

1991 (2)

The Zimbabwe Law Reports 1991 [Part 2]

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DOUGLAS v MEYERS 1991 (2) ZLR 1 (HC)

Court High Court, Bulawayo

Muchechetera J

Application for a declaratory order

2 March & 23 May 1986

This case was omitted from the 1986 Zimbabwe Law Reports

Flynote

Husband and wife - child - right of access or custody of an illegitimate child by the natural father - onus - test is best interests of the child.

Headnote

The applicant was the natural father of an illegitimate child born of the respondent. He sought an order declaring that he was entitled to reasonable access to the child. The mother opposed the relief on the ground that she was the natural guardian of the child, and that the father had no inherent right of access.

Held, the natural father of a minor illegitimate child does not have an inherent right of access to the child, but the court will grant such access if the father establishes that such access is in the best interests of the child. The court will only grant such an order if there is some very strong ground compelling it to do so.

Cases cited:

Wilson v Ely 1914 WR 34

Davids v Davids 1914 WR 142

Matthews v Haswari 1937 WLD 110

Docrat v Bhayat 1932 TPD 125

Calitz v Calitz 1939 AD 56

H I Bisset for the applicant

MUCHECHETERE J

Judgment

Muchechetero J: In this matter the applicant seeks the following order:

- "1. That it is hereby declared that the applicant has a right of reasonable access to the parties' illegitimate minor child Lance Willis Mayers.
2. That the respondent be, and is hereby, ordered to grant reasonable access by the applicant to the said minor child.
3. That the respondent be, and is hereby ordered to pay the applicant's costs as between party and party incurred in this application."

During the hearing, counsel for the applicant abandoned the third paragraph of the above order and instead asked for an order that each party pay its own costs whatever the result of the hearing.

The application is opposed by the respondent on the ground that she is the sole legal guardian and custodian of the minor illegitimate child (hereinafter referred to as "the child") and the applicant has no inherent right of access to the child and that the applicant has not shown any grounds to satisfy the court that it should, in the interests of the child, interfere with the custodial rights of the respondent. In the circumstances the respondent asked for the application to be dismissed with costs and also for the applicant to be ordered to pay maintenance for the child at the rate of \$100 *per mensem* with retrospective effect from 1 November 1985. The issues which I must determine are whether the applicant has any right of access to the child, whether in the interests of the child reasonable access to the child should be granted to the applicant and, in any event, how much maintenance is the applicant liable to pay for the child.

In his founding affidavit the applicant avers that during the period between October 1984 and January 1985, he had a carnal affair with the respondent which resulted in the respondent being pregnant during January 1985. The pregnancy culminated in the respondent being delivered of a child on 19 October 1985, at Bulawayo. The applicant further avers that he is willing to pay maintenance in respect of the child and that indeed he is presently paying maintenance for him. He also avers that he is advised and verily believes that he is entitled to reasonable access to the child, notwithstanding that the child is illegitimate, although he has no other rights in respect of the upbringing of the child. The applicant further avers that respondent, notwithstanding requests by him, refuses to allow him any access to the child. Finally the applicant submits that it will be in the best interests of the child that he should be offered access to him, and that it was in the best interests of the child that he should know who his father is, and become acquainted with his father.

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The respondent in her replying affidavit admits that she had a carnal relationship with the applicant which resulted in the pregnancy and subsequent birth of the child. She however describes the carnal relationship as seduction and avers that at the time of the seduction she was a virgin and that, in spite of the fact that she fell pregnant because of it, the applicant had neither offered to marry her nor offered to pay damages therefor. In the circumstances she had instructed her legal practitioners to institute legal proceedings against the applicant for the recovery of damages sustained by her. She further avers that at the birth of the child she and the applicant had entered into an agreement whereunder the applicant undertook to pay maintenance for the child at the rate of \$100 per month with effect from 1 November 1985, but that the applicant had subsequently repudiated the agreement and offered instead to refer the matter to the maintenance court, Bulawayo, for assessment. The respondent however admits that the applicant did pay some money towards maintenance but avers that there is still a shortfall on the amount agreed.

The respondent also avers that even though she has refused to grant the applicant regular rights of access to the child she has nevertheless on three separate occasions taken the child to the applicant's home. She however avers further that she does not believe that it would be in the best interests of the child that "the spurious father (the applicant) be allowed to visit him (the child) and have access to him". She elaborates on this as follows

- "9. That this is in view of the fact that I am 22 years of age and have very good chances of marrying following which it is my intention that the guardianship of the minor child pass to the stepfather either by process of adoption or order of this honourable Court.
10. That furthermore, the child would not be able to identify, recognise or appreciate his natural father either now or for several years to come.
11. That the minor child would, in addition, not be emotionally in a position to understand the inevitable conflict between natural father and step-father until he has attained the legal age of majority after which the question of access would be irrelevant.
12. That I am fully willing and able to care for the minor child and take all decisions relating to his upbringing, and should like to be in a position to do this with the child's future stepfather and without interference from applicant."

The applicant did not file an answering affidavit.

Mr *Bisset*, who appeared for the applicant, submitted that the law was not clear

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on whether the father of an illegitimate minor child had an inherent right of access to the child. He cited a number of cases where access was granted to such natural fathers but admitted that no clear principles emerged from the cases. In the end he was inclined to agree with Mr *Esat* who appeared for the respondent that the correct view was that natural fathers do not have inherent rights to access to their illegitimate minor children. Mr *Bisset* further submitted that even if such fathers are held not to have inherent rights of access the court can intervene to grant them access in the interests of the children concerned.

The law on the above points is stated in Boberg's *The Law of Persons and the Family* at 333-346:

"The legal position of an illegitimate child is founded upon the philosophy that *een moeder maakt geen bastaard*, ie as far as the mother is concerned, the law does not regard the child as illegitimate; his disabilities relate to his rights *vis-à-vis* his father and third parties."

The philosophy is reflected in what follows:

"Whereas the parental power over a legitimate child rests in his father, in the case of an illegitimate child it is his mother who, unless she is herself a minor has the right of guardianship and custody over him and whose surname and domicile he assumes. The father's only right over the child is one of reasonable access. Where it is in the child's interests, however, the court may deprive the mother of guardianship or custody, transferring these rights to the father, or even conferring them on a third party."

See also Spiro's *The Law of Parent and Child* 3 ed at 425-426:

"It was pointed out that the natural father is not possessed of the parental power and is not the guardian of the minor illegitimate child. But this principle does not conclude the inquiry into the question whether he is a complete stranger in relation to the illegitimate child.

First of all, as will be more fully shown later, the natural father is subject to the duty, though jointly with the mother, to maintain the illegitimate child. Thus his duty has been said to be based on paternity. In *Wilson v Ely* 1914 WR 34 a natural father was granted the right of access to an illegitimate child "especially as it was his duty to supply maintenance". If the learned judge meant thereby to refer to a rule of law, he went, with respect, too far. But the maintenance duty is a factor which cannot wholly be ignored. ...

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It is against this background that the question must be approached whether the natural father may apply for access or even custody. Some of the cases deal with the *locus standi* (*in judicio*) or otherwise of the natural father. But this is, with respect, not the real question. The natural father has clearly *locus standi in judicio* if he is the respondent or if he has a right to apply for access or custody. **In these matters there is, it is considered, only one question, viz, What is best in the interests of the minor illegitimate child. If it is in the interests of the minor illegitimate child that the natural father should have access, such access should be granted to him.** If the interests of the minor illegitimate child so demand, custody, if not even guardianship may be awarded to the natural father." (Emphasis is mine.)

A brief discussion of some cases where access and custody of minor illegitimate children was granted would be useful on this point. In *Wilson v Ely* 1914 WR 34 the applicant who was the mother of a minor illegitimate child applied for an order that the respondent, the natural father, forthwith deliver up and return her the child. The learned judge said that the applicant was the rightful custodian and guardian of the child and therefore ordered the return of the child to her. He however also ordered that in the circumstances of the case the father was entitled to have access to the child "especially as it was his duty to pay maintenance". While I agree with Spiro's above quoted views on this case I however consider that the learned judge's statement and decision must be considered within the text of this case. The parties had prior to the case lived together as man and wife for a long time (they had been married under Moslem rites but this marriage was not legal under South African law) and in the circumstances it was in the interests of the child to continue some kind of relationship with the father. In addition after the respondent had alleged that the child had "voluntarily come to him in rags and tatters" it was, in my view, in

the interests of the child for the person to whom the child went for support and who paid maintenance to have access to the child if only so that he could ascertain that the maintenance he paid was properly used. The case did not therefore grant an inherent right of access but access in the interests of the child.

In *Davids v Davids* 1914 WR 142, custody of a minor illegitimate child was granted to a natural father while the mother was granted access. The parties' marriage had been in accordance with Malay rites and therefore not recognised under South African law. The court made the order in this case after being satisfied that it was in the best interests of the child to give custody to the father and because the mother had an inherent right to custody after having deprived her of this, it was in my view natural that access had to be granted to her.

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In *Matthews v Haswari* 1937 WLD 110, while custody of a minor illegitimate child was confirmed to rest with the mother, reasonable access was granted to the natural father. Although the law on access was not discussed in the case I consider that again this decision must be looked at within the context of the circumstances found in the case. The parties had also lived together as man and wife together with the child who must have formed a parental relationship with the father. In the circumstances, it was, in my view, in the interests of the child to continue some form of relationship between them by granting access to the father. The learned judge indicated that in the final decision the interests of the child would be crucial.

In *Docrat v Bhayat* 1932 TPD 125 it was held that the father of a minor illegitimate child cannot claim custody of the child "as of right" after the mother's death. In this case the child was a product of a Moslem marriage which, as already stated above, was not recognised under South Africa law. There was nothing in the application to show that the child was not being properly cared for or would not be properly cared for by the respondent and his wife who were respectively the husband of the child's aunt and the sister of the child's mother. Although this case was concerned only with custody, it is very relevant because access is part of and, in fact, an encroachment upon, or a diminution of custodial rights. The point therefore to take note of in this case is that the court will only intervene to interfere with the custodial rights which include access in the interests of the child.

From the above, my conclusion is that there is no inherent right of access or custody for a father of a minor illegitimate child but the father, in the same way as other third parties, has a right to claim and will be granted these if he can satisfy the court that it is in the best interests of the child. The *onus* is on the applicant, in this case the father, to satisfy the court on the matter and usually the court will not intervene unless there is some very strong ground compelling it to do so. The standard usually applied by the court is that used before interfering with the custodial rights of a father of a legitimate child although in a case like the present one the fact that the applicant is paying maintenance for the child will also in my view be taken into account. See *Calitz v Calitz* 1939 AD 56 at 64 where TINDALL JA said:

"Where, however (as in the present one), it is not exercising such a power, the Court in Scotland cannot deprive the father of the custody except upon special grounds. In *Nicholson v Nicholson* (6 SC LR 692) a case where the Court ordered an infant to be returned to the father - the common law was thus stated, **'The legal right to the**

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father. But that right is not absolute, it is not beyond the control of the law. It is within the power of the Court to mitigate the severity of the general rule by interfering in exceptional cases. The exceptions must be few and must rest on clear grounds and the grounds must be found in consideration of danger to the life, health or morals of the child. When the interests of the child in regard to life, health or morals have required it, the Court has refused to permit the father to retain custody. This has been done in Scotland in the exercise of the *nobile officium* of this Court'. I presume that power corresponds with the powers of the Supreme Court in South Africa as the upper guardian of minors." (Emphasis is mine.)

In view of the above the applicant in this case can therefore only succeed if he satisfies this court that it is in the best interests of the child that the court interferes with the custodial rights of the respondent and grant reasonable access to him. In this connection the applicant avers:

"It is obviously in the interests of the child that he should know who his father is, and become acquainted with his father."

This and the fact that the applicant has paid and is willing to pay some maintenance for the child are the only matters placed before the court for consideration in support of the application. Mr *Bisset* could neither elaborate nor, indeed, add to these during his submissions. There are no allegations suggesting or implying that the respondent is not capable of, or has not looked after, the child properly, necessitating a periodical check by the applicant. There is no allegation or suggestion that the maintenance the applicant has paid so far had been, or in future will be, misused. There is no allegation that the child, who has been seen by the applicant on three separate occasions since birth, was other than happy and well in the respondent's care and custody. Nothing untoward has been said about the respondent's character and the environment under which the child is being brought up. It is, more importantly, not explained in which way it is in the interests of the child that it should know and be acquainted with its natural father. Mr *Bisset's* submission on this point in my view amounted to saying that any child needed a father. This may be correct, but there are some kind of fathers children are better without. In my view, the application has not gone beyond saying that the applicant wants access because he is a natural father and because he pays maintenance. This, in my view, is the same as applying for access as of right or the ground of an inherent right of access which, as I have stated above, is non-existent in the case of a natural father.

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Against the above the respondent's reply is that it is not in the interests of the child for it to get to know and become acquainted with its natural father because this might jeopardise her future efforts to get the child adopted. There is no reply to this from the applicant and he does not offer to adopt the child himself. The respondent also alleges that the applicant has been difficult in connection with the payment of the agreed maintenance instalments and this has not been denied. There is also an allegation of seduction against the applicant which has not been denied. The applicant has also not made or offered to make amends on this. In this connection

the respondent rightly, in my view, implies that as custodian and guardian of the child her discretion in deciding whether the child should or should not associate with an unrepentant seducer should remain unfettered. Lastly, the respondent in a wise and open-minded use of her discretion has, on three separate occasions, taken the child to the applicant's home. This, in my view, shows that the respondent's actions and attitude are in the interests of the child. There is therefore, in my view, no reason for the court to interfere with the respondent's custodial rights which are so wisely being exercised.

In the circumstances I agree with the conclusion arrived at by Mr *Esat* in his most helpful and well-researched heads of argument that the applicant has failed to satisfy the court that there is some ground, let alone strong ground, in the interests of the child requiring the court to interfere in any way with the full custodial rights of the respondent. The application therefore fails.

The next matter I have to decide is the amount of maintenance to be paid by the applicant. Mr *Esat* submitted that the court should enforce the applicant's agreement to pay maintenance at the rate of \$100 per month and argued that the agreement is a binding contract between the parties. Mr *Bisset*, on the other hand, while not denying that the applicant had agreed to pay the amount mentioned, submitted that the applicant cannot afford to pay the amount in question, but could only afford \$75 per month. He also submitted that as both parties were working and the respondent was receiving a salary which was about \$100 less than that of the applicant per month, applicant's contribution should be reassessed taking into account what the respondent should also contribute. He argued that in maintenance matters the means of both parties and the needs of the child should be looked at. He further argued the child was still only a small baby and that it needed no more than \$75 per month to support it.

As there was no denial in connection with the existence of an agreement by the applicant to pay \$100 per month I have no option but to hold that the agreement exists. However, an agreement to pay maintenance, in my view, is different from other agreements mainly because, unlike other agreements, parties to it can

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go to court and have it reviewed or varied without the agreement of the other parties if their circumstances or the circumstances under which it was made change. This is because maintenance payments depend on the ability of the person liable to pay affording it and the needs of the child in question. These could change from time to time. In view of this there is no reason why, in my view, this court cannot look at this agreement in the light of the evidence presented by the applicant.

From what has been said for both parties on this point I have come to the conclusion that an amount of \$75 per month would be reasonable in the circumstances. This amount is to be payable by the applicant as from 1 April 1986. The amount payable by or recoverable from the applicant for the period 1 November 1985 to 31 March 1986 is at the rate of \$100 per month. I have not made the new amount payable retrospectively because I regard it as a variation on an amount which was already payable and no argument has been advanced on behalf of the

applicant to make it retrospective.

Lastly, there remains the question of costs. Mr *Bisset*, after dropping the applicant's claim to costs, urged the court to order that each party should pay its own costs. He argued that it was usual in matters where the welfare of children were involved for parties to bear their own costs. Mr *Esat*, on the other hand, argued that the rule that costs should follow the result should apply in this case. I agree with Mr *Esat* that in this case costs should follow the result. Although a decision by the court to grant access to the applicant would have affected the welfare of the child, I do not consider that these proceedings were commenced by the applicant after being genuinely concerned about the welfare of the child. Nothing in the application points to this. In my view, the applicant's intention was primarily to assert what he thought was his right of access to the child. This removes the application from the category in which Mr *Bisset* sought to place it.

For the reasons given above I make the following order:

- (1) that the application be and is hereby dismissed;
- (2) that the applicant be and is hereby ordered to pay maintenance for the minor illegitimate child Lance Mayers at the rate of \$100 per month in advance on the first day of every month with effect from 1 November 1986 to 31 March 1986 and thereafter at the rate of \$75 per month;
- (3) that the costs of this application be borne by the applicant.

