but nothing else.

The cell, which is located on the ground floor of the prison complex, is one of eleven set aside for offenders who are under sentence of death. A row of

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five cells faces another row of six. In a small area at right angles to both rows are a wash basin and shower cubicle.

The only other prisoners in the same condemned section are Woods and Smith. The applicant is able to see them through the mesh screen. They are permitted to talk to one another and to the warders. An electric light burns in each cell and is never extinguished. It supplies the sole source of illumination (see s 74 of Standing Orders issued by the Director of Prisons in terms of s 12 of the Prisons Act).

A fairly large wedge-shaped yard adjoins the condemned section of the prison. It is enclosed on each side by very high walls and is open to the sky. Initially, the applicant was allowed virtually unrestricted access to this exercise yard during daylight hours until 4 pm; and the facility extended over week-ends and public holidays. He was thus able to take daily exercise in the open air and enjoy whatever sunshine was available.

The situation altered drastically, however, following upon the conviction of one Dennis Charles Beahan, on 28 June 1989. He was found guilty of having conspired with others to forcibly effect

the release from lawful custody of Woods, Smith and the applicant, and to remove them from Zimbabwe. In the implementation of stricter security measures deemed essential, the Director of Prisons reduced the period of the applicant's access to the exercise yard to half an hour on week-days only. This restriction prevails. Every afternoon the applicant is allowed out of his cell, but still within the small condemned section, for the purpose of showering, attending to his laundry, washing eating utensils, and sweeping the cell. The extent of this period is also half an hour. This means that during the week the applicant is locked in his cell for twenty-three hours each day, and over week-ends and public holidays, for half an hour more.

From 18 November 1988 until the middle of September 1990 it was the practice of the warders attached to the condemned section of the prison to remove and withhold from the applicant, between the hours of 4 pm and 7 am, every item of clothing. Additional blankets were provided during the cold winter months. It is claimed by the Director of Prisons that the need at the time to maintain absolute security prompted this action, which was discontinued as soon as conditions had improved. Whatever the reason for the deprivation - and I may say its cessation coincided remarkably with the institution of these proceedings in which the practice is bitterly complained of - it was not in dispute that it constituted treatment of a degrading nature.

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However that may be, the applicant's remaining plea is that the periods over which he is confined to his cell, both on week-days and particularly over week-ends and public holidays, without access to sunshine, the open air and the ability to exercise effectively, are so excessive as to amount to inhuman treatment; the commission of which he is protected against by s 15 (1) of the Constitution. It was urged that, although there is no evidence that the applicant's physical health is deteriorating, this court should interfere, nonetheless, to the extent of directing that the applicant be permitted daily access to the exercise yard for one hour in the morning and one hour in the afternoon.

Traditionally courts in many jurisdictions have adopted a broad "hands off" attitude towards matters of prison administration. This stems from a healthy sense of realism that prison administrators are responsible for securing their institutions against escape or unauthorised entry, for the preservation of internal order and discipline, and for rehabilitating, as far as is humanly possible, the inmates placed in their custody. The proper discharge of these duties is often beset with obstacles. It requires expertise, comprehensive planning and a commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Courts recognise that they are ill-equipped to deal with such problems.

But a policy of judicial restraint cannot encompass any failure to take cognisance of a valid claim that a prison regulation or practice offends a fundamental constitutional protection.

Fortunately the view no longer obtains that in consequence of his crime a prisoner forfeits, not only his liberty, but all his personal rights, except those which the law in its humanity grants him. For while prison officials must be accorded latitude and understanding in the administration of prison affairs, and prisoners are necessarily subject to appropriate rules and regulations, it remains the continuing responsibility of courts to enforce the constitutional rights of all persons,

prisoners included.

In *Sunil Batra v Delhi Administration* (1979) 1 SCR 392 (Sup Ct India) DESAI J, delivering the lead judgment, laid down the following broad principles: In the first place, it was not open to debate that prisoners were not wholly deprived of their fundamental rights and no iron curtain could be drawn between a prison and the Constitution. Secondly, prisoners were entitled to all constitutional rights, save those inevitably lost as an incident of confinement. Thirdly, conviction for a crime did not reduce the prisoner into a non-

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person, whose rights were subject to the whim of the supervising administration. Finally, the court had to strike a just balance between de-humanising prison atmosphere on the one hand, and the preservation of internal order and discipline, the maintenance of institutional security, and the rehabilitation of prisoners, on the other.

In a similar view of the position of the courts, yet expressed in more graphic and colourful language, KRISHNAIYER J, in *Charles Sobhraj v Superintendent, Central Jail, Tihar, New Delhi* (1979) 1 SCR 512 (Sup Ct India) at 518 - 519, said:

"Whenever fundamental rights are flouted or legislative protection ignored, to any prisoner's prejudice, this court's writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law. Then the parrot-cry of discipline will not deter, of security will not scare, of discretion will not dissuade, the judicial process. For if courts 'cave in' when great rights are gouged (out) within the sound-proof, sight-proof precincts of prison houses, where, often dissenters and minorities are caged, Bastilles will be re-enacted. ... Therefore we affirm that imprisonment does not spell farewell to fundamental rights although, by a realistic re-appraisal, courts will refuse to recognise the full panoply of Part III enjoyed by a free citizen."

The learned judge then added a word of caution at 519

"The court must not rush in where the jailor fears to tread. While the country may not make the prison boss the sole sadistic arbiter of incarcerated humans, the community may be in no mood to hand over central prisons to be run by courts. Each instrumentality must function within its province."

See also *Patnaik v Andhra Pradesh* (1975) 2 SCR 24 (Sup Ct India) at 26 per CHANDRACHUD J

The same sentiments are discernible in Justice Brennan's separate concurring opinion in *Rhodes v Chapman* (1981) 452 US 337, where at 361 he remarked:

"The task of the courts in cases challenging prison conditions is to 'determine whether a challenged punishment comports with human dignity'. ... Such determinations are necessarily imprecise and indefinite, ...; they require careful scrutiny of challenged conditions, and application of realistic yet humane standards."

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In performing this responsibility, this Court and the lower courts have been especially deferential to prison authorities 'in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security'. ... Many conditions of confinement, however,

including over-crowding, poor sanitation, and inadequate safety precautions, arise from neglect rather than policy. ... There is no reason of comity, judicial restraint, or recognition of expertise for courts to defer to negligent omissions of officials who lack the resources or motivation to operate prisons within limits of decency. Courts must and do recognise the primacy of the legislative and executive authorities in the administration of prisons; however, if the prison authorities do not conform to constitutional minima, the courts are under an obligation to take steps to remedy the violations."

See also *Wolff v McDonnell* (1974) 418 US 539 at 555-556.

Interestingly enough in South Africa, where the transgression of a fundamental human right is not susceptible of constitutional attack as such, much the same approach was adopted by CORBETT JA (as he then was) in his dissenting judgment in *Goldberg and Ors v Minister of Prisons and Ors* 1979 (1) SA 14 (A). He stressed at 39C that it is a recognised common law principle that:

"... a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed";

and that there is:

"... a substantial residuum of basic rights which he cannot be denied; and if he is denied them, then he is entitled, in my view, to legal redress."

See also *Hassim & Anor v Officer Commanding Prison Command, Robben Island & Anor* 1973 (3) SA 462 (C) at 472H-473B; *Cassiem & Anor v Commanding Officer Victor Verster Prison & Ors* 1982 (2) SA 547 (C) at 553 C-E; and *Nestor & Ors v Minister of Police & Ors* 1984 (4) SA 230 (SWA) at 250F-I.

A survey of the cases dealing with the fundamental rights of prisoners illustrates well a refusal by the courts to allow an impenetrable barrier to be placed between prisons and the Constitution.

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The United States Supreme Court has, generally, treated challenges to prison conditions, as a whole, under the cruel and unusual punishments clause of the Eighth Amendment to the Constitution. That august body has held the clause to have been violated where prisoners were confined, without proper diet, in excessively crowded and unsanitary conditions, and knowingly denied needed medical care (see *Estelle v Gamble* 429 US 97); and where an average of four, and sometimes as many as eleven, prisoners were crowded into windowless cells eight feet by ten feet containing no furniture other than a source of water and a toilet that could be flushed from outside the cell (see *Hutto v Finney* (1978) 437 US 678). On the other hand, a claim that double-celling of two inmates in a single cell in a maximum security prison was violative of the protection, was dismissed (see *Rhodes v Chapman, supra*, JUSTICE MARSHALL dissenting).

In *Sunil Batra v Delhi Administration, supra*, the Supreme Court of India ruled that to detain a prisoner under sentence of death in solitary confinement on the alleged ground of security, was in breach of his constitutional rights.

In Canada it has been held by the Federal Court that oppressive conditions of solitary confinement at a British Columbia Penitentiary amounted to cruel and unusual treatment under s 2(b) of the Bill of Rights (see *McCann v The Queen* (1975) 68 DLR (3d) 661); but that double-celling did not, under s 12 of the Charter of Rights and Freedoms (see *Collin et al v Kaplan et al* (1982) 2 CRR 352 (Fed Ct Canada)).

Adopting as correct the basic principle enunciated and emphasised in the authorities referred to that a prisoner, whether he be under sentence of death or merely a petty thief, does not shed his fundamental constitutional rights at the prison gate, the critical issue to be resolved is whether the confinement of the applicant, in a small single cell, for a minimum of twenty-three and one half hours every week-day and twenty-four hours on Saturdays, Sundays and public holidays (except for half an hour each day in which he is allowed out of his cell to attend to his ablutions), without access to natural light and fresh air, and with only a limited ability to exercise his body, infringes his fundamental right under s 15 (1) of the Constitution not to be subjected to inhuman treatment. Is the action of the Director of Prisons in enforcing this regime lawful?

The concept against which this particular protection should be construed is somewhat nebulous. As previously decided by this court, it is nothing less than the dignity of man. Section 15 (1) is a provision that embodies broad and

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idealistic notions of dignity, humanity and decency. It guarantees that punishment or institutionalised treatment of offenders be exercised within the ambit of civilised standards. Punishment or treatment incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the infliction of unnecessary suffering, is repulsive. What might not have been regarded as inhuman decades ago may be revolting to the new sensitivities which emerge as civilisation advances. See *S v Ncube and Ors* 1987 (2) ZLR 246 (SC) at 267A-D; 1988 (2) SA 702 (ZS) at 717A-D.

In determining the issue, I am mindful that there is no provision in the Prisons Act, the Prison Regulations 1956 (FGN 109/56 as amended) or the Standing Orders, dealing with the period of exercise permitted to prisoners who have been sentenced to death; it falls to the discretion of the Director of Prisons. And, secondly, that the applicant has not been ordered to undergo imprisonment as part of the punishment for the crime committed. He is incarcerated pending a decision, either in the appeal to this court, or by the President who may exercise a prerogative of mercy, as to whether he is to be put to death. So his punishment has not commenced.

It was not in contention that, should this court be disposed to uphold the applicant's claim that the period of exercise he is being permitted on week-days, or denied over week-ends and public holidays, is inhuman, then any variation thereof must be taken in the open air.

Counsel for the respondents understandably found himself in difficulty in seeking to justify the denial of access to the exercise yard over week - ends and public holidays. He suggested that this deprivation was due to the reduction of prison staff over these periods. That may be so, though no such reason was advanced (or any other) by the Director of Prisons in his opposing

affidavit. Staffing problems over week-ends and public holidays cannot be permitted to disadvantage the applicant and result in a situation in which he is denied the opportunity of daily exercise, a facility, as I shall show, enjoyed even by prisoners undergoing solitary confinement. After all, prison officers are always liable for duty (see s 17 of the Prisons Act).

I entertain no doubt that to confine a human being in a small cell over week-ends for 47 hours (with the two daily half hour periods out of the cell but within the condemned section itself and not in the open air), and for a much longer period where a public holiday falls on a day immediately preceding or subsequent to a week-end, is plainly offensive to one's notion of humanity

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and decency. It transgresses the boundaries of civilised standards and involves the infliction of unnecessary suffering.

Consequent upon the view expressed above, the next aspect of the matter is whether, in the particular circumstances which obtain, the applicant is entitled to be granted more than half an hour's exercise period every day in the open air.

It seems to me self-evident that the applicant, whose confinement is non-punitive, ought not to be subjected to a greater degree of restriction in relation to the period of exercise, than that specified in subsections (3) and (4) of s 102, and s 179, of the Prison Regulations, for a prisoner undergoing solitary confinement on spare or reduced diet as part of his punishment.

The former subsections read:

"(3) A prisoner undergoing solitary confinement shall be exercised for one hour each day;

(4) A prisoner undergoing solitary confinement may be permitted to bathe himself during the daily period of exercise referred to in subsection (3)."

And s 179:

"A prisoner sentenced to solitary confinement for more than three days shall be exercised daily."

Although recently it was decided in *S v Masitere* 1990 (2) ZLR 289 (SC); 1991 (1) SA 821 (ZS) that the punishment of solitary confinement is unconstitutional, the above-quoted provisions are instructive in that they prescribed the minimum exercise period to which prisoners undergoing solitary confinement were entitled.

Previously under s 174 (1) of the Prison Regulations the period on spare diet and solitary confinement to be served was not to exceed two consecutive days in each week; and under s 174 (2) the period on reduced diet was not to exceed fourteen consecutive days at a time with an interval of at least fourteen days. Clearly, in my view, it was envisaged that during these intermissions the prisoner was not to be limited to an exercise time of one hour each day. He was to revert to the status of an ordinary prisoner. There was to be no differentiation in treatment.

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Section 72 of the Prison Regulations is also relevant. It lays down that :

"Prisoners who are not employed in association with one another or who are employed in sedentary work such as tailoring or mat - making shall, if circumstances permit, be permitted to exercise in the open air for one hour each day."

No exercise period is specified in respect of prisoners employed in non-sedentary work. I assume the reason for this is that the nature of the work assigned to them is considered to be exercise in itself and is such as to afford access to the open air.

In justification of the strict curtailment of the exercise period the Director of Prisons points to the fact that the applicant is a high security prisoner, to the foiled escape attempt of nearly three years ago, and to his belief that this country is still under attack by enemy agents. He is apprehensive that were the applicant to be permitted a longer period in the exercise yard, steps might be taken to effect his removal by means of a helicopter. He gives the assurance that as soon as an overhead net has been fitted, thereby improving the security in the exercise yard, the present period will be reviewed.

It seems to me that the possibility of the applicant being whisked away by helicopter is remote. When in the exercise yard he is under constant supervision and, no doubt, would be immediately withdrawn from there should any suspicious aerial activity be noticed. Moreover, the timing of such an attempt would involve, of necessity, knowledge of the exact period the applicant would be in the exercise yard as opposed to the cells.

Nor has the Director of Prisons been entirely consistent in his assessment of the seriousness of the existing security situation. In September 1990 it was said that in view of improved conditions it was no longer necessary to continue the practice of removing the applicant's clothing. And in a letter written to the applicant's legal practitioners, a copy of which was annexed to the opposing affidavit, it was suggested that if the applicant were prepared to abandon this litigation without an order as to costs, the Director of Prisons, in turn, would be disposed to increase the exercise period to two hours per week-day. One can only infer from this that he was completely satisfied that such additional time in the exercise yard would not jeopardise security.

I would also reiterate that where provision is made in the Prison Regulations in relation to the exercise of prisoners, the period specified is not less than one

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hour per day. Indeed the advice the Director of Prisons received from the Prisons Medical Officer was "that **an hour's** exercise per day is not detrimental to (his) health" (my emphasis).

While the fact that a security problem attaches to the applicant must be recognised and afforded significant weight, nonetheless there must be mutual accommodation between such institutional

need and the provisions of the Constitution. A just balance must be struck. It is not an acceptable proposition that undue harshness under the guise of prison security or discipline attracts immunity from judicial review.

In my opinion, to deprive the applicant of access to fresh air, sunlight and the ability to exercise properly for a period of twenty-three-and-a-half hours per day, by holding him in a confined space, is virtually to treat him as non-human. I think it repugnant to the attitude of contemporary society. The emphasis must always be on man's basic dignity, on civilised precepts and on flexibility and improvement in standards of decency as society progresses and matures.

Were it not for the indication in the letter written on behalf of the Director of Prisons that he was not averse to increasing the exercise period to two hours per week-day, I would have left it to him to resolve what further time, if any, over one hour was to be allowed the applicant on these days. The "concession", however, does not cover week-ends and public holidays. While in relation to each such day it is competent for this court to declare that the minimum exercise period, in order not to offend s 15 (1) of the Constitution, be not less than one hour, it lacks the expertise and knowledge of prison administration to determine what maximum period is appropriate. That decision must accordingly remain with the Director of Prisons.

Both counsel requested that in the event of the application succeeding costs be awarded solely against the Minister of Justice, Legal and Parliamentary Affairs, since the administration of the Prisons Act is assigned to him. I am prepared to so order.

In the result:

- (i) It is directed that the applicant be allowed to exercise in the open air, every week-day, for one hour in the morning and one hour in the afternoon, exclusive of the time taken by him to bathe;

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- (ii) It is further directed that the applicant be allowed to exercise in the open air on every Saturday, Sunday and Public Holiday for a minimum of one hour, exclusive of the time taken by him to bathe;
- (iii) The costs of this application will be borne by the first respondent.

McNally JA: I agree.

Manyarara JA: I agree.

Korsah JA: I agree.

Ebrahim JA: I agree.

Coghlan, Welsh and Guest, applicant's legal representatives

ATTORNEY-GENERAL v BLUMEARS & ANOR 1991 (1) ZLR 118 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Appeal from a decision on review

21 February & 4 March 1991

Flynote

Constitution - s 3(2)(e) - meaning - degree of proof required at remand stage of proceedings.

Criminal procedure - remand - reasonable suspicion that offence committed - degree of proof required.

Costs - constitutional case - approach.

Headnote

The two respondents were arrested on an allegation of exporting gold. They opposed being placed on remand on the basis that no reasonable suspicion existed that they had committed the offence alleged. The magistrate found in favour of the prosecution, but on review to the High Court his decision was set aside. The Attorney-General appealed.

Held, an accused person is entitled to challenge the power and right of the State to place him on remand.

Held, the test at the stage of remand is whether or not the State has established facts or grounds from which the magistrate can objectively determine whether or not a reasonable suspicion exists that the accused person committed the offence alleged against him.

Held, on the facts, that the allegations by the prosecutor were sufficient to enable such a determination to be made in favour of the State.

Held, as the constitutional point was one of importance generally, there would be no order as to costs.

Seem, prosecutors should be more open and forthright when informing a remand court of the facts relied upon as establishing the nexus between the offence and the accused.

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Cases cited:

McNabb v United States (1943) 318 US 332; 87 L Ed 819

S v Ganyu 1977 (2) RLR 97 (A); 1977 (4) SA 810 (RA)

Bull v Attorney-General, Zimbabwe & Anor 1986 (1) ZLR 117 (SC); 1986 (3) SA 886 (ZS)

Attorney-General v Matewere & Anor 1983 (2) ZLR 339 (SC)

Bull v Attorney-General 1987 (1) ZLR 36 (SC); [1988] LRC (Const) 324

Hewlett v Minister of Finance & Anor 1981 ZLR 571 (SC); 1982 (1) SA 490 (ZS)

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

Bull v Minister of Home Affairs 1986 (1) ZLR 202 (SC); 1986 (3) SA 870 (ZS)

A V M Chikumira for the appellant

A P de Bourbon SC for the respondent

Judgment

Gubbay CJ: On Thursday 16 August 1990, the two respondents, who are brothers and business associates, were arrested, without warrant, under s 36 of the Criminal Procedure and Evidence Act [*Chapter 59*] by members of the Criminal Investigation Department, Gold Section. During the course of the afternoon, a warned and cautioned statement was recorded from each respondent in the presence of his legal practitioner. The first respondent was informed in the preamble thereto that the enquiry concerned an allegation that during the period between 1 and 30 November 1988 he had unlawfully dealt in, or possessed, or exported from Zimbabwe, gold weighing approximately 11988 kilograms. The allegation of which the second respondent was informed was identical, save that the quantity of gold was stated to be 15 771 kilograms and the period, 1 March to 31 December 1988. The reply of both respondents was a blanket denial.

On the Monday morning following their arrest, the respondents were brought before a magistrate for initial remand. They were represented by counsel. Placed before the magistrate was a "Request for Remand" form, signed and dated by the investigating officer. It contained the personal particulars of the two respondents and the words "export gold" in the space provided for the description of the offence. On the reverse side was a typewritten summary of facts, which read:

"Both accused persons are brothers and directors of some companies. Accused one William Paul Blumears is a Jeweller and is the Managing

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Director of Jewellery Centre, Union Avenue, Harare and his brother Keith John Blumears is the Managing Director of Progress Iron Craft (Pvt) Ltd, Factory Number 4, Williams Way, Msasa, Harare. During the period between March, 1988 and December 1988, the accused in

connivance exported to West Germany 27 kilograms of raw gold and one kilogram of platinum all valued at 517 121,19 DM (German Marks) which is approximately Z\$700 000,00; and nothing was recovered. The gold was refined and sold in West Germany and the money banked in a bank in West Germany."

In applying for a remand of the respondents in custody to 3 September 1990 the prosecutor, after citing the charge as a contravention of s 5(1)(a)(i) of the Exchange Control Act [Chapter 164] as read with s 16(1)(e) of the Exchange Control Regulations 1971 (GN 399/77), went on to say that:

"...on a total of four separate occasions in the period extending between March 1988 and December 1988 the two accused persons who are brothers and acting in concert with each other exported from Zimbabwe to West Germany 27 kilograms of gold and 1 kilogram of platinum in contravention of the law. Following information received enquiries were conducted by the police resulting in uncovering documentation proving the exportation of the gold and platinum. The approximate value of the minerals is 700 000,00 Zimbabwe dollars. Because of the sensitive nature of the investigations, the State cannot produce evidence until the trial. The police are still involved in further investigations."

Contending that the facts outlined did not meet the requirements of s 13(2)(e) of the Constitution of Zimbabwe, that the deprivation of the personal liberty of each respondent could only be lawfully effected:

"upon reasonable suspicion of his having committed, or being about to commit, a criminal offence"

counsel for the respondents invited the prosecutor to avail himself of the opportunity to comply with this constitutional safeguard. The prosecutor's response was that :

"The documentation (which was physically in his possession) establishes a reasonable suspicion that the minerals were exported."

Unpersuaded by this further pronouncement the respondent's counsel opposed the application for their remand. He called upon the legal practitioner instruct-

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ing him to testify. His evidence was designed to show that the facts alleged by the prosecutor were unreliable, being at variance with what was put to the respondents in the preambles to their warned and cautioned statements. In the main, however, the differences were due to a subsequent belief on the part of the State that the respondents had exported the gold in concert and not individually, each being liable for the quantity of gold exported by the other. The exportation of the one kilogram of platinum was a new allegation, but its introduction may well have been based on information which emerged after the warned and cautioned statements had been taken.

Undoubtedly an accused person is entitled to challenge the power and right of the State to place him on remand. He may do so upon a submission that insufficient facts have been alleged for the court to objectively find the existence of a reasonable suspicion of his having committed, or being about to commit, the criminal offence in question. Where in possession of immutable evidence, which if disclosed to the court would completely demolish the reasonable suspicion

arising from the facts alleged by the prosecutor, he may, at his option, adduce such proof.

This aside, I am satisfied that the evidence led on behalf of the respondents was not nearly cogent enough to oblige the magistrate to reject the facts recounted by the prosecutor at face value. Nor did I understand Mr *de Bourbon*, who appeared for the respondents, to suggest the contrary.

In the event, the magistrate remanded the respondents in custody to 27 August 1990. His reasons for so ordering were extremely brief and not clearly expressed. There is some uncertainty if he appreciated that it was for him to decide whether the facts alleged by the prosecutor were such as to give grounds for a suspicion, that was reasonable, that the respondents had exported gold and platinum from Zimbabwe, in contravention of the Exchange Control legislation, assuming those facts to be capable of proof.

The respondents brought the ruling of the magistrate on review before the High Court. The specified ground was that it was "so outrageous in its defiance of logic and accepted standards that no sensible person who applied his mind to the matter would have arrived at the same decision". The application succeeded before CHAMBAKARE J who set aside the order of the magistrate that the respondents be placed on remand. However pending the determination of an appeal noted by the Attorney-General against that judgment, it was ordered, by consent, that the respondents were to be released subject to the fulfilment of certain monetary and other conditions.

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The standard for the deprivation of personal liberty under s 13(2)(e) of the Constitution are facts and circumstances sufficient to warrant a prudent man in suspecting that the accused person had committed, or was about to commit, a criminal offence. This standard represents a necessary accommodation between the individual's fundamental right to the protection of his personal liberty and the State's duty to control crime. It seeks on the one hand, to safeguard the individual from rash and unreasonable interference with liberty and privacy, and from unfounded charges of crime; yet on the other, to give fair leeway for enforcing the law in the community's protection. The criterion of reasonable suspicion is a practical, non-technical concept which affords the best compromise for reconciling these often opposing interests. Requiring more would unduly hamper the legitimate enforcement of the law. To allow less would be to leave law-abiding persons at the mercy of the whim or caprice of the authorities.

Viewed in the context of s 13(2)(e) of the Constitution, the remand procedure which precedes the trial offers the accused person a neutral and detached determination of the existence of "reasonable suspicion" by someone independent of the police and prosecution. It is a most meaningful administrative step consequent upon arrest; for it should never be overlooked that to remand an accused in custody, or even out of custody but subject to burdensome conditions, awaiting trial, may jeopardize his employment, interrupt or diminish his source of income, and impair his family and social relationships.

The importance and necessity of this protective process is no better underscored than in the

wise words of Justice FRANKFURTER in *McNabb v United States* (1943) 318 US 332 at 343; 87 L Ed 819 at 825 - 826:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication."

As mentioned *en passant*, the adversary safeguards customarily employed at

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a trial such as, the presentation of witnesses, the full exploration of their testimony on cross-examination and the application of the hearsay rule, are not essential for the determination of "reasonable suspicion" required by s 13(2)(e) of the Constitution. That issue is capable of being reliably determined without an adversary hearing. The standard is the same as that for arrest without warrant. It does not require the fine resolution of conflicting evidence that guilt beyond a reasonable doubt demands, or even a preponderance of probability. Certainty as to the truth is not involved for otherwise it ceases to be suspicion and becomes fact. See *S v Ganyu* 1977 (2) RLR 97 (A) at 104F; 1977 (4) SA 810 (RA) at 813C-D, per McDONALD CJ. Suspicion, after all, is nothing more than a state of conjecture or surmise whereof proof is lacking.

This is not the first occasion at which the impact of s 13(2)(e) of the Constitution has come before this Court for consideration. In *Bull v Attorney-General, Zimbabwe & Anor* 1986 (1) ZLR 117 (SC); 1986 (3) SA 886 (ZS) BECK JA, after stressing that the onus of demonstrating the legality of a deprivation of personal liberty rests with the State, continued at 888D-G thus:

"It is not open to doubt ...that the question whether a reasonable suspicion exists that the men in question have contravened, or were about to contravene, s 4(1)(d) (i) of the Official Secrets Act, is to be tested objectively. Conditions of this kind on the existence of which the lawful right to exercise a given power is made to depend must, when put in issue, be objectively demonstrated: *S v Purcell-Gilpin* 1971 (3) SA 548 (RA) (1971 (1) RLR 241); *United Democratic Front (Western Cape Region) v Theron* NO 1984 (1) SA 315 (C); *Ndabeni v Minister of Law and Order and Another* 1984 (3) SA 500 (D); *Inland Revenue Commissioners and Another v Rossminster Ltd* [1980] AC 952 ([1980] 1 All ER 80 (HL) at 92h-93b and 104a). To that end the Court must be informed of the grounds upon which reliance is placed for the existence of the reasonable suspicion - *Katofa v Administrator-General for South West Africa and Another* 1985 (4) SA 211 (SWA)."

Bull's case, *supra*, was preceded by *Attorney-General v Matewere & Anor* 1983 (2) ZLR 339 (SC) in which the effect of s 13(2)(e) on what had been done to the arrested persons under the authority derived from the provisions of the Criminal Procedure and Evidence Act, did not arise for decision, because at that time (being prior to 18 April 1985) anything done under the authority of an existing law enjoyed protection against unconstitutionality by

1991 (1) ZLR p124

GUBBAY CJ

virtue of ss 26(2)(b) and (3)(b) of the Constitution. The only observation of GEORGES CJ which still remains apposite, is that a remand court, as the tester of the existence of reasonable suspicion, is not permitted to qualify allegations of fact put before it by drawing inferences of doubtful validity in favour of the accused (see at 345A-C); nor I would add in favour of the State.

I wish firmly to dispel any impression that may arise (albeit, in my view, without warrant) from the decisions referred to, that it is only where the accused person claims a violation of the protection afforded by s 13(2)(e) of the Constitution, that the remand court must satisfy itself that there has been due compliance therewith by the State. Put differently, that it is the obligation of an accused person to protest an unlawful deprivation of personal liberty and that until he does so there is no duty on the part of the judicial officer, before whom he appears, to obtain information from the prosecutor of the grounds upon which reliance is placed for the existence of the reasonable suspicion that he has committed, or is about to commit, a criminal offence, and to determine, on the facts presented, whether the *onus* has been discharged. The vast majority of accused persons detained under arrest and who appear for remand, are unrepresented. It is no exaggeration to say that most of them are totally unaware of their constitutional rights and have no access to legal advice. The courts are there to ensure fair play and to offer protection to those in need of it. Unless therefore, this elementary but nonetheless vital enquiry is undertaken, the possibility of an unfounded invasion of liberty cannot be discounted. It is the judicial safeguard of an impartial determination which stands between an accused person arrested without warrant and, perhaps, the over zealous peace officer, engaged in the often competitive function of unearthing crime, who was the first to adjudge him. This grave responsibility does not terminate with the decision at the initial remand that a deprivation of liberty is warranted. It is to be exercised at all subsequent remands pending the trial, for the situation may change. Investigations may reveal that, for one reason or another, the reasonable suspicion once justified is no longer maintainable. So there is a double obligation: on the prosecutor to assure the court that the grounds upon which reliance was formerly placed for the existence of the reasonable suspicion have not altered in favour of the accused; and on the court to ensure that this is so. In short, the protective process is always on-going.

I turn, finally, to the pertinent and closely debated question of whether the State established grounds from which it could objectively be held that a reasonable suspicion existed that the respondents had committed the offence for which they were placed on remand.

1991 (1) ZLR p125

GUBBAY CJ

Of course, if the facts presented do not constitute a criminal offence known to the law, then *cadit quaestio* - the assumption that the State is able to prove those facts would be of no relevance. And if this requirement is met, then such facts must sufficiently link the accused with the commission of the offence in the sense that they create a reasonable suspicion of his having committed it, or being about to commit it.

It was accepted by counsel that the facts appearing on the reverse side of the Request for Remand form, and those spoken to by the prosecutor, if proved, would amount to a

contravention of the Exchange Control legislation. Their arguments ranged on whether or not the second requirement, that of connecting the respondents to the criminal offence, emerged from the facts with adequate clarity so as to demonstrate objectively a reasonable suspicion of the offence having been committed **by them**.

Certainly, the second sentence of the typewritten summary did no more than provide particulars of the offence. The phrase "nothing was recovered", and the final sentence "the gold was refined and sold in West Germany and the money banked in a bank in West Germany", failed to associate either respondent with such actions. It was not stated that they had anything to do with the refining of the gold, that it had been sold by them in West Germany, or that the proceeds from that sale were credited to an account held by them at a West German bank.

With regard to the prosecutor's verbatim presentation it was acknowledged by Mr *Chikumira*, for the Attorney-General, and by Mr *de Bourbon*, that the critical statement was "following information received enquiries were conducted by the police resulting in uncovering documentation proving the exportation of the gold and platinum".

What Mr *de Bourbon* was quick to allude to was the absence of the closing words "by the accused". Without them, so it was strongly urged, the vital link was missing, for the identity of those responsible for the exportation of the gold and platinum remained vague and ambiguous. I am unable to agree. This particular statement made by the prosecutor was not to be viewed disjunctively, but conjunctively in the context of the facts preceding it. The prosecutor did not say that the police had uncovered documentation "proving an exportation of gold and platinum", but "**the** exportation of **the** gold and platinum" (my emphasis). Having earlier alleged that the respondents, in concert with each other, had exported from Zimbabwe to West Germany 27 kilograms of gold and one kilogram of platinum, it followed, so it seems to

1991 (1) ZLR p126

GUBBAY CJ

me, both grammatically and as a matter of irresistible deduction, that he was conveying that, *ex facie* the documentation in his possession, it was the respondents who were the exporters; and that what had been exported were the 27 kilograms of gold and the one kilogram of platinum previously mentioned.

Notwithstanding this conclusion, which I must confess, was not reached too easily, I consider that prosecutors would be well advised to be more open and forthright when informing a remand court of the facts relied upon as establishing the *nexus* between the offence and the accused, than the prosecutor was in this matter. Understandably, what facts to reveal, and what to conceal, at this early stage of the proceedings, may occasionally pose an agonising decision, especially where the investigation being undertaken is of a sensitive nature and it is believed that interference by, or on behalf of, the accused may occur if over much is made known. But concealment, symptomatic of a desire to be uncooperative and to hinder the defence, should never be resorted to. If such be the case, the prosecutor would have only himself to blame in the event of his application for a remand in custody being refused.

Mr *Chikumira* advised that if the appeal were to succeed it was not the intention of the

Attorney-General to procure the return of the respondents to custody. What had prompted the appeal was the opportunity to obtain guidance from this Court. If I may say so that is a commendable attitude, and I trust this judgment will provide some clarification on the issue so ably argued.

It is competent in an appeal of this nature to order that costs should follow the result. See *Bull v Attorney-General of Zimbabwe* 1987 (1) ZLR 36 (SC). Nonetheless a constitutional point was involved with regard to which the answer was not self-evident and which the Attorney-General viewed as important. Furthermore, in resolving it, the argument presented by Mr *de Bourbon* was of much assistance to this Court. In line with the approach to costs adopted in *Hewlett v Minister of Finance & Anor* 1981 ZLR 61 (SC) at 596; 1982 (1) SA 490 (ZS) at 508A; *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (SC) at 385; 1984 (2) SA 778 (ZS) at 785G - H; and *Bull v Minister of Home Affairs* 1986 (1) ZLR 202 (SC); 1986 (3) SA 870 (ZS) at 876B-C, I consider the respondents should not be penalised because a decision adverse to them has been given.

Accordingly, I would allow the appeal and alter the order of the court *a quo* to read:

1991 (1) ZLR p127

GUBBAY CJ

"The application is dismissed."

Korsah JA: I agree.

Ebrahim JA: I agree.

Gollop & Blank, respondents' legal representatives

1991 (1) ZLR p128

S v LEVY 1991 (1) ZLR 128 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Manyarara JA

Criminal appeal

7 February & 11 March 1991

Flynote

Interpretation of statutes - interpretative criteria are aids to construction - references in legislation to action or conduct - presumed to be references to lawful action or conduct.

Words and phrases - meaning of "value" - usually means market value or exchange value - absence of market value - court must do its best to assess what the commercial value should be.

Statutes - Control of Goods (Price Control) Regulations 1954 - s 18 (3) - value means best price lawfully

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obtainable.

Headnote

The various interpretative criteria are aids to construction and should not be regarded as immutable principles.

It is a recognised canon of construction of statutes that any reference in any law to any action or conduct is presumed, unless the contrary intention appears from the statute itself, to be a reference to a lawful action or conduct. *S v Mapheele* 1963 (2) SA 651 (A) at p 655D followed.

Where the word "value" is an ambiguous word, it normally means "market value" or "exchange value". Where, however, there is no market value, the court must do its best to assess what the commercial value should be.

The word "value" however in the context of s 18(3) of the Control of Goods (Price Control) Regulations, 1954 means the best price lawfully obtainable and not an unlawful black market price.

Cases cited:

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

1991 (1) ZLR p129

McNally JA

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

S v Mutumbuka & Anor 1989 (2) ZLR 217 (HC)

S v Gondo 1990 (2) ZLR 171 (SC)

S v Makina 1983 (1) ZLR 202 (HC)

S v Makandigona 1981 ZLR 408 (A)

Abbott v Commissioner for Inland Revenue 1963 (4) SA 552 (C)

Pietermaritzburg Corporation v South African Breweries Ltd 1911 AD 501

SA Railways v Theron 1917 TPD 67

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

Sarembok v Medical Leasing Services (Pty) Ltd & Anor 1991 (1) SA 344 (A)

BM & Ors v Commissioner of Taxes 1970 (1) RLR 13 (G); 1971 (1) SA 506 (R)

Todd v Administrator, Transvaal 1972 (2) SA 874 (A)

S v Mapheele, supra

Gatooma Rural Council v Crook 1974 (1) RLR 321 (A); 1974 (3) SA 840 (RA)

May & Ors v Reserve Bank of Zimbabwe 1985 (2) ZLR 358 (SC); 1986 (3) SA 107 (ZS)

Attorney-General v Slatter & Ors 1984 (1) ZLR 306 (SC); 1984 (3) SA 798 (ZS)

Klerck NO v Kaye 1989 (3) SA 669 (C)

Kauluma & Ors v Minister of Defence & Anor 1987 (2) SA 833 (A)

S v Avari S-4-86 (not reported)

A P de Bourbon SC for the appellant

I Houston for the respondent

Judgment

McNally JA: The appellant was convicted in the High Court on 6 June 1989, on his plea of guilty, of a contravention of s 18(3) as read with s 18(1)(b) of the Control of Goods (Price Control) Regulations 1954, (FGN 255 of 1954).

The offence arose out of the purchase and sale of a 1987 Toyota Cressida motor car. He bought it new on 16 October 1987 for \$29 821,58. He sold it on 23 September 1988 for \$105 000. The maximum controlled re-sale price (SI 578/81 as amended by SI 36/88) was \$24 457.

There were various mitigatory features put before the court in relation to sentence, but the main question to be determined in this appeal against sentence was the size of the maximum fine permitted by the Regulations.

1991 (1) ZLR p130

McNALLY JA

Section 18(3) of the Regulations provides that an offender is liable, in a case involving a commodity, "to a fine not exceeding the value of such commodity or \$5 000, whichever is the greater".

What is "value" in this context? Is it the controlled price, which is the highest price lawfully obtainable for the vehicle, ie \$24 457? Is it the market price, in the sense of a black-market price or unlawful price? And, if it is the (black) market price, is that price to be ascertained by evidence, or is it to be taken to be the actual price obtained in the particular case?

In the High Court, both in this case 1989 (2) ZLR 12, and in *S v Shava* 1989 (2) ZLR 107 (HC) and *S v Mutumbuka & Another* 1989 (2) ZLR 217 (HC), it has been held that value is not the controlled price. Some judges have said in effect that the value is the black market value, which value is usually to be ascertained by looking at the price paid in the particular instance. Others have said the value is the price paid. Both lines of reasoning lead to the same conclusion.

In this court, in the case of *S v Gondo* 1990 (2) ZLR 171 (SC) the matter was considered in passing but not discussed. No argument on this issue was addressed to the court and the

matter was left in abeyance as the following extract indicates:

"I have read the judgments with some care. Without having the benefit of argument to the contrary, my *prima facie* view is that they correctly decide that the law-maker did not intend 'value' to mean the selling price specified by the Minister, as permissible under s 3 (1) of the Price Control Order. I say no more, for I understand that appeals are pending ...This judgment is not, therefore, to be taken as finally disposing of the issue."

The reasoning of Mr Justice SMITH in the present case was set forth with his customary lucidity. He came to the conclusion that the maximum fine he was authorised to impose was \$105 000 "the value of the Toyota Cressida". He came to this conclusion for two reasons.

First he decided that "value", by reference to decided cases and legal dictionaries, ordinarily means "market value" or "exchange value". The fact that "market value" or "exchange value" in this case meant "black market value" was unimportant. It did not mean the court was condoning illegal trading. The court, he said, "is merely accepting the current situation". He pointed out that the very reason for price controls was usually that market values were escalating unreasonably.

1991 (1) ZLR p131

McNALLY JA

Second, he decided that it accorded with justice and commonsense to give this interpretation to "value". The intention of the legislature must have been to authorise a fine greater than the unlawful profit. In the present case, to impose a fine of \$24 457 when the appellant had made a profit of \$80 543 would not, he concluded, accord with justice or commonsense.

Let me start by considering that second reason. It is of course correct to say that a man should not be allowed to benefit from his crime, but it does not always follow that it is necessary, or even just, to deprive him of his whole profit by way of a fine. There may be cases where the profit is taken away by other means. I gave some instances of this situation in *S v Makina* 1983 (1) ZLR 202 (HC) particularly at 204F.

In the present case, s 16 of the very Regulations under which the appellant was charged made provision for an order to be made by the Minister, whether or not the seller had been prosecuted, "that he should refund to the purchaser, or, if his whereabouts cannot readily be ascertained, to the Consolidated Revenue Fund, a sum not exceeding twice the amount by which the selling price exceeded the controlled price."

The existence of this provision, I think, destroys the significance of the learned judge's second argument. It does not mean that we cannot give "value" the "higher" meaning for which he opted. But it does mean that we are not compelled by logic to adopt that "higher" meaning. We cannot say "the legislature must have intended 'value' to mean 'black market value' because otherwise the offender's punishment would be no punishment at all but a mere reduction in his profit".

There is nothing unjust or contrary to commonsense in a provision whereby the fine is set at a figure lower than the unlawful profit made, so long as there is another provision precisely aimed at taking away that profit. In short the existence of s 16 renders colourless the second argument relied on by the learned judge.

I turn then to consider the first and primary argument. This argument is based squarely on the basic rules of interpretation.

The earlier penal section made it an offence to sell controlled goods at a price which exceeded the appropriate price at which it was permissible to sell such controlled goods. In 1980 it was decided to fix the maximum penalty by reference to the value of the commodity concerned.

1991 (1) ZLR p132

McNALLY JA

The learned judge relied on the interpretative criterion that where the draftsman departed from the previous formula relating to appropriate price (ie the controlled price) and adopted a new formula relating to value, the intention must have been to introduce a new concept. That new concept must relate the maximum penalty not to the appropriate or controlled price, but to some other figure which must be the black market value. See Bennion *Statutory Interpretation* p 376, under the heading "Different words to be given different meaning". See also *S v Makandigona* 1981 ZLR 408 (A) at 413C-G; 1981 (4) SA 439 (ZA) at 443B - F. It must be noted, however, that such criteria are aids to construction, not immutable principles. (See *Abbott v Commissioner for Inland Revenue* 1963 (4) SA 552 (C) at 556E.) In an addition to page 376 Bennion, in the first supplement to his book, says:

"Two enactments intended to have the same meaning may use different words where the draftsman of the later provision was unaware of the former."

I am not convinced that the amendment to the Regulations shows a change of concept. The original regulations (and one must bear in mind that these were drafted in 1954 under Federal Government legislation) simply set out a list of twelve offences, one of which (s 18 (f)) was that any person who:

"sells or agrees to sell any controlled goods at a price which exceeds the appropriate price at which it is permissible for him to sell such controlled goods under any order ...shall be guilty of an offence."

The penalty was not in the regulations but in the Act itself (Federal Act No. 12 of 1954). It provided generally, for the contravention of any order by a first offender:

"...a fine not exceeding one hundred pounds (\$200) or in default of payment imprisonment for a period not exceeding six months" (s 7).

This became s 6 of [Chapter 280] of the Statute Law of Rhodesia. In 1976 s 6 was repealed and replaced. The President was empowered (s 29 of Act 42 of 1976) to prescribe offences and penalties in regulations, and a ceiling of \$5 000 or five years or both was introduced for such penalties. However, the President did not in fact prescribe any penalties.

In 1978 the Act was again amended by s 28 of Act 41 of 1978. The permissible level of penalties was both increased and made more flexible by

1991 (1) ZLR p133

McNALLY JA

the introduction of the concept of "value". Thus s 6 of the Act now reads:

"No penalty prescribed in regulations made in terms of section 3 shall exceed -

- (a) in the case of an offence which involves any goods or commodity, a fine of an amount equivalent to the value of such goods or commodity or a fine of \$5000, whichever is the greater, or
- (b) in any other case a fine of \$5000;

or imprisonment for a period of five years or both such fine and such imprisonment."

It is I think of major significance that when the Act was amended in 1978 the concept of value was introduced while the regulations as they stood still spoke of "a price which exceeds the appropriate price". Section 18(f) of the Regulations co-existed with the amended s 6 (2) of the Act.

In other words the one concept did not replace the other. The penal provisions of the Act were made wider and more flexible by the use of the "value" concept while the other wording remained in the regulations. Moreover the Act had to use different and wider wording than was in the regulations because the Act was providing a penalty for more offences than merely the offence set out in s 18(f) of the regulations. Its wording had therefore to be wider. The Act dealt not only with price control but also with "distribution, disposal, purchase and sale ...control of imports ...and exports".

Despite the change in 1978, the Government still did not use its powers to make regulations prescribing penalties until 1980. It was in Statutory Instrument 370 of 1980 that the original s 18 of FGN 255 of 1954 was at last repealed and replaced.

The new section created quite differently worded general offences in subs 18(1). There was nothing as specific as the old s 18(f). Section 18(1)(b), which is the section under which the appellant was charged, reads:

"No person shall ... without lawful excuse, refuse or fail to comply with any order or direction of the Minister or request of an inspector made in terms of these regulations."

Statutory Instrument 578 of 1981 is just such an "order of the Minister" and it lays down the maximum sale price of certain vehicles. Thus, under the new form, there was no need for the old section 18(f).

1991 (1) ZLR p134

McNALLY JA

The conclusion one must reach from this rather wearisome analysis is that this is not a case where different words must be given different meanings. It is a case where the structure of the Act and of the regulations changed. Originally there was a simple penalty provision in the Act and twelve specific offences detailed in the Regulations. Now the Act is permissive and the Regulations contain three generalised offences and one very flexible penalty provision. The use of the word "value" in the current penalty provision merely follows the introduction of that concept into the Act in 1978. It was not introduced as something different from "a price which exceeds the appropriate price" but simply as a more general term, to apply to a wider range of

offences.

Or, to put it differently, the formula "a price which exceeds the appropriate price" was used to define the **offence**. The formula relating to value was used to define the limits of the **penalty**. The two expressions were never in conflict. The one did not replace the other.

In short I do not agree that "value" must necessarily mean something other than the controlled price. It may, or it may not, but the decision is not assisted by applying the interpretative criterion that different words must be given different meanings.

We must go back to the first principles of interpretation.

There is no doubt that "value" is an ambiguous word. It requires interpretation. However certain statements can be made about its meaning.

1. It is accepted that it normally means "market value" or "exchange value". *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 at 533; *SA Railways v Theron* 1917 TPD 71; *van der Merwe NO v van der Merwe* 1973 (1) SA 436 (C) at 438H; *Sarembok v Medical Leasing Services (Pty) Ltd & Another* 1991 (1) SA 344 (A) at 352B. Strouds *Judicial Dictionary* 5 Ed. *BM & Others v Commissioner of Taxes* 1970 (1) RLR 13 at 24 - 25; 1971 (1) SA 506 (R) at 517 - 518.

But surely when a controlled price is introduced, that controlled price becomes the market value? That is the price at which such goods are lawfully bought and sold.

2. Where there is no market the court must do its best to assess what the commercial value should be. *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A);

1991 (1) ZLR p135

McNALLY JA

Gatooma Rural Council v Crook 1974 (1) RLR 321 (A); 1974 (3) SA 840 (RA); *May & Ors v Reserve Bank of Zimbabwe* 1985 (2) ZLR 358 (SC); 1986 (3) SA 107 (ZS).

That situation does not arise in the present case.

3. In deciding whether "value" should be interpreted to mean "black market value" one must take account of the words of BOTHA JA in *S v Mapheele* 1963 (2) SA 651 (AD) at 655D:"

"It is a recognised canon of construction of statutes that any reference in any law to any action or conduct is presumed, unless the contrary intention appears from the statute itself, to be a reference to a lawful or valid action or conduct".

See also *Attorney-General v Slatter & Ors* 1984 (1) ZLR 306 (SC) at 317; 1984 (3) SA 798 (ZS) at 806 D-E. *Klerck NO v Kaye* 1989 (3) SA 669 (C) at 676B. (And for a case which on the facts went the other way see *Kauluma & Ors v Minister of Defence & Anor* 1987 (2) SA

833 (A) at 856 et seq.)

In the English law this canon of construction is apparently known as construction in *bonam partem*, as to which see *Bennion, supra*, at 298 and Maxwell on the *Interpretation of Statutes* 12 Ed at 174 et seq.

It has been argued by Mr *Houston*, who appeared for the State, that it is not unusual for the courts to recognise an illegal value. He pointed to the situation in drug-peddling cases such as *S v Avari* S-4-86 where in assessing the penalty to be imposed the court relied on evidence as to the "street value" of drugs which could not lawfully be sold except under prescription. It seems to me that this involves a different principle. The court was not using the word "value" to mean "unlawful value". It was not defining "value".

In *Avari's* case, *supra*, and similar cases the court takes account of the profitability of the illegal trading in order to assess a proper penalty. If a man has made \$10 000 illegally it would be ridiculous to fine him \$100. If he stands to make \$10 000 a slap on the wrist will not deter him or his suppliers or those anxious to follow his example and get rich quick. The principle involved is simply the old principle that a wrong-doer should not benefit from his wrongdoing.

1991 (1) ZLR p136

McNALLY JA

In this case the legislature has used the word "value" to define the upper limit of the court's jurisdiction in relation to punishment. There does not seem to me to be any reason to suppose that it meant "unlawful value" or "black market value". If it had meant that it would have said "in the case of goods or commodities sold in breach of the Price Control Regulations the maximum fine shall be the price at which the goods or commodities were sold" or "twice the unlawful profit made on the transaction" or similar words.

It seems to me unthinkable that we should assume that when the legislature used the word "value" it meant "unlawful value". The only argument in favour of that essentially unacceptable interpretation would be that otherwise the penalty would be ridiculously too low. As we have seen, that argument falls away because of the existence of a parallel administrative remedy in s 16. The Minister may intervene and order a refund of up to twice the profit made, either to the purchaser, or, if he is not readily ascertainable, to the State. That parallel remedy, now replaced by s 34 of SI 153B of 1989, may not be entirely satisfactory in practice, but the fact is that it exists precisely in order to fill the gap between the upper limit of the fine and the excess profit of the offender.

I am driven to the conclusion therefore that there is no good reason for the court to assume that when the lawgiver set the upper limit of the fine in this case as the value of the car in issue, it meant the black market value of that car. Had it not been for the existence of s 16 we might with great reluctance have been driven by the canons of purposive construction to that conclusion. But that situation does not arise.

The law, with respect, is unsatisfactory. I venture to suggest that the new law, and in particular s 34 of SI 153B of 1989, is even more unsatisfactory. Indeed, without wishing in any way to interfere in matters of economic policy, I think it is the duty of the court to point out that this

particular piece of legislation in relation to the price of motor vehicles has made criminals out of more ordinary citizens than any other legislation since the "anti-terrorist" legislation prior to independence.

The tragedy of this enactment lies not only in the fact that so many ordinarily honest citizens are tempted to break it, but also in the fact that it is so randomly enforced. So many offend, so few are prosecuted. These are the hall-marks of bad law.

It remains only to apply the conclusion to which I have come, to the facts of

1991 (1) ZLR p137

McNALLY JA

this case. If the maximum fine which can be imposed is equivalent to the lawful value of the car in question, that maximum fine is \$24 457.

The appellant's moral blameworthiness is relatively low. It was not alleged that he acquired the vehicle for purposes of making an illegal profit on resale. He kept it for almost a year before re-selling. The price was suggested by the purchaser.

On the other hand one cannot be blind to the fact that this is an economic crime, and a large profit has been made unlawfully. Personal considerations cannot loom too large. I would impose a fine of \$20 000, in default of payment, three months' imprisonment with labour.

Accordingly the appeal against sentence succeeds to the extent that the fine of \$95 000 or, in default of payment, six months' imprisonment with labour is set aside. Instead the appellant is sentenced to a fine of \$20 000 or, in default of payment, three months' imprisonment with labour.

Gubbay CJ: I agree.

Manyarara JA: I agree.

Atherstone & Cook, appellant's legal practitioners

1991 (1) ZLR p138

S v MUKOMBE 1991 (1) ZLR 138 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Ebrahim JA

Criminal appeal

11 February & 19 March 1991

Flynote

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Criminal procedure sentence - murder - consideration of extenuating circumstances. Conviction and sentence set aside and the matter remitted to the trial court for further evidence.

Headnote

The accused was sentenced to death for the murder of his wife. The trial court found no extenuating circumstances. The killing was without motive and there was no psychiatric evidence as to the accused's state of mind at the time.

Held, that in the absence of evidence of motive or mental or emotional fragility there was a real probability that the accused acted from a sense of diminished responsibility.

Held, that it was proper that where a person is charged with murder, the trial court should investigate fully the mental condition of an accused person and this would include receiving reports of the accused's family, friends, co-workers and former employers.

Held, that the accused's conviction and sentence be set aside and the matter be remitted to the trial court for further consideration of the accused's mental and emotional state.

Cases cited:

S v Taanorwa 1987 (1) ZLR 62 (SC)

M Madziwanzira for the appellant

A O Agyemang for the respondent

1991 (1) ZLR p139

McNALLY JA

Judgment

McNally JA: There is no doubt in this case that the appellant killed his wife. He came towards her as she was washing some clothes at a rock in the Muparadzi River near her home in village 4, Chinyika West, near Headlands. It was the morning of 4 April 1987. He called out her name and she replied: "What is the matter?" Then, without any warning, and without her showing any sign of expecting trouble, he threw an axe at her, knocking her over into the water. He then took a knife out of his pocket and stabbed her twice. She ran away a short distance and he caught up with her. He then stabbed her a third time, in the chest. This was the fatal blow.

The appellant ran away and hid, but later gave himself up to the police. He paid damages to her parents. He put up a number of conflicting explanations as to why he had killed his wife. He said he had seen her just before the incident committing adultery. He said she was "insulting him too much". He said she assaulted him painfully at the river, causing him to lash out in pain and anger. All this the trial court rightly disbelieved. It was nonsense.

The court therefore found him guilty of murder with an actual intent to kill. In considering the question of diminished responsibility the court decided that there was no evidence before it which would justify such a conclusion. Accordingly, in the absence of extenuating

circumstances the sentence of death was passed.

The absence of positive evidence of mental or emotional fragility (and I use that word to include diminished responsibility as well as true mental disorder or defect) is not at all uncommon. The only clue may be, as I said in *S v Taanorwa* 1987 (1) ZLR 62 (SC), the "odd, or inexplicable or sometimes bizarre" behaviour of the killer. In the present case it seems to me unfortunate that defence counsel at the trial did not, apparently, interview the appellant's family, friends, co-workers and former employers, in an attempt to discover whether he had any history of strange behaviour. It should have been apparent to defence counsel that his client's version of events was unlikely to be believed. In such cases, as I once tried to explain in a speech reported in *Legal Forum* Vol 1 No 2 at p 3, and in particular at paras 8 and 9, defence counsel should bear in mind the possibility of a second or third line of defence:

"Drink, dagga, provocation and insanity are always or nearly always possibilities, especially in apparently motiveless killings. I know the State does not have to establish a motive, but the absence of a motive should always set alarm signals ringing in the mind of a defence counsel."

1991 (1) ZLR p140

McNally JA

This is such a case. Not only is there no evidence of motive. There is positive evidence of an absence of motive. The learned judge himself asked the mother of the deceased:

"Q. Are you able to throw any light as to why the accused should have killed your daughter?"

A. I cannot throw any light at all, I have no knowledge why the accused killed my daughter because they were quite happy."

Moreover there was no immediately preceding quarrel. That very morning they had all been together, and the mother said:

"I was also surprised because they were quite happy when I left them, the deceased was cooking sadza for the accused her husband and warming some water for him and then the deceased came to the field where we were and eventually one kills the other. I was surprised how it came to that way."

Generally, she said:

"The relations between them were very good."

That evidence of the mother is positive evidence that there was no reason for the killing. I do not say it is positive proof, because there may be a reason of which no one is aware. But certainly, since we are dealing with a small rural family, one would expect that if there was a rational reason for the killing, it would have been known to the deceased's relatives. The fact that they can offer no rational reason is surely evidence amounting to proof, on a balance of probabilities, that the killing was an irrational act. And if that is so, is not the killer, in the absence of psychiatric evidence, to be regarded as a man suffering from diminished responsibility?

I should add that in this case there is some evidence of superstitious beliefs in the background which may or may not be relevant. The deceased had a previous husband. His mother had strongly disapproved of the marriage. Because of this, it was said, he committed suicide. As a

result there was apparently some perceived need to "appease the spirits" before the marriage between the deceased and the appellant could be finally approved.

I have given some thought to the question whether it is necessary to refer the matter back to the trial court, or whether this court could not, on the evidence,

1991 (1) ZLR p141

McNALLY JA

make a finding of diminished responsibility, and thus a finding of extenuating circumstances.

The practice in the past has usually been to refer the matter back. Essentially this is because a full and proper investigation may reveal not merely diminished responsibility but mental disorder or defect justifying a special verdict. The cases in this connection have very carefully been discussed and analysed in two articles by G Feltoe in *Legal Forum* Vol 1 Nos 4 and 5 dated June and September 1989, and entitled "Investigating the Mental Condition of Persons charged with Murder".

Accordingly, and in order to leave open the possibility of a special verdict, the conviction and sentence will be set aside, and the matter remitted to the High Court for further consideration of the appellant's mental/emotional state. The appellant should undergo psychiatric examination, but before that is done the State and *pro deo* counsel for the defence should endeavour to obtain information from the appellant's family, friends, co-workers and former employers which may be of value in the psychiatric investigation. The trial court's attention is directed to the comments in *Taanorwa, supra*, and the articles referred to above. Finally it is pointed out that even if it is not possible to obtain meaningful background information on the appellant, and if as a consequence the psychiatric evidence is inconclusive, the trial court may nevertheless come to the conclusion, on the stark facts as they presently exist, that the appellant's mental condition warrants a finding of diminished responsibility.

The conviction and sentence are hereby set aside and the matter is remitted to the High Court for further investigation and consideration in the light of this judgment.

Manyarara JA: I agree.

Ebrahim JA: I agree.

Gambe, Chinyenze & Associates, appellant's legal practitioners

1991 (1) ZLR p142

S v MAKAWA & ANOR 1991 (1) ZLR 142 (SC)

Court **Supreme Court, Harare**

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

Criminal appeal

26 March 1991

Flynote

Criminal procedure - appeal - failure to give reasons for judgment - gross irregularity.

Assault - by police officers - need to investigate.

Traps - evidence of - no corroboration required - evidence to be approached with caution.

Parks and Wild Life Act 1975 - s 37(b) - possession of rhino horns - need to explain nature of offence and the attendant penalties to accused before conviction.

Headnote

Appellants were charged, tried and convicted of contravening s 37(b) of the Parks and Wild Life Act 1975 in that they were found in possession of two rhinoceros horns. They had pleaded not guilty and at their trial they alleged that they had been mistreated by the police who had assaulted them with a view to extracting confessions, but they had not succumbed to the assaults. In convicting them the trial court did not give reasons for its judgment, although it was apparent that the convictions were based on the evidence of traps.

Held, that as appeals are argued and decided on the contents of the record of the proceedings in the lower court, a failure to give reasons for judgment is a gross irregularity. Without reasons an appellate court is hamstrung in its endeavours to determine if the conviction was justified.

Held, that although allegations of police mistreatment are commonly made and are often found to be spurious, the frequency with which they are

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made justifies that a thorough investigation be made. When an accused person stands in jeopardy of a criminal conviction if a confession made as a result of mistreatment is accepted, it is incumbent on the judicial officer to investigate to the fullest extent the veracity of the allegations.

Held, further, that although the evidence of a trap requires no corroboration, such evidence must be treated with caution.

Seemle, where a person is charged with a serious offence such as a contravention of s 37(b) of the Parks and Wild Life Act 1975, which carries minimum mandatory penalties, a failure to explain to the accused before conviction that he stands in jeopardy of a heavy mandatory sentence vitiates the propriety of the conviction.

Cases cited:

Muroogasen v R 1952 SR 143

S v Mapiye S-214-88 (not reported)

R v Jokoniya 1964 RLR 236 (G)

R v d'Enis 1966 RLR 457 (A); 1966 (4) SA 214 (RA)

Practice Note 4 of 1966 (Appellate Division) 1966 RLR 755 (A)

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

Watt (or Thomas) v Thomas [1947] 1 All ER 582 (HL)

Joyce v Yeomans [1981] 2 All ER 21 (CA)

S v Chaerera 1988 (2) ZLR 226 (SC)

S v Maharangwe S-5-90 (not reported)

S v Khanyile & Anor 1988 (3) SA 795 (N)

Judgment

Ebrahim JA: In this case the State filed a notice conceding that the convictions could not be supported. As the concession was proper, the case was withdrawn from the roll to be dealt with in Chambers. I shall now set out the reasons why the appeal must succeed:

The appellants were convicted of contravening s 37(b) of the Parks and Wild Life Act 1975. It was alleged that they had been in joint possession of two rhinoceros horns without a permit. The horns had been officially valued at \$50 000. Each appellant pleaded not guilty but was found guilty and sentenced to pay a fine of \$15 000 or, in default of payment, to serve five years' imprisonment with labour.

The record before me is totally inadequate for purposes of appeal. The appellants' legal representative drew attention to the fact that the notice of appeal had been prepared "without the benefit of the court record". In a replying memorandum to the notice of appeal (included in the record) the

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EBRAHIM JA

magistrate commented:

"It is a pity that the notice of appeal was prepared before the judgment. It is therefore based on what the legal representative of the appellants assumed was going to be the basis for conviction.

The court placed due weight to all circumstances on discrepancies and also took the necessary caution in relation to the evidence of the informer (*sic*)."

Notwithstanding these somewhat righteous sentiments, no judgment has to date (almost three years after the trial) been forthcoming.

The appellants were caught in a police "trap". The State alleged that a friend of the first appellant's husband, one Dickson Banda, was asked by the appellants to find a buyer for two

rhinoceros horns. They specified that the buyer should be a white man. Banda reported the request to the police who thereupon enlisted the aid of a white man, John Morrison, to pose as a potential buyer. That latter gave evidence substantially corroborating Banda's testimony.

The appellants throughout the trial leading to their convictions were steadfast in their denials of involvement in this offence. They alleged that the police had tortured them to obtain admissions of guilt. Yet they denied involvement despite this discomfort. The first appellant, in reply to a question towards the end of her evidence-in-chief, stated "My thumb cannot stretch any longer" following police assaults. There is no record of the magistrate requesting a demonstration of this phenomenon, simple though it would have been to have done so. The second appellant alleged assaults on the head and chest by police details. She became ill while in prison and was taken to hospital at the recommendation of a magistrate who visited the prison. This allegation also seems to have fallen on deaf ears, although it surely would have been easily verified from hospital records.

I am well aware that allegations of police maltreatment are commonly made by accused persons and that such allegations are often spurious. But the frequency with which they are made ought not to justify ignoring them. It is a matter of gravity to the State that policemen have abused their positions in this manner. It is even more serious to allege that the reason for such abuse was to force the victim to say or do something he would not otherwise have said or done. Where an accused person stands in jeopardy of a criminal conviction, should the statement made because of the alleged maltreatment

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EBRAHIM JA

be believed, it is incumbent on the judicial officer to investigate to the fullest possible extent the veracity of the allegations.

In this case, the appellants maintain that they did not succumb to the maltreatment and make the admissions demanded of them. Their convictions were based solely on evidence led in court. Nonetheless, in the circumstances of this case, it would have been a telling point for the defence case had the appellants proved that the police had improperly attempted to force confessions from them.

As far as one can tell in the absence of a reasoned judgment, the convictions were based on a substantial concordance between the evidence of Banda and Morrison.

Corroboration of the evidence of traps is not a requirement (see, for example *Muroogasen v R* 1952 SR 143). However, this rule cannot be taken as absolute. From the remnant of the record available to me, it is clear that the magistrate regarded Morrison's evidence as coloured to some extent by his conservationist views. The extent of this colouration and the weight the magistrate attached to it are factors which ought to have been included in the judgment. Regrettably this is unavailable.

Banda's evidence ought also to have been approached with caution. An informer such as he, who gives unsolicited incriminating evidence to the police, cannot but arouse suspicion as to his motives. His explanation for so doing - that he became afraid of the

consequences of negotiating the sale of the horns - might be true. On the other hand, elsewhere in his evidence he denies knowledge of the value of rhinoceros horns and intimates ignorance of the campaign to protect the species.

It seems to me that to base a conviction on evidence so patently questionable would, in the best of circumstances, be ill-advised. The magistrate might have had sound reason for so doing, but as his reasoning process (in the form of a written judgment) has not been supplied, I have no way of testing it for purposes of this appeal.

The situation arising when it appears that insufficient evidence has been supplied to enable an appellate tribunal to decide on appeal raises thorny procedural problems. Not the least of these is the question of when the appellate tribunal is justified in interfering with the decision of a lower court to the extent of saying that the decision was wrong and reversing it.

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EBRAHIM JA

Fortunately the situation is not without precedent.

In *S v Mapiye* S-214-88, the former Chief Justice dealt with a case in which the magistrate had omitted from the appeal record the evidence relating to a second charge on the charge sheet yet had convicted the appellant on both charges. It is instructive to quote the final paragraph of that judgment:

"To confirm the conviction on the second count, would, in my view, result in a failure of justice. The omission to consider and to give reasons for convicting the appellant on Count Two is fatal to the prosecution case. **It is a gross irregularity.** Appeals are argued and decided on the contents of a certified record of the trial proceedings. If those contents are stored in the mind of the trial magistrate, they are not good enough." (My emphasis.)

Strictly speaking, this passage, and especially the sentence which I have taken the liberty of underlining, is decisive as regards the disposition of this matter. Although there are indications in this case that the magistrate may have considered the case, a large portion of those considerations remained stored in his mind instead of being committed to paper. In the circumstances, this amounts to an omission to consider and give reasons. There is a gross irregularity in the proceedings. See *R v Jokoniya* 1964 RLR 236 (G); *R v d'Enis* 1966 RLR 457 (A); 1966 (4) SA 214 (RA); and *Practice Note 4 of 1966 (Appellate Division)* 1966 RLR 755 (A).

There are a number of subsidiary points which bear further elucidation:

With respect to DUMBUTSHENA CJ, I think it would be beneficial to examine in greater detail the legal niceties of an appeal in such cases. An appellate court is bound to be reluctant to overturn the decision of a trial court which will have the advantage of hearing verbal evidence, observing the witnesses, and generally acquiring a "feel" for the case; see, *inter alia*, *R v Dhlumayo & Anor* 1948 (2) SA 677 (A); *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 (HL); *Joyce v Yeomans* [1981] 2 All ER 21 (CA).

Dhlumayo's case, to which DUMBUTSHENA CJ referred in *Mapiye*, *supra*, dealt essentially with the situation where the appeal is on a question of fact. In the course of his opinion in *Watt's* case, *supra*, (House of Lords precedent to which the South African Judges of Appeal referred in

the former case) Viscount Simon pointed out (at p 583H) that a lack of evidence to support a particular conclusion is really a question of law. If there is no such evidence

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EBRAHIM JA

an appellate court will say so and there is no need for the further consideration of how the decision was reached.

In this case, I am unable to say, on the basis of the evidence made available to me, that the magistrate was justified in concluding that the appellants had either committed the offence charged, or (on the supposition that I had been so satisfied) that their convictions warranted, in law or in fact, the severe sentences imposed.

The offence of unlawful possession of rhinoceros horn is punishable by a mandatory minimum sentence which the magistrate, having found the appellants guilty as charged, was obliged to impose. The crimes for which mandatory minimum sentence must be imposed have proliferated of late and certain procedures, amounting now almost to rules of practice, have been developed by the judicial system in an attempt to ensure that these severe penalties are imposed only in the situations contemplated by the Legislature. Possibly the most important procedures of this nature relate to the finding of special reasons which, if found, restore the trial court's discretion to the sentencing process. The vital importance of ensuring that accused persons (and especially undefended accused persons) know what special reasons are is self-evident and has been stressed by various courts time and again. See *S v Chaerera* 1988 (2) ZLR 226 (SC) and *S v Maharangwe* S-5-90.

There is not a jot of evidence in this case that the magistrate mentioned to the appellants, prior to either conviction or sentence, that they stood in jeopardy of a heavy mandatory minimum sentence, nor that they could avoid this on a show of special reasons. This factor alone would have sufficed to ensure the success of the appeal against sentence.

Finally, in the context of fairness and due process (which were two factors conspicuously lacking in the present case) I would, as did McNALLY JA in *Chaerera's* case, *supra*, draw the attention of the magistrate concerned and those interested in improving criminal justice to the judgment of DIDCOTT J in *S v Khanyile & Anor* 1988 (3) SA 795 (N).

In the result the appeal succeeds and the conviction and sentence in respect of each appellant is set aside.

My brother KORSAH JA agrees with this judgment.

A J A Peck, appellant's legal practitioners

1991 (1) ZLR p148

MASAWI v CHABATA & ANOR 1991 (1) ZLR 148 (HC)

Court **High Court, Harare**

Greenland J

Civil trial

4, 5 & 27 March 1991

Flynote

Delict - damages for wrongful arrest and imprisonment - quantum of damages assessed - requirements of the *actio injuriarum*.

Headnote

The plaintiff was arrested wrongfully by police in his home. He was taken to the police station where he was detained unlawfully for a few hours. He was insulted and humiliated by the police but he was not assaulted. The requirements of a lawful arrest were considered together with determining when an arrest is made.

Held, that for the purpose of the *actio injuriarum* an unlawful arrest had been made and maintained by threats.

Held, further, that the *contumelia* suffered by the plaintiff was objectively an integral part of the arrest and therefore, even though not specifically pleaded, could be taken into account in the assessment of damages.

Held, that in an assessment of damages the liberty of the individual is a fundamental right in a free society which right should be guarded and preserved.

Cases cited:

Bird v Jones (1845) 7 QB 742

Tsose v Minister of Justice 1951 (3) SA 10 (A)

Beckenstrater v Rottcher & Anor 1955 (1) SA 129 (A)

Makomberedze v Minister of State (Security) 1986 (1) ZLR 73 (HC); 1986 (4) SA 267 (ZH)

Botha v Lues 1983 (4) SA 496 (A)

S v Ncube & Anor 1982 (1) ZLR 212 (SC); 1982 (4) SA 419 (ZS)

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S v van Vuuren 1983 (4) SA 662 (T)

R v Mazema 1948 (2) SA 152 (F)

Anderson v Booth [1969] 2 QB 216; [1969] 2 All ER 271

R v Jones [1965] Crim LR 222

R v Inwood [1973] 2 All ER 645 (CA)

Newman v Prinsloo & Anor 1973 (1) SA 125 (W)

Ingram v Minister of Justice 1962 (3) SA 225 (W)

Stambolie v Commissioner of Police 1989 (3) ZLR 287 (SC); 1990 (2) SA 369 (ZS)

Murape v Chikwaka 1977 (1) RLR 39 (G)

Granger v Minister of State (Security) 1985 (1) ZLR 153 (HC)

Minister of Home Affairs v Allan 1986 (1) ZLR 263 (SC)

Bennett v Minister of Police & Anor 1980 (3) SA 24 (C)

Holgate-Mohammed v Duke [1984] 1 All ER 1054

Chitunya v Minister of Home Affairs HH-261-89 (not reported)

R v Long 1970 (1) RLR (A); 1970 (2) SA 153 (RA)

S v Hove S-64-88 (not reported)

S v Masuku & Anor 1989 (3) ZLR 33 (SC)

Thandani v Minister of Law and Order 1991 (1) SA 702 (E)

H Simpson for the plaintiff First defendant in person

K Ngozo for the second defendant

Judgment

Greenland J: In this case plaintiff seeks \$10 000 in damages for wrongful and unlawful arrest and imprisonment.

The facts which are common cause or indisputable, on the evidence given by both sides, may be summarised as follows:

- (i) Plaintiff runs an estate agency which was retained by first defendant, "Mr Chabata", in order to administer and lease out the latter's residential property at 67, Broughton Drive, Sunridge, Harare.
- (ii) In accordance with his mandate plaintiff leased the property to a Mr Bonde in terms of a written lease (Ex.1). In terms thereof the lease period was for six months. The expiry date was stipulated as 31 April 1988. However, in terms of clause 9 of the lease, Mr Bonde, as lessee, was granted the option to renew the lease on one month's written notice to the lessor. It is quite plain that he did not exercise this option in terms thereof.

However it is clear also that Mr Bonde had no intention to vacate.

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GREENLAND J

- (iii) This did not please Mr Chabata who required re - possession for personal occupation. In early April he visited Mr Bonde. The latter was unco - operative. Later that month he telephoned plaintiff only to be told that contractually he was required to give Mr Bonde two months notice to vacate.
- (iv) Mr Chabata became frustrated and angry in the extreme. On 1 May 1988, a day after expiry of the written lease, he attempted to move into his still occupied premises. He was resisted by Mr Bonde and family. In desperation, at 5 pm that day, he and his family invaded the home of plaintiff, his estate agent. They remained there until after dark and proceeded to bed down for the night in the lounge much to the understandable consternation of plaintiff's wife.
- (v) Plaintiff was absent. He returned to this chaotic and emotionally charged scene that was now his home at about midnight. Mr Chabata was absent. However because Mrs Chabata and her children required shelter plaintiff and his wife had little option but to accept the situation. They furnished their "guests" with blankets and retired to bed.
- (vi) The comfort of sleep was to be shortlived. At about 3 am they were awakened by a knock at their bedroom door. The police had arrived having apparently been afforded entry by Mrs Chabata then "camped" in the lounge with her children. There were two police officers present inside. They required plaintiff to attend at the police station for the purpose of "settling" the dispute. After a discussion plaintiff left the comfort and sanctuary of bed and home and drove, in convoy with the police, to the police station.
- (vii) At the police station he was transferred to a police vehicle. The police drove him, in convoy with Mr Chabata, to 67, Broughton Drive, Sunridge. Hooting at the gate failed to induce a response from the sleeping Bonde family. A police officer jumped over the locked gate and knocked on the bedroom window. In the result Mrs Bonde eventually emerged.
- (viii) She was told that her husband was required at the police station. She explained that he was absent being away at Chinhoyi. After a discussion she was driven away to the police station leaving the sanctuary of her home and four young children. It was now about 4 to 5 am.

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GREENLAND J

- (ix) At the station the dispute as to whether Mr Chabata was entitled to re - possession of his Bonde occupied home was discussed. The written lease was produced and analysed clause by clause. It was revealed that plaintiff had accepted rent for May even though the lease had expired on 30 April, the day before. Plaintiff was castigated by the police. Other police officers contributed to the debate. In part plaintiff was labelled as "dishonest". In the result he backed down.
- (x) The result was that by 8 am that morning the Bonde family vacated 67, Broughton Drive and Mr Chabata took occupation. Plaintiff "installed" the Bonde family in a different residence at personal cost of \$30 per month being the difference between the rent Mr Bonde had been required to pay for the Chabata residence and the residence they were compelled to move to.

By the time the matter was "settled" in the above stated manner plaintiff had been without sleep or rest for over 24 hours. The above constitutes the background to the matter and the facts which, as said, are either common cause or indisputable on the evidence.

The police officer involved, Inspector Bungo, admits that plaintiff was away from home from approximately 3.20 am to approximately 6 am, a period of approximately 2 hours 40 minutes. The crucial factual issue for determination is whether or not his sojourn with the police was freely embarked upon or was it in consequence of impaired volition induced by illicit police pressure.

A superficial objective view supports neither side.

As regards the police they were undoubtedly faced with an emotionally charged potentially explosive situation. It was right and proper that they assume measures to diffuse the situation. Such measures would include inviting all parties involved to the neutral ground of a police station where proper resolution of the dispute would take place. This is the claim of the defence and it is supported by the evidence of the Inspector and Mr Chabata.

As regards plaintiff he was of the firm view that the Bonde family were in lawful occupation and required two months' notice to vacate. (Incidentally this stance was correct although plaintiff arrived at it for the wrong legal reasons.) What is important is that his stance was *bona fide* and firm. There could have been no point in attending at the police station.

1991 (1) ZLR p152

GREENLAND J

On this bare unadorned objective picture the probabilities are fairly evenly balanced. Plaintiff may or may not have left home voluntarily in consequence of an invitation civilly extended.

However having seen the witnesses and assessed their evidence, performance and demeanour I have little hesitation in concluding that truth and probability are with the plaintiff.

In a nutshell he claims that his decision to accompany the police was induced by illicit actual

and implied pressure. The police told him that if he refused to co-operate they would use force. The force referred to was not specified. They did however specify that he would "be locked up". Their manner, demeanour and tone was aggressive, harsh, insistent and intimidatory. One of them was in possession of what appeared to be a machine pistol slung over the shoulder. In the circumstances he concluded that he had little option but to succumb to their orders. This impaired volition persisted for the period he was with the police. At the police station he was subjected to general and specific ridicule and contempt including being described as a crook and a fraudster.

Plaintiff struck me as a truthful witness although sometimes unreliable on matters of detail. This unreliability is apparently due to defects in memory. This is understandable bearing in mind the time that has elapsed. Also it is clear that plaintiff's intellectual capacity is not of a particularly high order.

He is supported by the following factors. Plaintiff is not a young man. He arrived home tired and in need of rest. He suffers from high blood pressure. At the time the police arrived he had already accepted the fact of the Chabata family bedding down in his lounge for the night. Indeed they had been furnished with blankets. It is difficult to see how, in these circumstances, he would have willingly left the comfort of bed to go to the police station to discuss a civil dispute. Civil disputes are not resolved in this way at that time of night. What would a discussion achieve at that time of night? Surely it was inconceivable that the Bonde family could be evicted at that time of night and the Chabata family moved in? Surely a meeting at the police station was an exercise in futility which no sensible mature mind would subscribe to?

Also it is a fact that the police had been instructed to bring all parties to the police station. It was a mandate with an imperative complexion. That much is clear from the evidence of Mr Chabata who overheard the orders being given. It is clear therefore that they would not have lightly allowed their mission to be frustrated.

1991 (1) ZLR p153

GREENLAND J

To this must be added the fact that the Inspector admits that plaintiff was resistant. He was never able to properly explain what changed the man's mind or attitude. Also it is a fact that plaintiff was accompanied by a police officer when he drove from home even though he had agreed to go. This is consistent with coercion.

Plaintiff is fully corroborated by his wife who was an impressive witness and furnished a far more detailed and clearer picture of the circumstances of plaintiff leaving home. On this evidence there is no doubt that plaintiff had no choice but to comply with what was, in effect, an order.

It is pertinent to point out that Mr Chabata makes the same assessment of the reason for Mrs Bonde leaving her home. He said, as she says, that the woman had "no choice". Mrs Bonde elaborated to say that the police were of the view that if she attended then it was likely that her husband whom they believed was in hiding would relent and follow.

Mr *Simpson*, for plaintiff, is right in submitting that the Bonde incident is an important and

certain indication of the police frame of mind and code of behaviour that night. In terms thereof the persons whose presence at the station they were charged with securing were really given no choice. Mrs Bonde was required to leave her home and children in the dead of night. In my view so was plaintiff. The police were efficiently, though insensitively, discharging the mandate deposited to by the defence witness Mr Chabata. Insofar as this witness alleges that plaintiff reacted willingly to a cordial invitation I have no hesitation in disbelieving him. It is clear that he did not witness the conversation at plaintiff's home. He said the conversation took place outside whereas plaintiff, his wife and the Inspector all said it took place inside the residence.

Inspector Bungo gave his evidence well. This is only to be expected. He is a police officer of eleven years experience. However nothing about his performance induces any doubt in my mind that plaintiff (and Mrs Bonde) were given no option but to accompany the police. It should be noted that he is contradicted on this aspect as regards Mrs Bonde by the other defence witness Mr Chabata who also contradicts him on the issue of whether or not plaintiff was labelled as dishonest at the police station.

The following facts are therefore found as proved:

- (a) at approximately 3 am two police officers entered plaintiff's home and in a subsequent conversation insisted that plaintiff accompany them;

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- (b) their motive for such insistence was to discharge a mandate from their superiors in terms of which they were required to secure the presence, at the police station, of all parties to a civil dispute involving a residence;
- (c) for various objective and subjective reasons, including the fact that he was very tired and the fact that there seemed little sense in attempting to settle an occupation dispute at that time of night, plaintiff persistently declined to accompany the police and to attend at the police station;
- (d) this resistance was overcome by the insistent, aggressive, harsh and intimidatory manner and tone of the police officers who also made it clear that if he failed to co-operate they were prepared to use force and even lock him up. The fact that one officer had an exposed weapon contributed to the capitulation of plaintiff's resistance;
- (e) in the result plaintiff accompanied the police and remained in their company from approximately 3.20 am until approximately 6 am, not voluntarily, but because of impaired volition induced by illegitimate police pressure. This was a classical case of where:

"...though little may be said, much is meant and perfectly understood" *Bird v Jones*

(1845) 7 QB 742 at 748, *per WILLIAMS J*;

- (f) at the police station the police canvassed the merits of the civil dispute, arrived at conclusions against those held by plaintiff, and, in the process subjected him to general ridicule and contempt, including labelling him as a crook and fraudster. Plaintiff had little option but to co-operate in an exercise, implemented immediately, in terms of which the Bonde family were evicted from a residence which plaintiff, as an estate agent, was administering, and the Chabata family afforded occupation.

On the facts thus found has plaintiff proved a case in damages? The relevant paragraphs of his declaration read:

- "4. On or about the 1st May 1988 and at 3 Friend Close, Cranborne Park, Harare, the first defendant caused duly attested members of the Zimbabwe Republic Police in the employ of second defendant and acting within the scope of their employment to arrest the plaintiff and to remove him to 67 Broughton Drive, Sunridge, Harare and later to Harare Central Police Station.
5. The said arrest and imprisonment were wrongful and unlawful and without justification or excuse.
6. By reason of the aforesaid wrongful arrest and imprisonment the plaintiff has suffered damages in the sum of \$10 000,00."

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GREENLAND J

From this pleading can be abstracted two causes of action specified *co nomine* - wrongful arrest and wrongful imprisonment.

Mr *Simpson*, for plaintiff, understandably submits that, on the facts an unlawful and wrongful arrest of plaintiff occurred in terms of a wide or liberal meaning of the word arrest. Mr *Ngozo*, for second defendant (the Minister of Home Affairs), submits that the facts do not disclose an arrest as it was neither the motive nor intention of the police to arrest the plaintiff. No act of physical confinement, express or symbolic, was executed neither did plaintiff claim in evidence that, at any stage, he believed he was under arrest. The issue for determination therefore is where a man accompanies police officers in the circumstances particularised in para (e) above is it to be held that such person is under arrest?

A preliminary but vital step is to recognise that the motive for perpetrating an arrest is not a crucial factor in determining the issue. This was authoritatively set out by SCHREINER JA, in *Tsose v Minister of Justice* 1951 (3) SA 10 (A) at 17G. His statement that:

"...just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal"

was expressly approved by VAN DEN HEEVER JA in the *Beckenstrater v Rottcher & Anor* 1955 (1) SA 129 (A) at 140. As I accept the correctness of this approach it follows that the fact that the police intended only to settle a civil dispute in taking and keeping plaintiff in their company does not materially affect the issue as to whether or not they, in fact, arrested him.

Next it is relevant to point to the truism that the unlawfulness of an arrest in no way detracts

from the fact of its existence. To put it simply, the fact that a purported arrest fails to comply with, or is in breach of statutory prescription does not render it a non-event, quite the reverse, it renders it actionable in delict at the behest of the unlawfully arrested party. The law reports are replete with examples, eg, *Makomberedze v Minister of State (Security)* 1986 (1) ZLR 73 (HC); 1986 (4) SA 267 (ZH) and *Botha v Lues* 1983 (4) SA 496 (A).

In order to test whether what plaintiff has proved constitutes an arrest it is useful and logical to compare the essential nature of what he was subject to with what occurs in a lawfully executed arrest.

Shorn of technical trimmings a lawful arrest is **constituted by the police**

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GREENLAND J

officer verbally and, if necessary, physically subjecting a person to his control. The person is subjected to this control by the express or implied threat of lawfully sanctioned force.

In the present case plaintiff was undoubtedly subjected to the control of the police officers, such subjugation being induced by threats expressed and implied.

Except that the threats in the present case had no lawful sanction common to both scenarios is the **essential ingredient of a person being subjected to physical control.**

In my view therefore, on a simple common sense and logic test, there is really no difference between the two situations if one is seeking to determine the existence of an arrest in the present case as a matter of fact.

The element of control must be regarded as decisive. Not surprisingly the fact of a lawful arrest will not disable a person accused of escaping from lawful custody avoiding conviction if the facts show that control was absent. See *S v Ncube & Anor* 1982 (1) ZLR 212 (SC); 1982 (4) SA 419 (ZS) an instructive judgment by Beck JA, as he then was, and the precedents cited therein.

Plaintiff has proved the element of control. More specifically, as found in para (e) above, he has proved that, for approximately 2 hours 40 mins, he was under the complete direction and control of the police officers. I hold that he has proved that he was under arrest. I am fortified in that conclusion by the approach of ACKERMAN J, in *S v van Vuuren* 1983 (4) SA 662 (T) who held that in determining whether an arrest has occurred:

"the central idea is one of physical subjection"

quoting HOEXTER J, as he then was, in *R v Mazema* 1948 (2) SA 152 (E) at 154:

"A person is under arrest as soon as the police assume control over his movements"

and Halsbury's Laws of England, 4th ed, Vol II para 99:

"Arrest consists in the seizure or touching of a persons body with a view to his restraint; words may, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's

notice that he is under compulsion and thereafter submits to the compulsion."

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GREENLAND J

See *Anderson v Booth* [1969] 2 QB 216; [1969] 2 All ER 271 (QB). Cf *R v Jones, ex parte Moore* [1965] Crim LR 222 and *R v Inwood* [1973] 2 All ER 645 (A).

In *Anderson, supra*, it was held that an arrest is constituted when any form of words are used which, in the circumstances, are calculated to bring, and do bring, to the notice of a person that he is under compulsion to which he thereafter submits.

Such act of arrest is actionable in delict falling under the general heading of *injuria* of which McKerron *The Law of Delict* 7 ed properly states at p 9:

"In short long before the time of Justinian the *actio injuriarum* had come to be regarded as a general remedy for any wrongful aggression upon the person, dignity or reputation of another. D 47.10.1.2."

He expands this fundamental statement at p 53:

"The interests of personality protected by the *actio injuriarum* are those interests 'which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation'. The plaintiff must show that the act complained of constituted an impairment of his person, his dignity, or his reputation.

Examples of such acts are assaults of all kinds, **the unjustifiable infliction of any restraint upon the liberty of another ...**

It is an *injuria* to prevent a person from dealing with his own property ...**or indeed from exercising any right, whether public or private.** Voet 47.10.7; and see *Kleyn v Snyman* 1936 OPD 19" (my emphasis)

The arrest of plaintiff, as particularised hereinbefore, constitutes an unjustified infliction of restraint upon the liberty of plaintiff and a wrongful aggression upon his person and dignity.

For the sake of completeness it is relevant to set out the judicial approach in such situations. This was comprehensively canvassed by MARGO J, in *Newman v Prinsloo & Anor* 1973 (1) SA 125 (W) at 127A citing VIEYRA AJ, in *Ingram v Minister of Justice* 1962 (3) SA 225 (W) at 227D:

"In my view this is correct. All interferences with the liberty of the citizen are *prima facie* odious and it is for the person responsible to establish

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why in the particular circumstances such interference is legally justified: see *Theron v Steenkamp* 1928 CPD 429 at 432. The English Law is similar: see Clerk & Lindsell on *Torts*, 11th ed, p 293; *Dumbell v Roberts* [1944] 1 All ER 326 at p 331"

and later at p 127C -

"In *Thompson and Another v Minister of Police and Another*, 1971 (1) SA 371 (E) Eksteen J, at p 374H, dealing with the delict of wrongful arrest said:

"The arrest itself is prima facie such an odious interference with the liberty of the citizen that *animus injuriandi* is thereby presumed in our law, and no allegation of actual subjective *animus injuriandi* is necessary (*Foulds v Smith* 1950 (1) SA 1 (AD) at p 11). In such an action the plaintiff need only prove the arrest itself and the *onus* will then lie on the person responsible to establish that it was legally justified'."

See also the long line of judicial precedents thereafter cited and the approach of GUBBAY JA (as he then was) in *Stambolie v Commissioner of Police* 1989 (3) ZLR 287 (SC) at 301G; 1990 (2) SA 369 (ZS) at 376J.

Second defendant has not proved any justification for the actions of the police. He is cited as a nominal defendant in control of the Ministry of Home Affairs the employers of the police in question and vicariously liable because, at the time, the police were about their official duties and acted within the course and scope of employment.

Incidentally plaintiff has also pleaded and proved a case of wrongful or false imprisonment as defined by McKerron, *supra*, at p 159 and Salmond *Law of Torts* 17 ed p 123. However as I have already found for him on the basis of wrongful arrest and being by no means satisfied that the concept of false imprisonment, thus defined, which has its roots in the English concept of trespass, is part of Roman Dutch law I do not propose to make any findings in respect thereof. The point was not raised in *Stambolie, supra*.

First defendant did not enter appearance. However there was simply no evidence to prove that he instigated, directed or controlled the arrest. He lodged a complaint of a civil dispute. It cannot be inferred that he either foresaw or intended the arrest of plaintiff. In the result default judgment against this defendant was refused at the close of plaintiff's case.

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GREENLAND J

As regards *quantum* it must be borne in mind that the primary object of the *actio injuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as a *solatium* for the injury to his feelings. The court has to relate the moral blameworthiness of the wrongdoer to the inconvenience, physical discomfort and mental anguish suffered by the victim.

Because of the various subjective aspects involved, which must necessarily be peculiar to the case, precedents can only be of general assistance. Such general assistance in approach is gleaned from precedents such as *Murape v Chikwaka* 1977 (1) RLR 39 (G); *Granger v Minister of State (Security)* 1985 (1) ZLR 153 (HC); *Makomberedze v Minister of State (Security)*, *supra*, and *Minister of Home Affairs v Allan* 1986 (1) ZLR 263 (SC).

Allan's case, *supra*, is particularly relevant and is, of course, binding on me. The general principle of approach that may be abstracted from this case is that where the police, in arresting a subject, act without malice but out of understandable genuinely held motives which are not improper and limit their actions to the resolution of a problem genuinely perceived exemplary damages are not indicated.

Allan "was inconvenienced and put to unnecessary worry by some clumsy but well-intentioned actions of the police". "In all he spent perhaps twenty hours under technical arrest", ie mostly at

the house of a friend under what is commonly referred to as "house arrest".

In the present case plaintiff was deprived of his liberty for some 2 hours 40 minutes as a result of the misguided but well intentioned actions of the police. Having seen Inspector Bungo give evidence I have no doubt that the police genuinely believed that theirs was the best course of action to avoid a potentially explosive situation getting out of control. It is all too easy to now take an armchair view of the matter and say that they ought to have counselled Mr Chabata to let things await morning when lawyers could be contacted at their homes even though the day would be a Sunday.

The police were heavy handed, abrasive and intimidatory. Therein lies their moral blameworthiness. Also they commenced the delict in the sanctuary of plaintiff's home at a most unearthly hour. One child was distressed by the arrest of plaintiff and started to cry.

However plaintiff was not subjected to any physical force or maltreatment.

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Neither did he believe he would be **as long as he co-operated**. This aspect is important also for the following reasons.

Plaintiff was humiliated and insulted at the police station. However he has not specified *contumelia* in his claim. Can the aspect of *contumelia* be included in aggravation of the punitive damages for wrongful arrest? The answer would appear to be in the affirmative if the insults were **objectively** an integral part of the arrest, ie, perpetrated in the course of the arrest. See *Bennett v Minister of Police & Anor* 1980 (3) SA 24 (C) at 37.

As said the arrest **was effected and maintained** by the threats. As McNALLY JA states in *Allan, supra*, at p 271, quoting LORD DIPLOCK in *Holgate - Mohammed v Duke* [1984] 1 All ER 1054 at 1056 -

"...arrest is a continuing act; it starts with the arrester taking a person into his custody ...and it continues until the person so restrained is either released from custody or ...remanded in custody..."

It does seem to me therefore that where the arrest is effected and maintained by means of verbal pressure and, at some stage during such "continuing" arrest, such verbal pressure includes insults the *contumelia* occasioned thereby is an integral part of such continuing arrest and aggravates the damages indicated even if not specifically pleaded. The approach of SMITH J, in *Granger, supra*, and CHIDYAUSIKA J, in *Chitunya v Minister of Home Affairs* HH-261-89 (not reported) must therefore be distinguished. In each of these cases plaintiff had specifically confined his claim to *contumelia* omitting to claim for the loss of liberty.

Plaintiff was treated in a highhanded and undignified manner. He was greatly inconvenienced being denied sleep for over 24 hours in consequence. He experienced a certain amount of mental anguish at the fact of the arrest and implications of the threats. He was generally demeaned and specifically insulted being labelled a crook and a fraudster. The whole saga had the effect, not unintended, of severely bruising plaintiff's personal feelings and demeaning his

personal and professional pride and integrity in the presence of others including clients.

Also the observation that comparisons are odious simply does not detract from the fact of close similarity between the facts of this case and the criminal offences of plagiarism which is always treated very seriously by the courts. See *R v Long* 1970 (1) RLR 1 (A); 1970 (2) SA 153 (RA); *S v Hove* S-64-88 (not

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reported) and *S v Masuku & Anor* 1989 (3) ZLR 33 (SC).

Liberty is a sacrosanct fundamental human right which must be meaningfully protected by the courts. A court must guard against trivialising a human rights breach involving liberty simply because it is categorised as civil. Like the criminal sanction for *plagium* the civil sanction under the *actio injuriarum* is *penal* in nature.

I would respectfully associate myself with the approach of VAN RENSBURG J, in *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707B:

"In considering *quantum* sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual. In the words of BROOME JP in *May v Union Government* 1954 (3) SA 120 (N) at 130F:

'Our law has always regarded the deprivation of personal liberty as a serious injury'."

Taking all these factors into account I would assess the sum of \$3 000,00 as fair, just and indicative of the inherent seriousness of this civil wrong.

There will be judgment for plaintiff against second defendant in the sum of \$3 000,00 together with costs.

AJA Peck, plaintiff's legal practitioners

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

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S v MUTEKEDE & ORS 1991 (1) ZLR 162 (HC)

Court High Court, Harare

Smith J

17 April 1991

Criminal review

Flynote

Criminal law - malicious injury to property - defences - claim of right - duress - necessary averments.

Headnote

The six accused were convicted on their pleas of malicious injury to property. Having noted an appeal, they sought to review the proceedings. They alleged that their actions were authorised by their employer, alternatively that they were coerced to destroy the property.

Held, on the facts accepted at the trial, there was no basis of finding that the accused acted under a claim of right, or through duress.

Cases cited:

R v Canestra 1951 (2) SA 371 (A)

R v Damascus & Ors 1965 RLR 477 (A); 1965 (4) SA 598 (RA)

R v van der Merwe 1950 (4) SA 124 (O)

Judgment

Smith J: The accused were charged with malicious injury to property. The outline of the State case read as follows:

- "1. The complainant resides at Togarepi Farm, Shamva. He shares the farm with two other partners of whom one is Dr Herbert Ushewokunze (Minister).
2. The six accused are all employed by Dr Herbert Ushewokunze and they are currently residing at the same farm.

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3. On the 14th day of January, 1991 at about 1400 hours, all the six accused, acting in common purpose, went to the maize lands belonging to the complainant. They had some hoes.
4. Upon arrival at the maize lands, they began to slash and destroy some maize plants. They destroyed a total of four hundred and fifty maize plants which had an average height of about one and half metres."

The accused did not appear in court on 17 January 1991 as ordered and so warrants for their arrest were issued. They were arrested and appeared in court on 18 January. They were found guilty of contempt of court and each fined \$50. When the charge of malicious injury to property was put to accused No 1 he said:

"I understand the charge and admit destroying the complainant's property but I was acting on my employer's instructions."

Accused No. 2 said:

"Same for me. Mr Ushewokunze sent us a letter. I admit destroying the maize plants."

The other four accused admitted the charge. When the outline of the State case was read to them they said that they were correct and "Mr Ushewokunze instructed us". When they were asked whether they knew that their conduct in destroying the complainant's crops was unlawful they all said "yes, but I was afraid of losing my job".

The accused were all convicted and each was sentenced to a fine of \$250.

Legal practitioners acting for the accused lodged an appeal but have deferred the appeal pending these review proceedings. They wrote to the magistrate saying "If our Client (*sic*) is not happy with the outcome of the review proceedings the appeal will be prosecuted". The main grounds of appeal will be the convictions for malicious injury to property were based on the allegations that the accused destroyed the property in question, namely the maize plants, following specific instructions of the owner thereof namely Togarepi Property Investments (Pvt) Ltd and that the explanations given by the accused disclosed a valid defence of claim of right and/or ignorance or mistake of fact and law. In relation to the contempt of court it was alleged

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SMITH J

that the failure of the accused to attend court on 17 January was neither intentional nor wilful and that the summons had not been properly served.

There was no evidence before the court that the farm belonged to a company. The State outline alleged that the farm was shared by three partners. The accused never raised the defence of claim of right or ignorance or mistake of fact or law. In fact they admitted that the maize was the complainant's and that they destroyed it because their employer instructed them to do so. They did not say that they thought that the maize plants belonged to their employer or that they destroyed the wrong plants. They said that they knew that they were acting unlawfully but they were scared of losing their jobs if they did not carry out their employer's instructions.

It is obvious that the accused destroyed the complainant's property because they were instructed to do so by their employer. There was no other motive. They were scared that they would lose their jobs if they refused to obey the instructions. Was the defence of necessity available to them? I do not think so. In *R v Canestra* 1951 (2) SA 317 (A) the court held that necessity did not extend to threats of mere pecuniary loss such as fear of losing one's employment or livelihood. At p 324H SCHREINER JA said:

"Nevertheless it seems to me to be clear that the defence of necessity has not been made out. The only necessity compelling the appellant to risk contravening the regulation is economic and that is not a form of necessity that the law recognises. If he cannot avoid infringing the law without abandoning his occupation then he and his fellow fishermen must seek some other means of livelihood."

In *R v Damascus & Ors* 1965 RLR 477 (A), 1965 (4) SA 598 (RA) McDONALD J, as he then was, analysed the defence of compulsion and concluded, inter alia, at 483I - 484A; p 603A:

"Generally speaking it is only threats of death or grievous bodily harm which are likely to expose a person to such a motive and there is every justification for limiting the defence to threats of such a nature and for excluding threats against property."