Webb, Low & Barry, applicant's legal practitioners

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

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HODGSON v GRANGER & ANOR 1991 (2) ZLR 10 (HC)

Court High Court, Harare

Greenland J

Special plea

2 & 10 July 1991

Flynote

Prescription - Prescription Act 1975 - s 15(3) - purpose of statutes of limitation to ensure timeous prosecution of causes of action of which the creditor is aware - meaning of the terms "debt" and "cause of action" - meaning of the words "the facts from which the debt arises" in subs (3) being the facts which constitute the cause of action of which the creditor is aware.

Headnote

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On 10 November 1986 the first defendant, a legal practitioner, was required to draw up an agreement of sale for the plaintiff in terms of which ownership of the *merx* was not to pass to the purchaser until the price had been paid in full. The agreement was however defective as a result of which ownership immediately passed to the purchaser who, having defaulted in the payments due, validly disposed of the *merx* to an innocent third party. The plaintiff did not discover that the agreement had been defective until a date fixed as soon after 6 October 1987.

The plaintiff sued the defendant firm for damages occasioned by the first defendant's negligence, summons having been served on 15 August 1990, ie more than three years after the defective agreement had been drawn, but less than three years from the date upon which the plaintiff had become aware of the defective draftsmanship. To this the defendant entered a special plea in bar averring that the plaintiff's action was prescribed in terms of the Prescription Act 1975.

Held that the approach to interpreting s 15(3) and in particular the words "became aware . . . of the facts from which the debt arises" therein is first to recognise that the word "debt" has a statutory and a judicially ascribed meaning.

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GREENLAND J

Held, further, that the words "debt" and "cause of action" which being herein synonymous mean the entire set of facts which give rise to an enforceable claim and includes every fact which it is material to plead and prove so as to successfully sustain an action and that therefore, the words "the facts from which the debt arises" mean simply the facts constituting the cause of action which the creditor needs to know in order to plead.

Held, further, that even if it was wrong to import judicial meanings to the term "debt", it would make no difference because, if the words were recast as "the facts from which the thing to be sued for arises" what is stipulated is **awareness of facts** which enable the prosecution of a civil claim.

Held, further, that it is important in this exercise of interpretation to emphasise that the whole purpose of statutes of limitation is to ensure that a person who has a valid cause of action of **which he is aware** proceeds timeously to the prosecution thereof before events become "stale" and, that it is to penalise the dilatory creditor but not the creditor who is unaware, through no fault of his own, of the cause of action at his disposal.

Held, further, that the passage of ownership of the *merx* was a matter of fact and not purely one of law and that it was incorrect to say that the plaintiff was not covered by subs (3) because, as at 10 November 1986, he was possessed of knowledge of all the facts which gave rise to the debt, save for knowledge of the passage of ownership which was a matter of law and therefore not a fact for the purposes of the subsection.

Special plea accordingly dismissed.

Cases cited:

Syfin Holdings Ltd v Pickering 1982 (1) ZLR 10 (SC)

Patel v Controller of Customs & Excise 1982 (2) ZLR 82 (HC)

Abrahamse and Sons v SA Railways & Harbours 1933 CPD 626

Denton v Director of Customs & Excise 1989 (2) ZLR 41 (HC)

van Vuuren v Boshoff 1964 (1) SA 395 (T)

Stambolie v Commissioner of Police 1989 (3) ZLR 287 (SC); 1990 (2) SA 369 (ZS)

Chase Securities Corporation v Donaldson (1944) 325 US 304; 89 L Ed 1628 (US Sup Ct)

DG Bartlett for the plaintiff

AP de Bourbon SC for the defendants

Judgment

Greenland J: In this case the defendants have entered a special plea in bar (prescription) to the summons and declaration.

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GREENLAND J

The relevant facts are:

- (a) On 10 November 1986 the first defendant, acting for the partnership of both defendants, drew up a written contract of sale in terms of which the plaintiff sold a Leyland horse and trailer to another.
- (b) It was a specific stipulation in the plaintiff's instructions to first defendant, at the time, that the contract, once signed, would have the legal effect of ensuring that ownership of the *merx* remain with plaintiff until payment, in full, of the purchase price.
- (c) In fact the contract was defectively drawn up in this respect and it is agreed that, in consequence of such defective draftsmanship, ownership passed to the purchaser on signature of the contract and delivery of the *merx*.
- (d) The purchaser, having thus secured ownership, defaulted on payments of the purchase price and, when harassed with legal process, disposed of the trailer to a third party, a fact which the plaintiff discovered on 29 September 1987.
- (e) The plaintiff became aware, for the first time, of the fatal defect of draftsmanship at a date fixed as soon after 6 October 1987 when he attempted to recover the trailer from the third party. The latter, being an innocent purchaser for value, was only too pleased to expound to the plaintiff the fundamental principle of property law that in a sale on credit ownership passes on delivery unless retained by contractual compliance with statute, ie The Hire Purchase Act.

- (f) The plaintiff sued out summons and the defendants were served on 15 August 1990, exactly three years, nine months and five days after the date on which the defective contract was drawn up, signed and delivery made.
- (g) The declaration sets out a cause of action in which the plaintiff claims damages allegedly occasioned by first defendant's negligence in not drawing up a written contract of sale in accordance with plaintiff's stipulated requirements.

It is agreed that, in terms of the Prescription Act, No. 31 of 1975, the prescriptive period in respect of plaintiff's cause of action is three years. The real issue for determination is from what date did prescription commence to run?

It is the plaintiff's stance that the period must be computed as commencing on 6 October 1987; the date after which he became aware of the fact of the defective draftsmanship and the dreadful consequences thereof.

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Mr *de Bourbon*, for the defendants, disputes the validity of this stance and points to several earlier dates, in the alternative, all of which, if selected, would have the effect of determining the issue against plaintiff.

The issue revolves around an interpretation of s 15 of the Act which is therefore set out in full:

"15. (1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as a debt is due.

(2) If a debtor wilfully prevents his creditor from becoming aware of the existence of a debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises:

Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care."

The plaintiff's stance is that he is saved by s 15(3) for the very good reason that he only became aware of the "facts from which the debt arises" no earlier than 6 October 1987, the date soon after which he discovered the defective draftsmanship; (a period of two years, nine months and nine days before service of the summons).

My approach to interpreting the section and, in particular, the words "became aware . . . of the facts from which the debt arises" is to first recognise that the word "debt" which appears therein has a statutorily defined meaning complemented by well-established judicially ascribed meaning. In summary:

- (i) Section 2 of the Act reads:

"2. (1) In this Act -

'debt', without limiting the meaning of the term, includes anything which may be sued for or claimed by

reason of an obligation arising from statute, contract, delict or otherwise;"

- (ii) In *Syfin Holdings Ltd v Pickering* 1982 (1) ZLR 10 (SC) at 19 FIELDSEND CJ

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GREENLAND J

equated the word "debt", in the Act, with "cause of action";

- (iii) In *Patel v Controller of Customs and Excise* 1982 (2) ZLR (HC) 82 at 86 GUBBAY J, as he then was, stated:

"In *Controller of Customs v Guiffre* 1971 (2) SA 81 (R) at 84A, BECK J, (as he then was) discussed the meaning of the phrase 'the cause of the action' and adopted the definition of LORD ESHER MR, in *Read v Brown* (1888) 22 QBD 131, as being

'every fact which it would be necessary for plaintiff to prove if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every act which is necessary to be proved.'"

- (iv) In *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637 WATERMEYER J stated:

"The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action. (See Halsbury, vol 1, sec 3, and the cases there cited.)"

From all of the above may be abstracted the following propositions which commend themselves as sound:

- (ia) the word "debt" is, in part, defined in s 2 of the Act as meaning "anything which may be sued for";
- (ib) this meaning is complemented by meanings ascribed judicially because of the words "without limiting the meaning of the term" which appear in the definition;
- (iia) in terms of judicial pronouncement the word "debt" is synonymous with what is generally accepted as "cause of action";
- (iiia) "cause of action" and "debt" therefore, for all intents and purposes mean the entire set of facts which give rise to an enforceable claim and includes every fact which it is material to plead and prove so as to sustain an action successfully.

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GREENLAND J

Now once the word "debt" is accorded the meaning, amplified immediately above, it becomes plain that the words "the facts from which the debt arises" mean simply the facts constituting the

cause of action a conclusion I reached in *Denton v Director of Customs and Excise* 1989 (3) ZLR 41 (HC) in saying:

"In my view the words '**the facts from which the debt arises**' for all practical purposes mean what is, in law, understood as a '**cause of action**' (emphasis added)."

Even if I am wrong to import the judicial aspects (ii) to (iv) above and one were to recast the words as: "the facts from which the thing to be sued for arise" it makes little difference because what is stipulated is **awareness of facts** which enable prosecution of a civil claim.

It is important, in this exercise of interpretation, to emphasize that it is trite that the whole purpose of statutes of limitation is to ensure that a person who has a valid cause of action, **of which he is aware**, proceeds reasonably timeously to prosecution thereof before events become "stale". See *van Vuuren v Boshoff* 1964 (1) SA 395 (T) the headnote of which reads:

"The Prescription Act, 18 of 1943, was designed to penalise the person who can enforce his claim by action, but does not do so, and not the person who delays taking action because he is not yet able to do so."

Also see the adoption by GUBBAY JA, in *Stambolie v Commissioner of Police* 1989 (3) ZLR 287 (SC) of the *dictum* of Justice Jackson in *Chase Securities Corporation v Donaldson* (1944) 325 US 304; 89 L Ed 1628:

"Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a 'right' a claim that can find no remedy for its invasion. On the other hand, some common law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments.

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They

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GREENLAND J

are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost."

This view, as to purpose, is emphatically reinforced by a careful reading of s 15 as a whole, in particular subs (2) and the proviso. It is absolutely clear that the purpose is to penalise the dilatory creditor but not a creditor who is unaware, through no fault of his own, of the cause of action at his disposal.

I hold therefore that the words "facts from which the debt arises" in subs (3) mean the facts which constitute the cause of action and which the creditor needs to know in order to plead. It is to pose an all too obvious question to ask how else can a creditor be expected to proceed!? It is plain that the manner of expressing legislative intention in subs (3) is explicable on the basis of drafting style.

Applying this interpretation it follows that a court must analyse the cause of action and determine which essential aspects of fact therein the creditor was not aware of at the time the

cause of action arose. In the present case it is absolutely clear that the plaintiff was not aware:

- (a) that what he had stipulated for had not been drafted by the first defendant, ie, that the first defendant had negligently failed to carry out his instructions; and
- (b) that in consequence thereof he ceased to be owner of the *merx* on delivery and had therefore suffered a diminution in his patrimony.

To my mind both aspects are matters of fact and the submission that, because ownership passes by operation of law the matter is one of law, not one of fact, and therefore not covered by subs (3), which is only concerned with matters of fact, is simply untenable.

The submission, by Mr *de Bourbon*, is that as at 10 November 1986 the plaintiff was possessed of knowledge of all the facts which gave rise to his cause of action, ie, awareness of the written contract (the paper, the words, the grammar, punctuation etc) and the fact of delivery. These were the **facts** which gave rise to the debt and all were within his awareness. The only aspect not within his awareness, so the submission goes, was that which occurred by operation of law, ie the passing of ownership.

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GREENLAND J

This proposition is inherently absurd because acceptance thereof would defeat an important purpose of the Act, ie, to penalise only those who are aware of the existence of a cause of action and are unreasonably dilatory. It is absolutely clear that he was simply not aware that his lawyer, the first defendant, had done anything wrong, let alone knowing that he had a cause of action against him.

Also it ignores the fact that whether or not the first defendant drew up a contract in accordance with his client's stipulation is clearly a matter of fact. The question as to whether or not a person has done what he has been told to do is a question of fact. In any action against defendants this matter of fact would have had to be pleaded and indeed it now has been. On this aspect alone the special plea must fail.

Also I would not agree that passing of ownership is not a matter of fact. The question as to who is the owner of a thing is a question of fact determinable by legal rules just as the question as to whether a brand of oil has a certain viscosity is a matter of fact determined by laws of physics involving matter. Surely an expert who were to supply an oil of wrong viscosity with subsequent damage to machinery being occasioned cannot argue that the person supplied, who not being an expert knows nothing about viscosity and relies on the supplier, is to be taken as having been aware of all the facts entitling him to sue.

The Concise Oxford Dictionary defines "fact" as a "thing certainly known to have occurred or to be true . . . what is true or existent, reality". To my mind the passing of ownership **occurred**, that is the **truth** of the matter, it is the **reality** of the situation and therefore a matter of fact albeit brought about by operation of law.

Incidentally I would also not agree that plaintiff's loss occurred at some date after 10 November

1986. It seems to me that he suffered loss immediately ownership passed. The fact that there was a chance prospectively of the loss being made up for by way of payment in instalments does not invalidate the proposition that he suffered loss because his personal estate was reduced by the loss of a valuable asset. However this aspect is not crucial because it is accepted that by the time he became aware of the defective draftsmanship, ie, by 6 August 1987 the trailer was then beyond recovery. The test for completeness of a cause of action was therefore satisfied. See *Syfin Holdings, supra* at p 13 and *Abrahamse, supra*.

As the plaintiff only became aware of these matters of fact on 6 October 1987 and it was only from about that date that he was in a position to prove the debt

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GREENLAND J

or plead his cause of action prescription, in terms of s 15 of the Act, commenced to run therefrom and the claim is therefore not prescribed as summons was served within three years.

The special plea in bar is therefore dismissed with costs.

Byron Venturas & Partners, plaintiff's legal practitioners

Granger & Harvey, defendants' legal practitioners

1991 (2) ZLR p19

SAVANHU v HEIRS ESTATE SAVANHU 1991 (2) ZLR 19 (SC)

Court Supreme Court, Harare

Gubbay CJ, McNally JA & Manyarara JA

Civil appeal

23 June & 11 July 1991

Flynote

Statutes - interpretation - Wills Act 1987 s 16(1) - meaning of the words "subsequent marriage" - excludes a later marriage where the parties are the same - the provisions of the African Marriages Act [Chapter 238] and the Marriage Act [Chapter 37] considered.

Headnote

The appellant, a widow, married her husband under African law and custom in terms of the African Marriages Act [Chapter 105] (presently [Chapter 238]). There were five children of the marriage. The husband left a valid will in favour of their children. Shortly before his death the parties contracted into a second marriage in terms of the Marriage Act [Chapter 37]. Thereafter the testator died and his widow contested the will on the ground that the will was void in terms of s 16(1) of the Wills Act 1987 as the second marriage was a subsequent marriage. The court

a quo considered whether the testator had in fact entered into a subsequent marriage and found that he had not, see 1990 (2) ZLR 177 (HC). On appeal:

Held, that the court *a quo* was correct in its finding that a subsequent marriage as contemplated by s 16(1) of the Wills Act 1987 had not been entered into by the parties. *Held*, that the later marriage between the same parties in terms of the Marriage Act [Chapter 37] did not dissolve an existing marriage nor did it affect the status of the parties.

Held, that the later marriage was **not** a subsequent marriage for the purpose of the provision of s 16(1) of the Wills Act and did **not** invalidate the terms of the will.

Held, that in the interpretation of the words "subsequent marriage" the words must be given their ordinary grammatical meaning.

1991 (2) ZLR p20

GUBBAY CJ

Cases cited:

Chikosi v Chikosi 1975 (1) RLR 140 (G); 1975 (2) SA 644 (R)

Ludwig v Ludwig's Executors (1848) 2 Menz 452

Shearer v Shearer's Executors 1911 CPD 813

Braude NO v Perlmutter & Ors 1969 (2) RLR 103 (A); 1969 (4) SA 101 (RA)

National Railways of Zimbabwe Contributory Pension Fund v Edy 1988 (2) ZLR 157 (SC)

I Manikai for the appellant

H Simpson for the respondent

Judgment

Gubbay CJ: The appellant is the widow of the late Joseph Caxton Savanhu ("the testator"). They were married in accordance with African law and custom, the marriage being solemnized on 17 May 1949 in terms of the African Marriages Act [Chapter 105] (presently [Chapter 238]). For almost forty years they lived together under this valid union which bore to them five sons.

Aware that he was in the twilight of his years and of the disadvantages of dying intestate, the testator executed a last will and testament on 7 October 1988. Under it he made specific bequests to the appellant and the five sons, but left the residue of his estate, both movable and immovable, to the second born, Victor.

Not long after this, the appellant and the testator decided to contract a civil marriage in church. Banns of marriage were published and on 26 February 1989 they were married at St Paul's Parish, Highfield, by a marriage officer in terms of the Marriage Act [Chapter 37]. The marriage was concluded without the customary union having been first dissolved by a court of competent jurisdiction, as defined in s 16 of the African Marriages Act [Chapter 238]. A duplicate original

register of the civil marriage was delivered to the parties. This reflects the status of the testator as widower and that of the appellant as spinster. The appellant's surname is given as Mhonderwa.

Just over six months later, on 6 September 1989, the testator died.

Early in January 1990 the appellant applied to the High Court for an order declaring the will of the testator to be null and void, on the ground specified in s 16(1) of the Wills Act, 1987, that he had entered into a subsequent marriage. The relief sought was opposed by the testator's two eldest sons and heirs, Sydney and Victor, and was refused by CHINENGUNDU J

1991 (2) ZLR p21

GUBBAY CJ

The issue then that arises for determination is simply whether the learned judge was correct in deciding that, in the circumstances pertaining, the Christian ceremony of marriage contracted on 26 February 1989 was not one which qualified as a "subsequent marriage" for the purposes of s 16(1) of the Wills Act.

It is by no means uncommon for parties to a customary union, solemnized under the African Marriages Act, to thereafter contract a marriage under the Marriages Act. The consequential legal effect of such an act was carefully considered by MACAULAY J in *Chikosi v Chikosi* 1975 (1) RLR 140 (GD); 1975 (2) SA 644 (R), where at 142 *in fine*-143H (646 *in fine*-647B of SALR) it is said:

"As to its essential validity, the question which presents itself is whether the parties had the capacity to so contract if they were already validly married in Rhodesia, as sec 7 of the African Marriages Act [*Chap 105*] declares them to be. Spouses validly married cannot during the subsistence of that marriage create an effective second marriage with each other. See *Ex parte Gordon and Gordon*, 1921 WLD 43, where a second ceremony was declared void because it purported to marry in community a couple who were already married to each other out of community.

However, to say that the parties were already validly married according to the law of Rhodesia is only partly correct. Their registered customary union is not recognized here as a valid marriage for all purposes but as valid only 'according to African law and custom'. See sec 7 *supra* and *R v Tshipa*, 1958 (2) SA 384 (SR) and *R v Ncube*, 1960 (2) SA 179 (SR).

By sec 12 of the African Marriages Act, Africans are given the right to contract a civil marriage under the Marriage Act, now Act 18 of 1964; nothing in the former Act denies this option to Africans who, having already contracted a registered customary union, desire to convert the potentially polygamous character of their married status into a monogamous one, governed by the Marriage Act. Nor can I see anything in logic or principle to prevent such a course. Unlike *Thynne (Marchioness of Bath) v Thynne (Marquess of Bath)* [1955] 3 All ER 129 at 140, the second marriage is not devoid of content and ineffective to bring about some change in their status. It converts their earlier potentially polygamous status into a monogamous one with all the personal incidents associated with the latter. See *R v Tarasanwa* 1948 (2) SA 29 (SR). It also establishes their marriage as one recognized henceforward in Rhodesia for all purposes and not merely one 'according to African law and custom'. Section 13 of the African Marriages Act impliedly recognizes this by preserving in such

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GUBBAY CJ

a marriage only the proprietary rights of the parties as they exist according to African law and custom.

It is true that section 16 provides that the registered customary union may only be dissolved by a court of competent jurisdiction, but I do not view this as requiring a prior dissolution of the registered customary union (if only potentially polygamous) before the same parties thereto convert to a monogamous status. On this view of the matter it would seem that all that remains of the registered customary union is the matter of the proprietary rights of the parties as section 13 in fact indicates."

I respectfully associate myself with this expose. It is with regard to it that s 16(1) of the Wills Act is to be examined. The provision reads:

"Subject to this section, a will shall become void upon the subsequent marriage of the testator".

The term "subsequent marriage" is not defined in the Act but "marriage" is stated to include "a marriage solemnized in terms of the African Marriages Act".

In holding that the testator had not contracted a subsequent marriage upon entering into the marriage ceremony with the appellant on 26 February 1989, CHINENGUNDU J expressed himself as follows:

"The section does not say that the subsequent marriage in terms of Chapter 37 is the only valid marriage despite the fact that the same parties were previously married in terms of the African Marriages Act [Chapter 105]. It should be stated that no registered marriage can be dissolved by implication. The marriage in terms of [Chapter 105] can only be dissolved by a court of competent jurisdiction which was the District Commissioner's Court then or the Community Court as presently constituted. The only other way of dissolving a valid marriage without appearing in court is when one of the parties dies. One can therefore not say that for the purposes of wills a subsequent marriage ceremony between the same parties that entered into a prior marriage ceremony has the effect of invalidating or dissolving that previous marriage. If the Legislature wanted this to be the case it should have said so in no uncertain terms."

And:

"In my view a subsequent marriage contemplated by section 16(1) of the Wills Act is a marriage by one party to another person after the dissolution

1991 (2) ZLR p23

GUBBAY CJ

of an existing union either by divorce in court or by death. Such a marriage can properly be regarded as a subsequent marriage for the purposes of the above-mentioned Act. What the parties did was to convert their potentially polygamous marriage into a monogamous one, but their proprietary rights are still governed by African law and custom."

In my opinion, the reasoning of the learned judge is impressive, and I can find no fault with it.

It is plain to me that by enacting the provision in question the lawmaker was minded to alter the common law in accordance with which a will is not revoked by the subsequent marriage of the testator. See *Ludwig v Ludwig's Executors* (1848) 2 Menz 452; *Shearer v Shearer's Executors* 1911 CPD 813; *Braude NO v Perlmutter & Ors* 1969 (2) RLR 103 (AD) at 109C; 1969 (4) SA 101 (RA) at 106. It was appreciated that the operation of such a principle would cause injustice and untold hardship. So in 1929 a change in the law was effected by the introduction of s 2 of the former Deceased Estates Act, presently superseded by s 16(1) of the Wills Act. Its object is to afford some measure of protection to the new spouse of the testator who had been previously

married, and to any issue whether born to the parties or adopted by them. The provision contemplates more than the mere conversion of an existing polygamous or potentially polygamous matrimonial union to one of monogamy. It envisages a necessary change, brought about by the subsequent marriage, to the status of both the spouse and the testator to that of a married person - from a bachelor, divorcée or widower in the case of the man, and from a spinster, divorcée or widow in the case of the woman. It is designed to avoid a situation in which the will of one or each of them, which pre-dates the subsequent marriage, makes no provision for the other's new spouse.

But the right given to Africans who have already contracted a registered customary union to contract a second marriage under the Marriages Act, without having the first dissolved, does not mean that their second marriage has the effect of rendering void any pre-existing will. For there has been no change in status of the testator from an unmarried to a married person, and it is the existence of that very change that the legislative intendment is aimed at.

I would add in conclusion that this interpretation is wholly consistent with the ordinary, grammatical meaning to be assigned to the expression "subsequent marriage", that is, as it is popularly understood. See Black's *Law Dictionary*, Abridged 5 ed at p 501 *sub nom* "marriage". Such a meaning is to be adopted unless, by virtue of the context and construction of the enactment, some other

1991 (2) ZLR p24

GUBBAY CJ

meaning is apposite, or would create an anomaly, or would otherwise produce an irrational result. See *National Railways of Zimbabwe Contributory Pension Fund v Edy* 1988 (2) ZLR 157 (SC) at 160G-H.

I consider therefore that the appeal must be dismissed with costs.

McNally JA: I agree.

Manyarara JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Chirunda, Chihambakwe & Chikumbirike, respondent's legal practitioners

1991 (2) ZLR p25

S v KAMANGA 1991 (2) ZLR 25 (HC)

Court **High Court, Harare**

Chidyausiku J

Criminal review

17 July 1991

Flynote

Criminal procedure - conviction in absentia - Criminal Procedure and Evidence Act [Chapter 59] - s 336(6) - court must hear evidence - not competent to convict unless prima facie case established against accused

Headnote

The accused, having been issued with a written notice to appear in the magistrates court to answer an alleged violation of the traffic law, failed to appear. The magistrate thereupon and without hearing any evidence proceeded to convict and sentence the accused *in absentia* in terms of s 336(6) of the Criminal Procedure and Evidence Act [Chapter 59]. On review:

Held, that as s 336(6) provides that the court may ". . . proceed to hear such case and adjudicate thereon . . ." in the absence of the accused, it is not competent to convict unless evidence is led establishing a *prima facie* case against the accused.

Accordingly, conviction quashed and sentence set aside.

Judgment

Chidyausiku J: The accused in this case was issued with a ticket for allegedly contravening s 6(1) of the Road Traffic (Carriage of Passengers) Regulations SI 76/84, carrying excess passengers. He was supposed to appear in court on 26 September, 1989. He did not. The trial magistrate acting in terms of s 336(6) of the Criminal Procedure and Evidence Act [Chapter 59] convicted the accused in his absence. The scrutinising Regional Magistrate has questioned the propriety of the proceedings before the trial magistrate and requested this court to provide some guidelines on the application of the provisions of s 336(6) of the Code because magistrates frequently try accused persons *in absentia* in

1991 (2) ZLR p26

CHIDYAUSIKU J

terms of the above section of the Code.

Section 336(6) of the Code reads as follows:

"(6) Where a summons has been issued in respect of any case in which the court has summary jurisdiction and in which the penalty prescribed by law is a fine, and only in default of payment of such fine, imprisonment, the party summoned need not appear personally and may appear through a legal practitioner duly authorized thereto; and should the party summoned fail to appear either personally or through such legal practitioner, the court may, if satisfied that such summons was duly served, and if further satisfied that the ends of justice will be met, proceed to hear such case and adjudicate thereon as fully and effectually as if such person had appeared:

Provided that, in case there is no legal practitioner available practising before such court, then any other person may appear on behalf of the accused.

So often as a person has been convicted of an offence in his absence in terms of this section, the court may direct the collection of any fine imposed, together with the costs of such collection, and further direct that, on failure to pay such fine and costs, the offender be arrested and committed to prison to undergo any sentence of imprisonment that may have been imposed as an alternative to such fine, and such direction shall be by warrant in

a prescribed form."

It is apparent from the above subsection that the Act permits the conviction of an accused person in his absence if the following requirements are satisfied -

- (a) the penalty prescribed must be a fine, and only in default of payment of such a fine, imprisonment;
- (b) the summons must be properly served;
- (c) the court must be satisfied that the ends of justice will be met.

Once these essentials are satisfied, the court may proceed to hear such a case and adjudicate thereon as fully and effectively as if such person had appeared. There is no doubt that a person can be convicted in his absence. The learned scrutinising Regional Magistrate is of the view that there should be no such trial in the absence of the accused if there is a possibility of an accused being able to raise a triable issue if he had been present. Thus in the present case the accused if he had been present could have raised a triable issue by relying on one of the

1991 (2) ZLR p27

CHIDYAUSIKU J

provisos. Thus a conviction in this case could only follow if the court were satisfied that the provisos to s 6(1) of the Regulations did not apply. In his view, the trial magistrate was wrong in assuming that because the accused did not appear in court, the various defences open to him could not apply.

I am unable to accept the scrutinising Regional Magistrate's interpretation of the above provision. The clear intention of the Legislature here is that an accused person who fails to answer a summons forfeits the right to defend himself against the charge. Indeed the failure to appear gives rise to the inference that the accused has no defence to offer. Speculation that the accused might have a defence is not consistent with his failure to appear. An accused person with a defence to offer will in all probability appear to offer such a defence. This provision works to the advantage of a guilty person and is intended to save him from the bother and inconvenience of travelling all the way to court, in some cases hundreds of kilometres away, when he has nothing useful to say to the court. The provision also serves to expedite the processing of petty offences. In my view it would be unjust to fine a person without giving that person an opportunity to be heard. If the person is given an opportunity to be heard, but fails to avail himself of that opportunity, there is no injustice done. This section should be used more often in respect of people who have been issued with traffic tickets warning them to appear in court and who do not wish to go to court but are willing to pay the fine.

The proceedings in this case are defective for the reason that no evidence was led before the magistrate convicted the accused. Subsection (6) provides that the court may "proceed to hear such case and adjudicate thereon as fully and effectually as if such person has appeared". The court cannot adjudicate without hearing evidence. The State should therefore lead evidence to establish at least a *prima facie* case before the court can convict. The proceedings are therefore set aside because no evidence was led by the State to establish a *prima facie* case against the

accused. Had the State led such evidence it would have been competent to convict the accused in his absence. This view accords with the view of the Attorney-General, whose minute I found most useful.

The conviction is therefore quashed and the sentence is set aside.

Mtambanengwe J agrees.

1991 (2) ZLR p28

McCRONE v SIBANDA 1991 (2) ZLR 28 (HC)

Court **High Court, Harare**

Greenland J

Opposed application

3 June & 17 July 1991

Flynote

Practice - motion proceedings - temporary interdict against disposal of property pendente lite - prima facie right - whether applicant may enforce a contract having failed to discharge his own obligations - whether set-off operates to excuse applicant for such failure.

Headnote

The applicant sought a temporary interdict restraining the respondent from disposing of an immovable property pending the resolution of a suit to be brought by the applicant for the enforcement of an admitted contract of sale entered into by the parties. The applicant admitted that he had not discharged his own obligation in terms of the contract to pay the respondent the required instalments in terms of the contract, but sought to claim set-off for such instalments against monies received by the respondent by way of rentals from sitting tenants in the disputed property after the date that the applicant was to be given vacant possession thereof.

Held, that set-off or *compensatio* is a method by which contractual and other debts are extinguished simultaneously *ipso iure*. Set-off may be regarded as a form of payment and may even operate as the equivalent of payment in cash.

Held, further, that a party cannot take advantage of his own default to the loss and injury of another.

Held, further, that as a consequence of the contract between the parties, the monies, payable as rental by sitting tenants, accrued to the applicant and were due and payable to him, but because of the respondent's wrongful frustration of the contract, the latter was able to appropriate the monies to his own account.

1991 (2) ZLR p29

GREENLAND J

Held, further, that as the applicant claimed set-off of the debt, such set-off or *compensatio* operated retrospectively and the applicant's obligation to pay the instalments in terms of the contract must be held to have been discharged.

Cases cited:

Re Hare and Gough (1862) 1 Roscoe 14

Ferguson v De Roos (1889) 3 SAR 15

Yamomoto v Rand Canvas Co 1919 WLD 100

Stiebel v Horn & Ors 1971 (3) SA 643 (W)

Mathews v Mathews 1936 TPD 124

Starr v Ramnath & Ors 1954 (2) SA 249 (N)

Voloshen v Highspeed Laundry & Cleaning Services (Pty) Ltd 1938 CPD 341

Stansfeld v Kuhn 1940 NPD 238

Farmers Co-operative Society v Berry 1912 AD 343

Wolpert v Steenkamp 1917 AD 493

Geldenhuys & Neethling v Beuthin 1918 AD 426

Sapro v Schlinkman 1948 (2) SA 637 (A)

Lawson v Stevens 1906 TS 481

Smiles' Trustee v Smiles 1913 CPD 739

Joint Municipal Pension Fund (Transvaal) v Pretoria Municipal Pension Fund 1969 (2) SA 78 (T)

Eaton NO v Johnstone (1833) 1 Menz 90

SWA Amalgameerde Afslaers (Edms) Bpk v Louw 1956 (1) SA 346 (A)

Scott & Anor v Poupard & Anor 1971 (2) SA 373 (A)

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

King v Cohen Benjamin & Co 1953 (4) SA 641 (W)

Nortje & Anor v Pool NO 1966 (3) SA 96 (A)

Dilmitis v Niland 1965 (3) SA 492 (SR)

Krueger v Navratil 1952 (4) SA 405 (SWA)

Naicker v Bell 1965 RLR 430 (G); 1965 (4) SA 210 (SR)

Schierhout v Union Government (Minister of Justice) 1926 AD 286

PC Paul for the petitioner

Respondent in person

Judgment

Greenland J: In this case the applicant seeks the grant of an interdict to restrain the respondent from disposing of an immovable property (the property) pending the resolution of a suit to be brought by the applicant for enforcement of an admitted contract of sale previously entered into by the parties.

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GREENLAND J

That the applicant can bring such an application is not in question. See *Re Hare and Gough* (1862) 1 Roscoe 14; *Ferguson v De Roos* (1889) 3 SAR 15; *Yamamoto v Rand Canvas Co* 1919 WLD 100; *Stiebel v Horn & Ors* 1971 (3) SA 643 (W); *Mathews v Mathews* 1936 TPD 124 and *Starr v Ramnath & Ors* 1954 (2) SA 249 (N).

The purpose of such proceedings is to ensure that the *merx* or thing sold is preserved until such time as the Court enforces the contract between the parties. The applicant is required to prove only that he has a *prima facie* right to enforcement of the contract. *Mathews, supra*; *Voloshen v Highspeed Laundry and Cleaning Services (Pty) Ltd* 1938 CPD 341; *Stansfeld v Kuhn* 1940 NPD 238 and *Starr supra*.

The position however is that, by his own admission, the applicant has not discharged an obligation, in terms of the contract, to pay the respondent instalments of \$500 per month with effect from 1 January 1991.