There have been cases where fear of lesser injury to the person and a threat of damage to

property have sufficed. However the courts have invariably stressed the necessity to confine the defence within the strictest and narrowest limits. In *R v van der Merwe* 1950 (4) SA 124 (O) at 126A HORWITZ J, after

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SMITH J

stating the principles relating to a plea of necessity, continued:

"As was pointed out, however in *Mahomed's* case, exemptions from criminal liability based upon the broad principle stated by *Stephen* must be confined within the strictest and narrowest limits because of the dangers attendant upon allowing a plea of necessity to excuse criminal acts, and this doctrine of limitation was expressly approved of in *Rex v Britz* (1949 (3) SALR 293 at pp 302 - 303 (AD)). While in *Mahomed's* case all the members of the Bench expressly, or by implication, held that the *onus* of establishing this excuse for otherwise criminal conduct lay upon the accused, the position was reconsidered in the light of more recent decisions in our Courts and in England in *Rex v Britz* (1949 (3) SALR 293 (AD)). Mr *de Villiers*, however, did not contend that the *onus* was on the Crown but conceded that by virtue of the provisions of Reg. 187 the *onus* rested upon his client. In the light of this concession, and bearing in mind the strictest limits to which the legal excuse must be confined, I proceed to review the evidence on this suggested defence."

The accused have not alleged that their employer uttered any threat which caused them to fear that they would lose their jobs if they did not carry out his instructions. It is not possible, from the record, to discover the basis for their fears.

In the light of these factors, I consider that the trial magistrate acted correctly in convicting the accused on the charge of malicious injury to property. The defence of necessity is not available to the accused. Furthermore, from the record it is obvious that a claim of right or of ignorance or mistake of fact and law could not succeed.

With regard to the conviction for contempt of court, the summons was served on each accused. A mere statement that one has transport problems cannot excuse failure to appear in court. In this day and age in Zimbabwe the vast majority of the population have transport problems.

The sentences imposed by the magistrate on the two counts cannot be impugned as being excessive.

Accordingly the proceedings are confirmed.

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S v TSHUMA 1991 (1) ZLR 166 (SC)

Court **Supreme Court, Bulawayo**

Gubbay CJ, Korsah JA & Ebrahim JA

Criminal appeal

3 April & 7 May 1991

Flynote

Criminal procedure (sentence) - murder - extenuating circumstances - influence of alcohol may be extenuating.

Headnote

The appellant was convicted of murder with actual intent and sentenced to death. The trial court found that there were no extenuating circumstances as, even though the appellant had consumed alcohol, he knew what he was doing when he deliberately killed the deceased.

Held, that in considering the presence or absence of extenuating circumstances, the relevant question for determination is whether or not the consumption of alcohol had any effect on the appellant.

Held, further, that the influence of alcohol on the appellant's behaviour was shown to be sufficient for a finding of extenuating circumstances.

Held, accordingly, that the sentence of death be set aside and substituted by a sentence of twenty years' imprisonment with labour.

Cases cited:

S v Kamusewu 1988 (1) ZLR 182 (SC)

S v Chiradza AD-44-81 (not reported)

S v Chamunorwa & Ors S-137-86 (not reported)

S v Mangwende AD-170-78 (not reported)

J Moyo for the appellant

G A J Hooper for the respondent

Judgment

Ebrahim JA: The appellant was convicted of murder with actual intent to

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EBRAHIM JA

kill. The court found no extenuating circumstances and the appellant was sentenced to death. Mr *Moyo*, who represented the appellant in this Court, has abandoned his appeal against conviction but has persisted with his appeal against sentence.

[The learned Judge of Appeal outlined the facts and then continued:]

The Post Mortem Report was put in as evidence by consent, and this reveals that the deceased died as a result of a stab wound to the heart, which led to haemorrhage and shock. The doctor was of the view that a severe degree of force was used.

The learned trial judge and his assessors made favourable findings on the quality of the witnesses called by the State. I can find no fault with these conclusions. The witnesses not only corroborated each other on a number of material aspects but their evidence reads well and the learned trial judge was impressed with their demeanour and the general manner in which they gave their evidence. The witnesses do not appear to have been shaken under cross-examination.

The appellant for his part gave evidence and called no witnesses.

[The learned Judge of Appeal outlined the appellant's case and then continued:]

The trial judge analysed the appellant's evidence with great care and found himself unable to accept the appellant's assertion that he had been struck by the deceased with a stool. He found it improbable that this could have occurred and yet no-one witnessed the incident. The appellant conceded that he had seen Edward Moyo at the beerdrink and yet Edward Moyo never saw the appellant assaulted by the deceased. The owner of the homestead where the beerdrink was held was never called as a defence witness to confirm the appellant's allegation that he had been assaulted and left unconscious. No explanation for this failure was proffered.

[The learned Judge of Appeal dealt further with the evidence and continued:]

The learned trial judge, faced with this evidence of the appellant, preferred the corroborated version of the State's witnesses and concluded as follows:

"There is no doubt in our minds that the intention to kill was actual. The accused and Fogus armed themselves with spears, weapons, the accused

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EBRAHIM JA

admits, whose only purpose is killing. When they went after the deceased and his companions they had only one intention - to kill. Indeed they were heard threatening to kill the deceased and his companions at the beerdrink and during the attack they were also heard to shout that they intended to kill and that they wanted two dead bodies. The way and the area the spear was plunged into the deceased's body already indicates an intention to kill. The spear was deliberately plunged 6 cm deep into the chest, a most vulnerable part of the body.

We do not agree that the accused was at the time so drunk that he lost his faculties or that he did not appreciate what he was doing. Although we accept that he had some drink in him we accept the witnesses' evidence that he knew what he was doing. The actions of the accused after the beerdrink do not indicate that he did not know what he was doing. On the way he was said to have taken part in trying to stop the quarrel. Thereafter, he went home, armed himself and then followed the deceased and his companions. He then ambushed them and then chased after them. These are not the actions of a person who was so drunk as not to appreciate what he was doing.

All in all we are satisfied that the State has proved beyond reasonable doubt that the accused committed murder. He is therefore found guilty of murder with actual intent."

I am satisfied that this reasoning is entirely justified and it is therefore understandable that Mr Moyo found himself unable to argue that the verdict of murder with an actual intent to kill can be faulted.

Mr Moyo, however, did not abandon the appeal against sentence and submitted that the trial court ought to have found that there were extenuating circumstances. Mr Hooper, whilst

submitting that the trial court was correct in its finding that there were no extenuating circumstances, conceded that the learned trial judge had misdirected himself in his interpretation of the *ratio decidendi* in the case of *S v Kamusewu* 1988 (1) ZLR 182.

The learned judge made the following observations in his findings on extenuating circumstances:

"... I cannot, with the greatest of respect, reconcile the finding in *Kamusewu v S*, *supra*, with a number of cases decided by the Supreme Court which cases appeared not to have been taken into consideration in the *Kamusewu* case."

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EBRAHIM JA

The learned judge then analysed in detail the cases of *S v Chiradza* AD - 44 - 81 (not reported), *S v Chamunorwa & Ors* S-137-86 (not reported), *S v Mangwende* AD-170-78 (not reported), and concluded:

"In conclusion I should state that I am inclined to follow the views expressed in the latter cases that I have cited in that a court should not find extenuating circumstances where it is found that the accused despite having taken alcohol knew what he was doing when he deliberately killed the deceased. The accused knew what he was doing when he killed the deceased even though he had consumed some alcohol."

With respect to the learned trial judge, I am of the view that there is no difference in what was said on the issue of extenuating circumstances in the *Chiradza*, *Chamunorwa* and *Mangwende* cases if properly read, compared to what was said in the *Kamusewu* case. The trial judge was wrong in how he interpreted these cases in comparison with the *Kamusewu* case. They do not support what the learned Judge said in the passage I have cited, *supra*. In *S v Kamusewu*, *supra*, McNALLY JA stated at 189A:

"The mindlessness and wanton brutality of his actions support the conclusion that what the appellant did was done at a time when his normal inhibitions had been clouded by his consumption of alcohol."

The same *ratio* can be found in the cases of *S v Chiradza* and *S v Chamunorwa*, *supra*. The relevant question which was required to be determined was what effect had the consumption of alcohol been on the appellant. It is not always easy to separate the extent of intoxication from the issue of intent, but the level of intoxication does not always as a matter of course affect an offender's *mens rea*. The consumption of alcohol is normally considered as a factor to be taken into account when consideration is given to whether extenuating circumstances exist or not unless an offender partakes of alcohol to boost his courage.

In this case the learned trial judge failed to take into account a material mitigating feature in assessing the issue of extenuating circumstances. He said in his findings on extenuating circumstances: "... that a court should not find extenuating circumstances where it is found that the accused despite having taken alcohol knew what he was doing when he deliberately killed the deceased". It is apparent that he confused the issue of intent with the issue of mitigation, a different consideration altogether. For it would be improper to hold that a person who deliberately and knowingly commits an offence

EBRAHIM J

cannot benefit from any mitigatory features which may exist in his conduct.

In assessing whether there were any extenuating circumstances in this case, the trial court was required to consider the whole background of this case. The mitigating features have to be balanced against the aggravating features and in particular on the facts of this case the deliberate act to kill exhibited by the appellant. It does not necessarily follow that because there are mitigating features extenuating circumstances have to be found. What is required is that the mitigating features have to be balanced against the aggravating features, and the judicial officer is then required to arrive at a moral judgment.

In the present case, most fortunately for the appellant, there is evidence that he had been drinking long before the assault and had been doing so for almost a whole day. There is evidence of a situation of unrest between the appellant and the deceased which continued on the way home. There was the irrational behaviour of the appellant in assaulting the deceased's mother and the child she was carrying. His drinking at the very least appears to have affected his inhibitions, that is, by lessening his inhibitions. His conduct towards the deceased's mother and the child she was carrying is so unreasonable that it can only be attributed to his level of intoxication.

Against these features account must be taken of the fact that the appellant armed himself with a spear, a dangerous weapon, with intent. He used severe force with a dangerous weapon with a deliberate intent to kill. The stabbing was not spontaneous, as he ran from the scene where he was quarrelling with the deceased and returned armed with a weapon and stabbed the deceased. It was not a one man affair, as he arrived with Fogus to launch the attack.

This is a borderline case but, weighing all the factors, the scale must come down in favour of a finding of extenuating circumstances.

In my view, a proper finding is that the influence of alcohol on the appellant's behaviour was shown to be sufficient for a finding of extenuating circumstances. But, having said that, there is little more to be said in his favour. This was a brutal killing and he deserves a severe punishment.

I would enter a finding of extenuating circumstances, set aside the death sentence, and substitute a sentence of twenty years' imprisonment with labour. To that extent the appeal succeeds.

EBRAHIM JA

Gubbay CJ: I agree.

Korsah JA: I agree.

S v CHIBANDA 1991 (1) ZLR 172 (SC)

Court **Supreme Court, Harare sitting as Court Martial Appeal Court**

McNally JA, Korsah JA & Ebrahim JA

Appeal from court martial

14 March & 7 May 1991

Flynote

Appeal - courts martial - verdict of panel only to be interfered with where summary of judge advocate misdirected or verdict ambiguous or wrong in law - Court Martial Appeal Court - if conviction unaltered no interference with sentence.

Courts - courts martial - panel - in analogous position to that of jury - appeal - verdict unassailable unless judge advocate misdirected in summing up or verdict ambiguous or wrong in law - Court Martial Appeal Court - sentence must stand if conviction unaltered.

Legislation - Defence Act [Chapter 94], s 87.

Headnote

The decision of the panel of a court martial is, like the verdict of a jury, unassailable unless the judge advocate was misdirected in his summing up or the verdict is ambiguous or wrong in law. The Court Martial Appeal Court has no power to interfere with sentence on appeal unless it has altered the conviction.

Cases cited:

S v Mutonhodza S-98-89 (not reported)

S v Steele 1972 (1) RLR 377 (A)

J Dondo for the appellant

A Guvava for the respondent

Judgment

Ebrahim JA: The appellant, a member of the Zimbabwe National Army,

EBRAHIM J

appeared before a court martial, constituted by a judge advocate and a panel of five officers,

charged with committing a foreign offence in contravention of s 39(1)(b) of the First Schedule to the Defence Act [*Chapter 94*], it being alleged that he wrongfully and unlawfully murdered a Mozambican woman in the Sofala Province of Mozambique on 16 July 1987.

After the summing-up of the judge advocate, the panel convicted the appellant of murder with an actual intent but found that there were extenuating circumstances and sentenced him to a period of thirty years' imprisonment with labour.

Thereafter, the appellant addressed an appeal to the court, praying that his conviction by the court martial be quashed and substituted with a verdict of culpable homicide and that the sentence be set aside and substituted with a more lenient sentence.

Several features of the case against the appellant are common cause and are summarised hereunder:

[The learned Judge of Appeal then analysed the evidence.]

Faced with this evidence it is not surprising therefore that the panel of officers comprising the court martial determined this matter on the prosecution's version of events.

This is not the only difficulty faced by the appellant in this case. In the case of *S v Mutohoda* S-98-89, KORSAN JA said:

"Proceedings at a court martial constituted by a judge advocate and a panel are akin to proceedings before a judge and jury in the sense that the verdict returned is that of the panel or the jury. That verdict is unassailable unless the judge advocate or judge can be shown to have misdirected the panel or the jury in his summing up, or unless the verdict is ambiguous or wrong in law."

No attack has been levelled against the summing-up of the judge advocate. Indeed, I am of the view that there is no basis for criticising his manner of summing-up. He appears to have addressed the panel of officers in an entirely proper and objective manner. It was not a ground of appeal that the judge advocate misdirected himself in his summing-up and therefore the appellant's appeal cannot succeed.

1991 (1) ZLR p174

EBRAHIM JA

[The learned Judge of Appeal then analysed the summing-up of the judge advocate.]

The verdict of the panel was amply supported by the evidence before it and was neither vague nor wrong in law. The appellant had armed himself with an unauthorised weapon, proceeded to the deceased's residence at night, no doubt encouraged by the presence of his companion, demanded money with threats, caused the man of the house to escape from the scene and fired his lethal weapon, causing the death of the deceased. I, therefore, can find no fault with the verdict of the panel.

The appellant also appealed against the severity of the sentence imposed on him, submitting that the sentence is so excessive as to induce a sense of shock. We have presided in this appeal as the Court Martial Appeal Court; see s 87 of the Defence Act [*Chapter 94*]. Our powers as an Appeal Court in appeals emanating from a court martial are regulated by s 90 of the

Defence Act. From the provisions of this section is apparent that, unless the Appeal Court interferes with the conviction by a court martial, it has no power to alter the sentence imposed. There has been no interference with the conviction in this case and we therefore cannot interfere with the sentence imposed on the appellant. See *S v Steele* 1972 (2) RLR 377 (A).

It may be that this is a matter for consideration by the Law Development Commission.

In the result his appeal both against conviction and sentence is dismissed.

McNally JA: I agree.

Korsah JA: I agree.

1991 (1) ZLR p175

S v NYAJENA 1991 (1) ZLR 175 (SC)

Court **Supreme Court, Harare**

Manyarara JA, Korsah JA & Ebrahim JA

Criminal appeal

7 March & 7 May 1991

Flynote

Criminal procedure - plea of guilty - alteration of plea to one of not guilty.

Criminal Procedure and Evidence Act [Chapter 59] - s 255A - procedure in terms of - discharge of onus.

Sentence - appropriateness of custodial sentence - effect of delay - factors arising after commission of offence and after sentence - relevant of where delay is excessive.

Headnote

Where an accused person, after verdict, seeks to withdraw his unequivocal plea of guilty, he is required to show, on a balance of probabilities, that the plea was not voluntarily and understandingly or correctly made.

Held, after analysing the evidence adduced on behalf of the appellant, that he had failed to discharge the *onus* of showing that his plea of guilty was not made voluntarily.

Held, setting aside the custodial sentences imposed by the lower court, that while reaffirming the principles laid down in cases such as *S v Corbett* 1990 (1) ZLR 205 (SC); *S v Ruzario* 1990 (1) ZLR 359 (SC); *S v Kundishora* 1990 (2) ZLR 30 (SC), and *S v Badze* 1990 (1) ZLR 369 (SC) on the issue of delay, that there were unique features in the present case which warranted a departure from the principles laid down in these cases. Such factors include *inter alia* that during the lengthy interval between the arraignment of the appellant and the conclusion of the appeal the appellant had obtained an undergraduate degree and was in the process of

obtaining a Master's degree and that appellant had since the noting of his appeal pestered the Clerk of Court about the preparation of his record

1991 (1) ZLR p176

EBRAHIM JA

with little success. Consequently the appeal court substituted monetary penalties for the terms of imprisonment imposed by the trial court although in the opinion of the appeal court such custodial sentences were appropriate.

Cases cited:

S v Onward Mudimu 1971 (1) RLR 172 (G); 1971 (4) SA 283 (R)

S v Haruperi 1984 (1) ZLR 258 (HC)

S v Maseko 1986 (2) ZLR 52 (SC); 1986 (4) SA 958 (ZS)

S v Corbett 1990 (1) ZLR 205 (SC)

S v Ruzario 1990 (1) ZLR 359 (SC)

S v Kundishora 1990 (2) ZLR 30 (SC)

S v Badze 1990 (1) ZLR 369 (SC)

E Chatikobo for the appellant

I Houston for the respondent

Judgment

Ebrahim JA: The appellant was on 16 June 1988 convicted of five counts of receiving stolen property and one count of attempting to defeat or obstruct the course of justice. All counts were treated as one for sentence and he was sentenced to thirty months' imprisonment with labour, of which fifteen months was suspended for three years on condition of good behaviour.

The appellant first appeared before the trial magistrate on 13 November 1986 and the charges were put to him. He was represented by a legal practitioner, Mr Makonese. In response to the charges the appellant pleaded guilty to all six counts. Mr Makonese then made the following statement to the presiding magistrate:

"I appear for accused. The pleas in respect of six counts are in accordance with my instructions. The statement of agreed facts has been read to the accused and he agreed with the contents and nothing to add thereto (sic). I have also explained the essential elements of all six charges and he understands the charges and pleads guilty to the charges and may be found guilty on all six charges on his pleas."

[The learned judge of appeal dealt with the facts and continued:]

After the appellant's plea had been recorded and he had been found guilty, Mr Makonese applied for a postponement to 3 December 1986, indicating that he wished to prepare an

EBRAHIM JA

appellant. The prosecutor did not oppose the application, as he wished to carry out a check to determine whether the appellant had any previous convictions. The appellant's trial did not recommence until 8 January 1987. It is not clear from the record why the trial did not resume on 3 December 1986.

On 8 January 1987 the appellant was no longer represented by Mr Makonese but on that day Mr James represented him and made an application to have the pleas of guilty recorded on behalf of the appellant altered to pleas of not guilty, in terms of s 255A of the Criminal Procedure and Evidence Act [*Chapter 59*].

This section and its South African equivalent (s 113) has received judicial interpretation in a number of cases in recent years: see *S v Onward Mudimu* 1971 (1) RLR 172 (G); 1971 (4) SA 283 (R); *S v Haruperi* 1984 (1) ZLR 258 (HC); and *S v Maseko* 1986 (2) ZLR 52 (SC); 1986 (4) SA 958 (ZS). It is apparent from these authorities that where an accused person, after verdict, seeks to withdraw his unequivocal plea of guilty he is required to show, on a balance of probabilities, that the plea was not voluntarily and understandingly or correctly made; see *S v Maseko*, *supra*.

The appellant sought to discharge this onus by giving evidence himself and calling a witness to support his allegations that he had been unduly influenced to plead guilty. In addition a medical report by a doctor was produced to the court in an attempt to support his assertion that he had been assaulted.

[The learned judge then analysed the evidence and concluded:]

Faced with this evidence the prosecutor declined to call any evidence in rebuttal. She had tested the applicant's evidence by cross-examining him at length and did the same with Dube. At the end of the evidence led on behalf of the appellant she moved for a dismissal of his application, holding the view that the appellant had failed to satisfy the onus which rested on him. I am satisfied that she was entitled to approach the matter as she did. She had satisfactorily established through cross-examination that the appellant and his witness were not worthy of belief and that doctor's evidence was at best of little value. The magistrate accepted her submissions and dismissed the application to alter the pleas tendered by the appellant.

It is my view that the magistrate was justified in doing so. The appellant had the benefit of legal representation when the guilty pleas were tendered. He

EBRAHIM JA

is obviously a man of some sophistication. It is inconceivable that he would have tendered pleas of guilty when he was innocent just because he had received threats or had been

assaulted by the police. The appellant failed to discharge the *onus* upon him, and the magistrate was therefore correct in refusing his application.

The appeal against the refusal of the magistrate to set aside the pleas of guilty therefore fails.

The appellant also lodged an appeal against sentence. The overall effect of the sentence is not excessive and, had it not been for the fact that there are a number of very special features which have arisen since the sentence was imposed on him, I would not have interfered with the sentence imposed. There are, however, very special circumstances in this case, unique circumstances in fact, which justify the interference with the sentence imposed.

The court has, in a number of recent cases, dealt with the issue of delay; see *S v Corbett* 1990 (1) ZLR 205 (SC); *S v Ruzario* 1990 (1) ZLR 359 (SC); *S v Kundishora* 1990 (2) ZLR 30 (SC); and *S v Badze* 1990 (1) ZLR 369 (SC). In *S v Kundishora*, *supra*, GUBBAY ACJ (as he then was) said:

"...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 become 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 a delay in bringing them to trial would ensure that they were not sent to goal."

In a more recent judgment GUBBAY ACJ (as he then was), whilst commenting

1991 (1) ZLR p179

EBRAHIM JA

on his *dictum* referred to above in the *Badze* case, *supra*, made the following observation:

"The appellant's situation is analagous. 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 fully endorse the views of the learned Chief Justice and would reaffirm this court's approach, in these terms, when dealing with the issue of delay.

The appellant was unassailably guilty of the offences charged and the sentence imposed on him was eminently appropriate, being beyond any meaningful challenge. But there are very special and unique circumstances to this case, factors which I doubt will be repeated again. Factors which in my view justify the interference with the sentence imposed.

The five counts of receiving stolen property were committed in 1983 and the appellant was only arrested in connexion with these offences in 1986. The fact that he managed to evade justice for all those years is not in itself a feature which would warrant interference with an appropriate sentence imposed on him. There are, however, other features which require consideration.

The appellant was brought before the trial court in November 1986 and pleaded guilty to all the counts he was charged with. On 8 January 1987 he attempted to have his pleas of guilty altered to pleas of not guilty. An inquiry was commenced but this was not finalised until 16 June 1988, a period of almost eighteen months. The record does not reveal what caused the delay in finalising the application to withdraw his pleas of guilty.

He was sentenced on 16 June 1988 and four days later he lodged an appeal against conviction and sentence. His legal practitioner wrote twelve letters from 11 November 1988 to 8 August 1990, attempting to secure a copy of the record of the proceedings of the appellant's trial, and finally he received a

1991 (1) ZLR p180

EBRAHIM JA

copy of the required record. The appeal was heard in this court on 7 March 1991, a period of two years and eight months after the completion of the trial in the magistrate's court. I would indicate, however, that the Registrar of this court allocated a date of hearing as soon as he received the record.

In the intervening period, the appellant has attained a Bachelor of Science Economics Honours Degree (Lower Second Division) from the University of Zimbabwe. In effect the appellant, despite having been convicted on 16 June 1988, pursued his studies and obtained a degree whilst awaiting his fate for his transgressions of 1983.

By the time the appeal finally reached this court the appellant was a registered graduate student with Leeds University in England, where he is currently pursuing a Masters Degree.

Eight years have therefore elapsed from the time the appellant committed five of the offences to the time this appeal was heard in this court. After he was sentenced every effort was made by his legal practitioner to have his appeal prosecuted. In the mean time he has rehabilitated himself by obtaining an undergraduate degree and is currently pursuing a graduate degree. In other words he has striven to make himself a useful member of society. It seems to me that no useful purpose could be served by incarcerating him.

It is against the background of these facts that I am satisfied that it would be proper to set aside the custodial sentence imposed on the appellant and substitute a fine and a suspended term of imprisonment:

Counts 1 to 5, the counts relating to the receiving of stolen property, are taken as one for the purposes of sentence. The appellant is fined \$4 500 or, in default of payment, five months' imprisonment with labour. In addition he is sentenced to a period of twenty-four months' imprisonment with labour, of which twelve months is suspended for three years on condition that the accused does not commit any offence involving dishonesty during that period, for which he

is sentenced to imprisonment without the option of a fine.

A further period of twelve months is suspended on condition that he repays, through the Clerk of the Court, Masvingo, by 30 June 1991, the following amounts: \$2 588 to the CMED, Masvingo; and \$2 272 to Colbro Tyres, Masvingo.

1991 (1) ZLR p181

EBRAHIM JA

On Count 6 he is sentenced to pay a fine of \$500 or, in default of payment, one month's imprisonment with labour.

He is to pay the total fine by 31 June 1991.

Manyarara JA: I agree.

Korsah JA: I agree.

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

1991 (1) ZLR p182

MUZANENHAMO & ANOR v KATANGA & ORS 1991 (1) ZLR 182 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

11 March & 8 May 1991

Flynote

Husband and wife - whether a wife's proprietary rights under s 7 Matrimonial Causes Act 1985 preclude the husband from disposing of matrimonial property pending divorce - rights of third parties who purchase such property - rights of a wife to occupation of the home due to her status as a wife.

Spoliation order - whether such an order operates to preclude the transfer of immovable property, possession of which has thereby been secured.

Headnote

After the separation of first and second respondents, being respectively husband and wife, but before second respondent instituted divorce proceedings, first respondent sold the immovable property owned by him in Harare to the appellants. The sale having been frustrated by second respondent's refusal to permit the building society inspector access to the premises, first respondent forcibly ejected the wife there from. Second respondent having thereafter obtained

a spoliation order restoring possession of the home to her, appellants applied to the High Court on notice of motion seeking to enforce the sale to them. First respondent tendered payment of half the proceeds of the sale to second respondent. The High Court having refused this application on the grounds *inter alia* that second respondent had an interest in the property under s 7 of the Matrimonial Causes Act 1985 which interest was the subject of the dispute between the first and second respondents in the pending divorce action and also that the Registrar of Deeds, fourth respondent, had been correct in refusing to register transfer of the property because of the existence of the spoliation order. On appeal,

1991 (1) ZLR p183

McNally JA

Held, that the right of a wife to remain in occupation (based on a claim under s 7 of the Matrimonial Causes Act 1985) as against her husband depends upon the exercise of purely discretionary remedies but that the rights as between the spouses are personal *inter se* and do not affect third parties, regardless of whether the latter are aware of the dispute.

Held, further, that a wife cannot prevent her husband from disposing of assets unless he is thereby attempting to defeat her just rights and that the second respondent had not shown any equitable consideration which warranted intervention on her behalf by the court.

Held, further, that a wife's right of occupation due to her status as a wife is essentially a matter of equity and the courts will intervene where, for example, the husband disposes of the home as a policy of harassment arising out of the divorce proceedings.

Held, further however, that even if the husband is the defaulting party he may eject the wife from the matrimonial home provided he offers her suitable alternative accommodation.

Held, further, that the existence of the spoliation order, relating as it did only to possession of the home, did not preclude transfer of the property to the appellants and, as they were not party to the spoliation proceedings, was no bar to a claim by them for second respondent's ejection.

Cases cited:

National Provincial Bank Ltd v Ainsworth [1965] 2 All ER 472; [1965] AC 1175 (HL)

Chhokar v Chhokar 1984 FLR 313

Jackson v Jackson [1971] 3 All ER 774 (CA)

Cattle Breeders Farm (Pvt) Ltd v Veldman (2) 1973 (2) RLR 261 (A); 1974 (1) SA 169 (RA)

Owen v Owen 1968 (1) SA 480 (E)

G S Wernberg for the appellants

H Simpson for the second respondent

Judgment

McNally JA: This is a dispute about a house (Stand 964 Kambuzuma). The real contest is between the Muzanenhamos, who have bought the house from Mr Katanga, and Mrs R C Katanga, his wife, who refuses to move out of the house. She is estranged from her husband. He is only too anxious to sell and transfer the house. She claims her husband has a duty to provide her with accommodation. She says Stand 964 Kambuzuma is the matrimonial residence. She has made a claim to that residence in the matrimonial proceedings, which seem to be moving at a very leisurely pace since summons was issued in July 1988.

1991 (1) ZLR p184

McNALLY JA

The relevant sequence of events is as follows. Mr Katanga bought the house under Deed of Transfer 5300/80 dated 24 September 1980. In December 1984 he was transferred to Mutare. He acquired a home there. His wife joined him in June 1985, but there was discord and she came back to Harare. She says he evicted her. She returned to Stand 964 and lived there.

In early 1987 Mr Katanga sold Stand 964 to the Muzanenhamos. But when the Building Society Inspector came to value the property Mrs Katanga would not let him inspect it. So the bond application fell away, the sale fell through and the estate agent returned the Muzanenhamo's deposit of \$9 500.

In September 1987 Mr Katanga and the Muzanenhamos renegotiated. They made a new agreement. They knew Mrs Katanga would object and prevent the Building Society Inspector from valuing the property. So they tried to force her out. They instituted magistrates court proceedings for eviction. She entered appearance to defend. They withdrew the action. Then Mr Katanga, with the knowledge of the Muzanenhamos, forcibly evicted her.

Mrs Katanga's response was to obtain a spoliation order against her husband from the High Court on 16 December 1987. The court ordered that possession of the immovable property at number 964, section 3, Kambuzuma, Harare be restored to the petitioner permanently. Mr Katanga sought rescission of that order unsuccessfully in 1988, and it is said there is an appeal pending to this court.

However that appeal is not now before us. We are concerned with an appeal from another High Court application made by the Muzanenhamos in September 1988. They sought relief on two levels. First they sought a declaration that Stand 964 had been sold to them by Mr Katanga and an order compelling Mr Katanga to transfer the stand to them. Secondly they sought to evict her and to delete the word "permanently" from the order of 16 December 1987.

In fact Mr Katanga had tried to transfer the stand to the Muzanenhamos, but the Registrar of Deeds had considered himself obliged to refuse to register the transfer. He treated the spoliation order as a caveat. However he abides by the judgment of this court.

The application was refused by the High Court. It is that decision which is now before us.

Mr *Wernberg*, who appeared for the appellants, summed up their case in his general submissions as follows:

McNALLY JA

"It is respectfully submitted that the learned judge *a quo* erred in the following respects:

- A. In finding that it was unnecessary for him to decide whether the Fourth Respondent was correct in refusing to register the transfer of the property in question and in assuming that he was correct in so holding;
- B. In holding that the Appellants' motion was not brought against the Fourth Respondent in this respect. (It was. The Fourth Respondent is the Registrar of Deeds).
- C. In holding that Second Respondent was entitled to resist Appellants' motion compelling transfer, ostensibly on the basis of her claim to an interest in the property in question."

Perhaps one can begin by reminding oneself that ownership and possession are two different things. A landlord owns, a tenant possesses. Possession by the tenant does not prevent the landlord from selling. The purchaser may take ownership subject to the lease. Ownership and possession may reside in two different people simultaneously. I appreciate that the wife is not a tenant. But her position is closer to that of tenant than to that of owner.

It is important therefore to determine the nature of Mrs Katanga's right in the property.

She does not claim ownership. She claims two things. First, a right of occupation based on the spoliation order and alternatively on her right as a wife to occupy the matrimonial home. Second, a right to claim transfer of the stand to herself in the division of matrimonial assets on divorce, by virtue of the provision of s 7 of the Matrimonial Causes Act, 33 of 1985.

Her right of occupation based on the spoliation order is a personal right against Mr Katanga. He was the other party in those proceedings. The Muzanenhams were not. So it seems to me there are three questions to be answered in connection with her occupation of the stand:

1. Can the Muzanenhams evict her in the face of the spoliation order?
2. Can the Muzanenhams evict her in the face of her claim to a right of occupation as a wife?
3. Can the Muzanenhams evict her or claim transfer to themselves in the face of her claim, in the matrimonial proceedings, to transfer of the house into her name?

McNALLY JA

The first question was not dealt with in argument before us. Certainly it seems clear that the order of 16 December 1987 (the spoliation order) is not before us by way of appeal. We cannot interfere with it. Particularly we cannot, as requested, delete the word "permanently" from the order then made, however anomalous that word may be.

On the other hand there is no doubt that the spoliation order regulates rights as between Mr

and Mrs Katanga. It is not an order binding as against the Muzanenhamos, who were not parties to that action. It gives Mrs Katanga no more than a personal right as against her husband.

It may be argued that the Muzanenhamos were aware of the dispute between the Katangas and knew that she would resist the sale of the house to them and any attempt to evict her. I accept that this is true, but I do not see any basis for saying that in consequence the spoliation order is binding on them.

LORD UPJOHN made this point very firmly in *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472; [1965] AC 1175 (HL) at 485G when he said:

"The right of the wife to remain in occupation even as against her deserting husband is incapable of precise definition; it depends so much on all the circumstances of the case, on the exercise of purely discretionary remedies, and the right to remain may change overnight by the act or behaviour of either spouse. So, as a matter of broad principle, I am of the opinion that the rights of husband and wife must be regarded as purely personal *inter se* and that these rights as a matter of law do not affect third parties."

He made it clear that this applied whether or not the third party was aware of the dispute.

I conclude therefore that if the other problems can be overcome, the mere existence of the spoliation order is no bar to an order of eviction in favour of the Muzanenhamos.

No justice will, on the face of it, be done to her by allowing the transfer to go through. And since her attempt to stop the transfer is based on equity alone, a finding that equity is satisfied if the transfer to the Muzanenhamos takes place is fatal to her cause. It might have been different if he had been attempting to defeat her claim for relief in the matrimonial proceedings. But I do not believe that a wife can raise such a claim just because the husband

1991 (1) ZLR p187

McNALLY JA

is disposing of an asset. There must be some evidence that he is disposing of the asset "at undervalue to a scoundrel, the accomplice of the husband" (*Chhokar v Chhokar* 1984 FLR 313), or that in some way he is attempting to defeat her just rights. In England, under their far more complex and comprehensive legislation, the test is "Am I satisfied that the disposition was made with the intention of defeating the wife's claim for financial relief?" If the answer is "no" as it must be here, the court will not stop the disposition. See generally *Rayden & Jackson on Divorce* Vol I, 15 ed pp 886-7 and the Note-up to page 887.

I conclude therefore that Mrs Katanga has not shown any equitable consideration which would or should cause the court to intervene on her behalf to stop the *prima facie* lawful wish of Mr Katanga to sell his property to the Muzanenhamos.

Once it is accepted that there is no equitable basis for denying the husband's *prima facie* right to transfer the property registered in his own name, the other questions resolve themselves relatively simply.

There can be no proper basis for the Registrar of Deeds to regard the ruling of 16 December

1987 as a ruling to ownership. It is a ruling only in relation to possession or occupation and a ruling only as between Mrs Katanga and Mr Katanga. The interdict does not prohibit transfer either expressly or by necessary implication. The Registrar has, as I have said, made a report in which he simply notes that on the issuing of the rule *nisi* which led to the order of 16 December 1987 "an examiners caveat was noted pending determination of the case". He makes no further submissions and concludes "I have no objection to the application (by the Muzanenhamos) and I would abide by the findings of this Honourable Court".

I turn secondly to consider whether she may have a right of occupation arising from her status as a wife. This is always a difficult problem for the courts to solve. See for example *Jackson v Jackson* [1971] 3 All ER 774 (CA); *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) 1973 (2) RLR 261 (A) and *Owen v Owen* 1968 (1) SA 480 (E).

It is essentially a matter of equity. The courts will intervene where, for instance, the husband sells the house as part of a policy of harassment arising out of divorce proceedings. Here that is not the case. He had been transferred to Mutare and had acquired a property there. He sought to sell the Harare property long before the divorce proceedings began. As the then Chief

1991 (1) ZLR p188

McNALLY JA

Justice said in the *Cattle Breeders case*, *supra*, at 267E:

"A long line of cases seem to have laid down the proposition that even if the husband may be the defaulting party, he may eject the wife from the matrimonial home, provided he offers her suitable alternative accommodation or offers her the means of acquiring such suitable accommodation."

Here the husband has offered her half the net proceeds of the house if the sale and transfer is allowed to go through and if she vacates the property. I do not see this as a case where equitable considerations demand that she be allowed to stay on in occupation of the stand.

The final question for us to decide is whether she can prevent transfer of the property into the name of the Muzanenhamos?

It seems to me that her claim to stop transfer because of the possibility that she might succeed in obtaining transfer herself as a result of the divorce proceedings, is a shadowy claim indeed. The power of the court under s 7 of the Matrimonial Causes Act is a discretionary and equitable power. Stand 964 is not "the matrimonial home". That home was established in Mutare after the husband was transferred there and she joined him. She claims he drove her out, but nonetheless, the Mutare property had become the matrimonial home. Stand 964 is no more than a property of Mr Katanga in the proceeds of which she has a potential interest. But it is, as Mr *Wernberg* puts it, an interest in the nature of a mere *spes*, a hope. And as I have noted Mr Katanga has undertaken to let her have half the net proceeds on sale (provided she yields vacant possession). That seems to me to satisfy the criterion of equity.

I can see no basis on which the Registrar can properly refuse to register the transfer. It seems to me with respect that the learned judge should have decided that issue in favour of the Muzanenhamos.

Accordingly it seems to me that the appellants must succeed in this appeal, and are entitled to the relief they seek, except for the order that would delete the word "permanently" from an order which is not before us.

In the premises the appeal is allowed with costs against the second respondent, and the order of the court *a quo* is amended to read: There will be an order in terms of the draft annexure L, save that the word "permanently" is

1991 (1) ZLR p189

McNALLY JA

deleted from the penultimate paragraph and the final paragraph is amended so as to provide that the second respondent pays the applicants' costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

A J A Peck, appellant's legal practitioner

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TRANSPORT AND CRANE HIRE (PVT) LTD v HUBERT DAVIES & CO (PVT) LTD 1991 (1) ZLR 190 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

25 January & 8 May 1991

Flynote

Contract - exemption and limitation clauses - interpretation - fundamental breach.

Headnote

The appellant purchased a Foden truck which the respondent had assembled. After travelling 43 730 km, the steering column of the truck was found to have been improperly assembled by the respondent, causing it to come apart and cause the truck to veer off the road and overturn. The appellant sued for damages based on the negligence of the respondent. In the High Court, it was held that the respondent had acted negligently, but that it could avoid liability by virtue of an exemption clause in the written contract between the parties. The appellant appealed against the finding that the exemption clause applied.

Held, (per KORSAH JA) the breach of contract was a fundamental breach, and the exemption clause could not exempt the respondent from liability for such fundamental breach.

Held, (per McNALLY JA) the negligent assembly of the steering column was not an act intended to be covered by the exemption clause, properly construed, based on a policy approach to interpretation of such clauses in a contract.

Cases cited:

Bristow v Lycett 1971 (2) RLR 206 (A); 1971 (4) SA 223 (RA)

Swart & Anor v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A)

Agricultural Supply Association v Olivier 1952 (2) SA 661 (T)

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Cardboard Packing Utilities (Pty) Ltd v Edblo Transvaal Ltd 1960 (3) SA 178 (W)

Minister of Education v Stuttford & Co (Rhodesia) (Pvt) Ltd 1980 (4) SA 517 (Z)

Smith & Ors v South Wales Switchgear Ltd [1978] 1 All ER 18 (HL)

Canada Steamship Lines Ltd v Regem [1952] AC 192; [1952] 1 All ER 305 (PC)

Hall-Thermotank Natal (Pty) Ltd v Hardman 1968 (4) SA 818 (D)

UGS Finance Ltd v National Mortgage Bank of Greece and National

Bank of Greece SA [1964] 1 Lloyd's Rep 446 (CA)

Suisse Atlantique Société D'Armement Maritime SA v NV Rottherdamsche Kolen Centrale [1966] 2 All ER 61 (HL); [1967] 1 AC 361

Cap Palos, The [1921] P 458; [1921] All ER Rep 249 (CA)

George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] QB

284; [1983] 1 All ER 108 (CA); [1983] 2 AC 803; [1983] 2 All ER 737 (HL)

Blower v van Noorden 1909 TS 890

Liverpool City Council v Irwin [1976] QB 319; [1975] 3 All ER 658 (CA)

Zimnat Insurance Co Ltd v Chawanda 1990 (2) ZLR 143 (SC); 1991 (2) SA 825 (ZS)

Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha & Anor 1964 (3) SA 561 (A)

Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A)

Gannet Manufacturing Co (Pty) Ltd v Postaflex (Pty) Ltd 1981 (3) SA 216 (C)

Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd & Anor [1983] 1 All ER 101 (HL)

Alderslade v Hendon Laundry Ltd [1945] KB 189; [1945] 1 All ER 244 (CA)

Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe 1988 (1) ZLR 304 (SC); 1990 (1) SA 582 (ZS)

SA Railways and Harbours v Lyle Shipping Co Ltd 1958 (3) SA 416 (A)

Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd 1978 (2) SA 794 (A)

A P de Bourbon SC for the appellant

J B Colegrave for the respondent

Judgment

Korsah JA: This appeal is from a decision of the High Court, Harare,

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dismissing the appellant's claim for damages against the respondent. The appellant, as plaintiff, claimed from the respondent, as defendant, in an action before that court:

- "1. Payment of the sum of \$138 883,12 being damages sustained by plaintiff as a result of defendant's negligence in assembling the steering mechanism of a Foden Truck Registration Number 405- 552 Q purchased by plaintiff from defendant in or about February 1983;
2. Interest *a tempore morae*.
3. Costs of Suit."

The background to this action is that in or around February 1983 the appellant bought from the respondent a Foden Truck assembled by the respondent.

On 19 September 1983, while the Foden Truck was being drive by an employee of the appellant on the road between Beitbridge and Bulawayo it veered off the road, overturned and caught fire. It was a total write-off. It was common cause that the Foden Truck left the road because the driver lost the use of the steering. The loss of the steering was due to improper assembling of the steering column, which caused the down-shaft top section of the steering column to separate from the universal joint into which it should have been fitted and secured by a pinch-bolt. The down-shaft top section has an annular groove into which the pinch-bolt should fit and then be tightened. If this is done the steering column will not separate.

It was common cause that, immediately prior to the accident, the pinch-bolt was fitted into the universal joint, but the down-shaft top section was not pushed all the way into the yoke of the universal joint, and because of this the pinch-bolt did not fit into the annular groove. The down-shaft top section rested on top of the pinch-bolt.

At the time of the accident the Foden Truck had travelled a distance of 43 730 kilometres and had been in service with the appellant for seven months. The respondent had given a guarantee against defects in relation to the Foden Truck until it had travelled 75 000 kilometres or been in service for a period of nine months.

The respondent maintained that it initially assembled the steering column properly, but that it was subsequently misassembled by the appellant during

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repairs, service or modification of the Foden Truck. It was maintained by the respondent in the alternative that if it assembled the steering column incorrectly the appellant, through its employees during the lubrication or service it performed on the vehicle, was at all material times aware that the steering column was incorrectly assembled and it was accordingly unsafe and dangerous to drive the Foden Truck and that, in spite of knowledge of the unsafe condition of the steering column, the appellant deliberately and voluntarily took the risk of driving the Foden Truck and thus contributed to the damage sustained.

The respondent maintained further in the alternative that if the improper assembly of the steering column was the responsibility of the respondent, then the respondent's liability is excluded in terms of an exclusionary clause contained in a paragraph entitled "GUARANTEE" incorporated in a letter dated 11 November 1982, written by the respondent to the appellant.

The learned trial judge rightly summed up the issues for determination as follows:

- "(a) Was the steering column misassembled or incorrectly assembled? Was it incorrectly assembled by the defendant at the time of the original assembly or by the plaintiff subsequent to the original assembly?
- (b) If the incorrect assembly of the steering column was by the defendant during the original assembly did the plaintiff become aware of the misassembly or did (its) failure to notice it amount to contributory negligence?
- (c) If the incorrect assembly of the steering was by the defendant did it contract out of liability for such incorrect assembly of the steering column?"

After an incisive analysis of the evidence placed before him, the learned trial judge concluded that the respondent was at fault for the original improper assembly of the steering column. He reasoned thus:

"If the defendant correctly assembled the steering column who then misassembled it, one might ask. In my view it is highly improbable that the plaintiff's employees did this on the one or two occasions that they serviced the vehicle. Service of a vehicle involves lubrication, greasing and change of filters. It does not involve adjustment of the steering

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column. Indeed the Foden Truck was still under guarantee and if there were problems with the steering one would have expected the vehicle to be taken to the defendant for repair at no cost to the plaintiff.

I am therefore satisfied by the evidence before me that, on a balance of probabilities, it was the defendant that

incorrectly assembled the steering column of the Foden Truck. I have come to this conclusion because Mr Popiel's report shows that the Foden Truck could have travelled 43 000 kilometres with an incorrectly assembled steering column. I find Mr Thompson's evidence to the contrary unreliable. **The witness marks at the bottom and splines of the down - shaft were probably caused** by tests carried out post accident. It is highly improbable that plaintiff's employees would interfere with a correctly assembled steering column during service of the Foden Truck. If anything they would have had reason to interfere with the steering column if it had been incorrectly assembled by the defendant. The finding of another Foden Truck in the defendant's workshop with a similarly incorrectly assembled steering column has also influenced me in coming to this conclusion.

I am also satisfied that the service of the Foden Truck was done by plaintiff's employees who were of a very low level of mechanical skill. These employees were not sufficiently skilled to be able to appreciate that the steering column was incorrectly assembled even if they had seen the offending universal joint during service. I am not satisfied that they saw the offending universal joint during servicing of the Foden Truck as it was likely to have been covered. On this basis the defendant's further defence of the plaintiff's negligence being the proximate cause of the accident and the plaintiff's contributory negligence fails."

This reasoning by which the learned trial judge dealt with the first two issues and concluded that the respondent was responsible for the misassembly of the steering column of the Foden Truck is unexceptionable. He considered the whole of the evidence placed before him and found, on a balance of probabilities, that the incorrect assembly occurred at the respondent's factory.

Notwithstanding the finding that the incorrect assembly of the steering column, which was the proximate cause of the accident, was the result of negligence of the respondent's employees, the learned trial judge held that the respondent was protected from liability by virtue of the letter of 11 November 1982 and, in particular, that portion under the heading "GUARANTEE". The relevant passage reads:

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"The Company hereby guarantees with a period of nine months or 75 000 km of delivery, at its option, either to repair or to replace any part which may prove to be defective through bad material or workmanship. This guarantee is in lieu of any guarantee implied in law and in substitution of any other liability on the part of the Company in respect of any other materials referred to, or of the work undertaken by the Company in the Tender. **Liability for direct or consequential loss of whatsoever nature or howsoever arising is expressly excluded.** The customer shall be liable for the labour, transport and other costs incurred by the Company in connection with any repair or replacement effected in accordance with the provisions of this clause." (Emphasis supplied.)

At common law, the right of a contracting party to claim damages for a breach of contract may be excluded by the express terms of the contract, provided that the language employed to do so is plain. Even liability for negligence may be excluded if words are used which sufficiently indicate that the parties intended, in the context of the agreement, that such should be the case.

It was accepted by Mr *de Bourbon* and Mr *Colegrave* that such an exemption or exclusionary clause must not be taken out of context, but read as part of the contract as a whole. In *Bristow v Lycett* 1971 (2) RLR 206 (A) at 221G - H; 1971 (4) SA 223 (RA) at 236 BEADLE CJ acknowledged that:

"The exemption clause is, after all, nothing more than a clause in a contract. There is no special magic to an exemption clause in this case. Its meaning must be ascertained in the same way as any other clause in a contract, by ascertaining what the parties must have intended to cover and bearing in mind the rules applicable to implied

or tacit contracts."

RUMPF CJ also observed in *Swart & Anor v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202 (translation) that:

"What must naturally be accepted is that, when the meaning of words in a contract have to be determined, they cannot possibly be cut out and posted on a clean sheet of paper and then considered with a view to then determining the meaning thereof. It is self-evident that a person must look at the words used having regard to the nature and purpose of the contract, and also at the context of the words in the contract as a whole."

Mr *Colegrave*, however contended that if the language of an exclusionary clause is sufficiently clear, then a court of law must give effect to it. He cited

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in support of this contention *Agricultural Supply Association v Olivier* 1952 (2) SA 661 (T) per STEYN J at p 665C and *Cardboard Packing Utilities (Pty) Ltd v Edblo Transvaal Ltd* 1960 (3) SA 178 (W) at 179. I am in entire agreement with Mr *Colegrave* that if the words of an exclusionary clause are sufficiently clear then effect must be given to them by a court of law. But are the words of the exclusionary clause in the instant case so clear that they call for instant application without regard being had to other parts of the contract?

Mr *de Bourbon* submitted that the exclusionary clause does not assist the respondent because:

- " (a) the loss did not fall within the terms of the exemption clause; and/or
- (b) the breach of contract was so fundamental as to go to the root of the contract, and the terms of the contract did not cover such a breach."

Mr *de Bourbon* argued that the exclusionary clause forms part of the general guarantee given by the respondent, and must be interpreted as being part and parcel of that guarantee, and not of general application. If I understood him correctly then what he means is that the exclusionary clause is operational only when the guarantee can be invoked and cannot exist in isolation.

The guarantee was limited to a period of nine months or 75 000 kilometres. It was made applicable to "any part which **may prove to be defective** through bad material or workmanship" and the obligation of the respondent was to repair or replace such a part. In the present case, so Mr *de Bourbon* contended, the appellant had no knowledge of the fact that a part was defective and had no right to invoke the guarantee until it had such knowledge. But the total write-off of the vehicle occurred before the appellant had that knowledge.

It seems to me that there is merit in this argument; for if the guarantee could not operate to cover a situation in which the appellant would not reasonably be aware of the defective part or workmanship, then the exclusionary clause, which forms part of that guarantee and cannot be read in isolation, is equally inoperable.