The respondent (a self actor) therefore makes the good point that the applicant cannot insist on the enforcement of a contract which he himself has not honoured. Had the respondent been represented no doubt the following precedents would have been cited in support of this proposition: *Farmer's Co-operative Society v Berry* 1912 AD 343 at 350; *Wolpert v Steenkamp* 1917 AD 493 at 499; *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 44-5 and *Sapro v Schlinkman* 1948 (2) SA 637 (A) at 643.

The applicant avers that he is "excused", in law, from his obligation particularised above. In essence he relies on set-off on *compensatio*. In support of this claim he advances the following facts:

- (a) that as from 1 January 1991 the respondent received monies, as rentals, from sitting tenants in excess of \$500 per month
- (b) that the respondent has appropriated these amounts to his own use despite the fact that the contract required that applicant be given possession/occupation of the property

as from 1 January 1991 in which event the applicant would have received the rentals as his own property.

For the purpose of deciding the issue these facts are accepted as the respondent has neither denied them nor put them in issue.

Set-off or *compensatio* is a method by which contractual and other debts are extinguished simultaneously *ipso iure*. Set-off may be regarded as a form of

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GREENLAND J

payment. It may even operate as the equivalent of payment in cash. See *Lawson v Stevens* 1906 TS 481 at 483; *Smiles' Trustee v Smiles* 1913 CPD 739; *Joint Municipal Pension Fund (Transvaal) v Pretoria Municipal Pension Fund* 1969 (2) SA 78 (T); *Eaton NO v Johnstone* 1883 (1) Menz 90; *SWA Amalgameerde Afslalers (Edms) Bpk v Louw* 1956 (1) SA 346 (A) at 354. On the accepted facts the position is that the respondent created a situation in which he then enabled himself to appropriate monies which would have been received by the applicant. It is more correct to say that, as a consequence of the contract between the parties, the monies, payable as rental by sitting tenants, accrued to the applicant and were due and payable to him, but because of the respondent's wrongful frustration of the contract the latter was able to appropriate the monies to his own account. It must be held that the said monies remain due and payable to the applicant.

This is the position reached by applying the equitable rule that a party cannot take advantage of his own default to the loss and injury of another. See *Scott & Anor v Poupard & Anor* 1971 (2) SA 373 (A) at 378G; *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 700G.

In the result therefore it must be held that, on the facts, the respondent has been unjustly enriched at the expense of the applicant. That this is a debt is made clear by the realization that the applicant has a cause of action founded on a *condictio* or for unjust enrichment against the respondent. See *King v Cohen Benjamin & Co* 1953 (4) SA 641 (W) which case restated the rule that the law will not permit a person to unjustly enrich himself at the expense of another. See also *Nortje & Anor v Pool NO* 1966 (3) SA 96 (A); *Dilmitis v Niland* 1965 (3) SA 492 (SR); *Krueger v Navratil* 1952 (4) SA 405 (SWA) and *Naicker v Bell* 1965 RLR 430 (G); 1965 (4) SA 210 (SR).

As the applicant has claimed set-off of the debt set-off or *compensatio* operates retrospectively and his obligation to pay the instalments in terms of the contract must be held to have been discharged. As to retrospective operation of set-off once claimed see *Schierhout v Union Government (Minister of Justice)* 1926 AD 286 at 289-290.

I hold therefore that the applicant has demonstrated a *prima facie* right to enforcement of the contract of sale. It is right and proper that the property be preserved pending resolution of his action in this respect.

There is simply no merit in the other arguments advanced by the respondent. These all rest on

the premise that the written contract was verbally varied by the

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GREENLAND J

parties and does not represent the contract between them. This stance is simply not available to the respondent for the simple reason that the written contract which he subscribed to contains a clause which clearly stipulates that the parties are agreed that the contract represents the whole of the agreement between them and that any variation thereof shall be in writing and subscribed. He has produced no such written variation.

The application succeeds. *Pendente lite* there shall be an interdict in terms of the draft. The respondent shall pay costs.

Winterton, Holmes & Hill, petitioner's legal practitioners

1991 (2) ZLR p33

CHIADZWA v PAULKNER 1991 (2) ZLR 33 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

2 & 23 July 1991

Flynote

Civil procedure - High Court Rules - rule 64 - summary judgment - requirements for affidavit - if not made by plaintiff deponent must be a person who can swear positively as to the facts.

Costs - point in limine raised for the first time on appeal - successful applicant not entitled to costs of appeal or in the court below.

Headnote

For the purposes of Rule 64 of the High Court Rules (summary judgment), an affidavit must fulfil three requirements:

1. It should be made by the plaintiff himself or by any other person who can swear positively to the facts.
2. It must verify the cause of action and the amount, if any, claimed.
3. It must contain a statement by the deponent that in his belief there is no *bona fide* defence to the action. Where the affidavit is not that of the plaintiff himself, the deponent, while not requiring any special authority from the plaintiff to make the affidavit, must belong to a particular class of persons, namely, those who can swear

positively to the facts. In this regard, the deponent should set out facts which will justify the court in coming to the conclusion that the averments in the summons are within his knowledge.

Where a point *in limine* which was raised for the first time on appeal, results in success, it is appropriate to deprive the successful appellant of his costs of appeal and in the court *a quo*.

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GUBBAY CJ

Cases cited:

Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd 1959 (3) SA 362 (W)

Fischereigesellschaft F Busse & Co Kommanditgesellschaft v African Frozen Products (Pty) Ltd 1967 (4) SA 105 (C)

Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)

Barclays National Bank Ltd v Love 1975 (2) SA 514 (D)

Misid Investments (Pty) Ltd v Leslie 1960 (4) SA 473 (W)

Raphael & Co v Standard Produce Co (Pty) Ltd 1951 (4) SA 244 (C)

Barclays National Bank Ltd v Smith 1975 (4) SA 675 (D)

Pinepipe (Pty) Ltd v Nolec (Pty) Ltd 1975 (4) SA 932 (W)

Jeffrey v Andries Zietsman (Edms) Bpk 1976 (2) SA 870 (T)

Barclays National Bank Ltd v Swartzberg & Ors 1974 (1) SA 133 (W)

Commissioner for Inland Revenue v Niko 1940 AD 416

E Chatikobo for the appellant

G Musariri for the respondent

Judgment

Gubbay CJ: This is an appeal against a decision of CHAMBAKARE J whereby he ordered summary judgment with costs against the appellant (the defendant in the action) at the instance of the respondent (the plaintiff).

The application for summary judgment was made on the basis of a summons issued under Order 3 Rule 13 of the the High Court Rules 1971. The particulars of claim annexed to the summons contain these allegations:

1. During July 1979 the parties entered into a written agreement of sale, pursuant to which the plaintiff sold to the defendant an immovable property, known as Stand 8090 Salisbury Township Lands, for the sum of \$8 425, payable as follows -
 - (a) by a deposit of \$843 on the signing of the agreement;
 - (b) the sum of \$1 017, at three monthly intervals, in instalments of not less than \$200, to commence on 1 November 1979, with interest thereon at the rate of 8% *per annum*;
 - (c) the balance of \$6 565, by the defendant assuming the responsibility with effect from 1 August 1979 for the monthly repayments of \$80 due on the plaintiff's loan account with Central Africa Building Society, which loan account is secured by a mortgage bond passed by the plaintiff on 29 July 1974.

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GUBBAY CJ

2. Transfer of the property was not to be registered until the price had been paid in full, the plaintiff being entitled to cancel the agreement in the event of any instalment of the purchase price not being met on due date.
3. The defendant neglected to pay the instalments due to Central Africa Building Society for the months of November and December 1988 and January 1989, and despite notice given in proper form to remedy the breach, failed to do so.
4. In consequence of the aforesaid breach, the plaintiff claims -
 - (i) an order cancelling the agreement of sale;
 - (ii) ejectment of the defendant and all those claiming rights of occupation through him, from the property; and,
 - (iii) costs of suit.

The defendant gave notice of his intention to defend the action. Thereupon the plaintiff filed an affidavit deposed to by one John Mashayamombe, the body of which reads:

- "1. I am related to the plaintiff by marriage, being married to his sister-in-law, and the facts contained herein are within my personal knowledge.
2. In or about July, 1979, the parties in this case entered into a written agreement of sale in terms of which the plaintiff sold to the defendant certain property known as: Stand 8090, Salisbury Township Lands, also known as: No. 2, Appleyard Road, Southerton, for a purchase price of \$8 425,00. (See Deed of Sale attached hereto and marked Annexure 'A'.)
3. During or about January, 1989, I found that the plaintiff's loan account with Central Africa Building Society (CABS) was three months in arrears. (See letter dated 25th January, 1989, written by CABS, which is attached hereto and marked Annexure 'B'.)

4. Despite a letter of demand addressed to the defendant by the plaintiff's legal practitioners, the defendant failed or neglected to update the CABS loan account within 30 days of the demand. (See letter of demand attached hereto and marked Annexure 'C'.)
5. In the premises the defendant is in breach of clause 1(a) of the agreement of sale and in terms of clause 4 of the agreement the plaintiff is entitled to the cancellation of the sale.
6. I truly believe that the defendant has no *bona fide* defence to this action

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GUBBAY CJ

and that an appearance has been entered solely for the purposes of delay."

Although in his opposing affidavit the defendant makes the submission that the verifying affidavit of Mashayamombe is defective and does not fall squarely within Order 10 Rule 64, as he is not a person "who can swear positively to the facts", no argument was addressed to the learned judge on what would have been an objection *in limine* to the court's jurisdiction to grant summary judgment. See *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366C-D. In the event, and quite understandably, the point is not considered in the judgment appealed against. It has now been raised by Mr *Chatikobo* who, on behalf of the defendant, was granted leave to incorporate it as a new ground in the notice of appeal.

Rule 64, which, in relevant part, is worded virtually identically to Rule 32(1) of the Uniform Rules of the Supreme Court of South Africa, permits of an application for summary judgment provided there is filed by the plaintiff an affidavit:

"... made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action ..."

Thus, the affidavit must fulfil three requirements -

- (a) It should be made by the plaintiff himself or by any other person who can swear positively to the facts;
- (b) It must verify the cause of action and the amount, if any, claimed;
- (c) It must contain a statement by the deponent that in his belief there is no *bona fide* defence to the action.

See *Fischereigesellschaft F Busse & Co Kommanditgesellschaft v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 108A-B; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (AD) at 422B-C.

Where the affidavit is not that of the plaintiff himself, the deponent, while not requiring any special authority from the plaintiff to make the affidavit, must belong to a particular class of persons, namely, those who can swear positively to the facts. See *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at

GUBBAY CJ

515D-E. It must appear *ex facie* the affidavit that the deponent belongs to such a class of persons. See *Misid Investment (Pty) Ltd v Leslie* 1960 (4) SA 473 (W) at 474G-H.

In his affidavit Mashayamombe states that he is married to the plaintiff's sister-in-law. That marital association does not, in my view, lead to the reasonable inference that he must be knowledgeable of the plaintiff's commercial dealings. In itself the relationship is far removed from that of a managing-director, or general manager, of a plaintiff company, or even of a legal practitioner who is acting for the plaintiff in the action instituted, and suggestive of the existence of hearsay as opposed to direct knowledge.

What a deponent must do in order to effectively counter any such doubt, is to set out facts which will justify the court in coming to the conclusion that the averments in the summons are within his knowledge - some facts which show an opportunity on his part to have acquired such personal knowledge. See *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C) at 245E-F; *Barclays National Bank Ltd v Smith* 1975 (4) SA 675 (D) at 681D; *Pinepipe (Pty) Ltd v Nolec (Pty) Ltd* 1975 (4) SA 932 (W) at 934H. A useful test is to ask whether the deponent would be a competent *viva voce* witness to the facts were he to be called. See *Jeffrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA 870 (T) at 872B.

Does Mashayamombe fall into this category? I think not. The facts relied upon to support the assertion of personal knowledge on his part fall short of establishing it. In the first place, it appears that his knowledge of the sale of the property is derived solely from a reading of the terms of the written agreement, or, perhaps, from what he was told by the plaintiff. He does not say that he was present during the negotiations that led to the conclusion of this agreement and certainly he did not sign as one of the witnesses thereto. He makes no claim to ever having met the defendant. Secondly, his discovery that the defendant was in arrears with the instalment payments was not based upon any personal enquiry made by him, but rather upon an acceptance of the correctness of what was contained in a letter written by Central Africa Building Society to its legal practitioners. Thirdly, the source of his professed knowledge that the defendant had failed to remedy the breach is not given. Reliance is placed solely on a letter of demand sent to the defendant by the legal practitioner acting on behalf of the plaintiff. This does not suffice.

Consequently, as the facts alleged in the summons have not been shown to be within the personal knowledge of Mashayamombe, he is not in a position to

GUBBAY CJ

verify the cause of action (the second requirement of Rule 64). It may be on account of his lack of knowledge of the facts, that he has not stated in his affidavit, as he is enjoined to do, that he verifies the cause of action. See *Barclays National Bank Ltd v Swartzberg & Ors* 1974 (1) SA 133 (W) at 134D. The second effect is that he is not qualified to express the belief that there is

no *bona fide* defence (the third requirement).

The strictness of this approach is justified by the necessity that a plaintiff bring himself fully within the scope of Rule 64. Summary judgment is, after all, an extraordinary and drastic remedy and a very stringent one based upon the supposition that the plaintiff's claim is unimpeachable. It gives a court power to grant a judgment without a trial, even though notice of the defendant's intention to defend has been properly given. Though this power must be exercised with great circumspection, it does not mean that effect must be accorded to an insubstantial technicality raised by way of objection to the grant of summary judgment.

For the foregoing reasons, the appeal must be allowed. Nonetheless as the point *in limine*, which resulted in its success, was raised for the first time at this hearing, I am of the view that the appellant should be deprived of his costs both in this court and below. See *Commissioner for Inland Revenue v Niko* 1940 AD 416 at 431.

I would accordingly order as follows:

1. The appeal is allowed.
2. The order of the court *a quo* is altered to read:
 - (a) The application is dismissed;
 - (b) Each party is to pay his own costs.

McNally JA: I agree.

Korsah JA: I agree.

A R Chizikani, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

1991 (2) ZLR p39

HARRY v DIRECTOR OF CUSTOMS & EXCISE 1991 (2) ZLR 39 (HC)

Court **High Court, Bulawayo**

Blackie J

Civil trial

29 July 1991

Flynote

Prescription - Customs and Excise Act [Chapter 177] s 178 (4) as read with s 176(9) - action for recovery of seized goods barred as result of failure to institute proceedings for recovery within three months of date of

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delivery of notice of seizure - whether defendant may waive the rights given under the section.

Practice - waiver - onus - requirements to establish.

Headnote

Where plaintiff had contended a waiver by defendant of the rights defendant had under s 178(4), as read with s 176(9), of the Customs and Excise Act [*Chapter 177*] for the action for the recovery of goods seized, to be brought within three months of seizure, the court, referring to the apparent conflict in the decided cases on the question of whether or not defendant could waive the rights given under the section, preferred to follow the judgment which had held that defendant could waive the rights.

Accordingly, the court found that defendant could waive the rights given under the section, but on the facts found that plaintiff had not established that there had been such a waiver.

Cases cited:

Quintas v Controller of Customs & Excise 1976 (1) RLR 208 (G)

Patel v Controller of Customs & Excise 1982 (2) ZLR 82 (HC)

Laws v Rutherford 1924 AD 261

Minister van Justisie v Swanepoel 1968 (1) SA 347 (SWA)

1991 (2) ZLR p40

BLACKIE J

J James for the plaintiff

I A Esat for the defendant

Judgment

Blackie J: On 27 August 1987, the defendants' officers seized two typewriters in the plaintiff's possession and immediately thereon issued and served on the plaintiff a notice of seizure in respect of those typewriters. On 30 December 1988, the plaintiff gave written notice, (purportedly in terms of s 178(1) of the Customs and Excise Act [*Chapter 177*], (the Act)) of her intention to institute legal proceedings for the recovery of the typewriters. A summons and declaration were subsequently issued out of this court on 6 March 1989. These were served on the defendant on 13 March 1989.

The defendant filed a plea in bar and exception to the action claiming that, in terms of s 178(4) as read with s 176(9) of the Act, plaintiff's action was barred, in that it had not been brought within three months of the date of delivery of the notice of seizure, and that, in any event, plaintiff's summons and declaration did not disclose any cause of action entitling the plaintiff to the relief which she sought. This plea in bar and the exception were set down for hearing but were not argued. The plaintiff undertook to amend his declaration and the matter was removed

from the roll.

The plaintiff has now filed an amended declaration. Insofar as it deals with the point raised in the original plea in bar it now alleges that the defendant waived his rights in terms of the Act for the action of recovery of the typewriters to have been brought within three months of the date of the delivery of the seizure notice. The correspondence, which it was said created such waiver, was attached to the amended declaration. The defendant has filed a further plea in bar to the amended declaration. This plea in bar claims that, in terms of the Act, the defendant cannot waive the rights alleged and that, if he can do so, the correspondence on which the plaintiff relies as the basis for such waiver, does not establish the waiver.