Mr *Colegrave*, on the other hand, contended that this approach, of necessity, involves reading words into the exemption clause which are not there; and that this cannot be done. He argued that the words "...of whatsoever nature

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or howsoever arising..." could hardly be wider in their import or their ambit, and that by the use of such words any liability is excluded. For support of this submission he relied on the *dictum* by SQUIRES J in *Minister of Education v Stuttaford & Co (Rhodesia) (Pvt) Ltd* 1980 (4) SA 517 (Z) at 523E - H, that:

"...there is ample judicial authority to the effect that the word 'any' is of wide and even indefinite connotation, and ordinarily means 'of whatever kind'. Conversely, it excludes limitation when it is used adjectivally as qualifying words like 'loss' or 'damage'. In *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363 at 371, for example, INNES JA said:

'In its natural and ordinary sense, "any" - unless restricted by the context - is an indefinite term which includes all of the things to which it relates.'

Applying that to the words of this provision, 'any loss' thus ordinarily means loss of whatever kind.

I am bound to say, in considering such a clause, therefore, that I can see nothing which limits the ambit of the losses here contemplated so as to exclude a loss caused by negligence. It is true that it is not unknown for clauses to add additional words such as 'of whatever kind' or 'howsoever caused', or terminology of a similar kind. These are said to have an additional effect but, in reading some of the cases in which such language appears, they seem to be added *ex abundanti cautela*. 'Any loss' must mean any kind of loss, and this must connote however it is caused. This would therefore include loss which resulted from negligence."

With respect, the *Stuttaford* case, *supra*, is distinguishable from the present case. SQUIRES J was there dealing with an averages clause limiting the liability of the carrier. He found that the defendant's servants were guilty of ordinary negligence and not such negligence as affected the very root of the contract so as to entitle the plaintiff to a repudiation of the contract. It is contended by Mr *de Bourbon*, that the breach was so fundamental as to go to the very root of the contract, and the terms of the exemption clause did not cover such a breach.

In England the guide-lines that are applicable in interpreting clauses which purport to exempt one party to a contract from liability, and which I find illuminating, were re-stated in summary form in the speech of Lord Fraser of TULLYBELTON in *Smith & Ors v South Wales Switchgear Ltd* [1978] 1 All ER 18 (HL) at 25d - g as follows (quoting from the speech of LORD MORTON

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OF HENRYTON in *Canada Steamship Lines Ltd v Regem* [1952] AC 192; [1952] 1 All ER 305 (PC) at 310:

"(i) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the *proferens*') from the consequence of negligence of his own servants, effect must be given to that provision. ... (ii) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. If a doubt arises at this point, it must be resolved against the *proferens*. ... (iii) If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground

other than that of negligence', to quote again LORD GREENE MR in the *Alderslade* case. The 'other ground' must not be so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it, but subject to this qualification, which is, no doubt, to be implied from LORD GREENE'S words, the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are, *prima facie*, wide enough to cover negligence on the part of his servants."

The words "**Liability for direct or consequential loss of whatsoever nature or howsoever arising is expressly excluded**" certainly do not appear to be wide enough to satisfy the first test because there is no clear and unmistakable reference to negligence or to a synonym for it. However, insofar as the words of the exemption clause do not make express reference to negligence the Court has to consider whether the words, in their ordinary meaning, are wide enough to cover negligence on the part of the servants of the respondent. That is the second test. Of course, the words "... of whatsoever nature or howsoever arising ..." are wide enough to cover negligence on the part of the respondent's servants. However, the intention of the parties must be gathered from the entire wording of the clause, and in construing the clause other parts of the contract which throw light on the meaning to be assigned to the words cannot be overlooked.

The first part of the clause recites that:

"The Company hereby guarantees within a period of nine months or 75 000 km of delivery, at its option, either to repair or replace any part which may prove to be defective through bad material or workmanship."

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The first part of the clause obviously gives the appellant a right to demand that the respondent repairs or replaces a part which proves defective, either because the material used was bad or the workmanship was not up to standard.

If the exclusionary clause, which recites that "Liability for direct or consequential loss of whatsoever nature or howsoever arising is expressly excluded" is interpreted to cover negligence then it takes away with one hand the guarantee offered with the other. The result would be to say that if, during the period covered by the guarantee, any loss is suffered by the appellant as a result of any part being defective through the use of bad material or workmanship, of which the appellant could not with due diligence have been aware, the *proferens* is not invoked if the appellant was aware of a defect due to the use of bad material or workmanship. This presupposes actual knowledge on the part of the appellant. How else could the guarantee be invoked?

Reading the guarantee together with the exclusionary clause, it seems to me that it was not the intention of the parties that during the currency of the guarantee the *proferens* would be excluded from liability for a breach of a condition which goes to the very root of the contract and for which, with the exercise of all due diligence on the part of the purchaser, the purchaser could not reasonably have become aware.

The question is: Was it in the contemplation of the parties, as reasonable men, that the appellant was accepting the risk of misassembly of a vital component of the vehicle? No - one could doubt that the purchaser of a vehicle would not normally accept the risk of receiving a

vehicle with an essential component, such as a steering column, incorrectly assembled, any more than the purchaser of a pistol would accept the risk that the gun he purchases will propel the bullet towards him when he pulls the trigger, rather than towards the object of his aim. I think breaches of this nature constitute fundamental breaches because they constitute performance which is useless for its intended purpose.

While accepting that there is no rule of law to the effect that an exemption clause would not avail a party who has committed a fundamental breach of contract, HENNING J, after indicating that an exclusionary clause must be construed in the light of the provisions of the contract as a whole, remarked in *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) at 835F-G that:

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KORSAH JA

"In spite of the emphatic language of the exemption clause in this case it appears to me that the parties could hardly have intended that the plaintiff would be exonerated from liability if it failed to perform its obligations at all, or if its performance proved useless, or if it committed a breach going to the root of the contract. After all the parties must have had in mind that both of them would carry out the terms of the contract. It is most unlikely that they contemplated that the plaintiff would be excused from the consequence of a fundamental breach. The clause is in my view to be construed as affording limited protection to the plaintiff against faults or imperfections in the product of its labours, which is otherwise substantially in accordance with the contract."

In the *Hall-Thermotank* case, *supra*, as in the instant case, the *proferens* guaranteed the "equipment" for a stated period "from the date of starting up thereof" against defective workmanship and material, and undertook to replace or repair free of charge any part failing due to such causes. The clause expressly limited the liability of the *proferens* to such replacements and repair, and provided that the liability of the *proferens* was not to extend to any consequential loss and/or damage due to any cause or causes whatsoever.

In the interpretation of the exemption clause, we are not dealing with a task more esoteric than applying the ordinary canons of construction to the provisions of the contract. It is essential to ascertain whether such a clause, having regard to the intentions of the parties, to be gathered from the contract as a whole, can be interpreted to cover fundamental breach. As PEARSON LJ observed in *UGS Finance Ltd v National Mortgage Bank of Greece and National Bank of Greece* SA [1964] 1 Lloyd's Rep 446 (CA) at 453:

"As to the question of 'fundamental breach', I think there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of the contract. This is not an independent rule of law imposed by the Court on the parties willy - nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the contracting parties. It involves the implication of a term to give to the contract that business efficacy **which the parties as reasonable men must have intended it to have**. This rule of construction is not new in principle but it has become prominent in recent years in consequence of the tendency to have standard forms of contract containing exceptions clause drawn in extravagantly wide terms, which produce absurd results if applied literally." (Emphasis added.)

1991 (1) ZLR p201

KORSAH JA

Similar views were succinctly expressed by LORD REID in *Suisse Atlantique Société D'Armement Maritime SA v NV Rottherdamsche Kolen Centrale* [1966] 2 All ER 61 at 71 - F; [1967] 1 AC 361 (HL) at 398 thus:

"As a matter of construction, it may appear that the terms of the exclusion clause are not wide enough to cover the kind of breach which has been committed. Such clauses must be construed strictly and, if ambiguous, the narrower meaning will be taken. Or it may appear that the terms of the clause are so wide that they cannot be applied literally; that may be because this would lead to an absurdity, or because it would defeat the main object of the contract or perhaps for other reasons."

This is a far cry from saying that a contractor may not make a valid contract that he is not to be liable for any failure to perform his contract, including even wilful default; but he must use very clear words to express that purpose. See *The Cap Palos* [1921] P 458 at 471; [1921] All ER Rep 249 (CA) at 254 *per* ATKIN LJ.

In my view, to interpret the exclusionary clause as the respondent contends would mean that, upon the total write-off of the Foden Truck as a result of the misassembly of the steering column by the respondent, all the appellant would be entitled to, if at all, is a steering column properly assembled. This is the absurdity which all the authorities cited, in the absence of clear and unambiguous words to the contrary, seek to avoid.

Where on a proper construction of the exclusionary clause, it is found to have no application to the loss sustained by the innocent party, nor to the claim brought by such innocent party subsequent to such loss, then each party is entitled to treat such fundamental breach as a repudiation, bring the contract to an end and sue for damages. Then, as LORD REID commented in the *Suisse Atlantique case*, *supra*, at p 71 (All ER) and 398 (AC):

"Then the whole contract has ceased to exist, including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by an innocent party after it has ceased to exist ..."

In my view, upon a proper interpretation of the contract, the breach of contract was so fundamental as to go to the root of the contract, and the terms of the exclusionary clause did not cover such a breach.

1991 (1) ZLR p202

KORSAH JA

Accordingly, the appeal is allowed and the order of the High Court dismissing the appellant's claim and awarding costs to the respondent is hereby set aside and substituted with the following:

- "(1) Judgment is granted in favour of the plaintiff in the agreed sum of damages of \$105 366,50;
- (2) Interest *a tempore morae* from 9 November 1988; and
- (3) Costs of suit."

In addition the appellant is awarded the costs of this appeal.

McNally JA: I have had the advantage of reading the judgment of my brother, KORSAH. I am in

full agreement with his conclusion that the exemption clause does not operate to indemnify the respondent in this case. I am equally in agreement with him, and with the learned judge in the court *a quo*, that the accident which resulted in the tragic death of the driver and the total destruction of the vehicle was due to the negligent assembling of the steering column of the vehicle by the respondent. This led to the steering column collapsing and the vehicle crashing out of control.

I do not propose to elaborate further on the factual conclusions, but I would like to set out my reasoning on the effect of the exclusion clause.

THE GENERAL EFFECT OF EXCLUSION CLAUSES

This exclusion clause is in a form generally similar to many such clauses. It masquerades as a guarantee, but in fact takes away a great deal more than it gives.

As long ago as 1956 Professor Hahlo, in an article in (1956) 73 SALJ 443, set out as an example a typical motor car "warranty". He comments at 443 - 4:

"The 'warranty' is beautifully printed, there is an impressive seal on it, and the very word 'warranty' inspires confidence. It is safe to assume that the average buyer is pleased when he receives it, thinking that something valuable has been given to him. In truth he would be far better off if there were no warranty. So far from giving him rights which he would otherwise not have, the 'warranty' cuts down on practically every right which our common law gives to a buyer of a defective article."

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McNALLY JA

He goes on to give a number of instances, one of which is:

"Thirdly there can never be a claim for consequential damages. If the buyer crashes on the way home from the salesroom because there is a defect in the steering mechanism, he has no action against the seller except for the replacement of the defective part."

THE COURT'S REACTION TO SUCH CLAUSES

The courts, primarily in England but followed in South Africa and Zimbabwe, were hostile to these exemption clauses. Their attitude is expressed, as only he can do it, by Lord Denning in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 at 296-7; [1983] 1 All ER 108 (CA) at 113-4. The decision was approved on appeal in [1983] 2 AC 803; [1983] 2 All ER 737 (HL) and Lord Denning's reasoning was specifically approved in the speech of Lord Diplock. This is what Lord Denning said:

"None of you nowadays will remember the trouble we had, when I was called to the Bar, with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues for timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of 'freedom of contract'. But the freedom was all on the side of the big concern which had the use of the printing press ... It was a bleak winter for our law of contract ... Faced with this abuse of power, the strong against the weak, by the use of the small print of the conditions, the judges did what they could to put a curb on it. They still had before them the idol, 'freedom of contract'. They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called 'the true construction of the contract'. They used it with great skill and ingenuity. They

used it so as to depart from the natural meaning of the words of the exemption clause and to put on them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability, or that in the circumstances the big concern was not entitled to rely on the exemption clause ...But when the clause was itself reasonable and gave rise to a reasonable result, the judges upheld it, at any rate when the clause did not exclude liability entirely but only limited it to a reasonable amount."

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McNALLY JA

Lord Denning then went on to deal with the effect of legislative intervention:

"In 1969 there was a change of climate. Out of winter into spring. It came with the first report of the Law Commission on Exemption Clauses in Contracts, ...which was implemented in the Supply of Goods (Implied Terms) Act 1973. In 1975 there was a further change. Out of spring into summer. It came with their second report on Exemption Clauses ...which was implemented by the Unfair Contract Terms Act 1977."

These legislative interventions introduced the concept of reasonableness. The courts were authorised to determine whether an exemption clause was reasonable or not. It was no longer necessary to put "strained" interpretations on such clauses.

In South Africa there has been limited intervention by the Legislature and in Zimbabwe none at all except for the provisions of ss 7 and 11 of the Hire-Purchase Act [Chapter 284]. These do not concern us in the present case. We therefore still rely on what Lord Denning calls "strained and unnatural constructions."

It must be said that Lord Denning's admission was made only in 1983, long after the intervention of Parliament had made those "strained and unnatural constructions" unnecessary. Prior to that the courts had always protested that they were indeed looking for the true meaning of the contract.

I do not think we should pretend that the court's approach to the interpretation of exemption clauses is based on a search for the "true meaning". I think we must accept that we are dealing with what I would call "policy-based interpretation". The cases in England and South Africa and Zimbabwe show, to my mind quite clearly, that the courts interpret exemption clauses in a way which can only be described as artificial. A great deal of ingenuity is expended in trying to show that these artificial interpretations are in fact true and natural interpretations. I do not think the effort is worth the candle. It is the old story of the courts claiming that they do not make law but only interpret it. That is not so. See *Blower v van Noorden* 1909 TS 890 at 905; *Liverpool City Council v Irwin* [1976] QB 319 at 332; [1975] 3 All ER 658 (CA) at 666; *Zimnat Insurance Co Ltd v Chawanda* 1990 (2) ZLR 143 (SC); 1991 (2) SA 825 (ZS) in fine.

I say this because later in this judgment I will refer to cases whose approach to the interpretation of exemption clauses cannot, to my mind, be defended

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McNALLY JA

on the grounds of grammar or logic. They are "policy - based interpretations". They are well-established in the law. I agree with them. But I do not defend them on the basis that they

interpret language truly and naturally. They can only be defended on the ground that they are accepted and established policy-based interpretations.

The Exemption Clause in this case I propose to consider it in four parts, and to ignore the last sentence which is of no importance. The first part is the so-called 'guarantee':

"The Company hereby guarantees within a period of nine months or 75 000 km of delivery, at its option, either to repair or to replace any part which may prove to be defective through bad material or workmanship."

The company, of course, is only an assembly company. It does not manufacture the parts, which are mostly imported from abroad. So it will seldom if ever be the fault of the company if a part turns out to be defective "through bad material or workmanship". Yet in our law a "merchant seller" may, in a proper case, be held liable for latent defects of which he was not aware and for which he was not to blame. This form of strict liability (another policy - based decision) was first clearly enunciated in *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha & Anor* 1964 (3) SA 561 (A) at 571H and is now well-established. See *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) and *Gannet Manufacturing Co (Pty) Ltd v Postaflex (Pty) Ltd* 1981 (3) SA 216 (C).

So this undertaking may well have been implied in the contract even had it not been expressed. Nor is it a very extensive commitment.

The next part of the clause follows:

"This guarantee is in lieu of any guarantee implied in law, and in substitution of any other liability on the part of the company in respect of (the) goods and materials referred to ..."

This makes it clear that the assembler repudiates any further liability in respect of the "goods and materials referred to" (ie the parts). In other words it is contracting out of liability for consequential damage caused by latent defects in the parts, for which it might otherwise be liable in terms of the strict liability principle set out in the *Kroonstad* case, *supra*.

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McNALLY JA

This part of the clause may be described as a limitation clause rather than an exclusion clause properly so called. For the significance of this distinction I refer to the speech of LORD FRAZER OF TULLYBELTON in *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd & Anor* [1983] 1 All ER 101 (HL) at 105h to 106a. It is certainly arguable, bearing in mind that the assembler has agreed to repair or replace defective parts, and that he is not really in a position to know whether or not they are defective since he is not the manufacturer, that this limitation on his liability is reasonable.

The third part of the guarantee/exemption clause necessitates a repetition of some of the words already cited in order that it can be properly understood. It reads:

"This guarantee is in lieu of any guarantee implied in law, and in substitution of any other liability on the part of the company in respect of [and here follow the important words] the work undertaken by the company in the tender."

This introduces an entirely new concept. It is one thing for the assembler to contract out of his

absolute liability for defects in the manufacture of parts which he has not himself manufactured. He has at least offered some quid pro quo in the form of an undertaking to replace or repair such parts. But here he is attempting to contract out of any responsibility for his own work. This is a true exemption clause, not merely a limitation clause. "Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion" as LORD WILBERFORCE said in the *Ailsa Craig* case, *supra*, at 102-103.

These words are slipped in, one might say almost surreptitiously, at the end of a clause, which might otherwise not be unreasonable. Unfortunately no attention was paid to these words in the argument before us. Yet without them the next following words would have little significance.

The next following words are these:

"Liability for direct or consequential loss of whatsoever nature or howsoever arising is expressly excluded."

Without the crucial clause to which I have referred, these words would clearly refer only to the assembler's responsibility for the sins of the manufacturer. They would merely reinforce the assembler's repudiation of

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McNALLY JA

liability for direct or consequential loss of whatsoever nature or howsoever arising in respect of defective parts supplied by the manufacturer.

But because the crucial clause has been included, the contention is that the assembler is not to be held liable for his own negligence in assembling parts which were not defective in any way. It was only because the parts were assembled negligently by the assembling company's employees that the accident took place and the damage was suffered.

HOW DO THE COURTS INTERPRET SUCH A CLAUSE?

The short answer is "very restrictively". In order to understand how restrictively, we must look at the cases. And in looking at the cases, we must bear in mind what I said earlier, namely that the courts' method of interpretation is a policy - based method. It is not necessarily grammatically logical. The way in which the courts interpret words in an exemption case is different from the way they interpret similar words in other clauses.

The first case on which I rely is *Alderslade v Hendon Laundry Ltd* [1945] KB 189; [1945] 1 All ER 244 (CA) at 245 in which LORD GREENE MR said this:

"...where the head of damage ...is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject - matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the clause is to be construed as relating to a different kind of liability and not to liability based on negligence."

This passage was expressly approved by Dumbutshena CJ in Cotton Marketing Board of

Zimbabwe v National Railways of Zimbabwe 1988 (1) ZLR 304 (SC) at 319 - 320; 1990 (1) SA 582 (ZS) at 594.

The next case on which I rely is one cited by Korsah JA in his judgment. It is Canada Steamship Lines Ltd v Regem, *supra*. At p 310 Lord Morton of Henryton said this:

- "(i) If the clause contains language which expressly exempts the person

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McNALLY JA

in whose favour it is made (hereafter called the proferens) from the consequence of negligence of his own servants, effect must be given to that provision ...

- (ii) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point it must be resolved against the proferens ...
- (iii) If the words used are wide enough for the above purpose, the court must then consider whether the ...'head or damage may be based on some ground other than that of negligence' to quote again Lord Greene MR in the Alderslade case. The 'other ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it, but subject to this qualification, which is, no doubt, to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are, prima facie, wide enough to cover negligence on the part of his servants."

These last words "even if ..." are the clearest indication of what I have called "policy - based interpretation" in the case of exemption clauses.

Next I refer to a Roman-Dutch decision, also approved in the Cotton Marketing Board judgment, *supra*. It is the judgment of Steyn CJ in *SA Railways and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A) at 419C-E. The Chief Justice said this:

"The rule to be applied in construing an exemption of this nature appears from *Essa v Divaris* 1947 (1) SA 753 (AD) at p 756. Generally speaking, where in law the liability for the damages which the clause purports to eliminate, can rest upon negligence only, the exemption must be read to exclude liability for negligence, for otherwise it would be deprived of all effect: but where in law such liability could be based on some ground other than negligence, it is excluded only to the extent to which it may be so based, and not where it is founded on negligence."

Finally I rely upon the words of Dumbutshena CJ in the Cotton Marketing Board case, *supra*, where after referring with approval to the cases I have cited, he said (at 325C):

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"In my opinion, for this exemption clause to exclude liability arising from negligence, there must be express reference to negligence. I do not believe that the words are wide enough, in their ordinary meaning, to cover negligence on the part of the servant of the respondent. And if the words are wide enough to cover negligence, I believe the head of damage may be based on some ground other than that of negligence."

HOW DO WE APPLY THIS "POLICY BASED" METHOD OF INTERPRETATION TO THE

EXEMPTION CLAUSE IN THIS CASE?

I propose to follow the three-stage inquiry set out by Lord Morton in the *Canada Steamship Lines* case, *supra*.

Clearly the exemption clause does not expressly refer to negligence. That answers the first point. Clearly the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. In this connection I adopt and accept the reasoning of Squires J in *Minister of Education v Stuttaford & Co (Rhodesia) (Pvt) Ltd*, *supra*, at 523E-H, that "any loss" must include loss arising from negligence. See also the speech of Lord Frazer of Tullybelton in the *Ailsa Craig* case, *supra*, 15 107g.

But that is not the end of the matter. We have to answer the third question, which introduces the "policy - based interpretation". I repeat that question:

"If the words used are wide enough for the above purpose, the court must then consider whether the head of damage may be based on some ground other than negligence."

In my view there is clearly at least one other ground, which is neither fanciful nor remote. It is the ground of the strict liability of the merchant seller, which arises regardless of negligence. Late delivery might be another ground. Accordingly I would interpret the exemption clause as applying to those grounds, and not to that of negligence. It follows that the respondent has not discharged the onus of satisfying the court that his negligence is covered by the exemption clause. (See Chitty on Contracts: General Principles, 26 ed para 956.)

It seems to me, in conclusion, that if a party to a contract wishes to exempt himself from liability for his own negligence, he should say so in so many words, unless the context indicates that the exemption clause relates only to negligence. Ideally, he should add words to the effect that the other party

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McNALLY JA

should take out insurance to cover any possible risk of loss from the negligence of the proferens. This is what happened in the case of *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A). In that case the court was satisfied that the exemption clause did not exclude the liability of the proferens for its own negligence. A major, if not the major, factor in that decision was that it was convenient for both parties, and expressly agreed, that the defendant (who was in the position of the respondent in this case) would insure the goods at an agreed rate. The agreement to insure was a satisfactory quid pro quo for the exemption.

There was no reference to insurance in the present case, except for a passing reference to the fact that the appellants had insurers. One does not know whether the respondents were insured for product liability.

For the reasons I have given I would agree, with respect, with the order proposed by Korsah JA. I note that the figure of damages is an agreed figure, intended to put the appellant in the position it would have been in had the contract been fulfilled. In other words it was a figure

based on a contractual rather than delictual damages.

Ebrahim JA: I agree.

Atherstone & Cook, appellant's legal practitioners

Granger & Harvey, respondent's legal practitioners

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S v NICOLLE 1991 (1) ZLR 211 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Criminal appeal

26 March & 13 May 1991

Flynote

Criminal law - private defence - search of suspected poacher - use of force to overcome resistance justifiable both in defence of self and in defence of property.

Criminal procedure - search - landowner's powers of search and seizure over poacher - entitled to use reasonable force to overcome resistance - State outline - discrepancies between outline and evidence of State witness - adverse inference against witness in absence of explanation.

Evidence - accused - evidence not to be rejected merely for reason of it being exculpatory - complainant - tendency to exaggerate wrong not to be overlooked.

Interpretation of statutes - implied powers - where implication necessary. Legislation - Parks and Wild Life Act 1975, s 86(1) - Criminal Procedure and Evidence Act [Chapter 59], s 136(4a).

Headnote

The appellant had been convicted of an assault upon a poacher on land of which he was the appropriate authority. The evidence of the poacher diverged in material respects from the outline of the State case. The effect of the outline was such as to corroborate the appellant's defence that the assault was an instance of the application of justifiable force to overcome the poacher's unlawful resistance to a lawful search and seizure and was in addition the use of reasonable force in defence of property, the poached fish.

Held, the appropriate authority over land is entitled to use reasonable force to overcome unlawful resistance to a lawful search.

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KORSAH JA

Held, a landowner is entitled to use reasonable force in defence of his property in order to

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recover from a poacher fish which have been unlawfully caught.

Cases cited:

S v Seda 1980 ZLR 109 (G)

R v Sene 1964 RLR 559 (A); 1965 (2) SA 144 (RA)

S v Reed 1971 (1) RLR 315 (A); 1972 (2) SA 34

Tribal Trust Land Development Corporation Ltd v Cone Textiles (Pvt) Ltd 1978 RLR 365 (G); 1978 (4) SA 659 (R)

Ex parte *Minister of Justice In re: S v van Wyk* 1967 (1) SA 488 (A)

S v Smart 1971 (1) RLR 256 (A)

M J Gillespie for the appellant

A Guvava for the respondent

Judgment

Korsah JA: The appellant was convicted of assault common and sentenced to pay a fine of \$80 or, in default of payment, serve a period of forty days' imprisonment with labour. He appeals against both conviction and sentence.

The incidents giving rise to the charges levelled against the appellant, though relatively simple, raise some interesting legal issues.

Around 8 am on 20 November 1989, Alice Potera, the complainant, went to the Blanket Dam at Gwanda in the company of Esinath Mpofu to fish. The appellant is a director of Sondela Mpofu (Pvt) Ltd, the company which owns Blanket Farm and upon which the dam in question is situated. At about 11.45 am the appellant arrived at the dam and found the two women fishing in the dam. Paragraphs 6 to 11 of the "Outline of State case" read as follows:

- "6. After the accused had arrested the complainant and her sister for fishing illegally he then took their rods, broke them and threw them into the water.
7. The accused went on to grab the bag that contained fish which Alice was holding. Alice resisted and the accused persisted.
8. Thereafter the accused grabbed Alice by the shoulders, pushed her towards the water and as she neared the water Alice pushed the accused away. Then the accused kicked Alice once in the right abdomen with his booted foot.

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9. Alice cried out and advised the accused that he had hurt her and thereafter the accused went away.
10. Alice did not sustain injury.

11. The assault was unlawful."

The evidence in support of the State's allegations which was given by the complainant and corroborated by Esinath Mpofu was that they had been told not to fish at Sheet Dam, but of Blanket Dam they knew of no such injunction. They said after the appellant had broken their fishing tackles and thrown them into the water, he took a paper bag containing sandals and threw that as well into the water. Then he grabbed the complainant around the shoulders and commenced pushing her towards the water. After the complainant had retreated some steps, she realised that she had been pushed too close to the water and so she shoved the complainant back, and the complainant then kicked her on her right lower abdomen. She screamed in pain and told the appellant that he had injured her and that he had hurt her where she had undergone an operation. The appellant called her a liar and told her that if she and her companion remained at the dam site he would set the dogs on them. After which, the appellant collected the bags containing the fish from the water, where the complainant and Esinath had placed them, and took them away with him.

The evidence of the State witnesses was therefore distinctly at variance with the allegations contained in the outline of the State case, that it was during the struggle between the complainant and the appellant for possession of the bag of fish that the appellant kicked the complainant in the region of her lower abdomen.

The appellant both in his defence outline and in evidence said that he grabbed hold of the bag containing fish, but the complainant resisted his efforts to prise it from her, and that he then applied his right foot as a lever to the left side of the complainant's abdomen in order to prise the bag from her and succeeded in so obtaining possession of the bag of fish, which he disposed of by throwing into the water before departing.

Subsection (4a) of s 163 of the Criminal Procedure and Evidence Act [*Chapter 59*] which provides that:

"In a trial before a magistrate, if the accused pleads not guilty or a plea of not guilty is entered in terms of section one hundred and sixty-six:

- (a) the Prosecutor shall make a statement outlining the nature of his case and the material facts on which he relies;"

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KORSAH JA

places an *onus* on the prosecution to outline the evidence on which it intends to rely in proof of the charge levelled against the accused and the contents of such a statement constitute a part of the prosecution's case against the accused.

Subsection (4b) of s 163 places a similar burden on an accused person to make a statement outlining the nature of his defence, although in his case he can exercise his right to remain silent subject of course to the limitation placed thereon. Commenting on the importance of the part played by the respective outlines of cases in a criminal trial Squires J said in *S v Seda* 1980 ZLR 109 (G) at 110H - 111A:

"They perform a similar function to the pleadings in a civil trial, and serve not only to identify what may be in issue between the State and the accused, but to advise each of the substance of the matters that are in issue, with the obvious advantages this affords of avoiding delay in completing the trial. In addition, it must always be appreciated that just as any significant and unexplained departure by the accused in his evidence from the outline of the defence which he makes, may be a matter for comment or even adverse conclusions, so does such a consequence affect what is said by the State witnesses."

While citing the above dictum of SQUIRES J with approval, I hasten to point out that whereas the outline of defence is prepared from what the accused person tells counsel, and is tendered in evidence with his approval, the outline of State case is not prepared on the instructions of the complainant and is certainly not approved by the complainant before it is tendered in evidence, and does not constitute part of the complainant's testimony. I would suggest that the reason for drawing an adverse conclusion when the outline of State case is seriously at variance with the evidence of the prosecution witnesses is that because of the conflict between the two a doubt is raised as to whether the State witnesses are being truthful. Such a conflict may easily be explained by the production of the complainant's statement to the police. But if this is not done, so long as that conflict is unresolved at the end of the hearing, the benefit of the doubt must be accorded to the accused; for it would not be possible to say that the State has proved the case which it undertook from the onset to prove, and has therefore proved its case beyond a reasonable doubt.

Mr *Gillespie* contended, rightly in my view, that two very important assertions in the State outline, favourable to the appellant, were contradicted without explanation. These were that (a) the complainant held the bag of fish,

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KORSAH JA

and (b) the complainant resisted its seizure. The learned trial magistrate did not apply his mind to these serious discrepancies between the outline of State case and the evidence. He did not demand an explanation and none was proffered by the prosecutor. The learned trial magistrate accepted without explanation the evidence of the prosecution witnesses, which was at variance with the outline of State case, and rejected, without adequate foundation, the appellant's defence which was, in part, supported by the outline of State case.

The learned trial magistrate reasoned thus:

"It appeared to this court that the accused only employed this explanation of him levering his foot against the complainant so as to lessen his moral blameworthiness and make the incident seem trivial. Considering the accused's aggression that he employed the very moment that he got to the complainant and her sister this court finds that in fact the accused first pushed the complainant towards the water and when she pushed him back he then kicked her in the abdomen."

It is apparent from the foregoing that the learned trial magistrate rejected the appellant's account of the incident merely because he thought it was calculated to diminish the appellant's culpability, and for no other reason. BEADLE CJ cautioned in *R v Sene* 1964 RLR 559 (A) at 560D-E that:

"This was not a proper approach to the appellant's evidence. An accused's evidence should not be rejected out of hand simply because he was the only witness who was likely to gain anything by giving false evidence. On this

approach, other things being equal, whenever there is a conflict between the police and an accused person, the evidence of police ought to be accepted and the evidence of the accused rejected, because, in all cases where accused gives evidence protesting his innocence, he has something to gain, whereas the police can hardly be said to have a similar cogent motive."

Mr *Gillespie* submitted that by rejecting the evidence of the appellant in preference to that of the prosecution witnesses, on the basis that the appellant wanted to lessen his moral blameworthiness, the learned trial magistrate had "discarded that ancient humanity and wisdom that cautions one that a person feeling aggrieved is at least as likely to exaggerate any wrong perceived by himself as may be the wrongdoer in minimising his fault". The appellant had deprived them of their catch.

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KORSAH JA

Having regard to the unexplained material discrepancies between the outline of State case and the evidence adduced by the prosecution, and the fact that the outline of State case was, in part, corroborative of that portion of the appellant's evidence which was at variance with the testimony of the prosecution witnesses, the learned trial magistrate should have found that the prosecution had not proved its case beyond a reasonable doubt.

Mr *Gillespie* further contended that apart from any authority conferred on the appellant to arrest under the Criminal Procedure and Evidence Act [*Chapter 59*] (see s 33 thereof) the appellant was imbued with authority under s 86(1) of the Parks and Wild Life Act 1975, not only to arrest, but also to search and seize. The section provides as follows:

"86 (1) The appropriate authority for alienated land or any person authorised thereto by it may, without warrant, search any premises, hut, tent, camping place, vehicle, boat, aircraft or receptacle whatsoever on such land if such appropriate authority or authorized person has reasonable grounds to suspect that there is contained therein any animal, fish, plant, meat, trophy, or article or thing which may afford evidence of the commission of an offence in terms of this Act and may seize any such animal, fish, plant, meat, trophy, article or thing found by him."

Subsection (2) of s 86 makes it unlawful for any person to hinder, obstruct or resist a person exercising his powers in terms of subs (1) above. Mr *Gillespie* submitted that it is a necessary implication of the enactment that the appellant might use reasonable force to overcome any resistance by the complainant. See *S v Reed* 1971 (1) RLR 315 (A) 316C - D; *Tribal Trust Land Development Corporation Ltd v Cone Textiles (Pvt) Ltd* 1978 RLR 365 (G) at 372 - 3. This, the appellant did by using his right foot as a lever to the left side of the complainant's abdomen in order to prise the bag containing the day's catch from the complainant, when the complainant, as stated in the outline of State case, resisted the appellant's attempt to seize the bag. The medical report which states that "No signs of external injury but patient had tenderness over the scar on the abdominal wall" is colourless, and does not suggest the use of more than reasonable force.

Thus, taking into account such evidence on record as supports the outline of State case, the appellant was entitled by law to act as he did, and his conviction was wrong in law.

Again, I cannot find fault with Mr *Gillespie*'s further submission that in

KORSAH JA

addition to the foregoing, on the acceptable evidence, the conduct of the complainant, both in poaching the fish and in resisting the search and seizure, was an unlawful assault against property which the appellant was entitled to defend against the use of reasonable force. See *Ex parte Minister of Justice In re: S v van Wyk* 1967 (1) SA 488 (A) 509A - D where TROLLIP AJA expressed the view that:

"What conditions must be fulfilled before killing or seriously injuring another in defence of property can be justified, need not be precisely determined in the present case; the minimum requirements would be somewhat similar to the general limits set aside for self - defence: (1) reasonable grounds for the defender to think that, because of the offender's unlawful conduct, there was the danger of serious damage to or destruction or loss of the property; (2) the means used in defending it and resulting in the offender's death or injury were not excessive having regard to all the circumstances, such as the nature and extent of the danger, the value of the property, the time and place of the occurrence, etc; and (3) they were the only means whereby he could avoid the danger."

See also *S v Smart* 1971 (1) RLR 256 (A) 258I. It seems to me that, on the acceptable evidence before the trial court, the appellant used no more force than was reasonable to regain control of his property.

To confirm the verdict of the trial court, in the circumstances, would, in my view, result in a travesty of justice.

The appeal is allowed, the conviction is quashed and the sentence imposed set aside.

McNally JA: I agree.

Ebrahim JA: I agree.

Joel Pincus, Konson & Wolhuter, appellant's legal practitioners

S v DUBE 1991 (1) ZLR 218 (SC)

Court **Supreme Court, Bulawayo**

Manyarara JA & Korsah JA

Criminal appeal

4 April & 13 May 1991

Flynote

Criminal law - assault with intent to do grievous bodily harm - whether actual harm inflicted relevant.

Headnote

Following a quarrel with the complainants at a shebeen, appellant and his two friends followed complainants from the shebeen and assaulted each one in turn. The first complainant, a woman, was punched, kicked and thereafter stabbed in the forehead with a knife by one of appellant's friends while she lay on the ground. The woman's husband was also stabbed on the hand when he attempted to render assistance to his wife. Appellant and his friends thereafter assaulted the other complainants in turn. He was charged with and convicted of one count of assault with intent to do grievous bodily harm and two counts of common assault. On appeal against the conviction for assault with intent to do grievous bodily harm:

Held, on a charge of assault with intent to do grievous bodily harm, the question as to whether grievous bodily harm is in fact inflicted on the victim is immaterial in determining liability; it is simply the intention to do is harm that is in question.

Held, further that the crime of assault with intent to do grievous bodily harm may be committed even though the physical injuries are slight. Conversely, the crime committed may be mere common assault even though bodily harm of a serious nature has in fact been inflicted.

Held, further, that *dolus eventualis* is sufficient although provocation or intoxication may negative the 'special intention' required, namely to do grievous bodily harm, with the result that the accused is guilty of

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MANYARARA JA

common assault only.

Held, further, that the requisite intent must be inferred from the evidence of the application of force on the person of another.

Held, further, that street thuggery is a type of offence which can be committed only with actual or constructive intent to do grievous bodily harm, in that it is essentially a type of violence directed against the victim recklessly or without regard to the consequences.

Quaere, whether the absence of medical evidence *ipso facto* raises reasonable doubt that the assailant intended to do grievous bodily harm.

Cases cited:

S v Melrose 1984 (2) ZLR 217 (SC); 1985 (1) SA 720 (ZS)

S v Harry & Anor S-146-88 (not reported)

R v Edwards 1957 R&N 107 (SR)

S v Pedersen 1976 (1) PH H 25 (RA); AD-133-75

S v Chidu S-139-89 (not reported)

G Nyoni for the appellant

G A J Hooper for the respondent

Judgment

Manyarara JA: The appellant was convicted of one count of assault with intent to do grievous bodily harm and two counts of common assault. He was sentenced to a total of thirteen months' imprisonment with labour, of which six months' imprisonment was suspended. He appeals against the finding that he intended to do grievous bodily harm in the first count and against the whole of the sentence imposed in respect of all three counts.

Mr Hooper, who appears for the State, submits that the disputed finding is "open to question", but he leaves it to the court to decide the issue whether or not the conviction is nonetheless proper. He supports the sentences imposed as appropriate for the offences.

It is common cause that on 24 March 1989 the appellant and his two friends, Martin Chitura and George Sibanda, were drinking beer at a shebeen operating from house No. 3312, Luveve in Bulawayo. Also patronising the shebeen on the occasion were the four complainants, Jeffrey Tawana and his wife Cynthia, Newman Mfuni, Mundiya Ndlovu and a fifth person, a lady named Charity. There was a quarrel between the two groups when Jeffrey accidentally spilt some beer on George's clothes. The dispute was quelled by the shebeen operator and the drinking continued uneventfully.

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MANYARARA JA

However, when the four complainants and Charity left the premises the appellant's group followed them. The former sensed trouble from the belligerent language the latter were using. Charity and Cynthia decided to seek refuge in a nearby house. But as the two women ran towards the house, one of Cynthia's shoes came off. She returned to retrieve the shoe and the appellant and his two friends converged on her. They punched her with clenched fists and when she fell down they kicked her several times with their booted feet as she lay on the ground. George produced a knife and stabbed her on the forehead, causing a deep cut.

Jeffrey heard Cynthia's cries for help and he came to her rescue. George stabbed him on the hand and he retreated. But by then Cynthia had managed to flee and the couple ended up in the house to which Charity had already escaped.

Presently there was a knock on the door but Jeffrey refused to let in the person who knocked. Shortly thereafter there was a second knock. Jeffrey ascertained that it was Newman and he let him in. Newman's mouth was swollen and he had bruises on his face. He too had been assaulted by the appellant's gang. Mundiya was the last to seek refuge in the house and he arrived in the same battered state as Newman. The matter was subsequently reported to the police.

George was not before the court when the trial commenced. The charges against him were accordingly withdrawn before plea and the trial proceeded in respect of Martin as the first accused and the appellant as the second accused.

Both accused were convicted of assault with intent to do grievous bodily harm to Cynthia (Count One) and sentenced to nine months' imprisonment with labour. The appellant alone was acquitted and discharged in respect of the assault on Jeffrey (Count Two). He was convicted of common assault on the remaining two counts and sentenced to two months' imprisonment with labour in respect of each such count.

As I have said, counsel have agreed to narrow the issue on appeal against conviction to whether the gang assault with fists and booted feet on Cynthia was committed with intent to do grievous bodily harm. This is because the magistrate says that his verdict was influenced largely by the use of a knife in the attack.

1991 (1) ZLR p221

MANYARARA JA

It is on this basis that Mr Nyoni argues that the appellant should have been convicted only of common assault on the principles enunciated in *S v Melrose* 1984 (2) ZLR 217 (SC); 1985 (1) SA 720 (ZS) and *S v Harry & Anor* S-146-88, among several authorities on the subject.

Mr *Hooper* conceded that there is no evidence to show that Cynthia suffered any injury other than the knife wound inflicted on her by George. He does not dispute that, in the absence of medical evidence showing that Cynthia suffered any injuries from the first blows and the kicks freely admitted by the appellant, the magistrate might have returned a verdict of common assault.

But, so Mr *Hooper* continues his argument, the magistrate should have disregarded the injury to the forehead and the use of a knife and then asked himself the question whether or not there was any evidence to show that the appellant's gang, acting with common purpose, intended that Cynthia should suffer more injury than she in fact suffered.

Mr *Hooper* also cites *S v Melrose* and *S v Harry & Anor*, *supra*, and summarises his contention as follows:

"Despite the *dicta* in the abovementioned cases it is submitted that where three men set upon a defenceless woman and proceed to kick her with booted feet whilst she is lying on the ground, it can be inferred that at the very least they were indifferent as to whether or not she suffered grievous bodily harm. It should be noted that the assault on the complainant terminated when her husband came on the scene and the assailants then turned their attention on him. These latter facts distinguish this case from the cases referred to (*Melrose* and *Harry*, *supra*) where the assailants stopped because they appeared to feel that they had inflicted sufficient injury for their purpose."

It suffices to refer to the headnote in *S v Melrose*, *supra*, which deals with the conflicting arguments of counsel as follows:

"*Held*, that there was some dispute in the decided cases on the precise meaning, one line of cases holding that the harm must be such as 'seriously to interfere with health' and the other that 'grievous bodily harm' means no more nor less than 'really serious bodily harm'.

Held, further, that in the present case it was not necessary to decide which formulation was correct. The facts from which the appellant's

MANYARARA JA

`intention' could be inferred showed that the injury actually sustained were no less serious than had been intended. Since the injuries were not very serious, it would be wrong to hold that the appellant had intended to inflict harm which 'seriously interfered with health' or was 'really serious'. Accordingly, the appellant should have been convicted of common assault.

Held, further, that this was one of those cases where the medical report was lacking in detail and should have been amplified by viva voce evidence. Prosecutors should regard it as the rule rather than the exception that the doctor's verbal evidence is necessary and magistrates should remember that it is their right - indeed, their duty - in any case where they believe viva voce evidence would be of assistance to require the doctor to attend court."

The case is referred to with approval in *S v Harry & Anor*, *supra*, at p 6 as follows:

"It does not seem to me to matter which definition of grievous bodily harm one uses. The two definitions are set out in *S v Melrose*, *supra*. I do not think the injuries suffered by the complainant were either 'such as seriously to interfere with health' or 'really serious bodily harm'. Without attempting to define where common assault ends and assault with intent begins, I would point out that here we have bruises but no cracked ribs, a cut mouth but no missing teeth, a bruised eyebrow but no laceration or concussion. The complainant was taken to hospital for examination but he was not detained there, unless for the purpose of stitching his elbow. There were no long or even medium term consequences of the assault. In an accident report he would have been fairly described as escaping with minor injuries. Even the magistrate found that he suffered no serious injury. In fact he said so on three separate occasions in his judgment" per McNALLY JA.

Our courts have invariably applied the principles enunciated by BEADLE J (as he then was) in *R v Edwards* 1957 R&N 107 (SR) and I respectfully associate myself with the correctness of the learned judge's remarks. However, I am beginning to have certain misgivings about what I perceive as a progressively narrow interpretation of the statement of law appearing at p 112D-E of the judgment, which reads as follows:

"I therefore come to the conclusion that so far as assault with intent to do grievous bodily harm is concerned, it is sufficient to prove that the

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accused committed the crime knowing that his act was likely to cause grievous bodily harm and that he committed it in circumstances which show that he was reckless and careless as to whether or not such harm resulted. If that was his state of mind, then I think the Crown has proved all the intent required to establish this crime."

It is trite that the "crime" to which the passage refers is assault with intent to do grievous bodily harm. The *actus reus* is assault of a qualified form, qualified by an intention to do grievous bodily harm. The position is lucidly set out by Professor Snyman in his work, *Criminal Law*, at p 397, as follows:

"7 **Assault with intent to do grievous bodily harm.** Under the influence of English law a number of qualified forms of assault have developed. The assault is qualified by a certain intention. Each of these qualified forms is in fact a separate, substantive crime, not merely an aggravated form of assault.

The most important is the crime known as assault with intent to do grievous bodily harm. All the requirements for an assault set out above apply to this crime, but in addition there must be intent to do grievous bodily harm.

Whether grievous bodily harm is in fact inflicted on the victim is immaterial in determining liability (though it is usually of great importance for the purpose of sentence). **It is simply the intention to do such harm that is in question.** Whether X in fact had intent to do grievous bodily harm is a factual question. Important factors which may indicate that he had such an intention are, for example, the nature of the weapon or instrument used, the degree of violence, the part of the body aimed at, and the nature of the injuries inflicted, if any. **The crime may be committed even though the physical injuries are slight.** In *Joseph* (1964 (4) SA 54 (RA)), for example, X drove a truck and deliberately swerved towards Y, but did not actually hit him. He was nevertheless convicted of assault with intent to do grievous bodily harm. **Conversely, the crime committed may be mere common assault even though bodily harm of a serious nature has in fact been inflicted.**

Dolus eventualis is sufficient. Provocation and/or intoxication may negative the "special intention" required, namely to do grievous bodily harm, with the result that X is guilty of common assault only.

The somewhat vague expression "grievous bodily harm" has seldom been explained in more precise terms by the courts. It need not necessarily be of a permanent dangerous nature. Thus merely twisting

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somebody's arm is not usually indicative of an intention to do grievous bodily harm, but **where somebody is lying prostrate kicking his face with a heavy boot does reveal such an intention.**" (The emphasis is mine.)

One of the cases cited by the learned author is *S v Pedersen* 1976 (1) PH H 25 (RA); AD-133-75 decided by the same learned judge who decided *R v Edwards*, *supra*, BEADLE ACJ (as he had then become). The second headnote to the report of *Pedersen's* case, *supra*, reads as follows:

"Appellant next submitted that he had no intention of causing grievous bodily harm. It might well be true that he had no actual intent but a constructive intent was certainly there. Kicking a man in the face with heavy gum boots always entailed a real likelihood of grievous bodily harm resulting and appellant had been quite reckless in his acts."

On a charge of assault with intent to do grievous bodily harm the evidence on the application of force on the person of another is invariably common cause from which the requisite intent must be inferred.

As Professor Snyman indicates, the influence of English law has so dominated the development of the offence that it seems to me that we may sometimes slip into the error of equating the offence with an "aggravated form of assault", which is a different offence. Worse still, we may unconsciously apply to the offence of assault with intent to do grievous bodily harm the principles relating to the English offence of **assault occasioning actual bodily harm** and in so doing acquit or convict on the wrong basis. See Smith and Hogan's *Criminal Law*, 6 ed, pp 396-397.

This is precisely the line of argument which has been adopted on the appellant's behalf, that is to say:

1. That no "instrument" in the conventional sense was used;
2. That it was not proved that the blows with clenched fists and booted feet were aimed at any vulnerable part of the victim's body;

3. That the degree of force used is unascertainable; and
4. That there is no medical evidence of any injury to the victim resulting from the assault.

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The magistrate summarised his findings of fact as follows:

"The two accused and George then fell upon her (ie Cynthia). She got kicked by all the three men. She fell and tried to rise. She got kicked all the more. Accused 2 punched her and as she put it she 'saw the stars'. She cannot say the number of blows that she received."

The record tells us that the appellant and his gang, no doubt fortified by the alcohol they had consumed, practically hunted down each of the four complainants. The purpose of the hunt was to give each of the complainants a thorough beating for no reason whatsoever. They caught up with Charity and Cynthia but Charity managed to escape as Cynthia retraced her steps to retrieve her shoe. The gang of three men punched and kicked Cynthia severely as she lay on the ground, without caring where the blows landed. They did not desist of their own free will but because they found a new target in Cynthia's husband when he came to her rescue. The gang was on the warpath, its bloodlust having been increased by Cynthia's cries of distress. These factors, in my respectful view, distinguish the case from *S v Harry & Anor, supra*, and the other cases and I would find that there was here a constructive intent to do grievous bodily harm on the principles explained in Snyman's *Criminal Law, supra*.

But Mr *Nyoni* raises a further factor, which has rarely if ever been lacking in convictions of this offence. This is the medical evidence of the injuries occasioned by the assault. The argument is invariably that the absence of medical evidence *ipso facto* raises a reasonable doubt that the assailant intended to do grievous bodily harm.

I am not attracted to this line of reasoning, and of the extent that the available authorities may suggest that this is the law I would respectfully decline to follow them in the present case.

One cannot overlook the fact that it is the same doctor who attended to Cynthia who also attended to the three other complainants in this case. A comparison of his reports, exhibits 1 to 4, shows that it is in the cases of Cynthia and her husband Jeffrey alone that he has recorded only the stab wounds each suffered in the attack. He has omitted therefrom any injuries caused by the assault with fists and booted feet on all four complainants, which appear only on the medical reports of Newman and Mundiya who were not knifed.

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The inference I draw from this state of affairs is that the doctor concerned himself only with what appeared to him to be the most serious injury suffered by each complainant. In the cases of Cynthia and Jeffrey it was the knife wounds, whilst in the cases of Newman and Mundiya, who did not suffer any knife wounds, it is the bruises etcetera of which they complained.

The offence against Cynthia was committed in the course of street thuggery by the appellant's gang. My view is that street thuggery is a type of offence which can be committed only with actual or constructive intent to do grievous bodily harm, in that it is essentially a type of violence directed against the victim recklessly or without regard to the consequences. Whether grievous bodily harm is in fact inflicted in the course of this form of assault is immaterial in determining liability, although it is usually of great importance for the purposes of sentence as Professor Snyman states. This is the explanation for the decision in *S v Chidu* S-139-89 in which an assault with open hands was nonetheless held to be assault with intent to do grievous bodily harm.

Therefore, I would dismiss the appeal against the conviction of assault with intent to do grievous bodily harm on the first count.

[The appeal against sentence was allowed on the facts.]

Korsah JA: I agree.

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

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S v BLANKET MINE (PVT) LTD 1991 (1) ZLR 227 (SC)

Court **Supreme Court, Bulawayo**

Manyarara JA & Korsah JA

Criminal Appeal

2 April and 13 May 1991

Flynote

Criminal law - culpable homicide - negligence - foreseeability of harm or death - breach of statutory duty - failure to comply with safety regulations.

Criminal procedure (sentence) - culpable homicide - deterrence.

Headnote

The deceased died as a result of inhalation of cyanide gas whilst working at the mine owned by the appellant. No adequate face mask was available for use by the deceased. Such was a breach of safety regulations published under the Hazardous Substances and Articles Act [Chapter 322].

Held, the appellant was negligent in not providing a proper face mask, and the death of an employee was reasonably foreseeable in those circumstances.

Held, the sentence of \$5 000,00 was appropriate having regard to the fact that a man lost his

life. The facts show a wanton disregard for the safety of the employees.

Cases cited:

Lochgelly Iron & Coal Co Ltd v M'Mullan [1934] AC 1 (HL)

East Suffolk Rivers Catchment Board v Kent & Anor [1941] AC 74; [1940] 4 All ER 527 (HL)

de Jong v Industrial Merchandising Co (Pvt) Ltd 1972 (2) RLR 132 (G); 1972 (4) SA 441 (R)

Vorster & Anor v AA Mutual Assurance Association Ltd 1982 (1) SA 145 (T)

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S v Van As 1976 (2) SA 921 (A)

R v Tatham 1968 (2) RLR 1 (A); 1968 (3) SA 130 (RA)

A P de Bourbon SC for the appellant

J Makowane for the respondent

Judgment

Korsah JA: The appellant company was convicted of culpable homicide and sentenced to pay a fine of \$5 000. It appeals against both the conviction and sentence imposed.

Most of the facts are common cause. The deceased, Dela Moyo, was employed by the appellant company as a cyanide plant assistant operator at its Blanket Mine at Gwanda. On 31 March 1988, he completed his eight hour shift at 4pm and proceeded to the beerhall where he consumed beer until midnight, when he left the beerhall to go home. While he was on his way home, he was recalled to report on duty to replace another worker who had not reported for work.

The general practice at the beginning of most shifts was for the cyanide plant assistant to carry dry cyanide flakes up the steps to the agitator in open buckets; and this was what was required of the deceased when he was recalled for duty after midnight.

At about 1.30 in the morning of 1 April 1988, the deceased was found lying prone on the steps leading to the agitator tanks. Of the two cyanide buckets he was carrying, one was on the step above his head and the other was under his chest, pinned to his body. He was dead. His death was due to the inhalation of cyanide gas from the buckets.

The deceased had no respirator with him. And it was alleged by the prosecution that the absence of a respirator was because the appellant did not supply the deceased with a respirator, and that the management negligently failed to supply a respirator to the deceased when he was working with a hazardous substance and thus negligently caused his death.

That the deceased died of cyanide poisoning was not, and could not be, denied by the

appellant because of the medical evidence. The absence of a respirator at the time the deceased was discovered lying on the steps leading to the agitator was also not denied. But the appellant company strenuously denied that it had caused the death of the deceased by negligently failing to provide the deceased with a respirator.

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KORSAH JA

In its "Defence Outline" the appellant alleged that all workers employed in the cyanide section and working with cyanide were required to wear a respirator, and that a respirator was at all times available and was in particular available at the time the deceased met his death.

The appellant was charged with the common law offence of culpable homicide and not an infraction of any of the provisions of the Hazardous Substances and Articles (Protective Clothing: General) Regulations 1984 (SI 263 of 1984) as was assumed by the respondent. Those Regulations were wholly irrelevant to the facts of this matter. The true position was that SI 263 of 1984 was repealed by s 13 of the Hazardous Substances and Articles (Protective Clothing: **Pesticides**) Regulations 1985 (SI 205 of 1985). As SI 205 of 1985 deals only with Pesticides, it has no bearing on the facts of this appeal. The legislation which may have some application in this matter is the Hazardous Substances and Articles (Group III : General) Regulations 1981 (SI 315 of 1981), the Regulations which were extant at the time of the commission of the offence alleged. By s 2 the Regulations apply to any substances, other than those described in the Third Schedule. Under the caption "Precautions to be taken by users and repackers" appears 7 (1) which provides as follows:

"7. (1) No person shall use any substance specified in column one of the First Schedule, or open the container and repack such a substance in any other container, **unless** he ensures that -

- (a) all persons involved take all the necessary precautions in the handling of that substance, including the wearing of appropriate protective clothing; and
- (b) appropriate measures are taken for the safety of any other person who may be at risk from exposure to that substance; and
- (c) there are immediately available all the requirements for the administration of appropriate first-aid treatment, and that there is a person capable of taking, and immediately available to take the necessary action in the event of an accident."

There was at no time any controversy that cyanide is a toxic poison as described under s 3 of the Regulations. Substances containing or consisting of toxic substances fall under the Second Schedule to the Regulations.

The trial court, assuming that SI 205 of 1985 had any application to the facts of the case, said the following were the issues to be resolved in a determination of the matter:

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- (a) whether a respirator was indeed available;

- (b) whether that respirator was fit to be used by the deceased, and if answers to the above are in the affirmative;
- (c) whether the deceased was made aware of the dangers of working with cyanide without a respirator.

If, indeed, the trial court was in error in setting out the above as the issues to be resolved, that error was not a very grave one; for by s 3 of SI 315 of 1981:

"protective clothing means -

- (a) clothing made from protective material; and
- (b) face - masks, face - shields, goggles and respirators with appropriate cartridges or cannisters;

specifically designed to afford protection to the wearer from the hazards presented by the substance."

It was argued upon us, by counsel for the appellant, that as the appellant was charged with the common law offence of culpable homicide the prosecution must prove that the appellant did not exercise the standard of care expected of the diligent *paterfamilias* in society (the reasonable man test) and not the standard of care imposed by statute.

I think it is well accepted that the word "negligence" in criminal cases does not have a different connotation from "negligence" when used in civil matters. In civil matters all that matters is that there was a duty of care owed to the victim and that that duty has been breached to his detriment. The source of the rule of law imposing that duty is irrelevant. As Lord Wright observed in *Lochgelly Iron & Coal Co Ltd v M'Mullan* [1934] AC 1 (HL) at 25:

"In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing: on all this the liability depends, and if this liability is attached by law formally to the employer, as happens in the case of a breach of a statutory duty, the whole position is I apprehend correctly described as 'personal negligence of the employer'."

LORD ATKIN with accustomed clarity of language drew the distinction between (1) A statutory duty to do or abstain from doing something and (2)

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KORSAH JA

A common law duty to conduct oneself with reasonable care so as not to injure persons liable to be affected by one's conduct, in *East Suffolk Rivers Catchment Board v Kent & Anor* [1941] AC 74 at 88-89; [1940] 4 All ER 527 (HL) at 533-534 thus -

- "(1) The duty imposed by statute is primarily a duty owed to the State. Occasionally penalties are imposed by the statute for breach; ... The duty is not necessarily a duty owed to a private citizen. The duty may, however, be imposed for the protection of particular citizens or class of citizens in which case a person of the protected class can sue for injury to him due to the breach. The cases as to breach of the Factory or Coal Mines Act are instances. As a rule the statutory duty involves the notion of taking care not to injure and in such cases actions for breach of statutory duty come within the category of negligence: See *Lochgelly Iron and Coal Co v M'Mullan*.

- (2) But apart from a public duty to the public, every person whether discharging a public duty or not is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care. This duty exists whether a person is performing a public duty, or merely exercising a power which he possesses either under statutory authority or in pursuance of his ordinary rights as a citizen. To whom the obligation is owed is, as I see it, the principal question in the present case."

In the instant matter there can be no doubt that, both under the common law and under statutory authority, the appellant owed a duty to the deceased as a member of a protected class and so the source of the rule of law imposing the duty to take care is irrelevant.

I am not unaware of the dicta in *de Jong v Industrial Merchandising Co (Pvt) Ltd* 1972 (2) RLR 132 (G) at 137; 1972 (4) SA 441 (R) at 445, to the effect that the mere failure to comply with regulations does not necessarily amount to negligence. *De Jong's* case, *supra*, was a motor traffic case. It has for long been accepted that speed by itself is not indicative of negligence. This is because the duty imposed by statute to drive within certain speed limits is a duty owed to the State. It is not necessarily a duty owed to a private citizen, and exceeding the speed limits specified in any regulations, even if no accident results therefrom, attracts a penalty. But excessive speed in conjunction with other factors which show that the driver was not acting reasonably in the circumstances may amount to negligence. In *de Jong's*

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KORSAH JA

case, *supra*, apart from a breach of the speed limit there were no such additional factors.

In *Vorster & Anor v AA Mutual Assurance Association Ltd* 1982 (1) SA 145 (T) on the other hand, GOLDSTONE J with reference to the regulation making the wearing of seat-belts compulsory in South Africa said at 154 of the judgment:

"This legislation is designed for only one purpose, viz to prevent or reduce the severity of injury to passengers in motor vehicles involved in collisions. The failure to observe such a provision constitutes some evidence, if not *prima facie* evidence, of negligence in relation to injuries sustained or rendered more severe because of such failure..."

It seems to me that on the facts of the case before him, GOLDSTONE J rightly took the view that the duty to wear seat-belts was imposed for the protection of particular citizens or class of citizens and, as such, a breach of the duty constitutes evidence of negligence.

In my judgement the provisions of the Regulations requiring the appellant to ensure that all persons involved in work with specified hazardous substances take all necessary precautions in the handling of that substance, including the wearing of appropriate protective clothing, were made for the protection of particular citizens or class of citizens of which the victim was a party and the breach of them constitutes some evidence, if not *prima facie* evidence, of negligence.

I now turn to the standard care which was expected of the appellant. It was common cause at the trial that no respirator meeting the requirements of SI 263 of 1984 (the repealed Regulations) was available to the deceased. Under SI 263 of 1984, a "Respirator means a close fitting mask equipped with disposable cartridges designed to protect the wearer against inhalation of hazardous substances in the form of gases, vapours or fumes". The Regulations

extant at the material time specify the necessity to provide "face-masks, face shields, goggles and respirators" with "appropriate cartridges and cannisters; specially designed to afford protection to the wearer from the hazards presented by the substance". It was not denied that the appellant knew that cyanide was a toxic substance which had the capacity to produce personal injury or illness through ingestion, by absorption through the skin, or by inhalation, and was required to provide adequate protective clothing for its employees who handled such a hazardous substance.

1991 (1) ZLR p233

KORSAH JA

Evidence was led to establish that respirators meeting the requirements of the Regulations were not available in the country. There was some evidence that Mine Inspectors at Head Office had authorised the use of foam rubber masks as a substitute for respirators. It is difficult to imagine how an authorisation by Mine Inspectors could override the provisions of a Statutory Instrument. It is clear to me that unless the provisions of a Statutory Instrument are repealed, they remain in force, and a person who breaches them cannot escape criminal liability on the basis of an authorisation by some official to breach them. The Mine Inspectors had no authority to override the provisions of the Regulations, and the appellant was under no duty to obey them, even if those orders had not been so manifestly illegal that the appellant should have known them to run counter to the Regulations, if respirators were the appropriate protective gear in regard to the handling of cyanide.

Accepting, however, that the Regulations also make mention of face masks as a form of protective clothing, and the evidence that a face-mask, consisting of a piece of foam rubber held by strings tied behind the head, was furnished by the appellant for use by the cyanide plant assistant operators to cover their mouths and noses, the question is: was the mask in use at the material time adequate for the purpose for which it was intended?

The evidence of the company employees seems to suggest that the mask did not afford adequate protection. Mr Chikumba, who was a plant operator at the mine, said of the mask:

"It was something very old, something quite tatty, the workers were refusing to wear it ... it was dirty. They were refusing to share this one respirator, they thought it was a health hazard."

Mr Thabani Moyo, another plant operator at the mine who testified for the appellant, conceded that the mask was tatty. Another defence witness Mr Allan Zhou also conceded that "tatty" meant torn. He said the mask was issued some three years before the accident giving rise to the appellant's prosecution. This was confirmed by Mr Brian Deacon, who was the Mill Manager.

Both Mr Chikumba and Mr Zhou said they made repeated requests for new masks for use by the employees of the appellant, but their requests fell on deaf ears. If the face mask was in good serviceable condition these persistent requests to furnish new ones would not have been made.

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KORSAH JA

The picture the evidence portrays is that whereas each assistant plant operator is supposed to have a mask of his own, the appellant provided all of them with only one; that this one mask was made of foam rubber and was old, being over three years old, and dirty and practically in ribbons. Even if the Regulations permit the use of face masks, it can hardly be urged that the mask provided by the appellant met, in the circumstances, with the requirements of the Regulations.

It is said that the standard of care expected of the appellant is that of the ordinary reasonable man and that by furnishing a foam rubber mask for use by the cyanide assistant plant operators he had discharged the duty cast on him by the law; that the test to apply is the objective test of negligence and the courts cannot require, under the guise of the ordinary reasonable man, a standard of conduct which is impractical.

I am fully in agreement with this submission by counsel. I even accept that the Regulations permit of the use of face masks. But having regard to the highly toxic substance the deceased had to handle, the age and the condition of the mask available to the deceased, can it be said that the appellant had discharged that standard of care which is expected of a reasonable man, in the same circumstances?

As Rumpff CJ observed in *S v Van As* 1976 (2) SA 921 (A) at 928E (translation):

"Since times immemorial we use in our law the *diligens paterfamilias* as a person who in particular circumstances will act in a particular manner. What he would have done is regarded as reasonable. We do not use the *diligentissimus paterfamilias*, and what the *diligens paterfamilias* would have done in a particular case the judicial officer must decide to the best of his ability. The *diligens paterfamilias* is of course a fiction and all too frequently he is not a pater. In the application of the law he is viewed 'objectively', but in essence he is viewed both 'objectively' as well as 'subjectively' because he represents a particular group or type of persons who are in the same circumstances as he is, with the same ability and knowledge. If a person, therefore, does not foresee what other persons in the group could and should have foreseen, then that element of *culpa*, viz omission to foresee, is present. That foreseeability and care are related to each other and that a lack of care usually flows from an omission to foresee, can in my opinion, hardly be denied. The foreseeability of death, as a possibility, in the case of culpable homicide, does of

1991 (1) ZLR p235

KORSAH JA

course, also not require the foreseeability of the precise manner in which the death occurred, as long as the possibility of death, as a result, was foreseeable."

In the instant appeal, despite the persistent requests for new face-masks, and there was no evidence that foam-rubber was not available in the country, the appellant failed to furnish the cyanide assistants with new face-masks for three years. In my view, knowing how hazardous the substance which the cyanide assistants had to handle was, the appellant exhibited utter indifference to an obvious risk to health, or actually foresaw the risk but was determined nevertheless to run it. He must in the circumstances have foreseen the possibility of injury to his employees.

It is of no consequence that the immediate cause of death of the deceased was as a result of

him not wearing a face mask. If the appellant had furnished the cyanide assistants with adequate face-masks, both as to numbers and serviceability, the deceased no doubt would have used such a mask. It is to be noted that the duty of care owed by the appellant to the deceased under the Regulations did not end with the provision of face-masks adequate for the purpose for which they were intended, but also extended to ensuring that all persons involved in the handling of the hazardous substance take the necessary precautions stipulated in the Regulations. And this also the appellant failed to do.

In law, the appellant's act need not be the sole cause or event the main cause of the victim's death, it being enough that the act contributed significantly to the result. See *R v Tatham* 1968 (2) RLR 1 (A); 1968 (3) SA 130 (RA). The appellant should have foreseen something untoward and unexpected, but within the range of human experience, might happen to cause death from the determination to run the risk of not supplying his employees with adequate protective clothing, and ensuring that they use them.

I am of the view that the appellant's conduct contributed significantly to the death of the deceased and was the predominant and substantial cause of the accident. The appeal against conviction must, therefore, fail.

As regards sentence, the offence charged was the common law offence of culpable homicide, and not a breach of the Regulations. A breach of the Regulations was only relied upon to establish the appellant's negligent act which contributed to the demise of the deceased. As such subs (2) of s 9 of the Regulations which recites that:

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KORSAH JA

"Any person who is convicted of an offence referred to in sub - section (1) shall be liable to a fine not exceeding one thousand dollars or to six months' imprisonment, or to both such fine and imprisonment,"

does not apply. The punishment to be imposed was within the discretion of the trial court.

In a case where death results from non-compliance with regulations made to protect the victim against such an event, the financial penalty to be imposed should be measured in accordance with the moral blameworthiness of the culprit. The incautious neglect of the appellant to provide the cyanide assistants with adequate protective face-masks, despite persistent requests for such masks, shows a wanton disregard for the safety of his employees and puts the appellant's blameworthiness in a very high order.

The learned trial magistrate also expressed the view that the sentence imposed, it was hoped, would deter other employers from flouting regulations made for the protection and safety of their workmen in their places of employment.

A person lost his life because the appellant would not purchase a piece of foam rubber big enough to cover a person's nose and mouth. Such avarice or utter disregard for the safety of employees which result in the loss of human life must, in my opinion, be visited with a sentence of appropriate severity. By this approach the sentence to a fine of \$5 000 does not appear to me to be grossly excessive.

Accordingly the appeal against both conviction and sentence are dismissed.

Manyarara JA: I agree

Webb, Low & Barry, appellant's legal representatives

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S v S (A JUVENILE) 1991 (1) ZLR 237 (HC)

Court **High Court, Harare**

Adam J

Criminal review

15 May 1991

Flynote

Criminal procedure - record lost - duties of Clerk of Court where presiding magistrate is functus officio - record to be reconstructed from best secondary evidence available

Duties of Clerk of Court in part - heard matters - plea of guilty - record to be reconstructed preferably under the direction and supervision of presiding magistrate - permissible if there is no prejudice to the accused - plea of not guilty - duty of Clerk of Court to obtain the best secondary evidence - witnesses to be re-called to confirm accuracy of reconstructed record - right of accused and State to cross-examine as to the correctness of re-constructed record.

Headnote

Where an accused has been convicted and sentenced and the record is irretrievably lost prior to review by the High Court, the Clerk of the Court (rather than the magistrate who is functus officio) shall state such on affidavit. He should then obtain from the magistrate, the witnesses and others present at the trial, affidavits as to the contents of the record. Thereafter he should give both the State and the accused an opportunity to peruse these so they may give their version as well. The Clerk of the Court should then send this reconstructed record, from the best secondary evidence, for review.

In part heard matters, the magistrate is not functus officio. It is, therefore, the duty of the Clerk of the Court, preferably under the direction and supervision of the presiding magistrate, to reconstruct the record as best he can. Where the accused has pleaded guilty, as long as there is no

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prejudice to him, the record restored in this manner by the presiding magistrate would be adequate.

Where the accused has pleaded not guilty in part heard matters, the task of the Clerk of the Court is again to obtain the best secondary evidence. Thereafter, once the evidence and record is restored, the presiding magistrate must recall all the witnesses in order to enquire whether this agrees with the evidence given by them previously. The accused and the State should be allowed to cross-examine the witnesses as to the correctness of the contents of the evidence and the record itself. Where the secondary evidence cannot be obtained, as long as the accused is not prejudiced, all the witnesses may be recalled to give evidence once again.

Cases cited:

R v Nortje 1950 (4) SA 725 (E)

R v Wolmarans & Anor 1942 TPD 279

R v Masemang 1950 (2) SA 488 (A)

S v Van Sitters 1962 (4) SA 296 (C)

S v Marais 1966 (2) SA 514 (T)

S v Manera 1989 (3) ZLR 92 (SC)

S v Mankaji & Ors 1974 (4) SA 113 (T)

S v Catsoulis 1974 (4) SA 371 (T)

S v Whitney & Anor 1975 (3) SA 453 (N)

Judgment

Adam J: The accused, a juvenile, was convicted on her guilty plea on 18 March 1991 of theft and the proceedings were adjourned in order to ascertain whether or not she had any previous convictions. On 20 March 1991, prior to sentence, it appeared that the entire record was lost. On that date the presiding magistrate had before him a completely new indictment showing the proceedings as of 18 March 1991 and handwritten entries pertaining to the guilty plea as well as judgment of guilty and in addition, the sentence imposed dated 20 March 1991. There was also a handwritten record of what was shown as the "Facts" as well as a document with the heading "Reconstructed Record" which purports to relate as to what transpired on 18 March 1991. All the above it seems was done after 18 March 1991. This record also reveals that on 20 March 1991 the public prosecutor informed the trial court that the record could not be found and a request that the trial magistrate reconstruct another record since he had prepared a new indictment. The record continues that the "reconstructed record was read to the accused and that she indicated she agreed with it." The record of proceedings also contains that was stated in mitigation and the reasons for sentence.

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On the foregoing being received by the Regional Magistrate, his minute of 3 April 1991

informed the trial magistrate that the reconstruction did not appear to have been done according to law and that the procedure that should have been followed was that mentioned in *R v Nortje* 1950 (4) SA 725 (E) and that this should be done. In his reply minute of 10 April 1991 the trial magistrate agreed that the clerk of court's affidavit showing that the record was lost should have preceded his decision to reconstruct the partial record and informed the Regional Magistrate that as he was seized with the matter he had reconstructed the record during the course of the trial so this was sufficient compliance with procedural law and the lack of the clerk of court's affidavit did not vitiate the proceedings.

It is true that in *R v Nortje's* case, *supra*, where the accused pleaded guilty, was found guilty and sentenced and before the record could be sent it was lost, the court ordered the clerk of court to submit the best secondary evidence, following *R v Wolmarans & Anor* 1942 TPD 279, and also laid down the procedure that should be followed.

In *R v Masemang* 1950 (2) SA 488 (A), where the record of evidence was lost, the Appellate Division determined the appeal with the agreement of the parties on the notes of the judge at the trial and a reconstructed record and held that this constituted an adequate and satisfactory secondary evidence upon which an appeal could be heard.

In *S v Van Sitters* 1962 (4) SA 296 (C), on appeal, the evidence on tapes recorded by mechanical means and other important exhibits were lost, the Court (which had earlier ordered the clerk of court to obtain the best secondary evidence) on being informed by the trial magistrate that his notes were short and insufficient to supply the lost evidence together with other affidavits filed indicated that the deponents were unaware of the nature of the evidence given at the trial, set aside the proceedings since the accused had been seriously frustrated and prejudiced. In *S v Marais* 1966 (2) SA 514 (T) Classens J said at 516-517:

"...A full opportunity has already been given to the State to rectify the matter. The appellant has been seriously frustrated and prejudiced owing to a fault on the part of the State's servants. She is entitled to an appeal as of right ... She has been frustrated in a basic right. She has been deprived of this through no fault of her own.

If during a trial anything happens which results in prejudice to an accused

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of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice."

This case was approved of by our Supreme Court in *S v Manera* 1989 (3) ZLR 92 (SC).

Similarly in *S v Mankaji & Ors* 1974 (4) SA 113 (T), where the record required for automatic review was lost and the best secondary evidence could not be assembled, the court set aside the conviction and sentence since a proper review could only take place if a complete and correct record of proceedings is submitted to a judge.

In *S v Catsoulis* 1974 (4) SA 371 (T), where the record was lost prior to the closing of the

State's case, MARIAS J most cogently observed at 372-4 (see Translations at 830-1):

"In a case like the present certain things should not be confused. One should distinguish for instance between the trial of an accused and the administrative task in connection therewith, e.g. the recording of the evidence. Once an accused has pleaded, he is entitled to have his case heard and finalised. (See sec.169(6) of Act 56 of 1955). The fact that the record has been lost, is no concern of the accused. The evidence given, has been heard by the trial court and forms part of the case, whether or not it has been recorded or is still on record. It would be an entirely different thing should the trial court, i.e. the magistrate, not be available to proceed with that trial. In such a case a trial *de novo* would be necessary, because the first proceedings could be considered void.

This is not the case here. The proceedings in court remain valid, despite the disappearance of the record. The trial should obviously proceed from where it was left off. There is no legal ground upon which a retrial at this stage can be ordered either by the trial court or the Supreme Court.

It was held in the leading case of *R v Wolmarans & Anor* 1942 TPD 279 that no retrial could be ordered in the Transvaal should the record be lost after the completion of the hearing, but before it could be reviewed. The

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only way out was to reconstruct the record as best as possible from secondary evidence and then to submit it to the Supreme Court. The facts of the present case differ from those in *Wolmarans'* case, but the question from where this Court or the trial court would derive the power to consider the proceedings, prior to the loss of the record to be void and to order a re-trial, remains equally unanswered in this case as was the similar question in *Wolmarans* case.

...

In the present part-heard case the position is, in my opinion as follows: that the trial was, up to the stage reached, a proper, valid trial and there is neither reason nor jurisdiction to declare the part-heard trial to be a nullity; that it is the administrative task of the magistrate and/or the clerk of the court to compile afresh a record of the completed part of the trial in any manner which is fair and reliable as possible; that this embraces an administrative enquiry and action and has nothing to do with the trial as such; that at the resumption of the trial, after the record has been restored as well as possible the magistrate is ...entitled to recall any witnesses to give evidence, to lay his reconstructed evidence before him and to ask whether it tallies with the evidence which he originally gave at the trial. The witness will then be subject to cross-examination by the defence on his answers to the magistrate's questions on the correctness of the record and on the contents of his evidence against the accused. Thereafter the trial can take its normal course."

In *S v Whitney & Anor* 1975 (3) SA 453 (N) VAN HEERDEN J said at 455:

"The reconstruction of a trial record can seldom be entirely satisfactory and whichever procedure is adopted in an attempt to achieve a reconstruction has its own limitations. It seems ...that the simpler procedure laid down in *Wolmarans'* case ...and the steps conveniently set out in *Nortje's* case should generally be followed as far as they may be applicable ...I respectfully agree ...that it would be particularly valuable if the clerk of the court performed his task under the direction and supervision of a magistrate, not necessarily but preferably the presiding magistrate."

Turning to the instant case as so correctly pointed out by the trial magistrate the proceedings before him had not terminated and he was not *functus officio*. As MARAIS J said the trial, up till the adjournment in order to ascertain the question of previous convictions, was a valid trial and what was needed was the administrative task of compiling the record of proceedings from the best

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available secondary evidence. This required that it be done "in any manner which is fair and reliable as possible". In *R v Wolmarans, supra*, GREENBERG JP held that the clerk of the court must submit the best secondary evidence that he can obtain of the record and said that he did not propose to prescribe to him in detail how this was to be done but instead drew his attention to the report of the Attorney General to that court in which it was revealed that the duty of the clerk of the court was to approach the witnesses and others present at the trial to obtain an affidavit proof of what the record contained and to give both parties an opportunity to peruse this so that they may give their versions as well. Even in *R v Nortje, supra*, REYNOLDS J in ordering the clerk of the court to submit the best secondary evidence he can obtain of the contents of the record, went on to observe that "it may be as well to as say that as far as possible" the clerk of the court should adopt the steps mentioned in that case. He did not lay down that was the only procedure to be followed.

It is clear from the foregoing that the practice has been for some considerable time well regulated in that the duty of the clerk of the court was to submit the best secondary evidence that he could obtain.

To summarise, where the accused has pleaded guilty, found guilty and sentenced or has pleaded not guilty, been found guilty and sentenced and the record is irretrievably lost prior to review by this court, since the trial court is *functus officio*, the clerk of the court must by affidavit indicate that the record is irretrievably lost and should obtain from the presiding magistrate, witnesses and others present at the trial affidavits as to the contents of the record and thereafter he must give both parties an opportunity to peruse this so they may give their version as well. This reconstructed record from the best available secondary evidence must be sent for review.

On the other hand in part-heard matters, the trial court is not *functus officio*, the administrative task of the clerk of the court preferably under the direction and supervision of the presiding magistrate is to reconstruct the record as best he can. Where the accused has pleaded guilty, as long as there is no prejudice to him, the record restored by the trial magistrate in the way he did would be adequate. Where the accused has pleaded not guilty in part-heard matters the administrative task is once again to obtain the best secondary evidence. Thereafter, once the evidence and record is restored, the presiding magistrate must recall all the witnesses in order to enquire whether this agrees with the evidence given by them previously. The accused and the State should be allowed to cross-examine the witnesses as to the correctness of the contents of the evidence and the record itself. Where secondary evidence cannot be

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obtained including due to the failure of the mechanically recorded evidence, as long as the accused is not prejudiced, all the witnesses may be recalled to give evidence once again. Thereafter the trial must continue in the normal way.

It is most important for all concerned that records of proceedings including exhibits must be

preserved with utmost care. Those operating recording machines must constantly guard against defective recordings.

In all the circumstances of this case it cannot be said that the proceedings were irregular in any way. The proceedings are confirmed as being in accordance with real and substantial justice.

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S v MARANGA & ORS 1991 (1) ZLR 244 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Criminal appeal

14 March & 16 May 1991

Flynote

Criminal law - statutory offences - Parks and Wild Life Act 1975 - s 47(2) - illegal hunting - onus on prosecution to prove necessary intent.

Criminal procedure - consequences of prosecution failure to inform accused person of case he has to meet.

Evidence - circumstantial evidence - dangers inherent in drawing conclusions therefrom - similar fact evidence - general purpose.

Statutory presumption of guilt - circumstances in which onus on accused to prove that it does not apply.

Legislation - Parks and Wild Life Act 1975 s 2 - s 47(2) - s 84(15) - presumption of guilt cast upon accused - onus on accused - when presumption can be invoked.

Headnote

On a charge of illegal hunting in contravention of s 47(2) of the Parks and Wild Life Act 1975 the evidence merely established that the first and second appellants had just alighted from the vehicle on a public road and that there were five kudu grazing about fifty metres from where they stood. Their loaded rifle was in the vehicle.

Held, the evidence tendered was not probative of an intention on the part of the first appellant to hunt.

Held, further, that when the first appellant was arrested he had not yet committed the offence charged.

Held, further, that accordingly, none of the other appellants were guilty of any offence.

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KORSAH JA

Cases cited:

S v Green 1962 (3) SA 886 (A)

Teper v R [1952] AC 480; [1952] 2 All ER 447 (PC)

R v Difford 1937 AD 370

R v Hlongwane 1938 NPD 46

S Mushonga for the appellants

A Guvava for the respondents

Judgment

Korsah JA: The appellants were convicted of illegal hunting in contravention of s 47(2) of the Parks and Wild Life Act 1975 ("the Act"), and sentenced to varying terms of imprisonment. They appealed against their convictions and sentences imposed.

The facts are that on 15 October 1989 the five appellants left the first appellant's home in Kadoma in a Peugeot pick-up driven by the first appellant. The second appellant, Mackenzie Bizbani, sat in the passenger seat next to the driver; while the other three appellants, all of whom were women and two of whom were the wives of the first and second appellants respectively, sat in the body of the pick-up. The first appellant had with him, to the knowledge of the other appellants, a .22 rifle, No. LA 55976.

At or near Twin Tops Ranch at Battlefields, fifty kilometres from Kadoma, the first appellant stopped the vehicle. Mr Douglas Kok (the complainant), who runs a safari business on the nearby ranch, for reasons which shall hereafter be given, followed the appellants' vehicle when first sighted near the ranch by his scouts up to the point where the appellant stopped his vehicle. The time was about 4.30 pm.

The complainant said that about fifty metres from the spot where the first appellant had parked his vehicle were five kudus grazing by the roadside. The first and second appellants were out of the vehicle when he got to them. He asked the first appellant why he had stopped his vehicle in that vicinity and was informed by the first appellant that he had stopped because the engine was boiling. The complainant checked the engine and found that it was not boiling. He said he enquired of the first appellant whether he had a firearm and the first appellant denied having a weapon. It was only when the complainant threatened to search his vehicle that the first appellant admitted being in possession of a firearm and produced the 22 rifle from the floor beneath the driver's seat and handed it over to the complainant. The rifle had a live round in the chamber, the catch was off, and it had four rounds in the magazine.

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KORSAH JA

The complainant asked for the destination of the appellants and the first appellant informed him that they were going to the next resettlement area, which was a further twenty-five kilometres

from the Ranch. The complainant arrested the first appellant and drove him in his (the complainant's) vehicle to Battlefields Police Station. Although the second appellant, at the request of the complainant, had agreed to follow them to the police station in the first appellant's vehicle, he did not do so.

The complainant said that he followed the first appellant's vehicle because of certain information that he had received from his scouts and a neighbour's son. Part of the information upon which the complainant acted emanated from Kudakwashe Masere, who is one of his game scouts residing at Twin Tops Ranch.

Kudakwashe testified that at about 4.30 pm on 8 October 1989, just a week before the arrest of the appellants, he saw the same blue Peugeot pick-up drive past their compound with four people in it. About three kilometres from the compound the Peugeot pick-up turned into a road leading to a dam nearby. He followed the vehicle and heard two shots being fired. As he approached the vehicle, the vehicle drove past him with only two persons on the vehicle. They lay in wait for the vehicle all night, expecting it to return for the other two occupants, but it did not return. He made a report of the incident to the complainant.

On 15 October 1989 Kudakwashe observed the same motor vehicle drive past their compound at around the same time as on 8 October 1989. He informed the complainant, who instructed the game scouts to get into his vehicle, and then proceeded to tail the appellants to where the first appellant had stopped his vehicle. Kudakwashe had, however, to admit under cross-examination that not once, on the occasions that he saw the first appellant's vehicle, did he see the vehicle transporting any game, but also said that on all the occasions that he had sighted the first appellant's vehicle never had he observed it carrying vegetables.

The road passing through Twin Tops Ranch and on which the first appellant parked his vehicle is a public thoroughfare. The appellants all denied that they were on that road with the intention to hunt or kill any animal. The onus was, therefore, on the prosecution to prove that they possessed the necessary intent.

The first appellant said he was the owner of a vegetable market at Kadoma.

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KORSAH JA

On 15 October 1989 he wanted to go to the resettlement area to buy vegetables. He drove his car to the Battlefields area and took the road to the resettlement area. They drove past a ranch where there were humps on the road. Having passed the ranch he noticed that there was a motor vehicle following them. After a distance of three kilometres from the ranch the vehicle trailing him overtook him and stopped him. The complainant asked why he was driving so slowly and he told the complainant that he was having problems with his motor vehicle. He said the complainant asked him whether he had a rifle, he answered in the affirmative, but refused to give it to the complainant; whereupon the complainant checked the front part of the driver's seat and recovered the 22 rifle from the floor.

I must state here and now that insofar as discrepancies appear in the accounts of the complainant and the first appellant, I am inclined to give greater credence to the testimony of

the complainant than to that of the first appellant; not only because the complainant had nothing to gain by fabricating a story against a man who was a stranger to him but also because the complainant's testimony was fully corroborated by that of Kudakwashe and had a ring of truth about it. But even so, was the evidence proffered by the prosecution probative of an intention on the part of the first appellant to hunt?

The definition of "hunt" in s 2 of the Act is:

- "(a) to kill, injure, shoot at or capture; or
- (b) with intent to kill, injure, shoot at or capture, to wilfully disturb or molest by any method; or
- (c) with intent to kill, injure, shoot at or capture, to lie in wait for, follow or search for;"

Of these heads the one most likely to apply to the appellants is (c), as the accepted facts were that the appellants were trailed and found standing by their car on a public thoroughfare with kudus grazing fifty metres from where the car was parked. The State's case could be put no higher than that.

The learned trial magistrate reasoned that:

"Accused accepts that he had driven past the same ranch on previous occasions and that this is a road used by other motorists proceeding to the resettlement area. But it is clear from the evidence of the State witnesses that this particular motor vehicle attracted specific attention of the game scouts. It could not have been because of its colour or white tyre alone

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but its movements. Its movements must have led the game scouts to suspect or believe that it was being used in poaching. So convinced was the second State witness that the motor vehicle was being used in poaching that he put it to Accused No. 1 that he had a firearm in the motor vehicle. The Accused had no good reason at all for the possession of the rifle. Accused No. 1 knew that it was supposed to be kept at home under lock and key. If he was going to the resettlement area to buy vegetables he had no pressing reason to arm himself. He admits that he had live rounds. In fact he had a bullet in the chamber. He also had a few rounds in the magazine. Surely if he was not on a mission whose object was to use the firearm would he have had to prepare the firearm in readiness for use at any given time during the course of the journey? He obviously would not. I am satisfied that the fact that Accused No. 1 had the loaded rifle conveniently placed on the floor of the motor vehicle just below the driver's seat was because he intended to use it when need arose."

The learned trial magistrate came to this conclusion because of the overwhelming weight of the circumstantial evidence placed before him.

Firstly, the learned trial magistrate placed great reliance on similar fact evidence and rightly emphasised in his reply to the grounds of appeal against conviction that he was legally entitled so to do. Ogilvie Thompson JA observed in *S v Green* 1962 (3) SA 886 (A) at p 894B-C that:

"For, as was stated in *R v Katz & Anor*, *supra*, and reaffirmed in *R v Roets*, *supra*, the general exclusionary rule that the prosecution may not prove that the accused has committed crimes other than the one charged is not an absolute one. In the words of Watermeyer CJ in *R v Katz & Anor*, *supra*, at p 79:

'It only operates to exclude such evidence when such evidence is solely relevant to show that the accused, by reason of his bad character or his commission of other crimes, had a criminal propensity and was,

therefore, likely to commit the crime with which he was charged. If, for any other reason, it is relevant to the question before the Court it is admissible'."

In the instant case the fact that the first appellant's vehicle had previously been observed in suspicious circumstances may assist in drawing the inference that he was once again in the vicinity of the ranch for some illegal purpose. But from the circumstantial evidence adduced, inclusive of the

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KORSAH JA

similar fact evidence, all that one can really infer is that the first appellant was there for some unlawful purpose, possibly even with an intention to hunt, but does that constitute the offence charged? Before I answer this question, I wish to draw attention to the dangers inherent in drawing conclusions from circumstantial evidence. Lord Normand observed in *Teper v R* [1952] AC 480 at 489 that:

"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sacks' "mouth of the youngest," and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

I ask myself, is the inference that the first appellant was hunting at Twin Tops Ranch the only one to be drawn from the circumstantial evidence? While the circumstantial evidence leaves me with a strong suspicion that he was up to no good, it cannot be said that the circumstantial evidence proffered excludes any other conclusion. Even if the first appellant's explanation that he was on his way to purchase vegetables from the resettlement area does not have a ring of truth about it, it still is not inconsistent with the circumstantial evidence and remains a possible explanation of his presence on a public thoroughfare adjacent to the ranch. At best, the circumstantial evidence raised no more than a very strong suspicion that the first appellant was there to hunt. The learned trial magistrate could not have been satisfied that the explanation was false. *R v Difford* 1937 AD 370. The learned trial magistrate fell into error when he concluded that the circumstantial evidence adduced led irresistibly to the conclusion that the first appellant was guilty of a contravention of s 47(2) as charged.

It seems to me that the State appreciated the error into which the learned trial magistrate fallen and attempted to mend its fences by raising in its heads of argument, for the first time on appeal, the presumption of guilt which subs (15) of s 84 of the Act casts upon the first appellant. The said section recites that:

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

(a) **on any land**, on which there are animals, in possession of any

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KORSAH JA

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

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

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

To begin with, at no time during their trial were the appellants apprised of the *onus* that lay on them. It seems to me that an accused person is entitled to be informed of the case which he has to meet and failure on the part of the prosecution to so inform him may result in the prosecution proving nothing against the accused. See *R v Hlongwane* 1938 NPD 46. On the other hand, the State may proffer sufficient evidence in support of the offence to cast upon the accused the *onus* of proving that the presumption does not apply. The question is: Did the prosecution lead sufficient evidence to raise the presumption that the appellants were hunting?

The presumption can only be invoked if any a person **is found on any land on which there are animals**. The appellants were found on a public thoroughfare and not on Twin Tops Ranch. But even if the phrase **any land** can be stretched to cover a public thoroughfare adjacent to a safari area, there is still another obstacle which the State failed to surmount. The State should at least have adduced evidence that the first appellant did injure, shoot at or capture, or lie in wait for, follow or search for any animal in terms of the definition of "hunt". All that the evidence established was that the first and second appellants had just alighted from the vehicle and that there were five kudus grazing about fifty metres from where they stood. The rifle was still in the vehicle. Even though there was a live bullet in the chamber it can hardly be said that they were lying in wait for any animal when they were arrested by the complainant. Perhaps if the complainant had waited for the first appellant to take the rifle out of the vehicle one may have been persuaded to the view that they were lying in wait with intent to kill, injure, shoot at or capture an animal. It seems to me, for want of a better phrase, that the complainant jumped the gun, when he arrested the first appellant in the circumstances that he did; for he had not yet committed the offence charged.

1991 (1) ZLR p251

KORSAH JA

If the first appellant was not guilty of the offence charged, then none of the other appellants were guilty of any offence.

In the result, the appeals succeed; the convictions are quashed, and the sentences imposed are set aside.

McNally JA: I agree.

Ebrahim JA: I agree.

S v WOLDERMAR 1991 (1) ZLR 252 (SC)

Court **Supreme Court, Bulawayo**

Manyarara JA & Korsah JA

Criminal appeal

3 April & 20 May 1991

Flynote

Criminal law - Road Traffic Act 1976 - s 46(1) - offence of "driving whilst drunk" - circumstances in which offence is proved.

Criminal law - Road Traffic Act 1976 - s 68(6) - offence of failing to provide a sample of blood for analysis - whether "reasonable excuse" for such failure exists - principles for determination of existence or otherwise of "reasonable excuse" - whether fear of contracting AIDS may constitute such excuse.

Headnote

Whilst negligence does not amount by itself to proof of drunken driving it is nevertheless most important evidence proving intoxication.

The appellant had declined to provide a sample of her blood for testing of its alcohol content on the ground of her fear of contracting the HIV virus from the needle used to extract the sample. In the absence of previous local decisions as to the meaning of "reasonable excuse" the court adopted the following principles:

- (i) Whether or not an excuse for failure to give a blood sample is reasonable is a question of mixed law and fact.
- (ii) The *onus* of proving that the accused had no reasonable excuse for refusing to provide a blood sample lies on the State but the accused carries the evidential burden of laying a foundation for it.
- (iii) In practice most cases of reasonable excuse will be predicated on medical grounds and may relate to the physical health or mental condition of the motorist.
- (iv) The test of reasonable excuse is an objective one and the grounds upon which the excuse is predicated must be of a very extreme

character to constitute reasonable excuse.

- (v) What constitutes reasonable excuse must be determined in relation to the provision creating the offence: its effect abridges personal liberty and it can be properly inferred that this was the intention of the law-maker.
- (vi) Honest and reasonable belief in the existence of facts which objectively constitute reasonable excuse is no defence if the accused's view of the facts is wrong.
- (vii) It is impractical to place rigid limits on what may constitute reasonable excuse in advance of all the possible factual situations which may arise. At the end of the day, reasonable excuse involves a consideration of whether a reasonable man in the motorist's position would be acting sensibly in refusing to provide a blood sample and of how far the admission of the excuse would defeat the overriding intention to protect the public from drunken drivers.

The evidence adduced at the trial established that the appellant did not mention to the doctor authorised to take a sample of her blood any fear she had of contracting AIDS through an unsterile needle nor did she give any reason for her refusal to give blood.

Held, accordingly, that the appellant had failed to lay any foundation for her claim to have had a reasonable excuse for declining to provide a sample.

Cases cited:

R v Peterson & Ors 1970 (1) RLR 49 (G); 1971 (2) SA 130 (R)

S v Zikhali S-221-81 (not reported)

S v Collington 1970 (2) RLR 6 (G); 1970 (4) SA 325 (R)

S v Glegg 1973 (1) SA 34 (A)

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

S v Brumpton 1976 (3) SA 236 (T)

J S Sayce for the appellant

G A J Hooper for the respondent

Judgment

Manyarara JA: This case raises for probably the first time in this jurisdiction the question whether fear of being infected with the HIV virus (commonly called AIDS) is reasonable excuse for refusing to give a blood sample in terms of statute.

The appellant is a married woman aged 42 years. She was convicted in the Bulawayo Magistrates Court on 27 July 1990 on two counts of contravening the Road Traffic Act, 1976.

The first count related to her driving whilst under

1991 (1) ZLR p254

MANYARARA JA

the influence of alcohol to such an extent as to be incapable of having proper control of a vehicle which is a contravention of s 46(1) of the Act. It is the second count which raises the novel question I have mentioned, that without reasonable excuse she refused to permit the taking of a blood sample in contravention of s 68(6) of the Act.

The sentence imposed on each count was a fine of \$250 or, in default of payment, two months' imprisonment with labour and prohibition from driving all classes of motor vehicle for a period of six months. The two prohibition orders were ordered to run concurrently and her driver's licence was ordered cancelled.

The appeal is against both convictions only and Mr Sayce appears for the appellant. His argument relating to the first count is that there was no evidence apart from that of his client as to how the accident occurred. On the second count, he argues that she had reasonable excuse for refusing to give a blood sample because the doctor in attendance failed to satisfy her that the needle was sterile.

A ground of appeal alleging that there was an improper splitting of charges has been correctly abandoned at the hearing in the light of the test laid down in cases like *R v Peterson & Ors* 1970 (1) RLR 49 (G); 1971 (2) SA 130 (R), and nothing further will be said on this ground.

The events leading to the prosecution are these:

On 13 July 1989 at about 5.30 pm the appellant and her brother, Brian Stewart MacMaster, drove to a Bulawayo cemetery in their separate vehicles to view a newly-laid tombstone on their mother's grave. She had died about one month before. The appellant and MacMaster were in the cemetery for approximately half an hour. Thereafter they proceeded home, stopping on the way for a drink at the Legion Club situated at the corner of Main Street and Sixth Avenue. They stayed at the Club for about an hour, in the course of which the appellant consumed two tots of vodka with soda. On leaving the Club, the appellant drove ahead of MacMaster along Main Street and turned left into Leopold Takawira Avenue. MacMaster was stopped by the red robot at the intersection.

When the appellant approached the intersection of Leopold Takawira Avenue with Fifth Street, she collided with the rear of a vehicle which was in front of her and was stationary at a red robot. She caused damage to the vehicle

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which she has since had repaired at a cost of \$250. The collision occurred just before 7.45 pm.

The police arrived at the scene after the vehicles had been removed and the parties were already at the nearby Central Police Station. Patrol Officer Carlson and Constable Maguta were

on duty. They suspected that the appellant was drunk so they conveyed her to the Traffic Office where Inspector Hamamuti conducted the usual tests and he also formed the opinion that she was drunk.

However, the breathalyser was out of order and Hamamuti instructed Carlson and Maguta to convey the appellant to the Central Hospital to give a blood sample. She was reluctant to go. But after some persuasion by MacMaster who had followed her to the Traffic Office she got into the police vehicle. MacMaster again followed her to the hospital. On arrival at the hospital, the appellant refused to give the required sample of blood despite further attempts by MacMaster to get her to comply.

MacMaster did not witness the accident. All he saw after he entered Leopold Takawira Avenue was the coming on of a vehicle's brake lights ahead of him and the sudden opening of car doors. He followed the appellant to Police Central and remained nearby throughout the subsequent events of that evening.

I shall consider firstly the drunken driving charge. There was no eye witness to the collision. The evidence for the State commenced with the arrival of the parties at Police Central.

Maguta said that there was a distinct smell of alcohol on the appellant's breath when he and Carlson spoke to her. She was uncooperative when he asked her for her particulars. She also refused to accompany him to the scene of the accident which MacMaster confirmed.

Carlson confirms that he sent Maguta to return to the scene with the complainant leaving the appellant at the Police Station. His evidence proceeds as follows:

"Outside the Charge Office at Bulawayo Central I asked the accused if she had been drinking. She said she had had a few drinks and all that she wanted was to have the accident sorted out. ... I witnessed that accused's eyes were glassy and there was a distinct smell of alcohol from her mouth. I then informed the Traffic Duty Inspector (Hamamuti) that

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we had a possible suspect of drunken driving (and) we conveyed the accused to Traffic ..."

Maguta says that the appellant was "agitated and very angry" when she was brought before Inspector Hamamuti at the Traffic Office. Carlson is uncertain of her mood at the time.

Hamamuti observed the appellant from 8.21 pm to 8.42 pm and recorded his observations on the pro forma document. He noted that there was a "faint smell of alcohol" on her breath and she told him that she had consumed two tots of vodka. Her pupils were contracted, her speech loud and she staggered. He demonstrated to her how she should walk along a straight seam on the floor tiles and she failed to do so. He found her talkative but polite but she banged the table when he told her that the breathalyser was out of order and she would be taken to the Central Hospital for a blood-alcohol test. He formed the impression that she was "moderately drunk (and) incapable of having proper control of a vehicle".

Carlson confirms Hamamuti's evidence of the appellant's failure to walk in a straight line and

that she appeared to be unsteady on her feet. He says that at this stage he left the office but returned when he heard a loud bang on the table. Hamamuti had then instructed him and Maguta to take the appellant to the hospital to give a blood sample.

The appellant's explanation for the collision is that the sight of her mother's grave upset her emotionally and the cause of the collision was the emotional state she was in rather than the alcohol she had consumed, although she was only "an occasional drinker". She says that when she approached the intersection where the accident occurred she "misjudged the distance" between her vehicle and the vehicle in front during a moment of inattention and applied her brakes when it was too late to avoid the collision.