There is an apparent conflict between the decisions of this court as to whether the defendant may waive the rights granted him in the Act and under discussion in this matter. In *Quintas v Controller of Customs and Excise* 1976 (1) RLR 208 at p 212 GOLDIN J (notwithstanding a concession by counsel for the Controller in that case that the Controller did have the right to so waive his rights) said that the Controller did not have that right. However in *Patel v Controller of Customs and Excise* 1982 (2) ZLR 82 at p 88 GUBBAY J (as he then was) held that the Controller could waive his rights. With respect to the learned judges concerned there is no doubt in my mind that the reasoning and conclusion in *Patel's* case

1991 (2) ZLR p41

BLACKIE J

is preferable to that in *Quintas'* case. I hold that the defendant does have the power to waive his rights in respect of the sections under discussion.

If the defendant can waive his rights in this regard, it must be decided whether the defendant did so in this case. The *onus* is on the plaintiff to prove the waiver. To establish waiver, the plaintiff must show an express abandonment or surrender of rights (or at least conduct which is plainly inconsistent with their enforcement) with full knowledge and appreciation of those rights. *Laws v Rutherford* 1924 AD 261; *Minister van Justisie v Swanepoel* 1968 (1) SA 347 (SWA) at 354; *Patel v Controller of Customs, supra*, at 88.

A careful examination of the correspondence attached to the plaintiff's amended declaration and on which the plaintiff's claim to waiver is based, does not reveal any express abandonment of rights or even conduct inconsistent with their enforcement. At best for plaintiff, the correspondence shows the defendant agreeing firstly to revoke forfeiture (due to the misfiling of a letter of representation sent by plaintiff's legal practitioner) and secondly, to withhold immediate and final forfeiture for fixed periods of time.

In these circumstances it seems to me that the defendant's plea in bar must be upheld. The plaintiff's claim is dismissed and judgment is entered for the defendant.

James, Majwabu - Moyo & Nyoni, plaintiff's legal practitioners

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

ANTONIO v ANTONIO 1991 (2) ZLR 42 (SC)

Court **Supreme Court, Harare**

Manyarara JA, Korsah JA & Ebrahim JA

Civil appeal

30 July 1991

Flynote

Customary law - inheritance - Administration of Estates Act [Chapter 301] - matters into which magistrate should enquire.

Headnote

A magistrate carrying out an inquiry in terms of s 69 of the Administration of Estates Act [Chapter 301] is required to summon all the parties concerned before him and take evidence of the customs and usages of the people concerned and to then determine both the issue of heirship as well as the manner of distribution of the assets of the estate.

Where a magistrate had not carried out a full inquiry as envisaged by the Administration of Estates Act [Chapter 301]:

Held, that the matter should be remitted to the magistrate to carry out a full and proper inquiry.

Held, obiter, that by virtue of the Legal Age of Majority Act 1982, even in customary law the right to guardianship and custody of a child born to a major woman vests in that woman upon the death of the child's father until a court of competent jurisdiction decides otherwise. That is so whether the child is legitimate or illegitimate.

Cases cited:

Vareta v Vareta S-126-90 (not reported)

Matambo v Matambo 1969 (2) RLR 154 (A); 1969 (3) SA 717 (RA)

Chiutare v Chiutare S-114-91 (not reported)

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

MANYARARA JA

E Chatikobo for the appellant

D P Drury for the respondent

Judgment

Manyarara JA: This appeal arises out of a notorious practice followed by certain members of the community of descending upon the wife or reputed wife of their deceased relative and stripping her of all the property that she and the deceased possessed. In this instance the relatives went so far as "evicting" the woman from the house in which she, the deceased and a minor child of the union resided. As usual, the parties to the case which was brought before the Provincial Magistrate's Court at Harare were the deceased's minor children, assisted by the real contenders, who were the dispossessed woman and the deceased's brother.

The proceedings came before the court in terms of s 69(2) of the Administration of Estates Act [*Chapter 301*], although neither the magistrate nor the parties seemed to realise this. The court was "called upon to decide who should be the heir to the deceased(s) estate", with the parties to the present appeal as the rival "claimants" thereto.

At the hearing of the appeal we made the following order by consent of counsel for the parties:

1. That the community court's order appointing the respondent as the heir to the deceased's estate is confirmed;
2. That the case is remitted to the Provincial Magistrate's Court to hold a full enquiry into the dispute surrounding the distribution of the estate in terms of s 69(2) of the Administration of Estates Act [*Chapter 301*];
3. That there be no order as to costs.

In the proceedings before the community court in November 1990 the appellant, aged 15 years, was assisted by Samuel Antonio, a brother of the late Richard Antonio ("the deceased"), who died intestate on 12 October 1989 in Harare. As I have said, the respondent, aged seven years, was assisted by his mother, Mercy Mukakati. She also claimed that prior to the deceased's death she was cohabitating with him at No. 7 Scott Road, Hatfield, Harare ("the house"), and the respondent was in their custody.

According to Ms Mukakati, the house was acquired by herself and the deceased jointly. But, following the deceased's death, Samuel Antonio, his mother and

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MANYARARA J

his other relatives came to the house and "evicted" her after seizing the deceased's savings account book or books, insurance policy and documents relating to the house. Samuel Antonio and his "gang" (which I consider to be an appropriate description of the group) went to the community court without Ms Mukakati and had the respondent appointed the heir to the estate. It was assumed by the court and Samuel Antonio's gang that Samuel Antonio was the

respondent's rightful guardian.

When Ms Mukakati learned of the appointment, she challenged Samuel Antonio's claim to be the respondent's guardian. Samuel Antonio and his gang returned to the community court and asked that the respondent be substituted by the appellant as heir. The community court purported to do so, but the decision was upset by the Provincial Magistrate to whom the matter was referred. The magistrate was obviously alarmed by Ms Mukakati's evidence of her eviction from the house because he went further and ordered that she and the respondent "shall take occupation of the house with immediate effect". In this respect the magistrate misdirected himself seriously. This is the only point which Mr *Chatikobo*, for the appellant, pursued in this appeal, and Mr *Drury* conceded the point on the respondent's behalf. Counsels' attitude was quite proper and in applying for the order we made they requested that there be no order as to costs, which was also right in the circumstances.

It was common cause that the respondent, as the deceased's eldest or only son, should succeed to the estate in accordance with the deceased's wishes. See *Vareta v Vareta* S-126-90 for the proposition that the respondent is "the natural heir" of the deceased in this case. His succession to the house will arise in the distribution of the deceased's property in terms of s 69(1) of the Administration of Estates Act: *Matambo v Matambo* 1969 (2) RLR 154 (AD), 1969 (3) SA 717 (RAD).

In this regard, the court welcomes the information given from the Bar that the appellant's legal practitioners of record have withdrawn from the matter and placed the administration of the estate in the hands of the Master of the High Court. It was not proper for the legal practitioners concerned to act for the appellant, for the reasons I shall set out for the guidance of the magistrate who will conduct the enquiry ordered on the remittal of the case.

Section 69(2) of the Administration of Estates Act states that the magistrate shall summon the relatives and reputed relatives of the deceased before him and take and record evidence of the customs and usages of the tribe to which the deceased belonged, which evidence he may supplement from his own knowledge and, on

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MANYARARA J

the basis of such evidence, determine the manner in which the estate shall be distributed. *Matambo v Matambo, supra*.

This procedure was not followed in this case and consequently the matter could not be said to be properly before us in terms of s 69(3) of the Act. Samuel Antonio has in fact jumped the gun, as it will be seen that he is only one of the persons who may be summoned in terms of the Act in his own right, but not as the guardian of either of the parties.

It may now be taken as settled law that, by the operation of the Legal Age of Majority Act 1982 on customary law, the right to guardianship and custody of a child born to a major woman vests in that woman upon the death of the child's father, if he had these rights in the child, until a court of competent jurisdiction makes an order to the contrary. *Chiutare v Chiutare* S-114-91. This is so whether the child is legitimate or illegitimate. To construe the Legal Age of Majority Act in any

other manner would make nonsense of the intendment of the Legislature which is to accord equal legal status to males and females in this jurisdiction. Ncube *Family Law in Zimbabwe* paras 7.2 and 7.8 should be read with this proposition in mind. See *Zimnat Insurance Co Ltd v Chawanda* 1990 (2) ZLR 143 (SC), which I suggest should now guide a court's application of customary law principles to the multifarious cases which arise for determination. Three judges of this court said at p 152H-153A:

"As our law accepts customary unions, it should endeavour to secure equality to the parties thereto and discard the intolerable affection of superior virtue (to borrow a phrase) inherited from the colonial past. To continue to exhibit a vestige of condescension and conservatism towards customary law unions ill befits, and is repugnant to, the current and unyielding movement by the State to remove the legal disabilities suffered by African women. See the remarks of DUMBUTSHENA CJ in *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (SC) at 124A."

The evidence in this case is that the appellant was born in wedlock between the deceased and one Elizabeth Chawanda who, though separated from the deceased, has survived him. The respondent is the deceased's illegitimate child with Ms Mukakati. It seems that the deceased is also survived by two other illegitimate children, namely Richard born in 1986 and Rumbidza a girl born in 1989, by a third woman referred to as Marceline. Surprisingly, this information came, not from Samuel Antonio, but from Ms Mukakati. Each of these minor children is entitled to claim maintenance from the deceased's estate, if such a child is in its mother's custody, and to claim a share in the distribution of the

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MANYARARA J

deceased's moveable property. In this regard, Samuel Antonio should be called upon to account for his present occupation of the house and to bring into the estate's account the securities and other documents which Ms Mukakati claims that he seized in the mistaken belief that they were his and his mother's property to deal with as they pleased. The true position is that the property referred to is part of the deceased's estate, to be distributed in terms of s 69(1) of the Administration of Estates Act.

In terms of s 6A of the Customary Law and Primary Courts Act 1981, the respondent, as the deceased's heir at customary law, shall succeed to the house in his individual capacity, although transfer to him may not be made until he attains his majority. The effect of the provision on this case is preserved by s 32 of the Customary Law and Local Courts Act 1990.

Ms Mukakati's evidence is that she contributed to the acquisition and upkeep of the house and lived in it with the deceased as his reputed wife until he died. If this is so, then she may be entitled to a share of the net proceeds of the sale of the house or to be put back in the house against her payment to the estate of the equivalent of the deceased's share in the house. All these and probably other considerations will arise in the enquiry into the dispute and the distribution of the deceased's property.

It is therefore directed that copies of this judgment be served on the Provincial Magistrate who will hold the enquiry ordered by this court and on the Master of the High Court.

Korsah JA: I agree.

Ebrahim JA: I agree.

Sawyer & Mkushi, appellant's legal practitioners

Gollop & Blank, respondent's legal practitioners

1991 (2) ZLR p47

S v ROFFEY 1991 (2) ZLR 47 (HC)

Court **High Court, Harare**

Mtambanengwe J & Chidyausiku J

Criminal appeal

27 May & 31 July 1991

Flynote

Criminal procedure (sentence) - sodomy between consenting adults - factors to be taken into account in determining sentence.

Headnote

The appellant pleaded guilty to one count of sodomy. He was sentenced to a period of ten months' imprisonment with labour, of which four months was suspended on appropriate conditions.

The evidence was that the complainant was both an adult and a willing party. No force or coercion had been used to persuade the complainant to submit to the appellant's desires. The complainant had apparently committed similar acts in the past.

Held, that these factors make this case less serious than others of its genre.

Held, accordingly, that the imposition of a fine was appropriate in the circumstances.

Cases cited:

S v Dongonda HH-73-88 (not reported)

S v Le Roux S-172-81 (not reported)

S v Kalides AB-142-72 (not reported)

S v Mackie HB-54-90 (not reported)

E W W Morris for the appellant

Mrs L Goredema for the respondent

Judgment

Mtambanengwe J: The appellant in this case was charged in the magistrates court with sodomy. He pleaded guilty and on conviction was

1991 (2) ZLR p48

MTAMBANENGWE J

sentenced to 10 months' imprisonment with labour, four months of which were suspended for four years on condition that within that period he did not commit any offence involving assault of an indecent nature for which he was sentenced to imprisonment without the option of a fine. He appeals to this court against that sentence.

The facts of the case, according to the State outline, which the accused accepted, can be summarised as follows:

On 24 September 1989 at about 5 pm the accused asked the complainant, a 21-year-old youth, to clean his car which was parked outside a house at 49 Craig Road, Borrowdale. When complainant had finished cleaning the car the accused invited him into the house. While the two sat in the lounge the accused asked the complainant to remove his overalls and try on an underwear which the accused wanted to give him as a reward for washing the car. The complainant obliged, he tried on the underwear and though it was too small, he said he wanted it all the same. The accused then asked if complainant played with men and the complainant answered in the affirmative. The next three paragraphs of the outline state:

- "8. The accused asked the complainant how he played with men and he started masturbating (*sic*) by which time he had an erection. The accused followed suit and also had an erection.
9. The accused took the complainant into the bedroom where the accused also removed his clothing and the accused placed his penis into the complainant's anus.
10. The accused did not ejaculate and later the accused played with the complainant's penis and the complainant ejaculated."

The complainant was 21 years of age. Nothing further is stated about him, that is, whether he was a domestic servant working at the address that the accused was caretaking during the absence of the owner. What complaint he made if any is not stated either though it can reasonably be surmised that he did report to someone since the offence came to light.

The complainant, as the magistrate stated in assessing sentence, was a consenting party. The accused is a first offender. These are factors he took into account. In noting the appeal the grounds were stated as:

1991 (2) ZLR p49

MTAMBANENGWE J

- "1. The learned magistrate failed to give due regard to the facts that
 - (a) appellant was a first offender

- (b) appellant had co-operated with the State in its investigations into the case and in pleading guilty to the charge;
 - (c) appellant had shown to the court that he was sorry for the offence that had been committed;
 - (d) on the agreed facts before the Magistrate's Criminal Court the offence was committed between consenting parties.
2. The learned magistrate misdirected himself in concluding that a custodial sentence without the option of a fine was necessary in respect of the nature of which the appellant was convicted as a deterrent either to the appellant himself or to other likeminded persons.
 3. In all the circumstances the sentence imposed is manifestly excessive and induces a sense of shock."

Mr *Morris* for the appellant has however based his argument on two main grounds; the first is that modern thought tolerates homosexuality and that our law should modify itself and be in accord with trends in other countries like Britain. He argued that the complainant in this case was an adult who fully consented and had been involved in homosexual activity before; he concludes that:

"homosexual acts between consenting male adults carried out in private 'harm no-one and leaves none the poorer' and society has little or no interest (in) the matter."

and submitted that:

"a prison sentence is wholly inappropriate for an offence of this nature."

Mr *Morris* also argued that the trial magistrate misdirected himself in holding that the appellant had acted "unscrupulously" and that this offence stank in the nostrils of justice.

For the submission that a prison sentence was wholly inappropriate Mr *Morris* relies on *S v Dongonda* HH-73-88 (not reported). That case dealt with criminal *injuria* and I find nothing said by EBRAHIM J (as he then was) in that case to be of any assistance to the appellant in this case. On the other hand the magistrate said, without citing the cases, that he had had the opportunity to look at various cases within our jurisdiction and:

1991 (2) ZLR p50

MTAMBANENGWE J

"it has always been the trend of our courts that even first offenders can expect to receive imprisonment regard being hard (*sic*) to (a) personal circumstances but in particular accused person and also the circumstances surrounding the commission of this offence. It is my view that this is a clear case where imprisonment is appropriate and in the result the accused is sentenced to undergo . . ."

One of the issues to be decided in this case is whether in saying that "such unscrupulous acts do in my view stink in the nostrils of justice, above all society does look at such offences with abhorrence" the trial magistrate misdirected himself. I do not think so. The language is strong but in my view the magistrate was merely saying that society feels disgusted by such offences which are offences merely because they are offences against the order of nature as he said.

The most recent decisions in our jurisdiction would seem to support the magistrate. In *S v Le Roux* S-172-81 (not reported) the facts available to the magistrate were stated as:

"On Wednesday, 24th June, 1981 at about 5.0 pm the accused saw Malcolm Peter Hobart, at 17-year-old youth, walking along Mainway, Hatfield in his school uniform. The accused stopped his vehicle and offered Hobart a lift. The lift was accepted and Hobart entered the car. On the pretext of dropping some bottles off at his residence, the accused drove to his house at 2 Southway, Hatfield. Having dropped the bottles off at his house, the accused then continued to drive Hobart to his home but on the way, on the further pretext of having forgotten something, returned again to his residence with Hobart.

On their arrival on this occasion, the accused invited Hobart into his house. He invited Hobart to view some pornographic photographs which he had. Hobart showed an interest in the photographs which he viewed in the accused's bedroom. The accused then made sexual advances towards Hobart which were accepted. Both lay on the bed, Hobart having removed his trousers of his own accord, whereupon the accused went through the motions of sexual intercourse 'per anum' with him. The accused did not ejaculate. The accused then masturbated Hobart until his ejaculation. Thereafter, the accused drove Hobart to his place of residence at his parent's house.