Her explanation of her behaviour in Hamamuti's office proceeds as follows:

"At Bulawayo Traffic after being told of the blood test, I had a relapse of emotion. I can't recall banging the table, but then I was upset. I thought I was able to stand on my feet. I recall walking along a line. I could not see it very clearly as it was (a line of) tiles on the floor. The line was a seam between two sets of tiles."

The prosecutor cross-examined the appellant in the following manner:

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"On the day in question you had your brother? - Yes.

You went to drink at the Legion Club from the cemetery? - Yes.

You well knew you were to drive a motor vehicle back home thereafter?

- That's right, hence I only had two drinks.

What two drinks? - 1 tot in a glass and a bottle of soda in each glass.

You were upset? - Yes.

Why did you decide to drink and drive when upset rather than let your brother drive? - My brother needed his own car when we left for the cemetery. I was completely capable of driving.

What then made you bump into the rear of the motor vehicle which was stationary? - I applied brakes but the car didn't stop in time.

By failing to apply brakes in time you failed to keep the car under proper control? - Yes I misjudged distance.

Not correct that alcohol you had taken impaired your judgment? - I don't think that the two drinks affected my driving.

When police told you the breath machine was out of order what made you to be upset again? - I didn't want to go for a blood test."

In her evidence-in-chief, the appellant says that when Maguta and Carlson said that they were taking her to the Traffic Office she assumed it was for a breath test and she was upset when she was told of a blood test. She was asked in cross-examination what she expected the police to do if the breathalyser was not working and her reply was that she did not know but expected that "another method had been found these days". The point was not pursued. The appellant did not recall banging on the table and denied the possibility that she might have consumed

more than two tots of vodka at the Club.

The cross-examination continued as follows:

"Correct that the Duty Inspector demonstrated to you how to walk in a straight line? - He showed me, how to do it, yes.

Correct that you walked from left to right? - I could not see how I was walking, but I think I was walking correctly.

You could not see the line clearly due to alcohol influence? - It wasn't a line, but a seam."

Although there was no medical evidence because of the malfunctioning of the breathalyser and the appellant's refusal to give a blood sample, the

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magistrate was satisfied that the State had proved beyond reasonable doubt that the appellant drove whilst drunk. He relied on the following factors -

- (1) The appellant's admission that she had consumed alcohol before the accident occurred;
- (2) That thereafter, whilst driving her motor vehicle, she collided with a stationary vehicle in circumstances which indicated that her faculties must have been impaired by the alcohol she had consumed;
- (3) That thereafter Hamamuti who was an experienced police officer conducted the tests he described and concluded that she was drunk and incapable of having proper control of a vehicle; and
- (4) That there was corroboration for Hamamuti's evidence in the evidence of Maguta and Carlson on the appellant's state of insobriety soon after the accident.

Mr Sayce has criticized the reliability of the evidence of the State witnesses on the appellant's insobriety. He argues that there are certain inconsistencies in the evidence of Carlson and Maguta on the appellant's demeanour and despite Hamamuti's twenty-seven years' police experience he was unqualified to conclude that the appellant was unfit to drive. Mr Sayce's written argument proceeds as follows:

"In the first place there were a number of inconsistencies between the Inspector's *viva voce* evidence and the observations from exhibit 3. ... More importantly, perhaps, the test of walking in a straight line along a line of joints in floor tiles seems to have been unusually difficult as compared to walking along an easily visible painted line and the suggestion that appellant was staggering is no more than another aspect of her alleged inability to walk a straight line."

Mr Sayce submits that if on the evidence the appellant is not guilty of contravening s 46(1) of the Act she cannot be convicted under either s 45(1), as there is no medical evidence of her blood alcohol content, or under s 43(1) as this is not a competent alternative verdict to contravening s 46(1). He is correct. However, I take issue with his contention that the available evidence fell short of being very clear to sustain a conviction under s 46(1). It seems to me that

Mr Sayce's reliance on *S v Zikhali* S-221-81 (not reported) is misplaced. That case went the way it did for the reasons summarized at p 3-4 of the cyclostyled judgment as follows:

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"In the present case there was not even an assertion by any witness that the appellant was so intoxicated as not to be able to have proper control of a vehicle. Despite statements made by some of the witnesses that the appellant appeared to have been drinking, no one spoke of any symptoms which supported that conclusion - the appellant did not stagger, nor was his speech slurred.

Nor could it be safe to conclude from the fact that an accident occurred that the appellant was under the influence of liquor, although he may have been driving negligently or even recklessly. *R v Spicer* 1945 AD 433 at p 441. The road was steep and winding at the point where the vehicle skidded and overturned, and it was probably raining heavily at the time, if not hailing. In addition, the appellant seems to have had a reputation for fast driving, which may go some way to explain the accident on a basis other than his drunkenness. There was no evidence of erratic driving before the vehicle skidded save for an incident of reckless or negligent overtaking."

My view is that *S v Collington* 1970 (2) RLR 6 (G); 1970 (4) SA 325 (R) is more in point. The relevant authorities are considered in the judgment and in my respectful view the correct principles are summarized by Beadle CJ, firstly at 12A-E as follows:

"The courts have interpreted the words 'while under the influence of intoxicating liquor' as meaning that 'the skill and judgment normally required of a driver is diminished or impaired as a direct result of the consumption of intoxicating liquor'. See Cooper and Bamford *South African Motor Law*; 1965 Edn, p. 334, and cases there cited. This test applied by the South African courts is virtually indistinguishable from the tests laid down in our Act, which is being under the influence of liquor to an extent of being incapable of having proper control of the vehicle, South African decisions on their Ordinances are, therefore, in point. See *R v de Labilliere* 1936 SR 226, and *Benham v R* 1950 SR 87.

The leading South African case is the case of *R v Spicer* 1945 AD 433. In that case, GREENBERG JA said (see p 436):

'The point is not whether the diminution is obvious or not; the driver in question, though bearing no obvious signs of intoxication, may possibly in fact be so much under the influence of liquor that it would be a danger to the public and to himself to allow him to drive a car, and, in our opinion, would be covered by the subsection.'

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The inference from this passage is clear. The drunken driver ought not to be allowed to drive at all. This is quite inconsistent with the requirement that he must be allowed to drive in order to manifest his drunkenness, by the manner of his driving."

And at 13G-I:

"I do not want it to be understood, however, that the manner in which the accused actually drives is an irrelevant consideration in determining his guilt under the section. Far from it: the manner in which the accused actually drives is most important evidence proving his state of intoxication; but the State can secure a conviction even though the accused drives perfectly, provided that the court is satisfied, from other evidence, that he was so drunk that the only conclusion which can be drawn is that he was not capable of being in proper control of a car at the time. For example, even though he was driving perfectly at the time, it may be inferred, from his state of intoxication, that, if he was faced with a sudden emergency, he would be incapable of exercising that degree of

skill which would be required of a normal driver, and to that extent would be incapable of having proper control of the vehicle."

I suggest that the test applied by the magistrate to this case accords with the principles enunciated in *Collington's case, supra*. As Mr Hooper for the State submitted, the magistrate took into account the appellant's own description of how the accident occurred and specifically warned himself that negligent driving is not proof of driving whilst impaired by alcohol. Compare *Zikhali's case, supra*.

On the appellant's evidence, she was "an occasional drinker" who had consumed two tots of vodka before the accident occurred. This is **direct** evidence of consumption of alcohol, the first element of the offence of contravening s 46(1).

Soon after she consumed the alcohol the appellant, again on her own admission, drove into the boot of a vehicle which was right in front of her and stationary at a robot-controlled intersection. The only reasonable inference to be drawn from these facts is that there was an impairment or diminution of her faculties due to the alcohol she had consumed. She was incapable of exercising the degree of skill required of a normal driver in the circumstances and the reason for the "momentary inadvertence" she alleged was traceable to alcohol.

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What is the sequel to the collision? No less than three policemen, one of them an Inspector of twenty-seven years' experience in the Police Force, detect a smell of alcohol on the appellant's breath which causes each witness to suspect that she is drunk. She is obstreperous with at least two of the police officers. When brought before Hamamuti, she staggers and is unable to talk in a straight line, however generous an allowance one may make for the fact that this was not the normal white line but a seam in the floor tiles. She shouts and screams just because the breathalyser was out of order. She agreed to go for a blood alcohol test after considerable persuasion by MacMaster. Dr Zulnawas who attempted to take a blood sample describes her mood as aggressive and says she was "restless" and eventually walked out of the hospital.

The magistrate believed the State witnesses' description of the appellant's condition. In my view, he was entitled to reach the conclusion he did on the basis of the principles enunciated in *Collington's case, supra*.

I am satisfied that the conviction of contravening s 46(1) as proper and I proceed to consider the conviction of contravening s 68(6) of the Act, that the appellant, without reasonable excuse, refused to permit the taking of a specimen of blood.

The Act does not define what is meant by "reasonable excuse" and in construing the phrase one must resort to general principles. Counsel have been unable to refer us to any precedent from our jurisdiction but to the principles and authorities referred to in Smith & Hogan's *Criminal Law* 4 ed published in 1978 at p 476-478 on the meaning which the phrase has been given in England and Wales. The passage does not appear in the later editions of the work. I assume that this is because the meaning of "reasonable excuse" in English law is regarded as settled.

The principles set out in the passage referred to may be summarized as follows:

1. Whether or not an excuse for failure to give a blood sample is reasonable is a question of mixed law and fact.
2. The *onus* of proving that the accused had no reasonable excuse of refusing to provide a blood sample lies on the State but the accused carried the evidential burden of laying a foundation for it.
3. In practice most cases of reasonable excuse will be predicated on medical grounds and may relate to the physical health or mental condition of the motorist.

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4. The test of reasonable excuse is an objective one and the grounds upon which the excuse is predicated must be of a very extreme character to constitute reasonable excuse.
5. What constitutes reasonable excuse must be determined in relation to the provision creating the offence: its effect abridges personal liberty and it can be properly inferred that this was the intention of the law-maker.
6. Honest and reasonable belief in the existence of facts which objectively constitute reasonable excuse is no defence if the accused's view of the facts is wrong.
7. It is impractical to place rigid limits on what may constitute reasonable excuse in advance of all the possible factual situations which may arise. At the end of the day, reasonable excuse involves a consideration of whether a reasonable man in the motorist's position would be acting sensibly in refusing to provide a blood sample and of how far the admission of the excuse would defeat the overriding intention to protect the public from drunken drivers.

Counsel are agreed that it is these principles which must be applied to the present case in the absence of any precedent in this jurisdiction. In this regard I am attracted to Mr *Hooper's* submission that the acid test is to ask oneself whether what the appellant says is: "I **cannot** provide a blood sample," or "I ought not to provide a blood sample". If it is the former, she may have reasonable excuse but if it is the latter she has none.

There are two stages to the enquiry which Mr *Hooper* suggested. The first is to establish the facts and the second to determine, on the basis of the facts, whether the appellant's excuse is reasonable or not.

The relevant facts in the present case are these:

Firstly, the appellant became very aggressive when Inspector Hamamuti announced his decision to send her to the hospital for a blood alcohol test. But she did not tell him why she was unwilling to comply although she had been prepared to submit to a breath analysis.

Secondly, the appellant was unwilling to get into the police vehicle taking her to the hospital

until MacMaster persuaded her to go. The defence did not elicit from this witness any explanation for the appellant's initial reluctance to undergo the blood test. It was content to lead him only on what transpired when the appellant reached the hospital, in respect of which the witness's evidence was as follows:

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"There the accused sat on a bench and waited. The doctor came and asked to take a blood sample from her and she refused and he said that he could not force her. My brother-in-law was also present and two or three police details. I don't know if the accused gave a reason for her refusal or not."

Carlson's evidence reads as follows:

"Accused was hesitant to come with me and refused saying no-one was going to take blood from her while a certain gentleman came and persuaded accused to comply. When outside the office accused went and sat on a rock. After more persuasion she went into police motor vehicle and we took her to hospital and the gentleman followed there in his car.

At the hospital I located the doctor on duty and told him that we had a suspect of drunken driving and we would like him to take blood samples. He asked me where the accused was. I took accused to doctor who explained to accused the procedure and that it was an offence to refuse to submit to blood sample taking. Doctor later informed me that accused had refused and I asked him to state it on written authority. I got back the authority doctor had endorsed. Exhibit 4 is the one ..."

It was after the prosecutor asked Carlson questions which seem to me to have been somewhat leading that the witness said:

"Accused said that she was not prepared to contract AIDS and the needles were dirty and this was in the doctor's presence and also at Bulawayo Traffic. I do not think that Maguta was present when the doctor wanted to take a blood sample."

There was a similar break in the evidence of Maguta relating to when it was that the appellant might have mentioned AIDS. The first and apparently spontaneous portion of his evidence reads as follows:

"When we conveyed (the appellant) to Bulawayo Central Hospital, I advised her that she was not allowed to drink or eat anything or smoke until the blood samples were taken from her. On the way she attempted to smoke on three occasions but I forbade her and she was very talkative ... We went and gave the doctor the (written) authority but the accused said she was not going to have her blood taken. This was when I asked her to go inside the doctor's room (cubicle). The accused never went to the doctor. The doctor only wrote on the written authority that the accused had refused to have her blood taken."

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It is here that there seems to be a break in the spontaneity of Maguta's evidence as well because his next averments are these:

"The accused said that she was not going to have samples taken because the needles were used on many people and she might contract AIDS. We then came back the doctor tried to speak to the accused but she never replied or listened."

Maguta was asked in cross-examination if the person to whom the appellant mentioned AIDS was himself or the doctor and he said it was mentioned to him first. Then he says he "never saw the doctor talking to the accused".

I turn to the evidence of Dr Zulnawas which reads as follows:

"At 21.30 hours on 13-07-89 I was on duty at Bulawayo Central Hospital and Police brought this written authority to me and accused. I then explained to accused that Police are requiring that I take blood sample from her for analysis and accused refused to submit after I told her of the set procedure. I then endorsed on written authority that accused had refused to submit. **Accused never gave any reason for her refusal. She merely stated that she didn't want any blood sample to be taken from her.**" (My emphasis.)

The cross-examination of the doctor by the defence did not pursue with him why he referred to AIDS in his evidence-in-chief if the appellant had not raised the question with him in the first place. It was for the defence to conduct its case in the manner it did. But its failure to elicit the evidence necessary to lay a foundation for reasonable excuse seriously weakens the submissions now made by Mr Sayce in the appeal.

My respectful view is that one is entitled to conclude that whilst there is a possibility that the appellant mentioned her fear of contracting AIDS to one or other of the police details who conveyed her to the hospital, this was not the excuse she gave to the doctor for refusing to give a blood sample.

I am not suggesting that the police details were being untruthful in their evidence, only that they were mistaken. As I have said, it was MacMaster who persuaded the appellant to go to the hospital in the first place. He was present with the two police details and the appellant's husband when Dr Zulnawas attempted to obtain the required sample. He makes no mention whatsoever of the subject of AIDS and he could have had no reason to lie

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against the appellant. She was his sister for whose welfare he demonstrated great concern throughout the events of that fateful evening. The defence did not call the appellant's husband to give any evidence at all at the trial and it must be assumed that he was not in a position to take the appellant's case any further.

In this regard the magistrate has seriously misdirected himself on the facts in the confusing passage of his judgment which states that once the appellant was told of the blood test she cried and said she feared she might contract AIDS. The facts established by the evidence are that if the appellant mentioned AIDS it was not when Hamamuti said he was sending her for a blood test or when MacMaster prevailed on her to go through with the test.

The appeal collapses at the very first hurdle set out by Smith & Hogan. The appellant has not laid the required foundation for reasonable excuse for refusing to give a blood sample and there was no evidence for the prosecution to negative.

The only point open to Mr Sayce to make and which he made is summarized in his written

heads of argument as follows:

"As the trial court accepted, it is notorious that infection with the HIV virus leads to AIDS and death. It is accordingly submitted that in the absence of clear evidence that a reasonable person in appellant's shoes would have been satisfied as to the needle's sterility it was not proper to convict the appellant of this offence. Unless, a reasonable person would be satisfied as to the needle's sterility a refusal to give a blood sample is perfectly proper.

It is further submitted that even if a suspected person is told that a particular needle is sterile it is still not unreasonable of him or her, in the light of the fatal consequences of contracting AIDS, to refuse a sample unless the needle sterilised in front of his eyes. In the instant case there is no suggestion that the doctor offered to do this despite being told the reason for appellant's refusal. It would have been a simple matter to sterilise the needle again in front of appellant. If this had been done her refusal could hardly have been reasonable."

With respect, this is casting on the State an *onus* which is greater than the required proof beyond reasonable doubt. See *S v Glegg* 1973 (1) SA 34 (A) at 38-39 of the English translation, the passage which reads as follows:

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"When the State must prove its case in such a way that the *judex facti* must be convinced that the offence was committed, it is not expected of the *judex* that his conviction must be based on a certainty which consists therein that an unlimited number of possibilities raised by the defence, which are hypothetical or merely speculative, must be eliminated by the State. The concept 'reasonable doubt' cannot be precisely defined, but this can be said; that it is a doubt which exists because of probabilities or possibilities which are considered reasonable on the ground of general human experience and knowledge. Proof beyond a reasonable doubt is not equated with proof beyond the slightest doubt, because the onus to render proof at so high a standard, would frustrate the administration of the criminal law."

See also *R v Sibanda & Ors* 1965 RLR 363 (A) at 370-371; 1965 (4) SA 241 (RA) at 246-247.

In the present case as in *Glegg*, the magistrate was entitled by the evidence to conclude that no reasonable person in the appellant's position could possibly doubt that the needle was sterile.

It was up to the appellant to say to the doctor, "It is all very well for you to tell me that the needle is sterile but prove it", or words to that effect prompting the doctor to do what Mr Sayce now suggests. If that had happened and the doctor then failed to assure or re-assure the appellant in a manner satisfactory to her, *cadit questio* - Mr Sayce's submission would then be unassailable.

I attach great weight to the fact that nowhere in cross-examination was it put directly to the doctor that the appellant said either to him or to anyone else in the doctor's presence that she did not want to give a blood sample because the needle might be contaminated with the AIDS virus. I am satisfied that my reasoning is correct. Nor was the doctor's evidence that the needle was prepacked and sterile inadmissible hearsay as Mr Sayce suggests, relying on *S v Brumpton* 1976 (3) SA 236 (T). That case dealt with reliance by a doctor on a manufacturer's label as proof that the contents of a bottle which he used to clean the accused's skin before taking a blood sample were what the label stated. The distinction between *Brumpton* and the present case is obvious. The issue here is whether Dr Zulnawas was required to re-sterilise a pre-packed needle bearing the manufacturer's guarantee that the needle was sterile for no

scientific or other sensible reason.

I suggest that no reasonable person in the doctor's position would be acting

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sensibly if he did as Mr Sayce suggests. There is a presumption of regularity in the execution of scientific procedures which remained intact after all the evidence was received in this case. Therefore, no reasonable person in the appellant's position would be acting sensibly if he expected a doctor to disregard an established medical manufacturer's guarantee without being specifically requested to do so.

In the oft-cited language of the courts, to uphold the appellant's excuse as reasonable in the absence of any cogent reason for doing so would be "to drive a coach and six horses" through the provisions of the Act.

The appeal must be dismissed in its entirety.

Korsah JA: I agree.

Ben Baron & Partners, appellant's legal practitioners

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INDEPENDENCE MINING (PVT) LTD v FAWCETT SECURITY OPERATIONS (PVT) LTD **1991 (1) ZLR 268 (HC)**

Court **High Court, Harare**

Chidyausiku J

11 March & 22 May 1991

Special plea in abatement

Flynote

Practice - arbitration clause in contract - stay of proceedings.

Headnote

The parties had entered into a written contract of carriage. When the plaintiff suffered a loss during such carriage, it issued a summons against the defendant. The defendant sought to have the matter referred to arbitration in terms of the arbitration clause in the written agreement.

Held, the dispute arose out of the performance of the contract and was thus subject to the arbitration provision. This applied whether the claim was a contractual one or a delictual one.

Cases cited:

Astro Vencedor Compania Naviera SA of Panama v Mabanft GmbH [1971] 2 QB 588; [1971] 2 All ER 1301 (CA)

Woolf v Collis Removal Service [1948] 1 KB 11; [1947] 2 All ER 260 (CA)

Universiteit van Stellenbosch v J A Louw (Edms) Bpk en andere 1982 (3) SA 9 (C)

A P de Bourbon SC for the plaintiff

M J Gillespie for the defendant

Judgment

Chidyausiku J: The parties in this case entered into a written agreement. In terms of this agreement the defendant undertook to provide to the plaintiff a security carriage service. On 30 October 1989 the defendant pursuant to the

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CHIDYAUSIKU J

contract, undertook to carry a consignment of gold and silver for the plaintiff from How Mine to Harare. The defendant received the gold and silver from the plaintiff but failed to deliver it to the plaintiff's duly appointed agent, Lonrho Zimbabwe Ltd in Harare. The gold and silver were stolen in transit. The plaintiff now sues the defendant for the return of the gold and silver or payment of its value in the amount of \$1 228 746,96.

Clause 9 of the agreement provides that any dispute arising from the provisions of the agreement shall be referred to arbitration in terms of the Arbitration Act. Clause 9 of the agreement reads as follows:

"Fawcetts will not enter into dispute over any matter arising from the services provided in terms of this agreement with anyone other than the hirer or his legally appointed representative, and Fawcetts and the Hirer hereby consent to refer any disputes arising from the provisions of this agreement to arbitration in terms of the Arbitration Act."

The defendant has filed a special plea in abatement and maintains that the dispute ought to be referred to arbitration in terms of clause 9, *supra*, and prays that the proceedings be stayed pending the arbitration of the dispute.

The plaintiff's stance is that it is arguable that the plaintiff's first cause of action arises from the provisions of the agreement and therefore referable to the tribunal in terms of the agreement. As far as the second cause of action is concerned the plaintiff maintains that this arises solely from an aquilian or delictual claim based on negligence. It does not arise from the provisions of the agreement therefore not referable to the tribunal.

Dealing with the first cause of action. The plaintiff's case is that the defendant being a common carrier undertook to carry its gold and silver from How Mine to Harare. The defendant took possession of the plaintiff's gold and silver at How Mine but failed to deliver the same at Harare.

His failure to do so is a breach of the agreement. The defendant denies liability. As I said earlier the plaintiff's stance is equivocal. Mr *de Bourbon* has submitted that it may well be argued that this claim arises from the provisions of the agreement. He did not advance any basis upon which it could possibly be held that this cause of action does not arise from the provisions of the agreement. The probabilities are that none exist. I am satisfied that the first cause of action arises from the provisions of the agreement therefore referable to the tribunal.

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CHIDYAUSIKU J

I now turn to the plaintiff's second cause of action. This is set out in paras 7 and 9 of the plaintiff's declaration. In this regard the plaintiff alleges that the defendant owed the plaintiff a duty of care to take reasonable steps to protect the gold and silver from loss while under its custody. In breach of such a duty the defendant acted negligently and consequently the gold and silver was lost. The negligence of the defendant is then particularized as follows in para 8 of the plaintiff's declaration:

"In breach of the aforesaid duty of care, the defendant acted negligently, in that:

- a) the defendant failed to provide adequate security guards to protect the gold and silver from theft or other loss;
- b) the defendant failed to provide a means of transport that was adequate to protect the gold and silver from theft or other loss;
- c) the defendant failed to provide proper communications between the vehicle carrying the aforesaid gold and silver and its offices in Harare and Bulawayo;
- d) the defendant failed to take adequate steps to protect the gold and silver against theft or other loss;
- e) the defendant failed to provide adequate firearms to such security guards as it employed to enable them to protect the aforesaid gold and silver from theft;
- f) the defendant failed to provide a back-up or escort vehicle to prevent the theft of the consignment of gold and silver;
- g) the defendant carried the said consignment based on a fixed and set routine, thus jeopardising the security of the carriage;
- h) the defendant failed to observe the standards of security required of a company, such as the defendant, professing to be an expert in the field of security operations."

The defendant denies any negligence and avers loss was due to a cause beyond its control and/or *vis major*, namely an armed robbery.

Is this dispute covered by the arbitration clause? The question of whether a dispute between parties to a contract fell within the arbitration clause is primarily a question of interpretation of the agreement and in particular the arbitration clause. Perhaps before one interprets the agreement one needs to identify what the dispute is about. In this case the parties entered into a contract of security of carriage service. The agreement itself is headed "Security Carriage Service Agreement". It is apparent from clause 1 of the conditions of contract that the contract

was for the carriage of valuables.

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CHIDYAUSIKU J

Indeed gold and silver which are the subject of this carriage are valuables. In my view it is an implied term of the agreement that the defendant would provide a high standard of care and adequate security during the carriage of such valuables. I came to this conclusion because of the nature of the service the defendant provides and the type of goods that were being carried. If, indeed, the defendant failed to provide the high standard of security and performed his contractual obligation negligently in one or more of the particulars alleged he breached the agreement. In particular he broke his implied undertaking to provide adequate security. The plaintiff says he was negligent the defendant denies this allegation.

This dispute, therefore, is really about the performance of the contract. The arbitration clause covers any dispute arising from the provisions of the agreement. A dispute about the performance, non-performance or inadequate performance of a contract cannot but arise from the provisions of the contract. In my view the fact that the dispute is couched in delictual terms as is the case here, does not affect the issue and is of no consequence. For this reason I have come to the conclusion that the second cause of action also falls within the arbitration clause.

Even if I am wrong in adopting the above approach I would come to the same conclusion for another reason. The delictual wrong complained of in this case was committed in the performance of a contractual duty, and therefore, in my view so sufficiently closely connected with the claim under the contract to bring it within the ambit of the arbitration clause.

I agree with Mr Gillespie's submission that the second cause of action founded on negligence, while less directly related to the contract, nevertheless arises out of the agreement because it is closely connected with the contract. In this regard he referred the court to the words of LORD DENNING MR in *Astro Vencedor Compania Naviera SA of Panama v Mabanafit GmbH* [1971] 2 QB 588 at 595; [1971] 2 All ER 1301 (CA) at 1309:

"If the claim or the issue has a sufficiently close connection with the claim under the contract, then it comes within the arbitration clause."

Also the cases of *Woolf v Collis Removal Service* [1948] 1 KB 11; [1947] 2 All ER 260 (CA) and *Universiteit van Stellenbosch v J A Louw (Edms) Bpk en andere* 1982 (3) SA 9 (C) are authorities for the proposition that a delictual claim can fall within the arbitration clause if there is sufficient connection between such a claim and the dispute. The instant case is one which has such

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CHIDYAUSIKU J

sufficiently close connection because the wrongful act relied upon for the delictual cause is the negligent performance of a contractual duty. In the result the second cause of action also falls within the arbitration clause.

Having come to the conclusion that both causes of action are covered by the arbitration clause the court has a discretion to refer the matter to such arbitration or not. The onus is on the plaintiff to show why the proceedings should not be stayed. The submission by Mr *de Bourbon* that staying the action would result in a multiplicity of action was predicated on the assumption that the first cause of action was covered by the arbitration and the second was not. I have come to a different conclusion on that issue. The general principle is that the courts will give effect to the intention of the parties. The intention of the parties was to refer the disputes to arbitration. There is no basis for departing from this principle in the present case.

In the result the special plea is allowed with costs and the proceedings are stayed.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

1991 (1) ZLR p273

RUZANE v PARADZAI & ANOR 1991 (1) ZLR 273 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Manyarara JA

Civil appeal

26 February & 3 June 1991

Flynote

Evidence - function of expert witness - expert in a particular field - who is an expert - qualifications required - reliance on text books - what must be shown.

Customary law - text - books on - written by persons of established repute - ascertainment of - s 9 Customary Law and Local Courts Act 1990 - court entitled to refer to text books. Legislation - Customary Law and Local Courts Act 1990 - s 9 - Customary Law and Primary Courts Act 1981 - s 5 - Chiefs and Headmen Act 1982 - s 3.

Chief - appointment - succession - letter of public official constitutes public document - accurate public record on succession to chieftainship - unfettered discretion of President to appoint.

Headnote

The appellant applied to have the appointment of the first respondent as an acting chief set aside and that the appellant be appointed instead.

The application having been dismissed, in an appeal,

Held, that text-books on customary law by persons of established repute with vast knowledge on the subject which has been acquired from extensive research may be referred to for guidance by the trier of fact without putting the contents of such works to an expert witness for

confirmation.

Held, further, that s 5 of the Customary Law and Primary Courts Act 1981 (now s 9 of the Customary Law and Local Courts Act 1990) specifically provides for the ascertainment of customary law principles in this manner.

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MANYARARA JA

Held, further, that a letter written by an assistant native commissioner in 1943 constituted a public document as it had been prepared by a public official in pursuance of a public duty and was properly placed before the Court as evidence of facts in dispute on the history of the chieftainship in question.

Held, further, that s 3 of the Chiefs and Headmen Act 1982 provides the President with an unfettered discretion in the appointment of a chief.

Cases cited:

R v Mofokeng & Anor 1928 AD 132

S v Collop 1981 (1) SA 150 (A)

S v Harris 1965 (2) SA 340 (A)

Menday v Protea Assurance Co Ltd 1976 (1) SA 565 (E)

Muwuungani v Minister of Native Affairs 1957 R&N 298 (FC); 1957 (2) SA 544 (FC)

E Chatikobo for the appellant

F Musakana for the respondents

Judgment

Manyarara JA: This is an appeal against the whole of the judgment of the High Court dismissing an application to unseat the first respondent as Acting Chief Ruzane of the Varozvi people in Wedza and have the appellant appointed in his place. The appellant is a member of the Mukamba family and the first respondent of the Musinganeti family.

The dispute is ably summarized by the learned judge as follows:

"In its barest form the dispute, in this matter, put in a historical context, is according to the Plaintiff, that the Ruzani Chieftainship only started with Nyenye Chief Ruzani I of the Mukamba Clan. According to him, he it was who approached Chief Swoswe and pleaded for the favour to set up the Rozwi Chieftainship in the Wedza area. The Musinganeti clan or family had nothing to do with it and for four reigns spanning from 1922 to 1984, only those of his clan succeeded to the Chieftainship till the intervention of the authorities in 1984 when Paradzai of the Musinganeti family was imposed as Chief and after him his son, the present defendant, was made acting Chief. The Musinganetis were made 'sadunhus', ie headmen, and had no right to succession to the Rozwi Chieftainship. He denies that there was any Rozwi Chieftainship in the area before 1922.

MANYARARA JA

The Defendant on the other hand claims that the Rozwi Chieftainship in the Wedza area was established long back when the two clans had come into the area of Chief Swoswe who had previously married a daughter of the Rozwis of this group that came from Matonjeni deriving from their ancestor Sarijo. The name by which the Chieftainship was known was 'Mbava'. According to him it was only through the intervention of the administration in 1922 when Nyenye succeeded Furaunye, who was Mbava 7, that the name was changed to 'Ruzani', and thereby excluded the Musinganeti family.

Thus the main dispute is whether the Musinganeti clan is entitled to succeed to the Rozwi Chieftainship in the Wedza area."

Matters came to a head when Nyenye Chief Ruzani, also known as Ruote, died in 1942. His younger brother, Magumise, the apparent, had predeceased him, and his next younger brother, Maburutse, wisely declined the chieftainship on account of ill health. Chigweshe and Gonese Sibindwane of the Musinganeti clan and Muchada of the Mukamba clan contested the succession at a meeting vividly described by the Assistant Native Commissioner for Wedza in a letter to his superior at Marondera as follows:

"The Native Commissioner,

September 12th 1943

Marandellas

Late Chief Ruote @ Rozani:

Appointment of a Successor;

Barozwi Tribe : Wedza

I beg to report that I attended a meeting of the Barozwi section of this sub-district on Wednesday 8th Sept. 1943, for the purpose of selecting a successor to the late Nyenye Chief Rozani who died in November 1942. 2/11/42.

I return the file of papers relative to the late Chief's appointment in 1927 and matters prior to this. I attach also a genealogical tree, compiled from data left by my predecessor (Mr JV. Kerr). In this tree the present claimants are underlined in red ink.

The views of the tribe will be expressed first: followed by my opinion of each respective claimant; my opinions are influenced by the fact that this is not an age-old dynasty. The new chief will be the third to succeed;

MANYARARA JA

prior to this the tribe, a migrant section of the Barozwi, had only a headman, who paid allegiance to the Soswe chief of his time.

There are some five hundred Tax-paying members of the tribe; and of these some three hundred are away at work. The meeting comprised some 180 adult males and 100 women (who of course were not allowed to vote) and can be said to be fully representative of the resident members of the Reserve.

The meeting was orderly and vehement bitterness absent. It was explained that the Government was anxious to hear from the people themselves, as to whether they could agree amongst themselves on the selection of a chief. After considerable discussion, the names of three claimants were put forward; their respective claims discussed

and finally the matter put to the vote, with the following result:

- | | | |
|-----|--|----------------------------------|
| (1) | Gonesu Sibindwani | 103 votes (a subsidized headman) |
| (2) | Muchada ((3838) Emp. SA Canvas Co Salisbury) | 69 votes |
| (3) | Chiweshe (Exempt unit, too old to attend, represented by his sons Chaka and Paradza) | 10 votes |

182 out of 500 Tax paying adults.

As Gonesu polled the greatest number of votes I then sounded the "Muchada" section as to their willingness to accept Gonesu if he was chosen by the Government. Changu (eldest son of the late chief) replied for his section in the following words: 'We will accept the man chosen by the Government but, if Gonesu is chosen he cannot take on the hereditary name of Rozani. Only claimant Muchada is entitled to this.'

The meeting was closed."

The writer then added the following comments:

"In conclusion, I must confess a feeling of disappointment that the name of Changu (eldest son of the late Chief Ruota Nyenye Rozani) was not advanced. This man has acted in an un-paid capacity for the past ten months and has shown marked ability. (I did not feel it my place to suggest him as I was presiding over the meeting.) Further, Ruote Nyenye Rozani's appointment in 1927 is a precedent for the passing of the

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MANYARARA JA

Chieftaincy from father to son (following Zansi Amandebele custom) and I feel it a great loss from the administration point of view, that all further succession cannot continue from father to son. In most Mashona custom a man cannot be chief unless his father at some time held the chieftaincy. Examination of the family tree, shows that only Changu and claimant No. 3 Chigweshe have those qualifications. Where the future chief is known, it is possible to give him, prior to his accession, education and administrative instruction. The main qualification for a chief in the mind of the average Mashona native, is **age**, with the result that the real chief takes no part in his official duties. The actual work being done by a deputy (son or nephew)."

The Native Commissioner followed his junior's advice and appointed Changu (Mukamba) as chief. Thereafter the chieftainship rotated among members of the Mukamba clan until the death of Pfuma Mukamba in 1982.

Following Pfuma's death, the appellant, (also of the same clan) acted as chief without being formally appointed in terms of the Chiefs and Headmen Act 1982. Then the Government appointed Paradzai Musinganeti in place of the appellant in 1984 but Paradzai died during the following year and the first respondent was appointed to succeed him.

It is this 1985 appointment which the appellant challenged unsuccessfully in the High Court. The first issue for the learned judge's determination was whether the first respondent was entitled at all to succeed to the chieftainship under customary practice. The second was whether the second respondent as the Minister responsible for the administration of the Chiefs and

Headmen Act had complied with the Act in appointing the first respondent.

The learned judge considered the relevant provisions of the Act, various texts on the subject and the evidence adduced at the trial. He concluded that the Musinganeti family had established that it was also entitled to succeed to the chieftainship but past governments had cheated the family out of its entitlement for policy reasons which did not bind the present government. Therefore, the first respondent's appointment was proper.

Mr *Chatikobo* who appeared for the appellant attacked the finding on the ground that the evidence which should have been accepted pointed the other way. Alternatively, that the first respondent's appointment was irregular in that he succeeded a member of his own family and "no two consecutive chiefs may be appointed from the same house".

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MANYARARA JA

Mr *Chatikobo* argues in the first place that the learned judge erred in relying on text-books and an Assistant Native Commissioner's letter as evidence to prove the facts in dispute. He contends that the contents of the text books should have been put to an "expert witness" whose confirmation of the accuracy of the various authors' opinions might have been receivable as evidence, which had not happened in this case. In support of his argument Mr *Chatikobo* cites *R v Mofokeng & Anor* 1928 AD 132 at 136; *S v Collop* 1981 (1) SA 150 (A) at 167B; *S v Harris* 1965 (2) SA 340 (A) and *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E), firstly the passage at 569B-C which reads as follows:

"In essence the function of an expert is to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable. (Cf Phipson, *Evidence* 11 ed, paras 1280 et seq., Hoffman, *Evidence* 2 ed pp 78 et seq, *R v Nksatlala* 1960 (3) SA 543 (AD) at p 546)"

and secondly, the passage at 569H which is to the following effect:

"Where, therefore, an expert relies on passages in a text-book, it must be shown, firstly, that he can, by reason of his own training, affirm (at least in principle) the correctness of the statements in that book; and, secondly, that the work to which he refers is reliable in the sense that it has been written by a person of established repute or proved experience in that field. In other words, an expert with purely theoretical knowledge cannot in my view support his opinion in a special field (of which he has no personal experience or knowledge) by referring to passages in a work which has itself not been shown to be authoritative. Again the dangers of holding the contrary are obvious."

The soundness of the principles enunciated in the authorities referred to cannot be doubted, but the principles do not apply to the text-books referred to by the learned judge in this case, namely Holleman's *Shona Customary Law*; Palley's *The Constitutional History and Law of Southern Rhodesia*; Goldin & Gelfand's *African Law and Custom in Rhodesia*, Bullock's *The Mashona* and Harold Child's *The History and Extent of Recognition of Tribal Law in Rhodesia*.

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MANYARARA JA

To quote from *Menday's case supra*, all these works are recognized by the courts as works written by persons of established repute with vast knowledge of the subject on which they wrote, acquired from extensive research. The learned judge as a trier of fact was entitled to refer to the works for guidance on the customary principles of succession to chieftainship among the Mashona. Section 5 of the Customary Law and Primary Courts Act 1981 (now s 9 of the Customary Law and Local Courts Act 1990) specifically provides for the ascertainment of customary law principles in this manner.

The cases cited by Mr *Chatikobo* are not applicable to the Assistant Native Commissioner's letter. The letter is a public document, which the author prepared as a public official in pursuance of his public duty of making an accurate record to which the public may refer. See Hoffmann & Zeffert's *The South African Law of Evidence* 4 ed pp 150-151. For these reasons, the letter was properly produced in evidence at the trial. The evidence of Chief Takawira Svosve aged 71 years, a direct descendant of the Vambire who are the traditional rulers of the Wedza area supported the Assistant Native Commissioner's letter. The oral tradition to which the witness testified is that the Varozvi arrived in the area under the leadership of Mbavha, also known as Sarijo. Chief Svosve allocated them land on which they settled and established the disputed chieftainship.

The witness said:

"I have nothing to do with the fighting for (their) chieftainship. ... but what I know is that I know the name Mbavha who I gave a place (to settle)."

And:

"When the Ruzanis took the chieftainship in turns I had nothing to do with it. I thought it was all well. It was their chieftainship."

Great weight attaches to the evidence in that, although Chief Takawira Svosve is married to a member of the appellant's family, and was restrained and non-committal in his evidence, he disclosed that "Ruzani" was not the original name of the disputed chieftainship.

Finally, it is a notorious fact that, unlike the Ndebele, the Shona have a very complicated system of succession which is correctly summarised by Harold Child, *op cit*, at p 6 (1 ed) as follows:

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MANYARARA JA

"Younger brothers succeed to elder brothers until the succession has been held by each in turn, when it reverts to the son of the first chief and then to the sons of the collateral lines. There are tribal variations, and the system is not always complete."

The facts which clearly emerge from the evidence to which I have referred may be summarized as follows:

1. There is no evidence of the origin of the name "Ruzani" as the traditional name of the disputed chieftainship. The probability is that it was Nyenye who adopted the name when he succeeded his father, Faraunye, as chief. I say so because the Assistant Native Commissioner's letter refers to Nyenye's branch of the clan (Mukamba) as the "Muchada

section" and to Nyenye himself as "Ruote" alias "Rozani".

2. The appointment of Nyenye in 1927 was a policy decision by the Government of the day to depart from the customary principle that a son should not succeed his father as chief.
3. The authorities persisted in their disregard of customary principles in 1943 when they appointed Nyenye's son, Changu, against the tribe's overwhelming choice of Gonese of the Musinganeti section.

The truth was not lost to the learned judge who concluded as follows:

"[The evidence] is at odds with the [appellant's] claim that Musinganeti's had no right to the Chieftainship and also confirms the claim by the Musinganetis that they were fighting for the[ir] right to chieftainship as early as [1943] but their claims were brushed aside by the authorities."

Mr *Chatikobo* has further submitted that the first respondent's appointment was in direct conflict with the views of the people on whose recommendation the appointment was based. I am quite unable to follow the logic of the submission. Section 3(2) of the Chiefs and Headmen Act 1982 provides that the President, in appointing a chief, "should give due consideration to the customary principles of succession, if any, applicable to the community over which chief is to preside".

The clear meaning of the provision is that the President is required to "give due consideration to the customary principles of succession", not to follow

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MANYARARA JA

them in making his choice. Dealing with the application of the principle under the African Affairs Act [*Chapter 228*] which the Chiefs and Headmen Act repealed and substituted, Palley op cit at p 476 says:

"The Chiefs are Government officials, appointed in terms of s 4 and 17 of the African Affairs Act by the Governor. They hold office during pleasure, and contingent upon good behaviour and general fitness.

Although Chiefs are envisaged as hereditary holders of the office, it is only official recognition that carried with it the title of Chief. In practice the Governor frequently appoints the person holding traditional title to the chieftainship, but this is not always done. In other cases where the tribe (reference is here to the Mashona, who have a complicated system of collateral succession) have been unable agree on a successor, the Government have made the decisions and in the last ten years have on twelve occasions arranged for some form of election. Furthermore, not all traditional chieftainships are recognized as from time to time Government has carried out a general reorganisation of chieftainships reducing the numbers of recognized Chiefs."

See also *Muwuungani v Minister of Native Affairs* 1957 R&N 298 (FC) at 300E; 1957 (2) SA 544 (FC) which reads as follows:

"On a straightforward reading of this, the operative section of the Act, the Governor is entitled to exercise an unfettered judgment in the creation, amalgamation or sub-division of tribes. Section 10 of the African Affairs Act obviously implies that he shall have regard to native opinion and native customary succession, as investigated by the Chief Native Commissioner. But, once the investigation has been made he is free to act as he thinks best in the interests of good government of the natives."

There is conclusive evidence from the second respondent that there was full compliance with the chiefs and Headman Act in the appointment of the first respondent. His letters, exhibit 2, addressed to the appellant in December 18 1984 reads as follows:

"Dear Sir,

Ruzane Chieftainship : Wedza

Reference is made to the meeting held at Head Office on the 17th October.

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MANYARARA JA

Your claim to the Ruzane Chieftainship has been examined fully to consider the evidence presented by your supporters that you are the correct and rightful heir, and has taken into consideration past history and customs. Nothing was found to reverse the decision to affect the appointment of a nominee from the Mbava house.

I therefore consider the matter closed.

Yours faithfully."

In conclusion then, the Assistant Native Commissioner's letter and Chief Svosve's evidence disposed of any doubt that the first respondent qualified for appointment as Acting Chief Ruzani under customary practice, whilst exhibit 2 proves that there was compliance with the Chiefs and Headmen Act in his appointment. The supporters of the rival candidates were consulted, whereafter the second respondent exercised the unfettered discretion conferred on him by the Act in picking the first respondent as the candidate which the administration preferred as laid down in the authorities to which the learned judge referred.

Therefore, the appeal must be dismissed and there is no reason why the costs of the appeal should not follow the event. It is so ordered.

Gubbay CJ: I agree.

McNally JA: I agree.

Chirunda, Chihambakwe & Partners, appellant's legal practitioners

Stumbles & Rowe, first respondent's legal practitioners

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

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KADOMA MAGNESITE (PVT) LTD v ACTING REGIONAL HEARING OFFICER & ORS 1991 (1) ZLR 283 (HC) 1991 (1) ZLR 283 (HC)

Court High Court, Harare

Robinson J

Opposed motion

11 June 1991

Flynote

Review - dismissal of employee - where misconduct established - dismissal.

Headnote

The labour relations officer found on appeal that three employees in the mining industry had participated in an illegal strike at their place of work with the applicant. He ordered that the applicant reinstate the employees (respondents) with benefits and give them final warnings in writing.

Held, that the labour relations officer had been guilty of an error in law by disregarding the provisions of a statute. For this reason the aggrieved party is entitled to bring the matter on review.

Held, that the respondents had engaged in an illegal strike and were guilty of an act of conduct which was in breach of a condition of their contract of employment.

Held, that in the circumstances, the labour relations officer was obliged to order the termination of the respondents' contracts of employment as is provided for by s 3(2)(a) of the Labour Relations General Conditions of Employment (Termination of Employment) Regulations 1985.

Held, that the labour relations officer be directed to serve on the three respondents an order terminating their contracts of employment with the applicant.

Cases cited:

Secretary for Transport & Anor v Makaravarwa 1991 (1) ZLR 18 (SC)

Masiyiwa v TM Supermarkets 1990 (1) ZLR 166 (SC)

1991 (1) ZLR p284

ROBINSON J

Matereke v CT Bowring & Associates (Pvt) Ltd 1987 (1) ZLR 206 (SC)

B D Brighton for the applicant

H Simpson for the respondent

Judgment

Robinson J: The matter involves two applications concerning the review of determination orders made by labour officials under the Labour Relations Act 1985.

In the first application, first respondent found on appeal that second, third and fourth respondents had participated in an illegal strike. His determination order was that applicant

reinstate the said respondents with benefits and give them final warnings in writing.

In the second application, the labour relations officer found that second respondent "was 25 minutes late on 3/12/90 and failed to report to the shaft office as he had been told by the mine manager. He was told to report to the office after he had finished his task and was under no obligation to do so since it was not an emergency". The determination was that second respondent be reinstated to his lashing job without any loss of benefits from the date of suspension.

Applicant contends that the determination orders made by the labour officials concerned in both matters were wrong in law in that, having found as proved the grounds for applicant's suspension of the respondents concerned from applicant's employ, the labour officials had no option but to order the termination of their employment, which they failed to do. Accordingly, applicant has approached this court by way of review to have the determination orders corrected.

Section 27 of the High Court of Zimbabwe Act 1981, deals with the matter of review by this court. Subsection (1) of that section specifies certain grounds on which any proceedings and decisions of inferior courts of justice, tribunals and administrative authorities within Zimbabwe may be brought on review and subs (2) then provides as follows:

" (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."

According to its definition in the Interpretation Act [*Chapter 1*], the word

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ROBINSON J

"law" in s 27(2), *supra*, includes the common law of Zimbabwe.

In ROSE-INNES'S *Judicial Review of Administrative Tribunals in South Africa* at p 55, one of the common law grounds of review listed is "if the administrative body or official disregarded the direct provisions of the statute;" Likewise, in *Secretary for Transport & Anor v Makaravarwa* 1991 (1) ZLR 18 (SC) at p 20, KORSAH JA stated that administrative action is subject to control by judicial review under the head of, inter alia, illegality, "where the decision-making authority has been guilty of an error in law".

It accordingly follows that where a labour relations officer has been guilty of an error in law by disregarding the provisions of a statute, the aggrieved party is entitled to bring the matter on review to the High Court.

Next it is necessary to consider whether the applicant is correct in its contention that if a labour relations officer finds that one or more of the grounds listed in s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985) on which an employer has suspended an employee is or are proved to his satisfaction, the officer has no option but to terminate the employee's contract of employment.

Section 3(1) of those Regulations provides:

"3. (1) Where an employer has good cause to believe that an employee is guilty of -

- (a) any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract;
- (b) wilful disobedience to a lawful order given by the employer;

. . .

the employer may suspend such employee without pay and other benefits and shall forthwith apply to a labour relations officer for an order or determination terminating the contract of employment."

Section 3(2) provides:

"3. (2) Upon application being made in terms of subsection (1) of 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

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ROBINSON J

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 and to reinstate such employee if the grounds for his suspension are not proved to the satisfaction of the labour relations officer."

In *Masiyiwa v TM Supermarkets* 1990 (1) ZLR 166 (SC) at 169H, 170 & 171A McNALLY JA, when alluding to s 3(2) of these Regulations, stated as follows:

"The matter of law which arises in 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 by the employer is proved. To what extent is that labour relations officer or Board or Tribunal entitled to say: 'In the exercise of our discretion, and despite the proof of the grounds of suspension, we think you 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 section 3(2) of SI 371 of 1985 seems to suggest a discretion, but a closer reading of the section indicates to me that the suggestion is illusory.

The section reads as follows: . . .

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 285.

Thus, in the case of section 3(2), the labour relations officer has to determine whether the grounds of suspension

are proved or not proved.

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ROBINSON J

If they are proved, he must proceed in terms of sub-para (a); if they are not proved, he must proceed in terms of sub-para (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)."

I respectfully agree with McNALLY JA's obiter views, with which GUBBAY JA (as he then was) and KORSAH JA concurred, on the construction of s 3(2) of the Regulations and, accordingly, I approach both applications on the basis of that construction.

In the first application, first respondent found on appeal that the second, third and fourth respondents had participated in an illegal strike but did not cause a determination order to be served on the said respondents terminating their contracts of employment, instead, ordering the said respondents to be reinstated with benefits by applicant and to be given final warnings in writing.

Applicant is governed by and acted under the provisions of the Disciplinary Code in Schedule J of the Collective Bargaining Agreement: Mining Industry (General Conditions), (SI 152 of 1990) ("the Disciplinary Code"), which applicant adopted in terms of s 31 of SI 152 of 1990. (It is to be noted that 1A of SI 371 of 1985, an amendment which was introduced on 7 December 1990, provides that s 2 & 3 of SI 371 of 1985 shall not apply to employers to whom the provisions of an employment code of conduct registered in terms of s 3 of the Labour Relations (Employment Codes of Conduct) Regulations, 1990 apply. However, in neither application is applicant affected by s 1A.) Insofar as s 25(1) of SI 152 of 1990 makes it necessary for dismissal of employees to be processed in terms of regulations published under the Labour Relations Act, 1985, in particular, the Labour Relations (General Conditions of Employment)(Termination of Employment) Regulations 1985, it remains to consider whether the determination made on appeal by first respondent that second, third and fourth respondents had participated in an illegal strike is covered by s 3(1)(a) of SI 371 of 1985, in particular, whether the said respondents were guilty of "any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions" of their contracts of employment.

Section 120(3)(a)(i) of the Labour Relations Act provides that no collective job action may be engaged in by any employee if the employee concerned is engaged in an essential service, which includes mining, as is relevant to the

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present application. "Collective job action" is defined as meaning "an industrial action calculated to persuade or cause a party to an employment relationship to accede to a demand related to employment and includes a strike, boycott, lock-out, sit-in or sit-out or other such concerted action".

The Disciplinary Code makes unlawful job action (as explained therein) an offence warranting

summary suspension with application for dismissal (see s 5 of Part B and s 6 of Part C of Schedule J to SI 371 of 1985).

In the premises, in my view there can be no doubt that an employee who engaged in an illegal strike is, in terms of s 3(1)(a) of SI 371 of 1985, guilty of an act or conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment as referred to in s 8(1) of SI 152 of 1990.

Consequently, first respondent was obliged to give effect to s 3(2)(a) of SI 371 of 1985 and applicant is therefore entitled to an order setting aside the determination order of first respondent and to an order, with costs against first respondent, that the labour relations officer, Kadoma, be directed to serve a determination order on second, third and fourth respondents terminating their contracts of employment with applicant from 27 September 1990. It is so ordered.

In the case of the second application, in my view applicant is not entitled to the relief which it seeks against second respondent since first respondent did not find that second respondent had been guilty of "wilful disobedience to a lawful order given by the employer" in terms of s 3(1)(b) of SI 371 of 1985, his finding being that first respondent "was told to report to the office after he had finished his task and was under no obligation to do so since it was not an emergency".

The onus is on applicant to establish clearly that first respondent was guilty of wilful disobedience to a lawful order given by applicant and it is not for this court to seek to go behind first respondent's expressed finding. If applicant had wished to go into the merits of the finding, then it should have proceeded by way of appeal and not by way of review. Review is a special procedure and its limits are not to be exceeded as would be the case if this court were to enquire into the facts behind first respondent's determination to see whether it justified a finding of wilful disobedience to a lawful order given by applicant. Accordingly, it is not necessary for me to consider the criteria relating to "wilful disobedience" as discussed by Gubbay JA (as he

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then was) in the case of *Matereke v CT Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (SC), as applicable to second respondent's alleged wilful disobedience in this matter. Consequently, the second application is dismissed with costs.

Jarvis & Palframan, applicant's legal practitioners

Civil Division, Attorney-General's Office, first respondent's legal practitioner in both matters and second respondent's in second application

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D'ELIA & ANOR v COMMISSIONER OF POLICE 1991 (1) ZLR 290 (HC)

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Editors note:(3)

High Court, Harare

Smith J

Opposed motion

29 May & 12 June 1991

Flynote

Criminal Procedure and Evidence Act [Chapter 59] s 57E(1) - return of goods seized by police - right to lawfully possess the liquor.

Liquor Act 1984 s 94 - seizure of liquor - powers of forfeiture - s 117(4) - court order necessary - no provision rendering mere possession unlawful - s 101(1).

Costs - Criminal Procedure and Evidence Act [Chapter 59] s 57E(3) - no ousting of jurisdiction of High Court

Headnote

A stock of liquor was seized from the applicants after their liquor licence had expired. After their licence was renewed they sought the return of the liquor. The police claimed it had been forfeited to the State, after a deposit fine had been paid by the applicants, and subsequently sold. The applicants sued for the value of the liquor.

Held, since the mere possession of liquor is not unlawful, the liquor should have been returned to the applicants.

Held, costs in the High Court scale must follow as its jurisdiction had not been ousted.

Cases cited:

Datnis Motors (Midlands) (Pty) Ltd v Minister of Law and Order 1988 (1) SA 503 (N)

Minister of Law and Order & Anor v Datnis Motors (Midlands) (Pty) Ltd 1989 (1) SA 926 (A)

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A P de Bourbon SC for the applicants

D P Carter for the respondent

Judgment

Smith J: The applicants carry on the business of a licensed restaurant. Their liquor licence authorizing them to sell liquor at the restaurant expired on 30 June 1990 and was not renewed. On 12 October the police visited the restaurant, having been informed by the Liquor Licensing Board that the licence had expired, and seized all the liquor on the premises in terms of s 94 of the Liquor Act 1984 (No. 9 of 1984). The applicants were invited to pay a deposit fine of

\$100,00 which they paid on 19 October. The restaurant liquor licence was renewed on 25 October. On that day the applicants' legal practitioner wrote to the police demanding the return of the liquor which had been seized. The liquor was not returned as it had been declared forfeit and sold. Accordingly the applicants instituted this action claiming the return of the liquor or, alternatively, an amount of \$5 481,90, being the cost price of the liquor, with costs.

It was agreed that the seizure of the liquor was lawful. The dispute concerned the forfeiture thereof. Mr *de Bourbon* argued that liquor which has been seized in terms of s 94(2) of the Liquor Act 1984 can only be forfeited in terms of an order of court under s 117(4) of that Act. Section 117 of the Liquor Act 1984 creates offences and prescribes penalties and subs (4) provides that where a person is convicted of an offence in terms of the Act the court may, in addition to any penalty, order that any liquor in respect of which the offence has been committed be forfeited to the State. It is clear that a court order is necessary declaring the liquor to be forfeited to the State. However, in my opinion, the liquor, even though seized in terms of the Liquor Act 1984, may be dealt with in terms of s 57E of the Criminal Procedure and Evidence Act [Chapter 59]. That section provides that a police officer to whom an article seized in terms of any other enactment is delivered to be dealt with in terms of Part VI of the code shall, if it has not been disposed of or delivered to another in terms of para (a) or (b) of that section, give it a distinctive mark and retain it in police custody. Section 57F(1) provides that if, in connection with an article so retained, the accused admits his guilt and pays a deposit fine the article shall:

- "(i) if the person from whom it was seized may lawfully possess such article, be returned to that person; or
- (ii) if the person from whom it was seized may not lawfully possess the article, be delivered to the person who may lawfully possess it; or

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- (iii) if no person may lawfully possess the article or if the police officer concerned does not know of any person who may lawfully possess the article, be forfeited to the State."

Mr *de Bourbon* argued that the liquor seized from the applicants should have been returned to them in terms of para (i) of s 57F referred to above because they were entitled to possess the liquor, even though they were not at the time holders of a liquor licence. Mr *Carter*, on the other hand, argued that the liquor was rightfully forfeited to the State in terms of para (iii) of s 57F(1) referred to above and therefore the sale of the liquor by the State was legal. In support of his argument Mr *Carter* referred to the definition of "sell" in s2(1) of the Liquor Act 1984 which provides that that term includes "keeping or exposing for sale" and to s 102 which provides that evidence that an unlicensed person had on his premises more liquor than was reasonably required for persons residing thereon shall be *prima facie* proof of the sale of liquor by such person. He submitted that if the liquor were returned to the applicants before their liquor licence was renewed they would be presumed to have the liquor for the purposes of sale and therefore would be committing an offence.

As was pointed out in *Datnis Motors (Midlands) (Pty) Ltd v Minister of Law and Order* 1988 (1)

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SA 503 (N) and *Minister of Law and Order & Anor v Datnis Motors (Midlands) (Pty) Ltd* 1988 (1) SA 926 (A) in relation to the provisions in the South African legislation which are identical to s 57F(1) of the Code referred to above, s 57F is not very happily worded. At what stage are goods forfeited in terms of para (iii) thereof. As DIDCOTT J said at p 507 of the former case:

"Then we come to the problem most troublesome of all, that of forfeiture. Ignorance of or uncertainty about anyone by whom the article may lawfully be possessed is hardly an occurrence, something happening at a particular moment. At such it may end, to be sure, when the knowledge which terminates it is peradventure gained. But until then, during the period that counts for our purposes, it remains a condition lasting indefinitely. Forfeiture, by comparison, is an event, an axe that falls, whenever it does, at a definite time, once and for all. The condition and the event cannot be synchronised with each other, as the draftsman seems to have imagined. Nor, if in truth he did not, can one discern from his handiwork the stage in the duration of the condition, and of accompanying efforts to remedy it, at which the event was meant to occur, doing so much of its own accord and by its own impetus, not through the formal

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act of any functionary. The result is doubt on a large scale about the thrust of the section This is easily illustrated. Having learnt of the recovery by the police of something I had which was stolen, I hasten to them. I tender documentary proof, irrefutable proof, that it has always been mine and that I may lawfully possess it. Without qualms they accept the proof. To their regret, they inform me all the same, they may not return the thing to me. Because they were previously unaware of my connection with it, they explain, it has already been forfeited. They would undo the forfeiture straight away, they add, were that possible. But it is not. The forfeiture ensued from no decision on their part which they may rescind. It was the automatic consequence of their ignorance when this unquestionably existed. By now the thing is well and truly the property of the State, which they have no power to alienate, much as they would like to help me."

Fortunately, it is not necessary in this case to resolve the issue concerning the time of the forfeiture. The liquor was sold by the State on 23 and 25 October. The applicants paid a deposit fine on 19 October before the liquor was sold. Thereafter, could they lawfully possess the liquor? In my view they could have done so. There is no provision in the Liquor Act 1984 which renders the mere possession of liquor, as defined in that Act, unlawful. It makes it an offence for an unlicensed person to sell liquor or to keep or expose liquor for sale. The presumption in s 102 of that Act that evidence that an unlicensed person has on his premises more liquor than is reasonably required for the persons residing thereon is *prima facie* proof of the sale of liquor is rebuttable. Thus if a person with excess liquor on his premises establishes that he is catering for a party or wedding for his family or friends or that he is about to open a restaurant and anticipates obtaining a liquor licence, the presumption is rebutted. The fact that mere possession of liquor without holding a licence is not an offence is clearly demonstrated by s 101(1) of the Liquor Act 1984. That section provides that whenever a licence is declared to be forfeited or is cancelled it immediately becomes null and void but the holder of the licence may, within fourteen days thereof, sell by public auction the liquor on his licensed premises. Thus the Legislature has appreciated that where the holder of a licence loses it, because of forfeiture or cancellation, his ownership and right to possess the liquor are not affected and so special provision is made for him to sell the liquor by public auction even though he does not have a licence at the time of the sale. If that is the case where a licence is cancelled by the Liquor Licensing Board, the position as regards the ownership and right to possess liquor cannot be any different when the holder of a licence fails to renew it.

SMITH J

In the circumstances I consider that the liquor should have been returned to the applicants in terms of s 57F(1)(i) of the Criminal Procedure and Evidence [*Chapter 59*].

Mr *Carter* submitted that the applicants should have brought this action in the magistrates court under subs (3) and s 57F of the Code and therefore if costs were ordered against the respondent they should be awarded on the magistrates court scale. In terms of that section, however, the magistrate is restricted as to the compensation that he may award. Where the article concerned has been disposed of by the State, he must direct that the applicant be compensated by the State to the extent to which the State has been enriched by the disposal. Therefore, if the liquor was sold for less than its cost price, the applicants would not be entitled to receive an amount equal to the value, or cost price, of the liquor. It is anomalous that one's measure of damages should differ, depending on whether the action is brought in the magistrates court or the High Court. In my view subs (3) and s 57F of the Code confers special jurisdiction on the magistrates court. It does not oust the jurisdiction of the High Court to entertain an action such as the present one. It would suggest that consideration should be given to redrafting s 57F of the Code so as to remove the anomalies which have been referred to in this judgment.

It is ordered:

- 1) That the respondent pay the applicants the sum of \$5 481,90;
- 2) That the respondent pay the applicants' costs.

Nicholas Collins & Associates, applicant's legal practitioners

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

MADAN v MACEDO HEIRS & ANOR 1991 (1) ZLR 295 (SC)

Court Supreme Court, Harare

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

20 May & 14 June 1991

Flynote

Contract - offer and acceptance - need for communication of acceptance before agreement complete - vagueness - duty of court to interpret *ut res magis valent quam pereat* - pre - emptive right - terms - no need for purchase price to be stipulated - enforcement - holder may be permitted remedy of specific performance to secure delivery of property from subsequent purchaser with knowledge of his prior right - notice of - genuine

and reasonable belief that right does not exist renders purchaser invulnerable.

Headnote

The appellant was the tenant of property owned by the first respondent and had in October 1981, been offered a pre-emptive right to these terms "should your client make any competing offer which is equal to another's offer and that offer be acceptable, our client would have no objection to giving your client the right of first refusal". He did not respond to the offer but six years later, in October 1987, was offered the property for sale. He declined the offer but his attorneys added "we note that he has a right of first refusal in respect of any proposed sale and we would ask therefore that any serious offers you may receive be referred to us ...". The first respondent replied confirming "that the normal provisions of right of pre-emption/first refusal will apply". One year later the second respondent expressed an interest in purchasing the property and its agent was informed of the existence of a right of pre-emption and showed the original letter of offer. The agent formed the view that this letter did not constitute an agreement because of the lack of acceptance thereof and received advice confirming this view from the

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first respondent's attorney. During negotiations between the agent and the appellant concerning the early termination of the latter of his right of occupation the appellant made no mention of his claimed right. The agent was never shown the subsequent correspondence confirming a right of pre-emption. Thereafter an offer was made by the second respondent which was accepted by the first. A sale was concluded and the property transferred. The appellant then sought to enforce his pre-emptive right claiming transfer of the property from the second respondent.

Held, the original offer of a pre-emptive right gave rise to a contract in respect thereof until the time of the appellant's letter of October 1987 which constituted a manifestation of acceptance of the offer. Prior thereto there had been no communication of acceptance and therefore no agreement.

Held, the offer of a pre-emptive right ought not to be held void for vagueness. Where both parties intend to be, and believe they are bound, the court ought to interpret the agreement if possible so as to give it effect. The purchase price of a property need not be stipulated in a right of pre-emption.

Held, a holder of a pre-emptive right will be permitted to assert his right and to pursue its subject matter in the hands of a third party to whom it has been sold if the latter was aware of the right of pre-emption, subject to the court's discretion to refuse specific performance. *Associated South African Bakeries (Pty) Ltd v Oryx Vereinigte Backerien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) followed.

Held, the second respondent entertained a *bona fide* and reasonable belief that the offer of a pre-emptive right had never been accepted and that no such right had come into existence.

Cases cited:

Orion Investments (Pvt) Ltd v Ujaama Investments (Pvt) Ltd & Ors 1987 (1) ZLR 141 (SC); 1988

(1) SA 583 (ZS)

Robophone Facilities Ltd v Blank [1966] 3 All ER 128 (CA)

McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16

Levenstein v Levenstein 1955 SR 91; 1955 (3) SA 615 (SR)

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

Hoffman & Carvalho v Minister of Agriculture 1947 (2) SA 855 (T)

Soteriou v Retco Poyntons (Pty) Ltd 1985 (2) SA 922 (A)

Bowhay v Ward 1903 TS 772

Doll House Refreshments (Pty) Ltd v O'Shea & Ors 1957 (1) SA 345 (T)

Crossroads Properties (Pvt) Ltd v A1 Taxi Service Co (Pvt) Ltd 1954 SR 152; 1954 (4) SA 514 (SR)

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Hattingh v Van Rensburg 1964 (1) SA 578 (T)

Dithaba Platinum (Pty) Ltd v Erconovaal Ltd & Anor 1985 (4) SA 615 (T)

Caltex Oil SA Ltd v Waller 1968 (1) PH A 36 (D)

Wissekerke en 'n Ander v Wissekerke 1970 (2) SA 550 (A)

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168

Sher v Allen 1929 OPD 137

Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backerien (Pty) Ltd en Andere 1982 (3) 893 (A)

Hirschowitz v Moolman & Ors 1985 (3) SA 739 (A)

Owsianick v African Consolidated Theatres (Pty) Ltd 1967 (3) SA 310 (A)

Kazazis v Georgiades en Andere 1979 (3) SA 886 (T)

Reynders v Rand Bank Bpk 1978 (2) SA 630 (T)

E W W Morris for the appellant

M R D Stonier for the first respondent

M J Gillespie for the second respondent

Judgment

Gubbay CJ: The appellant made application on notice of motion to the High Court, claiming an order that, as against payment of the sum of \$850 000 and the necessary conveyancing charges, the second respondent transfer to him Stands 388, 389 and 390, Salisbury Township, hereinafter referred to as "the property". In effect what was sought was the enforcement of a right of pre-emption alleged to have been granted to the appellant by the first respondents ("the heirs") in respect of the property. The application was dismissed with costs.

In this court the main issues debated, and which fall for determination, are these:

- (1) Did the appellant ever communicate to the heirs an acceptance of the right of pre-emption offered him, as set out in the letter of 21 October 1981?
- (2) Notwithstanding such communication, was the right of pre-emption expressed in such vague and uncertain language as to justify the implication that the parties were not *ad idem*?
- (3) If the appellant did enjoy an enforceable right of pre-emption, was such right extinguished by his refusal to purchase the property when the heirs offered to sell it to him for \$850 000?

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- (4) If the right of pre-emption remained in existence at all material times, was the appellant entitled to obtain an order of enforcement in *forma specifica* against the second respondent?

The essential facts, insofar as they relate to the first three issues, are as follows:

On 1 September 1981 the appellant, with the consent of the heirs as owners and landlords, took cession of a written agreement of lease of the property, which had been entered into with one James Crawford the previous year. In terms of this lease, as later renewed in pursuance of a written agreement made by the appellant and the heirs, the appellant was entitled to remain in occupation of the property until 30 September 1990.

On 10 September 1981 the appellant's then legal practitioner, Ali Ebrahim, wrote to the legal practitioners acting for the heirs, indicating that his client wished to exercise an option to purchase the property. The reply of 21 October 1981 was to the effect that, although initially clause 27 of the lease granted an option to purchase, the right had been subsequently revoked by agreement with Crawford and the clause deleted. The letter went on to state:

"In the circumstances, there is no option. However, our client is quite prepared to say that should your client make any competing offer which is equal to another's offer and that offer be acceptable, our client would have no objection to giving your client the right of first refusal."

There was no response from the appellant. He regarded the letter of 21 October 1981 as actually granting him a pre-emptive right over the property, and consequently considered that

notification of an acceptance was unnecessary.

Mrs Catarina Macedo, who deposed to an affidavit on behalf of the heirs, also believed that the appellant enjoyed this pre-emptive right by virtue of the letter of 21 October 1981. In accordance with that view, early in October 1987 she instructed Vivian Gabriel, whose company, Gabriel Real Estate (Private) Limited, she had appointed in June 1983 to administer the property, to inform the appellant that she was offering the property for sale at \$850 000. Gabriel complied. On 6 October 1987 he wrote to the appellant:

"Please be advised that the owners of the above property, currently occupied by your goodself have instructed that (the) same be placed on open market.

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GUBBAY CJ

Accordingly, we wish to advise that the entire property (freehold right) is on offer at \$850 000 - as the sitting tenant we naturally wish to offer you the first opportunity to consider outright purchase. This offer will remain exclusively with you until 31st October 1987 and thereafter, the property will be placed on the open market."

The reply of 19 October 1987 from the appellant's present legal practitioners, Brighton & Cole Bowen reads, in relevant part:

"Our client is not prepared at this stage to take up your offer of purchase at \$850 000, but we note that he has a right of first refusal in respect of any proposed sale and we would ask therefore that any serious offers you may receive be referred to us on his behalf along with verification, of course, that they are genuine offers."

After noting that the appellant was not prepared to take up the offer to purchase, Gabriel wrote on 2 November 1987:

"We confirm that the normal provisions of right of pre-emption/first refusal will apply."

The learned judge *a quo* resolved the first issue in favour of the appellant. He expressed the view that, because it was assumed by both the appellant and the heirs that the right of pre-emption was in existence when Gabriel wrote the letter of 6 October 1987, it was not open to the heirs to maintain that no such right had been given.

It was Mr *Stonier's* submission, advanced on behalf of the heirs, that the letter of 21 October 1987 was to be construed as a counter-offer, which the appellant at no time accepted either expressly or by conduct; and that even if he intended to accept the offer, he had failed to communicate such acceptance to the heirs. He went on to submit that the fact that both the appellant and the heirs had misconstrued the letter of 21 October 1981, in that they regarded it as immediately conferring the right of pre-emption making acceptance unnecessary, did not dispense with the need for the appellant to notify his assent and so complete the agreement.

It seems to be beyond argument that the letter of 21 October 1981 contained a counter - offer. The appellant had sought an option to purchase the property. His request was refused, but in substitution, and as a counter, he was offered the right of pre-emption. Indeed, this much was conceded by Mr *Morris*, who

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GUBBAY CJ

appeared for the appellant. Consequently a mental acceptance on the appellant's part was insufficient. It was necessary for him to establish a conveyance of such acceptance to the heirs. See *Orion Investments (Pvt) Ltd v Ujaama Investments (Pvt) Ltd & Ors* 1987 (1) ZLR 141 (SC); 1988 (1) SA 583 (ZS) at 588A; *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 (CA) at 131I-132B. Even if he had decided in his own mind to accept, which he obviously did for he did not protest what he considered to be the grant of a most advantageous right, the agreement was incomplete.

The position was not one in which the letter of 21 October 1981 constituted a waiver of the requirement of communication, by indicating either expressly or impliedly that acceptance by silence - an uncommunicated acceptance - would suffice. See, for example *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 22. In short, for the appellant to succeed on this issue there had to be evidence of an external manifestation of assent; some word spoken or written, or act done by him or by his authorised agent, which the law could regard as the communication of an acceptance to the heirs or to their authorised agent.

It is in this connection that the letter of 19 October 1987 to the heirs' agent, Gabriel, assumes importance. Although written under the misapprehension that the right of pre-emption offered in the letter of 21 October 1981 did not require acceptance, the statement: "We note that he has a right of first refusal in respect of any proposed sale" constituted, so it seems to me, a clear manifestation of an acceptance by the appellant. If this is correct, as I believe it to be, then the reply by Gabriel of 2 November 1987 is of no particular significance. It simply confirms Gabriel's belief that the right of pre-emption became effective under the letter of 21 October 1981.

The second issue was not one argued before the learned judge. Nonetheless it was Mr *Stonier's* alternative contention that the contract of the right of pre-emption was expressed in such vague and uncertain language as to be unenforceable - in language which indicates that the parties were never truly in agreement. In particular, counsel stressed that, in the first place, the period of the duration of the right was undefined. Was the right to remain if the lease was renewed? Was it to survive a termination of the lease? Secondly, was it contemplated that the appellant would have the right of pre-emption in respect of every offer made to purchase the property?; or was such right to be confined to the first such offer? In other words, if the appellant were to decline to equal the offer of another, which was acceptable to the heirs, but for some valid reason the sale to the third party was cancelled,

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GUBBAY CJ

would the heirs be obliged to provide him with the opportunity of equalling any subsequent offer made?

The attack upon the terms of the offer of pre-emption falls within the second class of case mentioned by GUENET J (as he then was) in *Levenstein v Levenstein* 1955 SR 91 at 97; 1955 (3) SA 615 (SR) at 619 - uncertainty as to what the promisor has acknowledged as being his obligation.

In relation to questions of vagueness what is to be avoided is the making of a contract for the parties by going outside the words used and finding consensus *ad idem* by mere conjecture. See *Carthew-Gabriel v Fox & Carney (Pvt) Ltd* 1977 (2) RLR 152 (A) at 157E; 1978 (1) SA 598 (RA) at 600H. But balanced against this principle is the approach adopted by the courts, which is to seek reasons to uphold the contract rather than destroy it. The law is generally anxious, wherever possible, to sanction an intention by parties to be contractually bound. See *Hoffman and Carvalho v Minister of Agriculture* 1947 (2) SA 855 (T) at 860; *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) at 931G-I.

In the instant matter both the appellant and the heirs genuinely believed that the pre-emptive right existed. Thus, it is the duty of the court to construe the letter of 21 October 1981 broadly and fairly, without being over-astute in finding faults, or obstructive by raising legal subtleties.

The offer of the right of pre-emption was made to the appellant in his capacity as a tenant of the property. He had just taken cession of the terms of the lease from Crawford. In refusing the request of an option to purchase, it was pointed out in the letter of reply that initially such a right had been included in clause 27 of the lease, but later deleted. In this context it seems to me that the intention of the parties was that the pre-emptive right be substitutory and was to endure during the full running of the lease, while the relationship of landlord and tenant subsisted, unless, of course, the right had come into operation by the appellant being given the opportunity to exercise it. It would have been different if there had been no formal renewal of the lease and the appellant's continued occupation had been by virtue of a tacit relocation. See *Bowhay v Ward* 1903 TS 772 at 777 *in fine*-778; *Doll House Refreshments (Pty) Ltd v O'Shea & Ors* 1957 (1) SA 345 (T) at 351F-G.

Nor do I consider that there is merit in the second contention urged by Mr *Stonier*, for it is based, in my view, upon a misconception.

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GUBBAY CJ

A pre-emptive right affords the grantee the opportunity to purchase the subject-matter of the right at the price offered by a third party which is acceptable to the grantor. As soon as a genuine offer to purchase is made the right of pre-emption comes into operation, with the consequence that the agreement which gave rise to it is converted into an option to purchase. If the grantee then exercises his right to purchase, a contract of sale is concluded. If he decides not to purchase, then the grantor has fulfilled his obligation and is free to conclude a sale with the third party offeror. If on any valid ground the grantor is obliged to cancel the sale the right of pre-emption does not revive, save where the pre-emptive agreement stipulates otherwise.

The letter of 21 October 1981 contained a price which is ascertainable, namely, the **right to purchase at a price equal to that offered by another**. See *Crossroads Properties (Pvt) Ltd v A1 Taxi Service Company (Pvt) Ltd* 1954 SR 152 at 153; 1954 (4) SA 514 (SR) at 515; *Hattingh v Van Rensburg* 1964 (1) SA 578 (T); *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd & Anor* 1985 (4) SA 615 (T) at 623E-H.

There was thus no question of the appellant and the heirs having to agree upon the purchase

price of the property.

Finally, I would point out that the omission to fix a definite period, after the notification by the heirs of the receipt of any offer to purchase, within which the pre-emptive right was to be exercised, is not fatal to its enforceability. It is implicit that the right is exercisable within a reasonable time. See *Caltex Oil SA Ltd v Waller* 1968 (1) PH A 36 (D); *Wissekerke en 'n Ander v Wissekerke* 1970 (2) SA 550 (A) at 559 and 560.

In respect of the third issue the learned judge expressed the view that the letter of 6 October 1987 fulfilled the undertaking of the heirs in the letter of 21 October 1981. It offered the appellant the opportunity to purchase the property at \$850 000 and, as he had rejected that offer, there was no obligation upon the heirs to address any further offer to him.

Mr *Stonier* did not seek to support this reasoning. He was constrained to concede that the offer contained in the letter of 6 October 1987 fell outside the terms of the pre-emptive right expressed in the letter of 21 October 1981. I agree entirely with this concession. The letter of 6 October 1987 did not state that the heirs had received an offer from "another" to purchase the property at \$850 000. All it indicated was that they were prepared to accept \$850 000 for the property and that if the appellant wished to meet their price

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they would sell the property to him; otherwise it was intended to place the property on the open market at that price.

It seems to me with respect that the learned judge overlooked the importance attaching to the phrase "equal to another's offer". In *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 INNES CJ dealt with the juridical nature of a right of pre-emption. He said at 188:

"Now a contract not to sell to a third person without giving the other contracting party an opportunity of purchasing at the price offered as analogous to a *jus retractus* or contractual right of *naasting* (*Schorer*, Note 380; *Voet*, 18.3, sec.10). Such an agreement being in restraint of alienation is narrowly construed; and, according to *Voet*, does not prevent the owner from freely disposing of the subject matter by way of gift or testamentary disposition. And, of course, it can only operate if and when the owner is willing to sell **and has received an outside offer**". (The emphasis is mine.)

See also *Sher v Allan* 1929 OPD 137 at 142; the *Crossroads* case *supra* at 153.

In order to guard against the contingency that he had wrongly decided the third issue, the learned judge wisely proceeded to determine whether the appellant was entitled to the grant of an order for specific performance against the second respondent. After a careful analysis of the pertinent undisputed facts, he came to the conclusion that such relief was to be refused on the ground that, when concluding the contract of purchase of the property with the heirs, as well as at the time of transfer, the second respondent genuinely believed that there was no foundation for the appellant's claim that he held a pre-emptive right.

It was common cause between Mr *Morris* and Mr *Gillespie*, for the second respondent, that the grant of specific performance is a competent remedy against a third party purchaser to enforce

a pre-emptive right, subject, of course, to the discretion reposed in the court to refuse it. Reliance was placed by both counsel on *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backerijen (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 907E; *Hirschowitz v Moolman & Ors* 1985 (3) SA 739(A at 762C-E; *Dithaba Platinum v Erconovaal Ltd & Anor, supra*, at 627C-E.

I can perceive of no basis not to follow the persuasive reasoning in the decisions cited above. I do so in preference to the earlier view expressed in

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Owsianick v African Consolidated Theatres (Pty) Ltd 1967 (3) SA 310 (A) at 323E, that the pre-emptive right only gives rise to a claim for an interdict to restrain a proposed sale, in appropriate circumstances, or for damages in the event of a sale in breach of such right.

The holder of a right of pre-emption will only be permitted to assert his right and pursue its subject-matter in the hands of a third party to whom it has been delivered, if the facts disclose that the latter was aware of the existence of the right of pre-emption. See the *ASA Bakeries* case, *supra*, at 908D. This enquiry involves what is termed "the doctrine of notice".

In *Kazazis v Georgiades en Andere* 1979 (3) SA 886 (T), SPOELSTRA AJ (as he then was), differing from *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T) at 637H, opined that it is unnecessary for the operation of the doctrine of notice:

"...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 is aware of the existing rights and the fact that he, despite that knowledge, continues to enforce his own rights by which the earlier rights are defeated or infringed upon, is regarded as a species of fraud upon the party holding the earlier rights" (at 893G, in translation).

VAN HEERDEN AJA (as he then was) in the *ASA Bakeries* case, *supra*, at 910E-H and 911A, approved of this view. He observed that the characterisation of the doctrine of notice as a species of fraud is merely a fiction employed to provide it with theoretical support. It does not require *mala fides* for its operation - only that the third party acted with knowledge of the prior right of another, or wilfully closed his eyes to it. But to act contrary to a right known to be claimed in the genuine and reasonable belief that such right never existed, or had ceased to exist, will not make the third party purchaser vulnerable. See *Kazazis v Georgiades, supra*, at 894D.

The factual situation to which this principle is applicable, is this:

On 16 September 1988 George Stuart, a property negotiator in the employ of the firm Richard Ellis Estate Agents, received instructions from the second respondent to act as its agent in negotiations to purchase the property. He duly contacted Mrs Macedo and was advised that the heirs were prepared to sell the property for \$850 000, but that the appellant was entitled to remain in occupation under a renewal of the lease until 30 September 1990. No mention was made at this stage that he was the holder of a pre-emptive right.

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A written enquiry made of Gabriel as to whether the appellant had an option to purchase the property or a right to further renew the lease, revealed that he had neither; simply, as expressed by Gabriel in his reply of 3 October 1988, "the right of first refusal during the currency of the lease." Two weeks later Gabriel despatched to Stuart a photocopy of the letter of 21 October 1981, but not those of 10 September 1981, 19 October 1987 and 2 November 1987. (It was after the motion proceedings had been instituted that Stuart and the second respondent's representative, Mr John Deary, first became aware of this existence). The reason for Mr Gabriel's omission to forward these three letters is plain. He did not regard them as in any way relevant to the existence of a right of pre-emption. To him an acceptance by the appellant of what was offered in the letter of 21 October 1981 was not required. In his own words:

"I forwarded to Messrs Richard Ellis copies of the lease agreement, cession and addendum as well as a copy of Annexure B (the letter of 21 October 1981) **in terms of which the right of first refusal was first granted.**" (Emphasis supplied.)

In this way Gabriel inadvertently misled Stuart and the second respondent into believing that the appellant's claim to be the holder of a right of pre-emption was grounded entirely upon an interpretation of the letter of 21 October 1981, and that there had been no external manifestation of assent on the appellant's part.

On 18 October 1988 Stuart, who by this time was aware that the appellant had previously declined an offer to purchase the property for \$850 000, informed the appellant that he was acting for an unnamed principal who was considering its purchase. He enquired whether he would agree to an early termination of the lease. The appellant suggested that a financial approach be made to him. He did not mention that he held a right of pre-emption over the property. Nor did Stuart disclose that he had been in contact with Gabriel about it. Subsequently, an offer to pay \$100 000 was rejected, and on 1 November 1988 the appellant informed Stuart that he was prepared to vacate the property at the end of February or March 1989 in return for payment of \$300 000.

In his letter of 28 October 1988 Stuart sought advice from Ali Ebrahim, who was then acting on behalf of the heirs, as to whether there was any evidence that the appellant had accepted the offer of a pre-emptive right. He correctly interpreted the letter of 21 October 1981 as not having created such a right. A few days later Ebrahim, having perused his file, confirmed telephonically

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(and later in writing) that the appellant had not accepted the offer contained in the letter of 21 October 1981. Obviously Ebrahim had no knowledge of the letter of 19 October 1987 written to Gabriel by the appellant's present legal practitioners.

On 3 November 1988 Stuart, on behalf of the second respondent, addressed an offer of \$850 000 for the purchase of the property to Mrs Macedo. The offer was accepted and on 28

November 1988, a written agreement of sale was signed by the parties. Transfer of the property was registered in the name of the second respondent on 20 December 1988. Two weeks later the appellant learned of this.

On 6 January 1989 the appellant complained to Stuart that he had not received a response to his counter-offer that the second respondent pay him \$300 000 for an early vacation of the property. He also advised that he had ascertained that the property had been transferred to the second respondent and that such action was in breach of his right of first refusal. This was the first occasion that he asserted to Stuart that he held such a right. Shortly after this conversation the appellant was informed that the second respondent had rejected his counter-offer and that negotiations were at an end.

Stuart deposed that Mrs Macedo did not raise with him that the appellant held a pre-emptive right. She, on the other hand, was certain of having told Stuart that she believed the appellant had the right to be offered the property first, in accordance with certain correspondence "going back several years", presently in the possession of Gabriel. Accepting her recollection as the more accurate, her reliance on what could only have been the letter of 21 October 1981 (for this was one of the early letters she had sent to Gabriel on his appointment as agent for the heirs) would only have caused Stuart to correctly conclude that she, as well as Gabriel, were misconstruing its legal effect.

This summation of what transpired between the parties prior to the date on which transfer of the property was affected, leaves me in no doubt that the appellant failed to show that the second respondent knew him to be the holder of a valid and current right of pre-emption. I would go further and say that I am satisfied that the second respondent positively proved that it entertained a bona fide and reasonable belief that the right offered in the letter of 21 October 1981 had never been accepted; and that Gabriel and Mrs Macedo were wrong in thinking that acceptance in some form or other was unnecessary to bring the right into existence. As pertinently stressed by Deary in his opposing affidavit:

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"This letter did not seem to me to be enough to establish that the applicant had a right of first refusal."

Whether the position would have been different if Gabriel had sent the second respondent a copy of the letter of 19 October 1987, need not be considered.

Moreover, Stuart received an assurance from the heirs' legal practitioner that as far as he was concerned the appellant had not accepted the offer of a pre-emptive right in respect of the property: And the appellant refrained during the negotiations with Stuart from making any mention of it.

For these reasons it seems to me that the court *a quo* was correct in refusing to make an order for specific performance against the second respondent.

I turn to the question of costs: The first and second issues, which were contested between the appellant and the heirs, have been resolved in favour of the appellant. The third issue was

ultimately conceded in the appellant's favour, through not in the heads of argument prepared by Mr *Stonier* on behalf of the heirs.

The fourth issue was the subject of much debate between the appellant and the second respondent and the submissions advanced on the latter's behalf by Mr *Gillespie* have prevailed. In consequence the appellant must be ordered to pay the second respondent's costs.

I think that a special order should be made with regard to the costs incurred by the appellant and the heirs. Notwithstanding that the appellant had failed in his bid to obtain an order for specific performance, the resistance by the heirs to his claim that he enjoyed an enforceable right of pre-emption, protracted the hearing of the appeal, in my estimation, by about one-third of its duration. It is just and appropriate, therefore, that the heirs be ordered to pay one-third of the appellant's costs.

I am not, however, inclined to disturb the discretion exercised by the learned judge in ordering the payment of costs as he did. No argument that a special order be made against the heirs was addressed to him, and such an alteration to the existing order is not even prayed for, in the alternative, in the notice of appeal.

Lastly, Mr *Morris* requested that this court issue a *declaratur* that at all

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relevant times the appellant was the holder of an enforceable right of pre-emption over the property. Although on the papers this court has come to that view, the heirs may have available to them certain defences, which were not raised because the appellant was not disposed to seek, in the alternative, any effective relief against them. The possibility, albeit remote, of prejudice being caused the heirs in future proceedings, by the issue of such a declaration, is to be avoided. The application is therefore refused.

In the result it is ordered as follows:

1. The appeal is dismissed;
2. The appellant is to pay the second respondent's costs.
3. The first respondent is to pay one - third of the appellant's costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Byron Venturas & Partners, first respondent's legal practitioners

Atherstone & Cook, second respondent's legal practitioners

IMF MANAGEMENT SERVICES (PVT) LTD v SICOM SPA (ZIMBABWE) LTD 1991 (1) ZLR 309 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

4 June & 24 June 1991

Flynote

Civil procedure - barring - whether available for failure to respond to request for further particulars - further particulars - whether a pleading - pleadings - nature of.

Legislation - High Court - High Court of Zimbabwe Act 1981 - High Court Rules, Rule 80.

Headnote

A pleading is a document which contains distinct averments or denials of averments. Further particulars, when filed, form part of the pleading in respect of which they are provided but neither the particulars themselves nor the request therefor constitute a pleading in their own right. A party faced with failure by its opponent to respond to a request for further particulars does not have available to it the procedure of barring the defaulter but must move the court for an order to compel the delivery of the particulars.

Cases cited:

Dinath v Du Toit NO: Singh v du Toit NO 1969 (4) SA 165 (N)

Jeramsingh v Prestige Homes 1975 (2) SA 704 (N)

Marley Floor Tile Co (SA) (Pty) Ltd v Geldenhuys 1967 (3) SA 585 (GW)

Schooling v Profile Enterprises Ltd 1971 (1) SA 555 (O)

Ex Parte Vally: In re Bhoolay v Netherlands Insurance Co of LSA Ltd & Anor 1972 (1) SA 184 (W)

Swart v Flugel 1978 (3) SA 265 (E)

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Shatterprufe Safety Glass Co (Pty) Ltd v Northern Hardware & Glass (Pty) Ltd & Ors 1983 (4) SA 26 (T)

Advanced Idea Mechanics (Pty) Ltd v Tiffany's Confectionery (Pty) Ltd 1985 (4) SA 444 (W)

Nangle & Anor v Aronowitz 1949 SR 47; 1949 (2) SA 713 (SR)

Luttig v Jacobs 1951 (4) SA 563 (O)

Banks v Hartford 1953 (1) SA 165 (C)

MacDonald, Foreman & Co Ltd v Van Aswegan & Anor 1963 (4) SA 735 (O)

J S Sayce for the appellant

M J Gillespie for the respondent

Judgment

Gubbay CJ: This is an appeal, consequent upon the grant of leave, against a decision of the High Court (ADAM J) in which it was held that the respondent (the plaintiff in the main action, Case No. HC 3517/88) was entitled to serve a notice of intention to bar on the appellant (the defendant) and thereafter impose the bar, in the absence of any response from the appellant to the request for further particulars to its claim in reconvention. Having so ruled, the learned judge, exercising his discretion in favour of the appellant, granted the alternative relief sought by it. He ordered that:

- (i) the bar be uplifted and that the appellant furnish the further particulars requested within four days, failing which it would be automatically barred; and,
- (ii) the appellant pay the costs of the application.

The dispute, culminating in the appeal, arose in this way:

On 26 August 1988 the respondent instituted an action against the appellant with the service of a specially endorsed summons. After giving the appellant several reminders that its plea was overdue, the respondent delivered a notice of intention to bar on 21 March 1989. Only then did the appellant react with the filing, on 30 March 1989, of a plea and claim in reconvention. On 14 April 1989 the respondent served a request for further particulars to the claim in reconvention, and on 2 May 1989 sought a prompt reply. On 22 May 1989 the appellant intimated that within the next day or two it expected to be in possession of the information necessary to enable it to answer the request. The respondent waited in vain and ultimately, on 2 June 1989, having lost all patience, gave notice of intention to bar in respect of the failure to furnish the further particulars. Even that threat did not evoke a response, so on 9 June 1989 a copy of the notice was filed with the Registrar of the High Court.

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Three weeks later the appellant queried with the respondent the validity of the bar, and on 3 July 1989 wrote informing the Registrar that it was now in a position to provide the further particulars and that in its opinion the notice of intention to bar, and the subsequent bar, were

invalid. As this contention was strenuously resisted by the respondent, the appellant instituted notice of motion proceedings, seeking a *declaratur* in its favour, failing which an order uplifting the bar.

Order 12 of the High Court of Zimbabwe Rules, 1971, sets out the "Procedure for Barring". Rule 80 thereof provides:

"A party shall be entitled to give four days' notice of intention to bar to any other party to the action who has failed to file any pleading or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No. 9 at the address for service of the party in default."

It was upon this Rule that the respondent grounded its right to serve a Form No. 9 notice upon the appellant. It accepted that it was only entitled to do so if the outstanding particulars requested of the appellant constituted a "pleading". If they did not, then *cadit quaestio*.

In answering the question posed in the affirmative, ADAM J relied on the decisions of the Natal Provincial Division in *Dinath v Du Toit* NO 1969 (4) SA 165 (N); and *Jeramsingh v Prestige Homes* 1975 (2) SA 704 (N).

In the former case HARCOURT J reasoned that a request for further particulars is a pleading within the meaning of the wide generic term "any pleading" in Rule 26 of the Uniform Rules of the Supreme Court of South Africa, 1965, (failure to deliver pleadings and barring) and therefore that rule operates to require that a notice to bar be delivered before a party loses his right to request further particulars (see at 167D-168D). One of the points made was that, while Rule 21(2) (request and delivery of particulars and signatures thereto) might be semantically capable of the construction that the request does not form part of the pleadings until there is a reply, this gives rise to an awkwardness of consequence and a refinement concept which should not be imputed to the framers of the Uniform Rules. In the *Jeramsingh* case HOWARD J (as he then was) was more diffident. Presiding alone, he felt constrained to follow the *Dinath* judgment as he was not satisfied that it was incorrect, but stressed that he would not necessarily have arrived at the same conclusion. At 705C the learned judge interpreted it as deciding that:

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"... a request for further particulars is not a pleading in the true sense of the word, but simply that it should be regarded as such for the purposes of the proviso to Rule 26."

These two judgments run counter to several others, which hold that neither a request for further particulars nor the reply thereto constitute a pleading for the purpose of Rule 26. See *Marley Floor Tile Co (SA) (Pty) Ltd v Geldenhuys* 1967 (3) SA 585 (GW) at 587G-H; *Schooling v Profile Enterprises Ltd* 1971 (1) SA 555 (O) at 556 A-H; *Ex parte Vally: in re Bhoolay v Netherlands Insurance Co of SA Ltd & Anor* 1972 (1) SA 184 (W) at 185E-186A; *Swart v Flugel* 1978 (3) SA 265 (E) at 266D-H; *Shatterprufe Safety Glass Co (Pty) Ltd v Northern Hardware & Glass (Pty) Ltd & Ors* 1983 (4) SA 26 (T) at 28A-E; *Advanced Idea Mechanics (Pty) Ltd v Tiffany's Confectionery (Pty) Ltd* 1985 (4) SA 444 (W) at 445C-446C.

The rationale for this review, gleaned from the authorities cited above, may be stated as follows:

1. There is no definition of "pleading" in the Uniform Rules. Linguistically, a pleading is understood to be a document which contains distinct averments or denials of averments. The function of a request is merely to require information from the other party and not to assert or deny anything.
2. Rule 26 deals with the delivery of pleadings and not with other notices or notices requesting particulars (see Rule 21(2)(a)).
3. Rule 18(1) emphasises the fact that every pleading must be signed by counsel and the attorney. However, Rule 21(2)(b) sets out that a request for further particulars must be signed - save, of course, where a party appears in person - by counsel and the attorney. This latter provision would be unnecessary if a request for further particulars is a pleading.
4. It is difficult to understand what benefits a party who has asked for particulars can obtain from barring the other party for failing to comply with the request. The basic function of seeking further particulars is to complete the picture with information sufficiently detailed to put the party making the request on his guard as to the case he has to meet and enable him to plead to it. The mere fact that he is able to place on record a bald denial of the allegations made is no ground for refusing further particulars. To bar a party from furnishing further particulars would in the circumstances, work rather to the detriment of the party who had made the request.

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5. Rule 21(6) provides that a party who fails to furnish particulars either timeously or sufficiently lays himself open to an application for an order for their delivery, or for the dismissal of the action, or the striking out of the defence, as the court deems just. Thus, where the framers of the Uniform Rules have afforded a specific remedy for this type of default, it would seem unreasonable to construe the procedure of barring for failure to deliver a pleading as applicable to further particulars.

These features, save for the third, are apposite and, being supported by the weight of respectable authority, persuasive in a determination of the present issue. Moreover, differences exist in the relevant Rules of the High Court which, in my opinion, make the position, that there is no entitlement to serve notice of intention to bar upon a failure to provide further particulars, even clearer than it is under the Uniform Rules.

Rule 80, unlike its South African equivalent, Rule 26, expressly provides that not only the failure to file any pleading will entitle a party to give notice of intention to bar, but failure to file a "request for further particulars" will do so as well. If, therefore, the framers of these Rules had considered that such a request is in the nature of a "pleading", it would have been unnecessary to have added the words "or a request for further particulars". Their presence points indubitably to an intention to distinguish between a "pleading" and a "request for further particulars".

Rule 30 also lays down the requirement that the form of relief specified may only be sought

where the other party "has failed to file ... within the time prescribed in these rules". An examination of the Rules as a whole, and in particular Order 21 which deals, *inter alia*, with "Applications for Particulars", reveals that nowhere is any time limit prescribed for the delivery of particulars prior to the close of pleadings. (Compare Rule 21(2)(a) of the Uniform Rules.) Significantly, under Rule 143 it is only in relation to particulars after the close of pleadings that a time limit for their delivery is set. This variance in the Rules must be taken as purposeful and affords the strongest indication that the relief under Rule 80 is not applicable; and that the procedure to be adopted by the offended party is to move the court in terms of Rule 141(b) for an order to compel the delivery of particulars.

Although there is no specific provision in the Rules, such as that contained in Rule 21(2)(a) of the Uniform Rules, that once particulars are filed they form part of the pleadings, they undoubtedly do so. See *Nangle & Anor v Aronowitz* 1949 SR 47 at 51; 1949 (2) SA 713 (SR) at 717; and pre-dating the

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Uniform Rules, *Luttig v Jacobs* 1951 (4) SA 563 (O) at 566B; *Banks v Hartford* 1953 (1) SA 165 (C) at 167B; *MacDonald, Foreman & Co Ltd v Van Aswegan & Anor* 1963 (4) SA 735 (O) at 737A. I would emphasise, however, that recognition of this principle does not mean that particulars when furnished constitute a pleading. They merely serve to amplify the pleading they relate to. They become part of and additional to an extant pleading and do not exist as a pleading in their own right.

Notwithstanding the frustration caused it by the appellant's inordinate delay in furnishing the particulars, I entertain no doubt that the respondent adopted the wrong procedure and that the learned judge ought to have set aside the bar as invalid.

In the result, I would allow the appeal with costs and alter the order of the court *a quo* to read:

- "1. It is declared that the notice of intention to bar in respect of the applicant's further particulars in Case No. HC 3517/88 and the bar imposed thereafter on 9 June 1989, are invalid;
2. The respondent is to pay the costs of this application."

McNally JA: I agree.

Korsah JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

1991 (1) ZLR p315

MACAPE (PTY) LTD v EXECUTRIX ESTATE FORRESTER 1991 (1) ZLR 315 (SC)

Court **Supreme Court, Harare**

Annotations [Link to Case Annotations](#)

McNally JA, Manyarara JA & Korsah JA

Civil appeal

16 May & 24 June 1991

Flynote

Contract - illegality - contravention of exchange control legislation - underlying debt not unlawful so contract enforceable.

Exchange Control Regulations 1977 - s 7(1) - s 8(1)(a) - s 12 - meaning and effect.

Costs - legal practitioner and client scale in terms of agreement - includes costs of appeal.

Headnote

The appellant sued the late defendant for recovery of a debt. It was argued, and accepted by the court below, that the debt and the acknowledgement of that debt, were illegal under the Exchange Control Regulations 1977. On appeal -

Held, the debt did not contravene any provision of the Exchange Control Regulations 1977, and a court could grant judgment even if eventual payment of the judgment required the permission of the Reserve Bank of Zimbabwe.

Held, since the acknowledgement of debt provided for costs to be on the 'attorney and client' scale, that agreement must include costs of any appeal. Accordingly, costs on that higher scale awarded in both courts.