Hobart was a willing party to this incident."

LEWIS JP said as regards sentence:

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MTAMBANENGWE J

"The regional magistrate in passing sentence on the facts before him, took account of the mitigating features and the aggravating features. He had regard to the fact that the youth was a willing party but said, before passing sentence:

'The accused is a man of 46, more than old enough to be this boy's father. All these circumstances could, quite easily, combine to persuade such a youngster, who may not normally have homosexual inclinations, to participate in the course of conduct desired by the accused. It is, in any event, apparent that the youth reported the whole affair to his parents in due course. The most serious aspect of this case is that it was, in fact, a youth who was involved and, as such, he is liable to corruption and psychological damage, and this is so whether or not he was, on the face of it, a willing party.'

It seems to me that the approach of the magistrate on the facts available to him was an entirely proper one, and the sentence imposed on the appellant on those facts was entirely appropriate, bearing in mind comparable sentences in other cases where young complainants are involved in this sort of offence."

The sentence was one of 15 months' imprisonment with labour of which 10 months were suspended for five years on conditions.

In an earlier case, *S v Kalides* AB-141-72 BEADLE CJ, on appeal altered a sentence of 15 months IWL to read "fifteen months' imprisonment with hard labour, of which six months is suspended on conditions . . .". The complainant was a 21-year old-youth who did not fully co-operate with the appellant when sodomy was committed on him; he was persuaded by the appellant to allow the appellant to do that to him. The learned CHIEF JUSTICE had this to say as regards deterrence: (see pp 3-4 of the cyclostyled judgment):

"Cases involving this particular type of offence have come before the courts on numerous occasions, and on numerous occasions before this court, and the court has always stressed that one of the most important features in assessing punishment in cases of this description is the deterrent effect which that punishment will have on other like-minded persons."

He emphasised the fact that:

"it is the knowledge that a person who commits an offence of this sort will go to prison, and not be punished with a fine, that is the basic deterrent. The

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MTAMBANENGWE J

offender will know that for this offence he will not be given the option of paying a fine, but will go to prison."

He went on to say:

"The actual duration, whether six months, nine months or fifteen months, does not seem to be of as much importance as the fact that the punishment is imprisonment and not the option of a fine. Indeed, I did not understand Mr GUBBAY to controvert this, because he did not suggest that the appellant should be given the option of a fine; he merely suggested that a portion of the sentence should be suspended on conditions."

In support of his argument that a prison sentence was inappropriate, Mr *Morris* cited *S v Mackie* HB-54-90 (not reported). In that case a 49-year-old accused was sentenced to nine months' imprisonment with labour of which five months' imprisonment with labour were suspended for indecent assault, he masturbated a willing 14-year-old boy. On appeal SANSOLE J altered the sentence to a fine of \$250 and a two-month prison sentence wholly suspended on conditions. The offence involved there was of course far less serious than sodomy and a comparison of that case with the present case, based on the disparity in ages of the accused and complainant is misleading.

The two cases cited above are Supreme Court or Appellate Division decisions. In the *Kalides* case BEADLE CJ in emphasising the point that a prison term was the appropriate sentence discussed a number of such cases that had come before the courts in all of which prison terms were meted out. However, he stated, at p 6:

"I refer to these two sets of cases to give an indication of the types of sentence that are imposed for this offence. **It will be seen that one of the aggravating features of this offence is the age of the complainant. Where the complainant is a youth the offence is more serious than if the complainant is an adult.**

Another important factor is the extent to which the complainant is a willing party. If the complainant is a willing party to an offence of this description it is unlikely that he will be corrupted perhaps to the same extent as a complainant who is not and who may be led astray by what the accused does to him."
(Emphasis added.)

In the present case the complainant was both an adult and a willing party. There was no force used to persuade the complainant to submit to the accused's

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MTAMBANENGWE J

desires. These features in my view distinguish this case from the two cases from which I have quoted several passages.

Paragraph 7 of the agreed Statement of facts reads:

"The accused asked the complainant how he played with men and he started masturbating by which time he had an erection. The accused followed suit and also had an erection";

which suggest complete willingness on the complainant's part to indulge in the act of which the accused was making hints to that stage, and I do not think a custodial sentence in these circumstances can be described as one that fits the offence, the offender and the interests of society.

In the result I think the appropriate sentence in this case is a fine, and, accordingly I would set aside the sentence imposed by the trial magistrate and sentence the appellant as follows:

A fine of \$300 or, in default of payment, three months' imprisonment.

Chidyausiku J: I agree.

Coghlan, Welsh & Guest appellant's legal practitioners

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S v STEAD 1991 (2) ZLR 54 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Criminal appeal

16 July & 5 August 1991.

Flynote

Employment - Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 - s 2(1) - criminal liability upon termination of employment - only attaches where there is employment.

Interpretation of statutes - penal provision - two constructions possible - more lenient construction to be adopted.

Company - lifting the corporate veil - when permissible - only when exceptional circumstances exist - rule applies even if company only has one member.

Headnote

In s 2(1) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, outside of the exceptions, criminal liability will only attach to the "employer" where he happens to remain an employer in the same business, enterprise or venture, subsequent to the termination of the contract of employment with which he is charged. Where there is no longer any employment, there is no employer.

A court should strive to avoid adopting a construction which penalises a person in a way which was not made clear by the Legislature. If there are two constructions of a penal provision that

are reasonably open, the more lenient, and not the one that leads to harshness and injustice, should be adopted.

In general the law will not go behind the separate personality of a company to the members. The conception of the existence of a company as a separate entity distinct from its shareholders is not merely artificial and technical

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thing, but a matter of substance. This principle obtains even if the company has only one member or, although it had more, one of them effectively controls it. It is only in exceptional circumstances, such as fraud, that the veil of incorporation is pierced.

Cases cited:

W & W 1978 RLR 429 (G)

Dickenson v Fletcher (1873) LR 9 CP 1

R v Milne & Erleigh (7) 1951 (1) SA 791 (A)

R v Moosa & Ors 1960 (3) SA 517 (A)

R v Sibanda (1) 1963 R&N 593; 1964 (1) SA 311 (SR)

Dadoo Ltd & Ors v Krugersdorp Municipal Council 1920 AD 530

RP Crees (Pvt) Ltd v Woodpecker Industries (Pvt) Ltd 1975 (1) RLR 151 (G); 1975 (2) SA 485 (R)

Lipschitz & Anor Nov Landmark Consolidated (Pty) Ltd 1979 (2) SA 482 (W)

Lategan & Anor NNO Boyes & Anor 1980 (4) SA 191 (T)

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

J B Colegrave for appellant

Mrs J Zindi for respondent

Judgment

Gubbay CJ: The appellant was tried upon five charges of contravening s 2(1), as read with s 6, of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (Statutory Instrument 371 of 1985), in that on 31 March 1988, in his capacity as an employer, he wrongfully and unlawfully terminated contracts of employment with five named female employees. Despite his having tendered pleas of not guilty, the trial magistrate convicted him on all counts and, taking the offences together for the purposes of sentence, imposed a fine of \$500 or, in default of payment, four months' imprisonment with labour.

The relevant and undisputed facts giving rise to this appeal are these:

In 1980, after retiring from service with the Air Force of Zimbabwe, in which he had been in charge of the electrical development section, the appellant commenced to trade on his own account under the name "Electronic Designs and Sales" (EDS). This business was concerned almost exclusively with the manufacture of battery chargers under contracts with the Zimbabwe National Army and Air Force and the Zimbabwe Republic Police.

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After a slow start the business began to prosper. Anticipating that his personal income tax liability was likely to be considerable were he to continue trading on his own account as EDS, the appellant decided to form a limited liability company. To this end, in February 1982, Electronic Designs and Sales (Private) Limited ("the company") was registered, with the appellant as its managing director and he and his wife as the sole shareholders in the proportions of twenty and eighty per cent respectively.

The company remained inactive until some time in 1985 when the appellant effectively transferred to it the manufacturing side of his business while he, trading as EDS, continued to carry out the electrical design work. The equipment required for the manufacture of the electrical components was leased to the company by the appellant who, in addition, provided the qualified and skilled employees. EDS, however, remained the registered employer and so the appellant was personally responsible for the payment of the salaries and wages of all employees, no matter the type of work they were engaged to do.

In the middle of 1987 the manufacturing operation undertaken by the company slumped. Dire shortages of foreign currency were the cause of very much reduced orders for battery chargers from the Defence Forces, which constituted almost ninety per cent of the company's output. A review of the situation in November 1987 revealed that sales were down by \$175 000. There was insufficient work to keep the employees occupied either on the manufacturing side or on design work.

Early in January 1988 the appellant decided to cease trading on his own account as EDS. The company was registered as an employer and as from the first day of that month became liable for the remuneration of the technical and skilled employees. The equipment previously leased to the company was sold to it and, with the almost total loss of orders for battery chargers, the company commenced to manufacture printed circuit boards for use in the private sector.

On 18 January 1988 the appellant gave written notice to those employees who were not employed by the company that he intended to close the business EDS at the end of March 1988 and that from 1 April 1988, he would no longer be able to employ them.

In a letter written to the Ministry of Labour, Manpower Planning and Social Welfare, the appellant advised of his decision. He pointed out that the only employees engaged by EDS were unskilled and that they would become unemployed on 1 April 1988 unless the company was in a position to find some

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work for them to do. In the event it was only the five female employees who were affected by the closure of the appellant's business, EDS.

Section 2(1) of the Regulations prohibits an employer from terminating the contract of employment with an employee, summarily or otherwise, unless such termination falls within one of the four stated exceptions in sub-paras (a) to (d) thereto. None of these were relied upon by the appellant and, in particular, it was common cause that he had not obtained the prior written approval of the Minister to terminate the employment of the five employees. The defence raised was simply that at the effective date of termination the appellant, having closed the business EDS, was no longer an "employer" within the plain meaning of s 2(1). In other words, the date of termination of the employment of the five women coincided with that upon which the appellant ceased to trade on his own account. It is upon this same argument that the propriety of the convictions are now challenged by Mr *Colegrave*.

The word "employer" is defined in s 2 of the Labour Relations Act 1985, to mean:

"... any person ... who employs or provides work for another person and remunerates or expressly or tacitly undertakes to remunerate him, and includes the manager, agent or representative of such person who is in charge or control of the work upon which such other person is employed."

It is apparent that this definition presupposes the existence of employment. It is aimed at a person, (whether an individual, a company, an association, or the like), for whom employees work and who pays their wages or salaries.

The golden rule of interpretation retains a position of priority among the other canons of construction, in the sense that recourse must first be had to it. It is only if the legislative intention is not disclosed with sufficient certainty by the clear and unambiguous meaning to be assigned to the words of the enactment, read in its proper context, that resort to further rules is justified. This may occur where an adherence to literalism would lead to an absurdity or anomaly so glaring that the lawmaker could not possibly have intended it, or where the language used is, in fact, ambiguous. See *W v W* 1978 RLR 429 (GD) at 432D-F.

In my opinion, effect can be given to the wording of s 2(1) of the Regulations taken in its plain, ordinary meaning and that, therefore, this is not a case where another interpretation is forced on the court. I am in agreement with Mr *Colegrave* that the legislative intention disclosed is that, outside the exceptions,

GUBBAY CJ

criminal liability will only attach to the "employer" where he happens to remain an employer in the same business, enterprise or venture, subsequent to the termination of the contract of employment with which he is charged. Where there is no longer any employment, there is no employer. Were this not so, an emigrating employer, who is constrained by a desire to leave the country to terminate the employment of his employees, would have no **absolute** right to do so;

he would have to bring himself within one of the exceptions to the provision.

But even if the wording of s 2(1) were not, as I consider it to be, against the view adopted by the magistrate, it must at least be held to be doubtful, and the principle must accordingly be applied that if there are two constructions of a penal provision that are reasonably open, the more lenient, and not the one that leads to harshness and injustice, should be adopted. As BRETT J remarked in *Dickenson v Fletcher* (1873) LR 9 CP 1 at 7:

"Those who contend that a penalty may be inflicted must show that the words of the Act distinctively enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty."

In short, a court should strive to avoid adopting a construction which penalises a person in a way which was not made clear by the Legislature. See *R v Milne & Erleigh* (7) 1951 (1) SA 791 (AD) at 823C-F; *R v Moosa & Ors* 1960 (3) SA 517 (AD) at 528C; *R v Sibanda* 1963 R&N 593 at 600A-D; 1964 (1) SA 311 (SR) at 318A-D.

The approach of the trial court was that, while it had to be recognised that the company was a separate juristic entity, a lifting or pulling aside of the corporate mask revealed the appellant to be in complete control of its activities, functions and decisions. Since 1985 the company was part of the machinery by which the appellant had conducted his business. Consequently, on the demise of EDS, the appellant remained an employer by reason of the continued life of the company.

With due deference, I do not consider the matter as simple as that. In general the law will not go behind the separate personality of a company to the members. As INNES CJ emphasised in *Dadoo Ltd & Ors v Krugersdorp Municipal Council* 1920 AD 530 at 550-551, the conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing, but a matter of substance. And the principle obtains even if the company has only one member or, although it has more, one of them alone

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effectively controls it. See *RP Crees (Pvt) Ltd v Woodpecker Industries (Pvt) Ltd* 1975 (1) RLR 151 (GD) at 152H-153D; *Lipschitz & Anor NO v Landmark Consolidated (Pty) Ltd* 1979 (2) SA 482 (W) at 487 in fine-488A.

It is only in exceptional circumstances that the veil of incorporation is pierced. See *Henochsberg on the Companies Act* 4 ed, vol I, at pp 46-47; *Lategan & Anor NNO Boyes & Anor* 1980 (4) SA 191 (T) at 201C-202A; *J Louw and Co (Pty) Ltd v Richter & Ors* 1987 (2) SA 237 (N) at 241C-F. This reluctance on the part of the courts is underscored by Professor Gower in the following passage of his *Modern Company Law* 4 ed, at p 124:

"When, however, they have been asked to treat the company as an agent of its individual controlling shareholder and to make the shareholder liable on that basis they have not been willing to do so except where that is necessary to frustrate some grave impropriety, and in such circumstances they have coupled the description of the company as an agent with more pejorative descriptions, such as 'sham', 'cloak', 'device' 'stratagem', 'puppet', 'creature', etc."

One such exception is where fraudulent use is made of the corporate principle. The courts have refused to allow it to be used as an instrument of fraud. Where what was done was designedly done to evade the provisions of the law, but falls in truth within these provisions, the courts will look behind to the substance of the act rather than to the form in which it was clothed. See *Dadoo's case supra* at 547.

In the present case it is beyond doubt that the company came into being for a perfectly legitimate purpose. In 1985 the appellant split the nature of the on-going operation between himself and the company, transferring the manufacturing side, together with the specialised personnel, to the company. The function of the company was no sham or stratagem designed to enable the appellant, should his personal business EDS fall on bad times, to terminate freely and at will the employment of the unskilled workers. In an era of prosperity that was furthest from his mind. But what the appellant did not foresee occurred a few years later. Economic necessity forced him to come to a decision. This was to no longer carry on with the remaining side of the operation, the electrical design work, and so cease to trade on his own as EDS. Having implemented that decision the appellant, in my opinion, abandoned the status of an employer. In the circumstances the company's continued existence after March 1988 was of no relevance, for the appellant did not use the corporate personality principle *in fraudem legis*.

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GUBBAY CJ

For these reasons, I would allow the appeal and quash the convictions and sentence.

McNally JA: I agree.

Ebrahim JA: I agree.

Stumbles & Rowe, appellant's legal practitioners

1991 (2) ZLR p61

ZIMBABWE DISTANCE (CORRESPONDENCE) EDUCATION COLLEGE (PVT) LTD v COMMERCIAL CAREERS COLLEGE (1980) (PVT) LTD 1991 (2) ZLR 61 (HC)

Court **High Court, Harare**

Smith J

Opposed motion

18 June & 7 August 1991

Flynote

Practice and procedure - leave to execute pending appeal - court's discretion - when exercised.

Appeal - leave to execute pending determination.

Headnote

In an application for leave to execute on a judgment, pending appeal against that judgment, the court, whilst retaining a wide discretion, will only order execution in such circumstances where the order would cause irreparable harm to the respondent, if it feels that an appeal has been noted with no *bona fide* intention of seeking to reverse the judgement, but merely to buy time, or where the appeal stands no prospects of success whatsoever.