Cases cited:

Karjieker v Karjieker 1978 (2) SA 499 (C)

Ornelas v Andrew's Cafe & Anor 1980 (1) SA 378 (W)

Barclays National Bank Ltd v Thompson 1985 (3) SA 778 (A)

Moolman v Marba Construction (Pty) Ltd 1982 (2) SA 223 (C)

1991 (1) ZLR p316

McNALLY JA

Pasaya v Interspace (Pvt) Ltd S-143-90 (not reported)

C W Jordaan for the appellant

J B Colegrave for the respondent

Judgment

McNally JA: The appellant was the plaintiff in the court below. I will refer to it as "Macape". It is a South African company. It sued Michael Forrester, a Zimbabwean, for payment of \$30 000 and other relief. Mr Forrester denied liability and made a claim in reconvention for \$30 000. He died before the case was heard but after the joinder of issue, and his widow, the executrix of his estate, was duly substituted as defendant. I will refer to the estate as "the defendant".

Both parties failed in the High Court and only Macape appealed. We are no longer concerned with the claim in reconvention.

Macape's claim was in terms of an acknowledgement of debt for Mr Forrester. Although this acknowledgement of debt was never apparently signed by Mr Forrester, it was not eventually disputed that it reflected the terms of an oral agreement reached between Mrs Forrester, acting for her husband, and a Mr Tuck, legal representative of Macape.

The only issue now between the parties is whether that agreement is lawful and enforceable. The defence contention, which was upheld in the High Court, was set out in the plea as follows:

- "5. Alternatively, and in any event, if the agreement was entered into as particularised in the Particulars of Claim then such agreement was void *ab initio* in that it contravened Section 7(1) or Section 9(1)(a) or both or Section 12 of the Exchange Control Regulations, 1977 ..."

The court *a quo* concluded that the contract was "tainted with illegality". The claim was dismissed with costs.

We are concerned therefore with the effect on the contract of ss 7(1), 8(a)(a) and 12 of the Exchange Control Regulations, 1977. I propose to deal with them in reverse order, because the latter two are more easily disposed of than the first.

However, before considering the law, a brief resume of the facts is necessary. These facts are broadly common cause.

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McNALLY JA

In 1982 two of the Forresters' sons were in Bloemfontein, South Africa. Mr Forrester was visiting them when he came across what seemed like a good business opportunity. He caused a company to be formed in South Africa, which was called Franz (Pty) Ltd, after one of his sons. He persuaded a Mr Feek, a Johannesburg accountant, to invest R30 000 in the company, which was done in fact by a company controlled by Mr Feek called Macape (Pty) Ltd, the present appellant.

Franz (Pty) Ltd did not prosper and soon the parties were at loggerheads. Mr Feek wanted his (company's) money back. The learned judge *a quo* seems to have assumed that Mr Feek had invested his money in shares in Franz (Pty) Ltd But the evidence is quite clear that Macape lent the money to Franz (Pty) Ltd In fact its loan account grew bigger as more money was lent, and the amount was eventually more than R60 000.

Finally it seems that Mr Forrester, under considerable pressure from Mr Feek, agreed personally to repay Macape in Zimbabwe. An agreement was reached whereby repayments would be made in instalments to a company called Keay Woan & Co in Bulawayo, which would receive the money on behalf of Macape.

One gains an impression that some of the evidence in this matter may not be before the court. It is not easy to understand why Mr Forrester should have personally accepted responsibility for the loan account of Franz (Pty) Ltd. It may be that he gave a personal guarantee, but if he did the guarantee is not before us. Such a guarantee would have been an infringement of s 8(1)(a)(ii) of the Exchange Control Regulations 1977, which reads:

"Subject to the provisions of subsection (2), unless otherwise authorised by the Minister -

- (a) No Zimbabwean resident shall do any act which involves or is in association with -
 - (i) . . .
 - (ii) the incurring of any obligation to make any payment outside Zimbabwe."

On the other hand, he may have accepted the debt as a moral obligation, or there may have been other pressures on him of which we are not aware. I do not think we can speculate on matters not in evidence. We must look at the facts as presented before the court. We must decide whether the agreement

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McNALLY JA

by a Zimbabwean resident, who is to hold that money on behalf of a foreign resident, is legal or unenforceable.

It is convenient to begin by considering s 12 of the Exchange Control Regulations. It reads:

"12. Unless otherwise authorised by the Minister, no Zimbabwean resident shall -

- (a) acquire from any person, wherever resident -
 - (i) any security on which capital moneys, dividends or interest are payable or expressed to be payable in foreign currency or in respect of which the holder has an option to require payment of any such capital moneys, dividends or interest in foreign currency; or
 - (ii) any coupon relating to a security referred to in subparagraph (i);

or

- (b) sell, transfer or otherwise dispose of to a foreign resident -
 - (i) any security on which capital moneys, dividends or interest are payable or expressed to be payable in foreign currency or in respect of which the holder has an option to require payment of any such capital moneys, dividends or interest in foreign currency; or
 - (ii) any coupon relating to a security referred to in subparagraph (i);

or

- (c) do any act which involves, is in association with or is preparatory to, the making of any transaction which is prohibited by paragraph (a) or (b)."

I must say that I think there is substance in Mr *Jordaan's* point that if (and there is no evidence) Mr Forrester took up shares in Franz (Pty) Ltd, that would have been a transaction involving him and that company. It would have no bearing on the agreement relied upon by Macape.

In any event, as Mr *Jordaan* also pointed out, the court *a quo* did not rely ultimately on s 12 but on s 7. It is unnecessary to dwell further on s 12.

The court *a quo* also, and with respect correctly, did not rely on s 8, which reads:

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McNALLY JA

"8. (1) Subject to the provisions of subsection (2), unless otherwise authorised by the Minister -

- (a) no Zimbabwean resident shall do any act which involves or is in association with -
 - (i) the making of any payment outside Zimbabwe; or
 - (ii) the incurring of any obligation to make any payment outside Zimbabwe;
- (b) no foreign resident carrying on any trade, business or other gainful occupation or activity in Zimbabwe shall do any act which involves or is in association with -
 - (i) the making of any payment outside Zimbabwe; or
 - (ii) the incurring of any obligation to make any payment outside Zimbabwe;

in respect of the trade, business or other gainful occupation or activity carried on by him in Zimbabwe.

(2) The provisions of subsection (1) shall not apply in relation to any act which -

- (a) is done by a Zimbabwean resident who is an individual; and
- (b) relates to any payment from money which -
 - (i) is lawfully held by him outside Zimbabwe; and
 - (ii) is available to him at the time of the act concerned; and
 - (iii) was acquired by him otherwise than by way of the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe."

This case is not about the making of payments outside Zimbabwe. It is about the making of payments in Bulawayo.

The real issue is s 7 of the Exchange Control Regulations. That section reads:

"7. (1) Unless otherwise authorised by the Minister, no person shall, in Zimbabwe -

- (a) make any payment to or for the credit of a foreign resident; or
- (b) make any payment to or for the credit of a Zimbabwean resident by order or on behalf of a foreign

resident; or

- (c) place any sum to the credit of a foreign resident:

Provided that where a foreign resident has paid a sum in or towards the satisfaction of a debt due by him, the provisions of this paragraph shall not prohibit the acknowledgement of recording of such payment.

1991 (1) ZLR p320

McNALLY JA

(2) Unless otherwise authorised by the Minister, a Zimbabwean resident who owns any property, whether movable or immovable, outside Zimbabwe, shall not sell, lease or hire such property to a Zimbabwean resident.

(3) Unless otherwise authorised by the Minister, no person shall, in Zimbabwe, accept payment from any person for or in respect of services which are to be provided outside Zimbabwe by another person."

The essential point to be noted is that there is a clear difference between ss 7 and 8. The former proscribes only the actual payment. The latter proscribes both the payment and the underlying agreement to pay.

In other words, when one is concerned with payments **inside** Zimbabwe it is perfectly lawful to enter into the agreement to pay. But, without authority from the Reserve Bank, the actual payment may not be made. By contrast, when dealing with payments outside Zimbabwe, it is unlawful even to enter into the agreement to pay, without first obtaining the authority of the Minister, whose powers have been delegated to the Reserve Bank.

This fundamental distinction between the two sections was not appreciated in the court *a quo*. It is a distinction which, to my mind, is clearly apparent on an ordinary grammatical construction of the two sections. If a precedent is necessary, it may be found in the two cases cited by Mr Jordaan, namely *Karjieker v Karjieker* 1978 (2) SA 499 (C) at 503 and *Ornelas v Andrew's Cafe & Anor* 1980 (1) SA 378 (W) at 392E. The latter passage reads as follows:

"In the *Karjieker* case it was held that s 24(1)(a) of the 1957 Group Areas Act (77 of 1957) did not prohibit persons from entering into an agreement for the acquisition of immovable property (by disqualified persons) prior to their obtaining a permit. What the section prohibits is the acquisition of immovable property, *inter alia*, in pursuance of an agreement, without a permit."

And later the point was made (p 392 *in fine*):

"By parity of reasoning, it would be competent to claim occupation in a given case on a permit being granted, even though, without such permit, such occupation were prohibited by s 20(1)."

1991 (1) ZLR p321

McNALLY JA

It seems to be that this conclusion disposes of the matter without the need to go into questions of credibility. The contract to pay is lawful. Actual payment in pursuance of the contract is unlawful, without permission. There is no reason why the court should not order payment, subject to the condition that authority is obtained. I must make it clear that this judgment in no way inhibits the Reserve Bank in the exercise of its discretion. It is entirely for the Reserve Bank to decide whether or not to authorise the payment. If it decides not to do so the payment may

not be made. The contract remains lawful. Payment will then have to await a change either in the law or in the policy of the Reserve Bank.

The conclusion that the lack of Reserve Bank permission for payment is no bar to the court giving a judgment in favour of the plaintiff was expressly decided, in analogous circumstances, by the Appellate Division in South Africa. In *Barclays National Bank Ltd v Thompson* 1985 (3) SA 778 (A), HOEXTER JA, with whom the CHIEF JUSTICE and three other JUDGES OF APPEAL concurred, said this, at 796B-D:

"I am consequently of the opinion that it is open to the court, unfettered as it is by any decision of its own, to conclude, as I do, that the obtaining of Treasury exemption or permission in terms of reg 3(1)(c) is neither a prerequisite to the institution of an action by the plaintiff in a case such as the present, nor does its absence constitute a valid defence to the plaintiff's claim.

I remains to consider whether in the absence of such exemption or permission a court has the right, *mero motu*, to decline to grant judgment in favour of the plaintiff on the ground that such a judgment will be ineffective. For the reasons which follow this question must also be answered in the negative."

The learned JUDGE OF APPEAL went on to cite with approval (at 797F) an article, part of which reads:

"The plaintiff is entitled to his judgment and Treasury permission is a hurdle which can be jumped when it is reached."

It must follow that the learned judge *a quo* erred in concluding that the agreement to pay money in Bulawayo was "tainted with illegality". There is no evidence before the court to show that the underlying cause of the acknowledgement of debt was illegal, and the acknowledgement itself was not illegal.

1991 (1) ZLR p322

McNALLY JA

It remains only to consider the question of costs. The agreement itself provides for "attorney and client costs". Mr *Colegrave* submitted that that agreement related only to the costs of first instance and there is some precedent for this contention in *Moolman v Marba Contractors (Pty) Ltd* 1982 (2) SA 223 (C). But in that case the court relied on the wording of the agreement, which reads:

"...[Defendant] consents to the jurisdiction of the magistrate's court ... and shall in addition to any costs of such proceedings be liable for costs on an attorney/client scale ..."

That was held to apply to costs in the magistrates court only. In the present case the agreement is not so restrictively worded. No reference is made to a particular court. The reasoning in *Pasaya v Interspace (Pvt) Ltd* S-143-90 (not reported) does not apply since we are concerned with interpreting an agreement. I can see no basis for limiting the agreement to the costs of court *a quo*.

Accordingly the following order is made:

1. The appeal is allowed with costs on the legal practitioner and client scale;

2. The order of the High Court in Case No. HC 545/85 is altered to read:

"1. There will be judgment for the Plaintiff as follows:

- a. In the sum of \$30 000, subject to the obtaining of the authorisation required by the provisions of s 7 of the Exchange Control Regulations, 1977;
- b. Interest thereon at the agreed rate of 10% per annum from 24 November 1983 to date of payment; and
- c. Costs of suit as between legal practitioner and client.

2. That the defendant's claim in reconvention be and is hereby dismissed with costs."

Manyarara JA: I agree.

Korsah JA: I agree.

Scanlen & Holderness, appellant's legal representatives

Coghlan, Welsh & Guest, respondent's legal representatives

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VRYSTAAT ESTATES (PVT) LTD v PRESIDENT, ADMINISTRATION COURT OF ZIMBABWE & ORS 1991 (1) ZLR 323 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

McNally JA, Manyarara JA & Korsah JA

Civil appeal

13 May & 25 June 1991

Flynote

Administrative law - effect of failure to comply with a mandatory requirement - tests applicable with regard to compliance with such requirements - whether failure renders decision void or voidable.

Practice - High Court rules - Rule 259 - eight week time limit for bringing review proceedings in High Court - non-applicability where applicant not aware of decision for longer period than eight weeks after made because not informed of it - proper test to apply in circumstances.

Legislation - Water Act 1976 s 33 - requirements of section not complied with.

Headnote

Where an upstream riparian owner had been given an increased water right and an unauthorized priority over the appellant, to the prejudice of the appellant and without notice to the appellant as required by s 33 of the Water Act 1976, the Court proceeded on the

assumption that this was an irregularity which rendered the proceedings voidable and that the appellant could not be blamed for any delay while it was ignorant of the infringement of its rights.

Applying the correct test of whether the appellant had shown a reasonable explanation for the delay, having regard to the strength of its case and the question of prejudice to others, the court found that on the facts condonation for the delay in bringing review proceedings ought to have been granted, and allowed the appeal.

1991 (1) ZLR p324

McNALLY JA

Cases cited:

Sterling Products International Ltd v Zulu 1988 (2) ZLR 293 (SC)

Grunwick Processing v ACAS [1978] 1 All ER 357 (HL)

Howard v Bodington (1877) 2 PD 203

Cluff Mineral Exploration (Zimbabwe) Ltd v Union Carbide Management Services (Pvt) Ltd & Ors 1989 (3) ZLR 338 (SC)

Clan Transport Company (Pvt) Ltd v Road Service Board & Anor 1956 R&N 322 (SR)

Wolgroeiers Afslaers (Pty) Ltd v Municipality of Cape Town 1978 (1) SA 13 (A)

R v Dairy Produce Quota Tribunal for England & Wales, ex parte Caswell & Anor [1989] 3 All ER 205 (CA)

M J Gillespie for the appellant

A P de Bourbon SC for the second and third respondents

Judgment

McNally JA: This is a dispute over water rights. The appellant is the downstream riparian owner. The second and third respondents (who are for practical purposes to be regarded as one party, which I will call collectively "Delta Trust") are the upstream riparian owners. The President of the Administrative Court is involved because it is his decision which the appellant sought unsuccessfully to have reviewed by the High Court. The High Court came to the conclusion that there had been an unwarranted delay in bringing the matter before it. Accordingly it refused to condone that delay and dismissed the application with costs.

The dispute is over the waters of the Manzimhlope River in the Umsweswe River Block. The problems arose because on 26 October 1977 a Mr Foreman (predecessor in title to Delta Trust) applied for an extension of his water rights. On 28 July 1981 that extended water right was granted to him, without the appellant being advised either of the application or the hearing or the grant.

Prior to these events the position had been as follows. Foreman had had a water right (No. 7546) with priority dates; 24 September 1966 and 4 March 1970. The appellant had had a water right (No. 8377) with priority date 18 June 1968.

It is of significance that the appellant had originally objected to the granting of Foreman's right. The appellant withdrew the objection only when Foreman accepted that certain conditions should be attached to his right. It

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McNALLY JA

was eventually granted subject to those conditions. In essence he was allowed to store 146 million gallons (63 600 cubic metres) of public water annually. But he was required to pass downstream half of the first seasonal floods up to an amount of 25 million gallons (11 400 cubic metres). He was given priority date 24 September 1966 in respect of 114 million gallons (51800 cubic metres) of storage in Overlaw Dam and priority date 4 March 1970 in respect of another 32 million gallons (118 000 cubic metres) in various small works.

The position of the appellant was then as follows:

1. He had a right to half the first seasonal floods up to a maximum of 25 million gallons (11 400 cubic metres);
2. Foreman then had a right to store 114 million gallons (51 800 cubic metres);
3. The appellant then had a right to the balance of his right of 1259 000 cubic metres.
4. Foreman then had the right to store the next 32 million gallons (118 000 cubic metres).

In about 1975 the upstream property was subdivided and Foreman's right became 7546A, but this is of no particular significance. What remained of significance was the set of priorities enumerated in 1-4 above. Priorities are of course of fundamental importance in the allocation of water rights - see s 63 of the Act. They determine the order in which the right holders exercise their rights.

On 28 July 1981 the Administrative Court granted Foreman a final water right to store 1 053 000 cubic metres of water in the Overlaw Dam. His priority was fixed at 24 September 1966 - the same date as his original provisional right. The effect of his was to give him the right to retain an extra 417 000 cubic metres in the Overlaw Dam before the appellant's right to 1 259 000 cubic metres came into operation. The appellant's right was thus superseded. The prejudice to the appellant is obvious.

The reason why Foreman applied for the extra right is not to my mind particularly relevant, but it appears that it was due to an earlier miscalculation. Someone had misjudged the holding capacity of the Overlaw Dam. It was in fact capable of holding nearly twice as much water as had been through. Foreman naturally wanted to take advantage of this extra capacity. Therefore he made the further application.

McNALLY JA

The appellant however makes two points. First, it was never advised of the application, and it was thus denied the opportunity to object. It would certainly have objected had it known of the application. Second, and in any event, the priority date for the additional right to 417 000 cubic metres should have been set at 26 October 1977, the date of the application. Had this been done, the right of the appellant would have been safeguarded, and it might well have had no further ground for objection. Its priority would have been maintained.

It seems to me that both these points are valid and of conclusive weight.

The provisions of the Water Act 1976 are clear. Section 33 reads as follows:

"33.(1) Before proceeding to the determination of any matter submitted to it, the [Water] Court (whose functions have now been taken over by the Administrative Court) shall be satisfied that all persons who, in its opinion, have an interest which is reasonably likely to be affected adversely by such determination have had due notice of such proceedings.

(2) Any person who has an interest in the determination of any matter submitted to the [Water] Court may -

- (a) appear before the [Water] Court, and
- (b) with the consent of the [Water] Court given on good cause shown, produce such argument or evidence or both before the [Water] Court as he thinks fit."

There can be no doubt whatever that the appellant had such an interest, and would have objected. Mr Hart, who gave evidence on behalf of the appellant, makes both averments in his affidavit. He also avers that the appellant was not given due notice, or any notice, of the application or the hearing, or indeed of the granting of the right.

There is no denial on the papers of the allegation that no notice was given. The matter was brought, erroneously, before the Administrative Court in 1988. The President of the Court ruled that it had no power to intervene and that the matter should have been brought before the High Court on review. In the course of his judgment he noted the appellant's claim that no notice had been given, but, curiously, made no comment on the point. Nor, although he was made a party to these proceedings, did he file an affidavit to say whether or not his records showed whether or not the appellant had been given notice of the hearing.

McNALLY JA

In dealing with this matter the learned judge in the court *a quo* had this to say:

"It would appear that in terms of Rule 14(1) of the Water Court Rules 1976, notice is given to interested parties by means of sending them a copy of the report of the Hydrological Branch. There is nothing on the papers that Rule 14(1) was not complied with except the Applicant's assertion that he did not receive the notice."

With respect, this seems to me to place an unfair *onus* on the applicant (appellant). The records of the court must show whether or not the report was sent. The President, who as I have said,

was joined as a party, does not say it was sent. Why should it be assumed that it was? Moreover, if the report referred to is the document at page 14 of the papers, it is noteworthy that under the heading "Priority date" the Chief Hydrological Engineer or possibly the Water Registrar, has written "24.9.66, 4.3.70, 26.10.77". That can only mean that he was recommending that the priority date for the extra water should be 26 October 1977. I will deal with this aspect later in this judgment.

Nothing is said on the point by the other respondents. They make various allegations about when the appellant ought to have known, or might reasonably have guessed, that its water right had been impaired, but they do not say that it was advised in terms of s 33 of the Act. And of course, the overwhelming probability is that if it had been advised, it would have objected.

It must therefore be taken to be a fact that the requirements of s 33 of the Act were not complied with.

The requirements are, in their form, mandatory. Does failure to comply with a mandatory requirement render the decision of the Administrative Court void or merely voidable? Does one's determination depend on whether the mandatory requirement is "peremptory" or merely "directory"? Some judges have used the term "imperative". For a consideration of these points see the judgment of GUBBAY JA (as he then was) in *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (SC) at 301B *et seq*.

Applying the less rigid test favoured in that judgment, it seems to me that there was no compliance at all with the requirement, not even "substantial" compliance.

De Smith, in the 4th edition of *Judicial Review of Administrative Action* at

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McNALLY JA

p 144 says:

"Some classes of procedural requirements are so important that they will nearly always be held to be mandatory. For example an administrative authority which fails to comply with a statutory duty to give prior notice or hold a hearing or make due inquiry or consider objections in the course of exercising discretionary powers affecting individual rights will seldom find the courts casting an indulgent eye upon its omissions."

In *Grunwick Processing v ACAS* [1978] 1 All ER 357 (HL) the Court of Appeal had held that a recommendation made in breach of a statutory duty to consult workers was void, and that decision was upheld in the House of Lords. But the decision is always a difficult one. Baxter in his *Administrative Law* at 447 *et seq* quotes LORD PENZANCE in *Howard v Bodington* (1877) 2 PD 203 at 211 as follows:

"[One] must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act."

In this case I am influenced by a practical consideration. Suppose that the Administrative Court, having heard the application, had decided what, on the face of it, it should have decided on, namely to grant the extra water right but to give it a priority date ranking after the appellant's. What then would have happened? On its own evidence the appellant would not have objected

when it learned of the decision. It would have condoned the irregularity. This suggests to me that it makes more sense to regard the irregularity as rendering the decision voidable rather than void. In any event, as will become apparent, I propose to come to the same conclusion whichever way the point is decided. In the circumstances I propose to leave the point open, and to proceed on the assumption that the irregularity renders the decision voidable rather than void.

I turn then to consider the second point concerning the priority date allocated to the additional water right.

I must say that I can see no basis whatsoever for the decision on priorities reached by the Administrative Court in its order of 28 July 1981. It seems to me, on all the evidence, that it was a decision reached *per incuriam*.

In his judgment of 22 November 1988, to which I have already referred, the President of the Administrative Court says:

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McNALLY JA

"Although the decision would appear to be an unusual one in the circumstances, and although the ultimate paragraph in Foreman's letter of 22nd August 1988, Exhibit 4, tends to suggest a mistake was in fact made, it is not possible to say that the priority date given to the additional storage was not a conscious and deliberate determination made by the President of the Court in the light of all the information placed before him."

With great respect, I cannot accept that reasoning.

1. It runs contrary to the apparent recommendation of the Chief Hydrological Engineer to which I have referred;
2. Foreman appears to concede the error in his letter of 22 August 1988 where he says "As Overlaw has priority over the first 114 million gallons, I would think the Harts would have priority on the next 129 million gallons";
3. The Water Registrar concedes the error in his letter of 5 February 1988 to the Chief Hydrological Engineer;
4. The latter, in his reply dated 3 May 1988 confirms that "the priority dates should be ... 26 October 1977 in respect of the remaining 417 ml."

And finally it is contrary to all rationality. Had the court given special reasons why it was overriding the recommendation of the Hydrological Branch, one might have had to pause for thought. But in all the circumstances one can only conclude that this aspect of the order was simply a mistake.

As a result the appellant was grievously wronged, without notice and for no apparent reason.

This aspect of the matter was not considered by the learned judge in the court *a quo*, who decided the matter ultimately on the basis of unreasonable delay.

I turn then to consider the question of delay. But I pause to observe that in deciding whether or not to condone delay, the courts traditionally consider not only the reasonableness of the explanation for the delay, but the prospects of the applicant on the merits. I have already indicated my view that the prospects on the merits are very strong indeed. I will consider the delay against that background.

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McNALLY JA

The first point taken is that review proceedings must, in terms of High Court Rule 259, be instituted within eight weeks of the termination of the proceedings in which the irregularity or illegality complained of is alleged to have occurred: Provided that the court may for good cause shown extend the time.

No authority is necessary for the proposition that the eight weeks cannot possibly apply to an applicant who does not even know of the decision for far longer than eight weeks after it was made, precisely because he was not informed of the proceedings as he should have been. Indeed it seems to me to be artificial to seek to apply the eight weeks rule as from the date the appellant became aware of the proceedings. The *Cluff Minerals* case (1989 (3) ZLR 338 (SC)) and the *Clan Transport* case (1956 R&N 322 at 325-6) were concerned with the date when the proceedings were terminated. They decided this was the date when official notice of the decision was communicated to the party concerned. The appellant in this case has never had official notice.

I do not think the rule applies at all. In my view the case should have been decided by the simple test - has the appellant shown a reasonable explanation for his delay, bearing in mind the strength of his case and the question of prejudice to others. See *Wolgroeiens Afslaers (Pty) Ltd v Municipality of Cape Town* 1978 (1) SA 13 (A) and *R v Dairy Produce Quota Tribunal for England & Wales, ex parte Caswell & Anor* [1989] 3 All ER 205 (CA).

It is convenient to begin with the question of prejudice to others. The point was made that the present owners of Delta Trust purchased the upper riparian property in good faith and presumably with knowledge of the water rights - in terms of s 61 of the Act final water rights are noted on the title deeds.

The fact is however that the present owners acquired the property some time in 1985. On any version of events the appellant did not know of the altered water right until 1986, and probably not till late 1987. It is clear therefore that nothing the appellant did, or could have done, or failed to do, prejudiced the new owners. Indeed in a real and practical sense the longer the new owners were left with a right which may prove to have been erroneously granted to them, the better off they have been.

Mr *de Bourbon*, for the respondents, says that the review was instituted seven years and ten months (less four days) after proceedings were terminated. This, while it is a dramatic presentation of the delay, does not reflect what actually happened.

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McNALLY JA

The appellant certainly cannot be blamed for delay while it was ignorant of the infringement of its rights. While respondents may speculate that it might reasonably have been expected to realise what had happened, when its dams failed to fill, the explanation given is perfectly reasonable. There was not much rain in those seasons. Mr Hart and his colleagues were not surprised that the dam did not fill. Why should they assume the unthinkable - that an upstream owner had been given an increased right and a queue - jumping priority without their being consulted?

According to the appellant's witnesses it was only in October 1987, as a result of dispute with Delta Trust, that they checked the records and discovered the true position.

Mr Hart initially thought that it was a simple error requiring correction in the priority date. That seems to me a perfectly reasonable reaction. He entered into correspondence with the Registrar of the Water Court and the Chief Hydrological Engineer. At first they seemed to support him. I have already referred to their letters. Then there was correspondence with Mr Kirkman of respondents, which dragged on during 1988. Then there was the abortive application to the Administrative Court - a procedural but *bona fide* error.

After that, and in accordance with the advice of the President of the Administrative Court on the last page of his judgment, the appellant once again tried negotiations. These were not pursued with vigour by the respondents. The desperate tone of appellant's lawyer's letter of 13 March 1989 indicates their anxiety to resolve the matter. By 30 March 1989 they decided that negotiations were fruitless and they notified their decision to seek a review. This was instituted seven weeks and six days later.

It seems to me clear that at all times after receiving official confirmation of what had happened, the appellant took strenuous steps to put the matter right. It may have made procedural and tactical errors. But we must remember that it was in the appellant's interests to resolve the matter and in Delta Trust's interests to delay a solution.

This is clearly a case where one can say there was no supine lack of action by the appellant. Between October 1987 and 23 May 1989 the appellant showed in the clearest possible way its anxiety to put matters right. It is the merest technicality to say it "delayed" for that period. And certainly the delay was of advantage not to the appellant but to Delta Trust.

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McNALLY JA

In my view the High Court misconceived the nature of the delay and failed to appreciate the strength of the appellant's case. On both counts it misdirected itself. It exercised its discretion on a wrong basis. It came to a wrong conclusion.

Accordingly the appeal is allowed with costs.

The order of the High Court is altered to read "There will be an order in terms of the Draft."

Manyarara JA: I agree.

Korsah JA: I agree.

Jarvis & Palframan, appellant's legal practitioners

Atherstone & Cook, second and third respondents' legal practitioners

1991 (1) ZLR p333

CITY OF GWERU v KOMBAYI 1991 (1) ZLR 333 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Ebrahim JA

Civil appeal

27 May & 25 June 1991

Flynote

Contract - illegality - failure to follow peremptory provision of statute.

Contract - undue influence - evidence.

Urban Councils Act [Chapter 214] s 164 - peremptory in nature - duty of council to follow provisions.

Headnote

The respondent was the Mayor of Gweru. Some months after a contract for the supply of concrete blocks to the appellant was awarded to a third party, the respondent secured the contract for himself. The respondent sued for monies due in terms of the contract. The appellant relied on its own failure to follow the tender procedure set out in s 164 of the Urban Councils Act [*Chapter 164*], and also alleged that the respondent had used undue influence to obtain a contract. The High Court (ADAM J) awarded \$5 380,90, with interest and costs, to the respondent. The appellant on appeal challenged the whole of that judgment.

Held, the provisions of s 164(1) of the Urban Councils Act [*Chapter 214*] are peremptory, and the failure to follow the tender procedure rendered the contract void and unenforceable.

Held, the facts overwhelmingly pointed to the use of undue influence by the respondent when he procured the contract for himself.

Cases cited:

Pottie v Kotze 1954 (3) SA 719 (A)

Macape (Pty) Ltd v Executrix Estate Forrester 1991 (1) ZLR 315 (SC)

McNALLY JA

A P de Bourbon SC for the appellant

D P Carter for the respondent

Judgment

McNally JA: Mr Kombayi, who was the Mayor of Gweru at all times relevant to this case, was partially successful in an action against the City of Gweru. He had sued for \$20 640,66 plus interest, in terms of a contract under which he, trading as Pleasure Pools, sold and delivered concrete blocks to the City of Gweru. He succeeded to the extent of \$5 380,90 with interest and costs.

The City of Gweru ("the Council") has appealed, claiming that the contract is unenforceable for two reasons:

1. Non-compliance with the provisions of s 164 of the Urban Councils Act [*Chapter 214*] ("the Act"); and
2. Undue influence.

It will consider these contentions in turn:

SECTION 164 OF THE ACT

The relevant part of this section provides:

"(1) Subject to the provisions of subsections (5a) and (6), before entering into a contract for ... the supply of any goods or materials to the council which involves payment by the council of an amount exceeding such sum or sums as may be prescribed, the council shall call for tenders ...

(2)Tenders received in terms of section (1) shall be opened in public on the closing date fixed therefor forthwith after the closing time."

Further procedural provisions are set out but it is not necessary to go into detail.

It is common cause or beyond argument that:

- a. The provisions of ss (5a) and (6) are not relevant;
- b. The amount prescribed at the relevant times was \$5 000,00; and
- c. The contract was for the supply of concrete blocks in a sum far exceeding \$5 000,00.

There is no doubt that these provisions were not observed. What happened was this:

McNALLY JA

1. On 1 September 1982 the council's Stores Superintendent called for "quotations" for the supply of concrete blocks. It may well be that the proper procedures were not followed. In any event one of the tenderers was a company called Fort Concrete (Pvt) Ltd. There is no reason to suppose that Fort Concrete was aware of any irregularity in the tender procedure;
2. Its tender was "accepted", in the sense that an order was placed with Fort Concrete, who were advised that their tender was the lowest. Despite requests by Fort Concrete for a formal written contract (to which they were entitled in terms of s 164(5) of the Act) they were told simply to proceed on the basis of orders placed from time to time. They did so, and a number of such orders were placed and fulfilled over succeeding months;
3. After some time Fort Concrete decided to invest in another machine to make blocks, but the manufacturer was unable to make the machine because it was busy making two such machines for Pleasure Pools, a business recently acquired by the Mayor, Mr Kombayi;
4. At the end of November 1982 orders to Fort Concrete ceased;
5. On 2 December 1982 a quotation for the supply of the same concrete blocks was submitted by Pleasure Pools. It was accepted on the same date and an official order was then placed with Pleasure Pools on the next day, 3 December 1982;
6. Pleasure Pools did not at that time have the machinery necessary to make the blocks. It only began delivering in about February 1983;
7. The council's Assistant Stores Controller at the time, a Mr Chivandire, gave evidence that he was called to a meeting, presumably on 2 or 3 December 1982, where he was shown the Pleasure Pools quotation. The City Treasurer, the Acting City Engineer and Mr Kombayi were present. He was instructed to accept the Pleasure Pools quotation. He did not then know that Mr Kombayi owned Pleasure Pools. He proceeded in terms of that instruction;
8. The Town Clerk at the time, Mr Nhemachena, gave evidence that there was no recorded resolution of the council to call for tenders or to declare, in terms of s 164(6)(a), that it would be against the best interests of the City to call for tenders.

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McNALLY JA

It is quite evident that the proper procedures were not followed. Indeed, what was done was a flagrant circumvention of the provisions of the section. The section is designed to protect the ratepayers of Gweru, and indeed taxpayers in general insofar as the council may be subsidised by the central government, from what may broadly be described as "insider trading".

Not only, in short, were the procedures not followed, they were not followed in order that a fairly major contract could be taken away from a company already involved in it, and given to a business acquired by the Mayor, who was present at the meeting where the decision was taken. That is not "substantial compliance" with the provisions, as Mr *Carter* submitted. It is blatant

avoidance of the required procedures for improper reasons.

The words of *Fagan JA in Pottie v Kotze* 1954 (3) SA 719 (A) at 726-7 may be cited here:

"The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent."

The learned judge in the court *a quo* did not, with respect, satisfactorily address the question of illegality. He made the point, in his judgment, that it was for the council to establish that the transaction was illegal. That is correct. He went on to observe that the council's earlier calling for quotations was probably also invalid. This may well be so. But it does not affect the point that this particular transaction was invalid. Indeed one must make the point that while the earlier transaction may have been formally invalid, the latter one with Pleasure Pools was *prima facie* corrupt as well.

The point was made in a recent judgment of this court (*Macape (Pty) Ltd v Executrix Estate Forrester* 1991 (1) ZLR 315 (SC)) that it is often difficult to decide whether an action taken in breach of a mandatory statutory requirement is void or merely voidable. Mr *Carter*, for the respondent, has made the point that no criminal sanction is provided in the Act for a breach of s 164. Mr *de Bourbon*, for the appellant, countered with the submission that it would be difficult and unsatisfactory to try to penalise a City Council. There is provision, he pointed out, in s 262 of the Act, for the Minister to intervene. He may, in a proper case, "order all such stops to be taken as in his opinion are necessary or desirable to rectify such act or thing, and the said

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act or thing, when done in terms of the said order, shall be of the same force and validity as if originally done in accordance with the appropriate provisions of this Act".

This is a strong indication that the Legislature intended the Minister to have the power to reinstate an act which would otherwise be void. It is not the sort of language one would use about a voidable act. No ministerial intervention has taken place to save this particular act. One would expect the Minister to intervene only where some innocent irregularity rendered void an otherwise entirely proper action. That is not the position with the present contract. It is therefore *prima facie* void. The respondent cannot sue on a void contract. I adopt, with respect, the reasoning of LEWIS AJP (as he then was) in *Abreu v Campos* 1975 (1) RLR 198 (A) at 202D-G; 1975 (3) SA 73 (RA) at 75A-C on this point.

That is really the end of the matter, but I should also deal briefly with the second point:

UNDUE INFLUENCE

Mr *Carter* has argued that no-one has said, in evidence, that he was unduly influenced. I do not think the courts can expect such tidy solutions to evidential problems of this nature. People do not really confess to have succumbed to undue pressure or influence. The facts of this case, as I have set them out, are such as to proclaim undue influence beyond reasonable doubt, never

mind a balance of probabilities. It does not matter that no-one actually uses the words. Such facts raise a very strong inference of impropriety. They require an acceptable explanation.

No such explanation was forthcoming. Impropriety was therefore established, at least on a balance of probabilities. Thus, even if the contract was not void *ab initio*, it was voidable at the instance of the appellant. The council succeeds on either argument.

It may be indeed that the two points run together. If the breach of the mandatory provisions had been technical and innocent there might have been room for the "substantial compliance" argument. It is the element of undue influence which, to my mind, is conclusively against any argument that there was substantial compliance with the statute. It is that element which finally convinces me that the breach renders the contract void.

Accordingly the appeal is allowed with costs and the judgment of the High

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McNALLY JA

Court is altered to one dismissing the plaintiff's claim for costs.

Manyarara JA: I agree.

Ebrahim JA: I agree.

Atherstone & Cook, appellant's legal representatives

Gollop & Blank, respondent's legal representatives

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CHIREDDI WILDLIFE INVESTMENTS (PVT) LTD v EXECUTORS, ESTATE LILFORD 1991 (1) ZLR 339 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & Ebrahim JA

Civil appeal

13 & 27 June 1991

Flynote

Contract - interpretation - 'free of liabilities' - meaning.

Headnote

The appellant purchased all the shares of a company owned by the respondents. It was a term of the contract that at the time of the sale the company would be "free of liabilities". The main

asset of the company was its trading stock of cattle. When the respondents sued for the balance of the purchase price on the sale, the appellant pleaded that the company had not been "free of liabilities", in that no provision had been made for income tax on future sales of cattle. The respondents filed an exception to the plea and claim in reconvention, which exception was allowed by the High Court. On appeal therefrom the appellant contended that the term "free of liabilities" included contingent liabilities.

Held, to hold in the circumstances of this case, that the respondents failed to deliver the company "free of liabilities" would be to strain the meaning of the phrase quite beyond its proper and natural parameters.

Cases cited:

Reed & Anor v Warren 1955 (2) SA 370 (N)

Durban City Council v Association of Building Societies 1942 AD 27

A P de Bourbon SC for the appellant

E W W Morris for the respondents

Judgment

Gubbay CJ: This is an appeal from an order of the High Court allowing

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with costs an exception taken by the respondents ("the plaintiffs") to the plea and claim in reconvention filed by the appellant ("the defendant").

The plaintiffs issued a specially endorsed summons against the defendant in which, tendering transfer of the entire issued share capital in Feeds and Pharmaceuticals (Private) Limited ("the company"), judgment is prayed for in the sum of \$250 000, together with interest thereon at the rate of sixteen per centum per annum from 1 September 1988 and costs of suit. The allegations contained in the particulars of claim annexed to the summons are to this effect: Pursuant to an invitation to tender for the purchase of the entire issued share capital of the company held in estate late Lilford, which invitation specified that the resultant sale would be voetstoots and that the company would be free of liabilities, the defendant's offer to pay \$2 000 000 was accepted by the plaintiffs. The parties agreed that:

- (a) the plaintiffs would have the right to declare and pay dividends in respect of the profits earned by the company to 31 July 1988;
- (b) a balance sheet of the company as at 31 July 1988 would be drawn and would reflect the assets of the company;
- (c) the debts of the company, including all income tax on profit to 31 July 1988 would be the responsibility of the plaintiffs;

- (d) in the event of the purchase price not being met in full by 31 August 1988, the defendant would pay interest on the outstanding balance at an annual rate of sixteen per centum. The defendant has paid \$1,75 million of the purchase price.

These facts are admitted by the defendant in its plea. What is denied is that the tender of transfer of the shares by the plaintiffs is in accordance with the agreement of the parties, in that the plaintiffs have not complied with the obligation to ensure that the company was free of liabilities as at 31 July 1988. Upon fulfilment of this warranty, the defendant will pay the outstanding balance of \$250 000.

The basis of this defence forms the subject matter of the claim in reconvention. The material averments, as further particularised, may be summarised thus:

1. At the effective date of sale, ie 31 July 1988, the business of the company was, *inter alia*, the rearing and sale of cattle, which livestock constituted a major portion of the company's stock-in-trade.

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2. The plaintiffs (and also the defendant) knew that the company would sell the cattle as part of its normal trading activities, notwithstanding the transfer of ownership of the shares to the defendant.
3. The fixed standard value of the cattle shown in the books of account of the company was set at an average of \$100 per head, totalling \$175 400; whereas the true market value of the cattle as at 31 July 1988, was that tendered by the defendant, namely \$648 980.
4. Upon sales of the cattle at their true market value the company will be assessed for income tax on the difference between the amount realised and that of the fixed standard value reflected in its books of account.
5. During the period between August 1988 and April 1989, 653 of the 1 754 head of cattle on hand at 31 July 1988, were sold for \$381 695,50, being their market value. The company has not as yet been issued with an assessment for income tax in respect of the proceeds of these sales.
6. The liability for income tax in respect of any sale of the cattle on hand arose as a result of the accounting methods of the company, and was thus a liability of the company as at 31 July 1988.
7. In order to fulfil its warranty that the company was free of liabilities it was necessary for the plaintiffs to show either the true market value of the cattle in the books of account of the company, or the amount of liability for income tax on the recoupment between the fixed standard value of the cattle and their market value.
8. Provision should have been made to meet the aforementioned liability by money being retained in the bank account of the company, or by reflecting the plaintiffs as debtors of the

company therefor.

9. The amount of potential income tax as at 31 July 1988 in respect of the cattle on hand, is calculable by deducting the fixed standard value from the true market value as tendered by the defendant. The difference, being \$473 580, will yield an income tax liability in excess of \$250 000.

In reliance upon these allegations, orders are sought directing the plaintiffs:

- (a) to pay the sum of \$250 000 to the company in respect of the contingent liability for income tax that would arise upon the sale by the company of the cattle owned by it as at 31 July 1988;
- (b) to provide an amended balance sheet and statement of accounts within 60 days of the date of judgment reflecting such contingent liability in the accounts of the company as at 31 July 1988.

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The ground upon which the exception was taken to the plea and claim in reconvention as, respectively, disclosing no defence and no cause of action, is that "the defendant has failed to show that the company has any liabilities at the date of the sale of the shares therein". Put, perhaps, more succinctly, the crux of the attack upon these pleadings is that any liability for income tax which may in the future accrue to the company upon a sale by it of the cattle on hand as at 31 July 1988, is not, upon a proper interpretation of the agreement as a whole, the type of liability which the company was warranted to be free of. No complaint is made in the formulation of the exception that the relief sought by the defendant is not maintainable in law.

The issue then is whether GREENLAND J, before whom the validity of the defendant's pleadings were challenged, was right in holding that the plaintiffs had discharged the responsibility of satisfying him that the word "liabilities" is incapable of the meaning which the defendant attaches to it.

In *Reed & Anor v Warren* 1955 (2) SA 370 (N) at 374A SELKE J pointed out that "liability" and "liable" are "words capable of very many shades of meaning, the precise meaning to be attributed to them varying with the collocation in which they occur". Reference to *Black's Law Dictionary*, Abridged 5 Ed, at p 473, amply supports this comment. Of "liability" it is there stated:

"The word is a broad legal term, ...of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely. It has been defined to mean: all character of debts and obligations; ... an obligation which may or may not ripen into a debt; any kind of debt or liability, either absolute or contingent, express or implied; ... condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden."

GREENLAND J held that the phrase "free of liabilities", in the context in which it was used, means free of existing liabilities - liabilities that had actually accrued as at the effective date - and that as on the facts pleaded by the defendant liability for income tax would only accrue if and when, at some undefined time, the cattle were sold, the warranty given by the plaintiffs had

not been breached. Is that a correct view of the matter?

In *Reed & Anor v Warren, supra*, the appellants, the sole directors and shareholders of a private company, sold their total shareholding to the respondent, warranting that the company was not liable for any taxation for

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the period up to 30 September 1952, and undertaking to discharge all liabilities of the company as at that date. When in due course the company was assessed for the income tax year ending 30 June 1953, the respondent claimed from the appellants the proportionate share of the income tax for the period 1 July 1952 to 30 September 1952, contending that this amount formed part of the company's liabilities at the last-mentioned date. On exception before the lower court and on appeal, it was submitted that liability for income tax arose on assessment, and assessments were made only in respect of complete tax years. Both submissions were rejected. BROOME JP at 372E-H, held that liability existed before any assessment was made and the Commissioner of Taxes was empowered under the Income Tax Act to take an assessment for any period. Thus, on 30 September 1952, when the agreement of sale was concluded, the company was carrying a liability for income tax even though this liability was then not only unascertained in amount but contingent in that any taxable income earned by the end of that month might have been extinguished by a loss during the remaining nine months of the income tax year. But in fact that did not occur. It was a question of construction whether the word "liabilities" in the agreement of sale included such a contingent liability. It might well be that a trial court would, on a consideration of all the circumstances, conclude that such a meaning should be given to the word. The issue was not one to be decided on exception and accordingly, the appeal was dismissed.

In that case liability for income tax already existed (profits had been made prior to the sale of the shares) and was dependent solely on the company not making a loss after the sale. What emerges clearly from the judgment of Broome JP and upon which Mr *de Bourbon*, for the defendant, strongly relied, is that liability may exist even where it is not yet fixed or quantified and is dependent on events to occur in the future.

Counsel stressed that the inevitability of the cattle on hand, or at least some of them, being sold by the company in the normal course of its business operation, is borne out by the allegation that during the nine month period following upon the sale of the shares, 653 head of cattle out of the original 1 754, being 32 per centum, had been sold. And, to demonstrate further, of the 557 weaners on hand as at 31 July 1988, purchased for \$128 880, that is at an average price of \$321 per head, 118 had been sold during the next month for \$50 000, at an average of \$423 per head. Thus, so the submission went, as at the effective date there existed a contingent liability, which crystallised upon the sale of the 118 weaners, consisting of the amount of taxable income payable by the company on the difference between the fixed standard value

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of \$100 and the market value of \$231 per weaner; and not on the difference between the fixed standard value and the market value of \$423 per weaner. In short, it was the defendant's contention that under the warranty the plaintiffs were to ensure, in one manner or another, that sufficient monies were available to the company to meet the liability for income tax in an amount calculated upon the difference between the artificially low fixed standard value and the true market value of the cattle as at 31 July 1988, dependent, of course, on the proceeds of the sale of any such animal being in excess of \$100. This was their underlying obligation; payment was to fall due on the happening of that future event.

Per contra Mr *Morris*, for the plaintiffs, argued that the phrase "free from liabilities" means, in *casu*, that at the date the shares in the company were sold, no event had occurred, which would entitle any person to have any claim against it. At that date there was no actual liability in existence, and to find that there was a contingent liability would be to assign to the contingency contended for by the appellant much too "large and value" a meaning. In this connection reference was made to the following remarks of WATERMEYER JA in *Durban City Council v Association of Building Societies* 1942 AD 27 at 33:

"In the large and vague sense any right to which anybody may become entitled is contingent so far as that person is concerned, because events may occur which create the right and which may vest it in that person; but the word 'contingent' is also used in a narrow sense, 'contingent' as opposed to 'vested', and then it is used to describe the conditional nature of someone's title to the right. For example, if the word 'contingent' be used in the narrow sense, it cannot be said that I have a contingent interest in my neighbour's house merely because my neighbour may give or bequeath it to me; but my relationship to my neighbour, or to the terms of a will or contract, may create a title in me, imperfect at the time, but capable of becoming perfect on the happening of some event, whereby the ownership of the house may pass from him to me. In those circumstances I have a contingent right in the house."

Counsel urged that use of the wide, as opposed to the more limited, sense of the term "contingent liability", necessarily implies that any asset valued in the books of account of the company at less than its true market value would give rise to a liability income tax whenever it was sold at a price in excess of such book value. It would mean that the fact that the company claimed a special initial allowance on plant and equipment would constitute a liability

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for income tax because, at some stage in the future, it may wish to dispose of one such item profitably.

The defendant's complaint relates directly to the low fixed standard value of the cattle as reflected in the company's accounts. But as Mr Morris was at pains to emphasise, although this legitimate means of undervaluation has the effect of increasing income tax liability upon an ultimate sale, it creates a compensatory income tax loss in respect of natural increase, or when, subsequently, additional cattle are purchased. I agree with him that the situation confronting the defendant is entirely neutral. It could create the potential for income tax recoupments; or a saving in income tax; or no income tax incidence at all, if cattle are not sold, or they succumb to disease and die, or their true market value plummets below the fixed standard value.

Furthermore, it is not to be overlooked that the defendant accepts that it was expressly agreed

that income tax on the profit made by the company up to 31 July 1988 was to be paid by the plaintiffs. Consequently, the warranty given in the invitation to tender must be read in conjunction with and subject to this restriction of liability, and not divorced from it.

These two terms of the agreement between the parties are not irreconcilable. They allow, without difficulty, of a consistent and harmonious construction. The question of who was to pay the income tax on existing profits made by whatever means, by the company, was specifically considered and provided for. The plaintiffs were to be liable for the payment of income tax on all actual profit (even though no assessment had been issued), except for that which accrues in respect of any profit made after 31 July 1988; such as for instance, upon the sale of an asset owned by the company up to the aforementioned date, at a price in excess of the value reflected in the books of account.

In my opinion to hold that the plaintiffs failed to deliver the company "free of liabilities", in the context of the agreement as a whole, would be to strain the meaning of the phrase quite beyond its proper and natural parameters.

It follows that I am satisfied that the learned judge was right in concluding that the plaintiffs had discharged the responsibility of establishing that the word "liabilities" is incapable of the meaning which the defendant attaches to it.

The appeal fails and is dismissed with costs.

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MANYARARA JA

Manyarara JA: I agree.

Ebrahim JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

Endnotes

1 (Popup - Popup)

An appeal has been noted against this judgment

2 (Popup - Popup)

See also the judgement in *Woods & Anor v Minister of Justice, Legal and Parliamentary Affairs & Anor* S-145-91 (not reported)

3 (Popup - Popup)

An appeal has been noted against this judgement.