Cases cited:

African Congregational Church Co Ltd & Anor v Dube 1944 WLD 204

Leask v French & Ors 1949 (4) SA 887 (C)

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)

Dabengwa & Anor v Minister of Home Affairs & Ors 1982 (1) ZLR 223 (HC)

Jeremy Prince (Pvt) Ltd v Owen & Anor HH-14-86 (not reported)

Van T' Hoff v Van T' Hoff & Ors (2) 1988 (1) ZLR 335 (HC)

Legal & General Assurance of Zimbabwe (Pvt) Ltd v BG Insurances (Pvt) Ltd HH-190-89 (not reported)

Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd 1989 (1) ZLR 152 (HC)

1991 (2) ZLR p62

SMITH J

Lincoln Court (Pvt) Ltd v Zimbabwe Distance (Correspondence) Education College (Pvt) Ltd 1990 (1) ZLR 158 (HC)

Electrical and Furniture Trading Co (Pvt) Ltd v M & N Technical Services (Pvt) Ltd HB-34-91 (not reported)

Wood NO v Edwards & Anor 1966 RLR 335 (G); 1966 (3) SA 443 (R)

J S Sayce for applicant

E W W Morris for respondent

Judgment

Smith J: The applicant owns premises in Harare known as College House. They are occupied by the respondent. The applicant had operated its business as a correspondence college from a building known as QV House but was evicted therefrom in July 1990 by the owner who wanted the premises for his own businesses. The applicant had to take urgent measures to house its operations. It has leased premises which are situated in an area zoned for residential purposes only and is under pressure from the Harare City Council to cease using the building as

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classrooms. Other classrooms are used in a building in Cameron Street which has inadequate toilet facilities. The head office and administrative staff of the applicant are housed in yet a third building and warehouse space has had to be leased elsewhere to store books, furniture and equipment. In short, the premises occupied by the applicant are highly unsatisfactory and the applicant is suffering considerable financial prejudice through not being able to occupy College House. In July 1990 the applicant instituted proceedings to evict the respondent from College House. Its application was heard on 9 October 1990 and on 30 January 1991 the court handed down its judgment ordering that the respondent vacate the premises. On 12 February a writ of ejectment was served on the respondent who, on the same day, filed notice of appeal. Thereupon the applicant filed this application for leave to execute the order in case No. HC 2430/90 notwithstanding the pending appeal. It based its application on the ground that the harm and prejudice it was suffering clearly outweighed any inconvenience that the respondent would suffer were the application to be granted. The respondent opposed the application, alleging the extreme prejudice that would be sustained by it and its staff and students if the application were granted. It said that there were approximately 850 students enrolled with it who were currently receiving classroom tuition and if the respondent were evicted they would not be able to complete their education or sit the examinations at the end of the year.

Mr Sayce submitted that in this case the equities clearly favoured the applicant and therefore the application should be granted - *African Congregational Church Co Ltd & Anor v Dube* 1944 WLD 204 at 205. He argued that the harm

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SMITH J

that would be suffered by the respondent if the application were granted was heavily outweighed by the prejudice which the applicant would undoubtedly suffer and, furthermore, that the respondent's prospects on appeal were bleak. Mr *Morris* argued that execution of a judgment order pending appeal should only be granted if such execution would not have the effect of irreparable loss or harm or if the appeal was totally without merit.

In *Leask v French & Ors* 1949 (4) SA 887 (C) at 893 SEARLE J said:

"In every case of an order of Court *ad factum praestandum* there must be a serious risk of prejudice to one or other party in the event of an appeal. If execution is authorised and the appeal succeeds it is seldom, if ever, possible to restore the full *status quo ante*, whereas on the other hand if execution is stayed and the appeal ultimately fails the successful party, through the delay, generally suffers a loss for which he cannot be compensated. In the circumstances the Court can only reduce to a minimum the possibilities of prejudice by granting or refusing the application in accordance with demands of the preponderance of equities."

Subsequently in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545D-F CORBETT JA enunciated the factors to which a court would have regard in exercising its discretion in considering an application for leave to execute. After stating that the court had a wide general discretion to grant or refuse leave and, if leave were granted, to determine the condition upon which the right to execute should be granted, he said:

"In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:

- (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
- (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, eg, to gain time or harass the other party; and

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SMITH J

- (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

The views of CORBETT JA have been cited and adopted in many cases which have subsequently come before the High Court - *Dabengwa & Anor v Minister of Home Affairs & Ors* 1982 (1) ZLR 223 (HC), *Jeremy Prince (Pvt) Ltd v Owen & Anor* HH-14-86, *Van T' Hoff v Van T' Hoff & Ors* 1988 (1) ZLR 335 (HC), *Legal & General Assurance of Zimbabwe (Pvt) Ltd v BG Insurance (Pvt) Ltd* HH-190-89, *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (HC), *Lincoln Court (Pvt) Ltd v Zimbabwe Distance (Correspondence) Education College (Pvt) Ltd* 1990 (1) ZLR 158 (HC) and *Electrical and Furniture Trading Co (Pvt) Ltd v M&N Technical Services (Pvt) Ltd* HB-34-91. While I accept that the court has a wide general discretion as mentioned in the cases I have referred to above, the court should always have regard to the views so ably expressed by LEWIS J (as he then was) in *Wood NO v Edwards & Anor* 1966 RLR 335 at 340:

"The learned judge, JANSEN J, in the *Ruby's Cash Store* case, suggested that the matter might be treated on the same basis as an application for leave to appeal. The court should ask itself: has the applicant any reasonable prospect of success? That may well be the position where no question of irreparable loss arises by allowing the execution, where, for instance, the judgment sounds in money and the appellant can be safeguarded by an order for security *de restituendo*. Then the question of whether or not execution should be ordered would depend on whether or not there are any reasonable prospects of success on appeal. But, in a case where the whole object of the appeal would be completely defeated if execution were to proceed, then it seems to me that this court has no right to deal with the matter on the basis of whether or not there is a reasonable prospect of success on appeal.

The position is this: that the appellant has an absolute right to appeal, and to test the correctness of the judgment appealed from in the Appellate Division, and if, by ordering execution the whole object of the appeal would be stultified, then this court would, in effect be usurping the functions of the appeal court if it ordered execution merely on the basis that it thought, in its opinion, that the prospects of success on appeal were slight. It seems clear, from the authorities, that it is only where the court is satisfied that the appeal is not brought genuinely with the *bona fide* intention of testing the correctness of the judgment in the court below, but is only brought as

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SMITH J

delaying tactic and as a means of staving off the evil day, that the lower court may order execution to proceed in such circumstances."

In this case the respondent has satisfied me that the object of the appeal would be completely defeated if the application were granted. Although the applicant will undoubtedly suffer prejudice if the application is not granted it seems to me that the "balance of hardship" test favours the respondent. If it were evicted, the students enrolled with it would suffer considerably and would have to be compensated by the respondent and it would be difficult, if not impossible, to restore the *status quo ante* if its appeal were successful. Having come to this conclusion, the application can only be granted if it is shown that the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but to gain time. Having given careful consideration to the submissions made by Messrs Sayce and Morris I do not think it can be said that the prospects of success on appeal are abysmal. The issues are complex and much depends on the assessment of the credibility of the parties. The judge who gave the order which is appealed against has given a well reasoned judgment but it seems to me that it would not be safe to conclude that the respondent has no prospect of success. The respondent, in my opinion, has the *bona fide* intention of testing the correctness of the judgment concerned and has not lodged its appeal as a delaying tactic to stave off the evil day.

The application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

1991 (2) ZLR p66

S v MUGWENHE & ANOR 1991 (2) ZLR 66 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Ebrahim JA

Criminal appeal

16 July & 21 August, 1991

Flynote

Criminal procedure (sentence) - "tariff" approach to sentencing to be avoided - assault with intent to do grievous bodily harm does not automatically attract prison sentence - factors to be considered in sentencing for that offence.

Headnote

While the "tariff" approach to sentencing is gaining wider currency, it ignores the fact that the determination of sentence is pre-eminently a matter for the discretion of the trial court. That discretion should be exercised to the full and sentences should be individualized as far as possible. Imprisonment should not be regarded as the only punishment which is appropriate for retributive and deterrent purposes nor should "deterrent" and "exemplary" sentences be regarded as just. Assault with intent to do grievous bodily harm does not automatically attract a prison sentence. In sentencing a person convicted of that offence, regard should be had to the

aforementioned principles and the factors which must be considered include: the nature of the weapon used; the seriousness of the injury; the nature and degree of violence and the medical evidence. Youths should not be measured by the same yardstick as mature adults.

Cases cited:

S v Fazzie & Ors 1964 (4) SA 673 (A)

S v Reddy 1975 (3) SA 757 (A)

S v Maseko 1972 (3) SA 348 (T)

S v Scheepers 1977 (2) SA 154 (A)

S v Holder 1979 (2) SA 70 (A)

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S v Mantusse 1973 (3) SA 223 (T)

S v Maxaku 1973 (4) SA 248 (C)

S v Edward 1978 (1) SA 317 (NC)

S v Kulati 1975 (1) SA 557 (E)

S v Makkahela 1975 (3) SA 788 (C)

S v Khulu 1975 (2) SA 518 (N)

S v Matoma 1981 (3) SA 838 (A)

S v Ncube HB-19-86 (not reported)

S v Machetbi & Anor 1974 (2) SA 369 (T)

S v Mutadza 1983 (1) ZLR 123 (HC)

S v Ndlovu HH-197-87 (not reported)

M R D Stonier for the appellant

Mrs J A Zindi for the respondent

Judgment

Ebrahim JA: The appellants were convicted of assault with intent to do grievous bodily harm. They were each sentenced to undergo three months' imprisonment with labour, of which two months' imprisonment with labour was suspended on appropriate conditions. They each appealed against both conviction and sentence.

Briefly the facts are as follows:

The complainant, Urayayi Mangore, resides in Kadoma where he is employed. On 26 December 1990 he was with a workmate of his, Edson Mambo, who was accompanied by his girlfriend, when they were accosted by the two appellants and a further accused, who was acquitted by the trial magistrate at the conclusion of this matter when the three of them appeared for the trial before him.

The complainant deposed that whilst he was in the presence of his companions the first appellant attempted to strike him with a clenched fist but he managed to avoid the blow. An argument had apparently developed between the appellants and Edson Mambo relating to Edson Mambo's female companion. The third appellant claimed that the woman was his girlfriend and that she should go with him but she declined to do so, and the complainant suggested that her wishes should be respected and that she should be permitted to proceed with Edson Mambo. The first appellant objected to the complainant's interference and struck out at him but his blow did not make contact, largely through the complainant's ability to evade the blow delivered.

The sequence of events, as described by the complainant, unfolded as follows:

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The two appellants and the acquitted accused ganged up on him and commenced assaulting him. He was punched in the face and as he ran from the scene a bottle was thrown at him but this failed to make contact. He was pursued as he ran and sought refuge inside a nearby house. His assailant, however, pursued him into the house and assaulted him therein with stones. The complainant was unable to say how many times he was struck in this manner, as he says he was in pain. It was his evidence that the appellants only desisted from their conduct when the crowd which had gathered to witness the melee shouted the word "police".

A medical report was produced at the trial and from this it is apparent that the injuries sustained and observed by the doctor who examined the complainant were: a cut on the forehead above the left eye, subconjunctival haemorrhage, and contusions on the right elbow and right ankle. The doctor also considered it necessary to call for an X-ray of the complainant's skull and right elbow. There was no evidence, however, to indicate what was the result of these X-rays. The doctor concluded that, in his opinion, the injuries he observed on the complainant were as a result of repeated blows having been inflicted on the complainant with moderate to severe force with a blunt heavy weapon.

Finally, the prosecutor called Edson Mambo as a witness. He corroborated the complainant's version of events in a number of respects. He deposed that on 26 December 1990 he was in the company of a certain woman and the complainant when he was accosted by the appellants, who were clearly displeased that the woman was with him. The second appellant alleged that the woman was his girlfriend. The complainant attempted to pacify the appellants but this was to no avail and the first appellant aimed a blow at him. The complainant was, however, able to avoid the blow. Edson Mambo then left the scene and went to seek the help of the police. On

his return he found the complainant had been injured and was bleeding. He subsequently took him to hospital for attention. Edson Mambo stated that he did not see the appellants' co-accused, who was acquitted, assault the complainant but in fact saw him attempting to restrain the others from perpetrating the assault.

Faced with this evidence, the appellants each gave evidence.

[The learned judge then considered the appellant's evidence and continued:]

In my view, the magistrate appears to have exercised his judgment properly in rejecting the appellants' evidence where it conflicted with the evidence of the State's witnesses. This was a serious assault which was perpetrated with the use

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of fists and the wielding of stones and which resulted in serious injuries. I am satisfied, therefore, that there is no basis for interference with the magistrate's conclusion on the verdict he returned in this case.

The appellants also noted appeals against the sentence imposed on them, and it is my view that there are aspects of the sentence which require comment.

An examination of cases of assault with intent to do grievous bodily harm lead me to the conclusion that a term of imprisonment is invariably imposed, particularly where the assault causes serious injury and/or disfigurement. The "tariff" approach to sentence is gaining wider currency, if it is not already firmly ensconced on our judicial Benches. This approach to sentence, while commendable, is not without its drawbacks; the principle one being that it ignores the fact "that the determination of a sentence in a criminal matter" is pre-eminently a matter for the discretion of the trial court. "In the exercise of this function the trial judge has a wide discretion in deciding which factors - I here refer to matters of fact and not of law - should influence him in determining the measure of punishment", *per* VAN WINSEN AJA in *S v Fazzie & Ors* 1964 (4) SA 673 (A) at 684A.

Elsewhere it has been said that:

"Though uniformity of sentences, that is, sentences imposed upon accused persons in respect of . . . similar offences or offences of a kindred nature, may be desirable, the desire to achieve such uniformity cannot be allowed to interfere with the free exercise of his discretion by a judicial officer in determining the appropriate sentence in a particular case in the light of the relevant facts in that case and the circumstances of the person charged."

(See *S v Reddy* 1975 (3) SA 757 (A) at 759H; and also *S v Maseko* 1972 (3) SA 348 (T) at 351; *S v Scheepers* 1977 (2) SA 154 (A) at 158-159.) Sentences should as far as possible be individualised and imprisonment alone should not be regarded as the only punishment which is appropriate for retributive and deterrent purposes:

"Apart from the fact that . . . prisons are overcrowded and that the upkeep of prisons and the maintenance of prisoners place a tremendous economic burden on the State, there are also other disadvantages attaching to imprisonment. The convicted person is removed from society, he is deprived of all responsibility and opportunities

of acting independently as a free member of the community, his life is disrupted, manpower is lost and

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the prisoner comes into contact with elements which are . . . out of all proportion to that which he possibly deserves. If the same purposes in regard to the nature of the offence and the interests of the public can be attained by means of an alternative punishment to imprisonment, preference should, in the interests of the convicted offender, be given to the alternative punishments. . . . imprisonment is only justified if it is necessary that the offender be removed from society . . . if the objects striven for by the sentencing authority cannot be attained by any alternative punishment."

(See *S v Scheepers*, *supra*, (translation) at 159). See also *S v Holder* 1979 (2) SA 70 (A); *S v Mantusse* 1973 (3) SA 223 (T); *S v Maxaku* 1973 (4) SA 248 (T).) It is accepted though that the deterrent and punitive aspects of sentence may, on appropriate occasions, only find expression in the incarceration of the convicted person.

It is my view, however, that judicial officers should avoid the tendency to approach sentence in the manner of an automaton. The approach of VAN DEN HEEVER J in the case of *S v Edward* 1978 (1) SA 317 (NC) has not yet been extended to any person convicted on an assault within this jurisdiction.

In *Edward's* case, *supra*, the accused had assaulted another over a minor debt. He had a previous conviction for assault and was sentenced, *inter alia*, to twelve months' imprisonment with labour all of which was suspended on condition that he compensate the complainant for the injury done to him. Section 297 of the South Africa Criminal Code, which finds its equivalent in our s 337, was found to be wide enough in its operation to allow for the punitive and reformative aspects of punishment to be given full effect without necessarily disrupting his life by imprisonment alone.

The tendency to regard all cases of violence and, in particular, those of assault with intent to do grievous bodily harm as falling within the scope of those offences where prison sentences are desirable must be avoided. (See *S v Kulati* 1975 (1) SA 557 (E); *S v Makkahela* 1975 (3) SA 788 (C).) There is also a tendency to regard "deterrent sentences" and "exemplary sentences" as being just: the view being that it is equitable to make an example of someone by punishing him more severely than he deserves so that others will be persuaded to desist from emulating him. (See also *S v Khulu* 1975 (2) SA 518 (N) at 521; *S v Matoma* 1981 (3) SA 838 (A).) Not only is the argument specious and fallacious; it is doubtful whether the claims supporting its alleged efficacy are justified at all.

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This is not to say that judicial officers are to throw up their judicial arms in exasperation and do nothing more. All that is being suggested is that judicial officers exercise their judicial discretion to the full and acknowledge where necessary the shortfalls of existing penal policy. The dynamism necessary for this approach is not achieved by reference to alleged "tariffs" of

sentences for specific categories of offences. Invariably when dealing with sentences the court refers, or is referred to, innumerable cases which purportedly lay down the limits of the range of appropriate sentences for the case actually before it.

All but the most dogmatic will confess the narrowness of this approach; for it becomes apparent that it is by no means easy to treat the various cases as entirely uniform and even less so to attempt to extract therefrom a means of propounding a precise statement of principles which can be invoked before the courts which would guide it in respect of the *quantum* of the sentence to be imposed. (See eg *S v Ncube* HB-19-86; *S v Machetbi* 1974 (2) SA 369 (T); *S v Mutadza* 1983 (1) ZLR 123 (HC); *S v Ndlovu* HH-197-87.

In the case of *S v Machetbi*, *supra*, it was held that in cases of assault with intent to do grievous bodily harm there could be "no question of any fixed form of punishment, subject to exceptions, being accepted as the starting point or general rule. The form of punishment which is suitable in a particular case depends on the particular circumstances of the case".

The nature of the weapon used, the seriousness of the injury, the nature and the degree of violence, and the medical evidence must all be considered; as must the factors discussed in the paragraphs preceding this.

It is against the background of these thoughts that I turn now to deal with the issue of sentence in the instant case: The first appellant was nineteen years old and the second appellant twenty years of age when they were brought before the magistrate to face trial in this matter. They were clearly youths, although not juveniles, but nevertheless youthfulness should be weighed up in deciding upon an appropriate sentence. Persons in their earlier twenties, although no longer children, cannot reasonably be expected to show the same stability of character, responsibility and self-restraint as a fully mature man. They are therefore not to be measured with the same yardstick as a mature adult.

Both the appellants are first offenders and it was the evidence of one of the witnesses called by the State that after the incident was over they both asked for forgiveness. Should they be incarcerated they both will lose their jobs. It would seem from the very nature of the sentence passed by the trial magistrate that he

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was reluctant to send them to prison. It seems to me that to send them to prison in the circumstances of this case is likely to cause them more harm than good.

The nature of the assault was nevertheless serious. The attack on the complainant was in the nature of a gang attack, the force used was of moderate severity but it was a persistent assault, the complainant suffered serious injuries, and the appellants only desisted when other persons shouted for the police. I intend to balance these aggravating features against the mitigating features and take into account the observations I have made earlier in this judgment on some of the principles to be considered in arriving at an appropriate sentence. I am satisfied that a fine, conjoined with a suspended sentence of imprisonment, would meet the requirements of this

case.

In the result, the appeals against conviction are dismissed, but the sentences imposed by the trial magistrate are set aside and substituted with the following sentence:

"Each accused is fined \$250 or, in default of payment, one month's imprisonment with labour.

In addition each accused is sentenced to two months' imprisonment with labour, all of which is suspended for three years on condition that the accused is not convicted within that period of any offence of which assault is an element for which he is sentenced to imprisonment without the option of a fine."

Gubbay CJ: I agree.

McNally JA: I agree.

Jarvis & Palframan, appellants' legal practitioners

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MASASI v POSTS AND TELECOMMUNICATIONS CORPORATION 1991 (2) ZLR 73 (HC)

Court High Court, Harare

Smith J

Civil application

26 July & 21 August 1991

Flynote

Employment - whether Labour Relations Act 1986 applies to parastatal organisations and in particular to the Posts and Telecommunications Corporation.

Interpretation of statutes - implicit repeal of earlier statutory provision by a later one.

Legislation - Labour Relations Act 1985 ss3, 17; Posts and Telecommunications Corporation Act [Chapter 251] s20, Sch paras 12 & 13; Parastatals Commission Act 1987 ss3, 18.

Headnote

The applicant, an employee of the respondent, was purportedly dismissed by the respondent without there being compliance with the provisions of the Labour Relations Act and Regulations concerning termination of employment, it being argued that the provisions of that Act do not apply to respondent in the light of specific powers given to it in its establishing Act, *inter alia*, to hire and dismiss employees

Held, the provisions of the Labour Relations Act 1985 are intended to and do modify the earlier provisions of the Posts and Telecommunications Corporation Act [Chapter 251] in such a way as to limit the powers of termination of employment bestowed by that Act upon the Corporation.

Semble: The Labour Relations Act 1985 applies to all parastatals unless specific provision is

made to the contrary.

SMITH J

Cases cited:

Musendekwa v Posts & Telecommunications Corp HH-33-91 (not reported)

Nyakanyanga v Postmaster - General HH-19-89 (not reported)

City of Mutare v Ncube & Ors HH-139-87 (not reported)

Seward v The Vera Cruz (1884) 10 AC 59 (HL)

Re Chance [1936] Ch 266

M J Gillespie for the applicant

G S Wernberg for the respondent

Judgment

Smith J: The applicant was employed by the Posts and Telecommunications Corporation (hereinafter referred to as "PTC"). He became Finance Director on 1 April 1986, and was appointed to the position of Deputy Postmaster-General on 1 August 1987. The PTC purported to dismiss him from that post with effect from 30 April 1990. Apparently the PTC Board had held a meeting on 26 March 1990 at which, after scrutinising the applicant's adverse performance reports, his submissions to the PTC Board and other relevant documentation, it was resolved that he was not competent to carry out the demanding duties of a Deputy Postmaster-General and therefore he should be asked to resign or accept demotion to an unspecified job. At the time the PTC Board had restructured the top management of the PTC, retaining the post of Postmaster-General, dissolving the three posts of Deputy Postmaster-General and replacing them with a post of Senior Deputy Postmaster-General, four posts of Deputy Postmaster-General and a fifth provisional post of Deputy Postmaster-General. The new structure became operative on 1 May 1990. The dismissal of the applicant was part of the exercise by the PTC Board to fill the new posts with persons it considered suitable.

The applicant objected to his dismissal and applied to this court for an order that he be reinstated. On 30 May, in case No. HC-1460-90, SANDURA JP issued an order declaring that the purported dismissal was unlawful and invalid and ordering the reinstatement of the applicant. The PTC did not oppose the application. By letter dated 31 May 1990 the applicant's legal practitioners wrote to the PTC drawing its attention to the court order and saying that the applicant would present himself for duty on Friday 1 June. The response was a letter signed by the chairman of the PTC Board, dated 5 June, saying that "for reasons previously stated you are hereby informed that with immediate effect you are suspended (without loss of salary) from duty with the PTC until your status with the Corporation has been determined. In the letter it was also stated that all the applicant's "perks" were withdrawn and that he was denied access to all PTC buildings otherwise than as an ordinary member of the public. The applicant objected to

his treatment but to no avail.

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According to the opposing affidavit of the Postmaster-General, during the period that the applicant had been removed from his post the entire department had been reformed and it was regarded as a "disaster" that the applicant should be reinstated. So although the court order of 30 May 1990 was complied with and he was officially reinstated, "he was instructed to vacate his office and not to attend to the affairs" of the PTC. Had the applicant accepted the instruction he would have been entitled to receive his salary and allowances but because he refused to vacate his office he was suspended. The Postmaster-General went on to say that although the PTC originally decided to dismiss the applicant, it subsequently decided that it would not be fair to the applicant to do so and that he should be given three months' notice of termination of service. It was initially believed that such a notice would require the authority of the Minister of Labour, Manpower Planning and Social Welfare (hereinafter referred to as the "Minister of Labour") and application was made for such authority. However, because of the judgment of CHAMBAKARE J in *Musendekwa v The Posts and Telecommunications Corporation* HH-33-91 it was decided that such authority was not necessary and accordingly notice of termination of service was given to the applicant without the authority having been obtained.

[His Lordship then proceeded to consider the facts more fully.]

The principal issue to be decided in this case is whether or not the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 of 1985) applied to the PTC in January, 1991. In *Nyakanyonga v The Postmaster-General* NO HH-19-89 GIBSON J came to the conclusion that s 3 of the Labour Relations Act, 1985 (No. 16 of 1985) did not by implication repeal s 20 of the Posts and Telecommunications Corporation Act [Chapter 251] (hereinafter referred to as "Chapter 251") and therefore the PTC could dismiss the employee concerned without reference to the Minister of Labour. She said that she was fortified in her views by the opinions expressed by REYNOLDS J in *The City of Mutare v Ncube & Ors* HH-139-87. In *Musendekwa v The Posts and Telecommunications Corporation* HH-33-91 CHAMBAKARE J concurred with the views expressed by GIBSON J Mr Wernberg has submitted that these cases were correctly decided. Mr Gillespie, although initially conceding that he could not challenge the basis on which those cases were decided, argued that the *Nyakanyonga* case was wrongly decided and that the *Musendekwa* case was not relevant as the views expressed were *obiter*. I intend to analyse the relevant provisions of Chapter 251 and the Labour Relations Act, 1985 (No. 16 of 1985) and also those of the Parastatals Commission Act, 1988 (No. 22 of 1988) and the Parastatals Commission (Repeal and Consequential Provisions) Act, 1990 (No. 29 of 1990).

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The format of Chapter 251 is similar to that of most of the other Acts of Zimbabwe which establish parastatals. Part I of Chapter 251 establishes the PTC, provides for a PTC Board to

administer the affairs of the PTC and deals with the appointment, etc of members of the PTC Board. Part II sets out the functions, powers and duties of the PTC and Part III deals with financial provisions. Part IV relates to employees of the State who were transferred or seconded to the PTC when it was established and Part V contains miscellaneous provisions. The Schedule sets out the powers of the PTC. With regard to the powers of the PTC, s 20 of Chapter 251 provides as follows:

"20. For the better exercise of its functions the Corporation shall, subject to the provisions of this Act, have power to do or cause to be done, either by itself or through its agents, all or any of the things specified in the Schedule, either absolutely or conditionally and either solely or jointly with others."

The Schedule to Chapter 251 specifies a wide range of powers. They include acquiring, establishing and constructing buildings, purchasing or acquiring movable property, including vehicles, employing staff and constructing dwelling houses for occupation by PTC employees.

Paras 12 and 13 of the Schedule provide as follows:

"12. To appoint, upon such terms and conditions as the Board may deem fit, such persons as may be necessary for conducting the affairs and carrying out the functions of the Corporation and to suspend or discharge any such persons:

Provided that the Corporation shall not suspend or discharge the Postmaster-General without the approval of the Minister.

13. Subject to the provisions of paragraph 12, to pay to employees of the Corporation such remuneration and allowances and bonuses and grant such leave of absence as the Board may consider fit."

In 1985 the Legislature enacted the Labour Relations Act, 1985. Section 3 of that Act provides:

"3. This Act shall apply to all employers and all employees except those whose conditions of employment are otherwise provided for by or under the Constitution."

That Act sets out the fundamental rights of employees and provides for a

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multitude of other matters relating to labour relations. It provides for the formation and functions of workers committees, trade unions and employment councils, collective bargaining agreements, the determination of disputes and unfair labour practices and the control of collective job actions, that is the declaration of essential services, lockouts and strikes. In s 118 of that Act the term "essential service" is defined and para (b) of the definition refers to "any communications system". The intention of the Legislature is clearly expressed in s 3 of that Act - the provisions of the Act, and of the regulations made thereunder (because in terms of s 3(1) of the Interpretation Act [*Chapter 1*] the phrase "this Act" includes any statutory instrument made and in force under the Act), are to apply to all employers and employees except those whose conditions of employment are provided for by or under the Constitution which would principally mean members of the Public Service, the Zimbabwe Republic Police, the Defence Forces of Zimbabwe and the Prison Service. Because of the wide ambit of the Labour Relations Act, 1985 it is obvious why it was intended to apply not only to employers and employees in the private sector but also to parastatals and their employees. If that were not the case employees of a

parastatal would not be able to claim the protection of the fundamental rights of employees prescribed in Part II of that Act, the Minister of Labour would not be able to impose wage and salary controls in terms of Part V of that Act over parastatals and the provisions of that Act relating to workers committees, trade unions and collective bargaining would not apply to parastatals or their employees.

In 1987 the Legislature enacted the Parastatals Commission Act, 1987. That Act established a Parastatals Commission. Section 18 of that Act provided as follows -

"18. The provisions of -

- (a) the Labour Relations Act, 1985, and statutory instruments made thereunder, which relate to conditions of service, termination of service, dismissal from service and disciplinary proceedings; and
- (b) Part XIII of the Labour Relations Act, 1985;

shall not apply in relation to parastatals or their employees."

Part XIII of the Labour Relations Act, 1985 provides for the determination of disputes and unfair labour practices. The Parastatals Commission Act, 1985 having declared that specified provisions of the Labour Relations Act, 1985, would no longer apply to parastatals or their employees, provided in s 19 that an employee of a parastatal who was aggrieved by the termination of his service or by any disciplinary proceedings instituted against him could appeal to the

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Parastatals Commission and the board of the parastatal concerned was required to comply with any direction given by the Parastatals Commission after it had considered the appeal. I would mention, at this stage, that the Parastatals Commission Act, 1987 applied only in relation to parastatals which had been designated in a statutory instrument. The PTC had been so designated - SI 130 of 1988 - with effect from 29 July 1988, and ceased to be so designated on 15 June 1990 - SI 116 of 1990. The Parastatals Commission (Repeal and Consequential Provisions) Act, 1990 repealed the Parastatals Commission Act, 1987, thus abolishing the Parastatals Commission. It provided that all appeals from parastatal employees that were pending before the Parastatals Commission were to be referred to the Labour Relations Board. Subsection (4) of s 3 of that Act provides that where before 18 January 1991 the board of a parastatal to which the Parastatals Commission Act, 1987, applied had terminated or purported to terminate the appointment of a deputy general manager, that termination or purported termination shall not be invalid solely on account of a failure by the board to consult the Parastatals Commission in terms of s 11(1)(b) of the Parastatals Commission Act, 1987. The repeal of the Parastatals Commission Act, 1987 repealed those provisions which had removed designated parastatals from the ambit of certain provisions of the Labour Relations Act, 1985.

Thus, in relation to "designated parastatals", the legal position, as I see it, was as follows. Prior to 15 December 1985, the board of the parastatal could regulate the labour relations with, and the conditions of service of, its employees as it thought fit, subject only to any limitations imposed in the Act which established the parastatal or other legislation such as the Audit and

Exchequer Act [*Chapter 168*] and, of course, the common law. After that however, the board of the parastatal had to observe the provisions of the Labour Relations Act, 1985. Thus, for example, it was required to grant maternity leave in accordance with the provisions of s 18 of that Act and also it was bound by regulations made by the Minister of Labour in terms of s 17 of that Act. Accordingly, it could not dismiss an employee without compliance with such regulations. With effect from 26 July 1988, when it was designated under the Parastatals Commission Act, 1987, the constraints on dismissal of employees imposed by the Labor Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 no longer applied to the parastatal. It had unfettered powers to dismiss any employee (other than the general manager or a deputy general manager) subject to compliance with any requirements of the Act which established the parastatal and the conditions of service of the employee concerned, but an employee who was aggrieved by the termination of his service had a right of appeal to the Parastatals Commission. That situation

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pertained until 15 June 1990 when the statutory instrument designating the parastatal was repealed. With effect from that date, the board could no longer dismiss employees without compliance with the relevant provisions of the Labour Relations Act, 1985 or regulations made thereunder. Any appeals to the Parastatals Commission in respect of dismissals prior to 15 June 1990 which had not been determined when the Parastatals Commission was abolished were referred to the Labour Relations Board.

Mr *Wernberg* pointed out that subs (2) of the said s 17 provides that regulations made by the Minister of Labour in terms of that section shall prevail over the provisions of any other statutory instrument or of any agreement or arrangement whatsoever, and does not provide that the regulations will prevail over any Act of Parliament. Therefore the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, which were made in terms of s 17 of the said Act, do not prevail over the provisions of Chapter 251 and so do not bind the PTC. He also pointed to the fact that s 20 of Chapter 251, which I have set out earlier, provides that the PTC may exercise the powers specified in the Schedule B either absolutely or conditionally. In *Nyakanyanga's case, supra*, GIBSON J, relying on *Seward v The Vera Cruz* 100 Appeal Cases at p 68, held that the general provisions of s 3 of the Labour Relations Act, 1985 could not have the effect of repealing by implication the specific provisions of s 20 of Chapter 251. I must confess that I cannot agree with Mr *Wernberg's* submissions or the conclusions of GIBSON J. I do not consider that s 20 of Chapter 251 has the effect of conferring on the PTC power to do any of the things specified in the Schedule to that Act "arbitrarily, without external control", which is one of the meanings given to the word "absolutely" in the Shorter Oxford English Dictionary. In the context, "absolutely" must mean "unconditionally". To hold that the PTC could exercise the powers specified in the Schedule to Chapter 251 "without external control" would lead to absurd results. It would mean, for example, that the PTC could erect post offices or staff houses wherever and however it wished, without regard to any town planning requirements in the Regional Town and Country Planning Act, 1976 (No. 22 of 1976) or any municipal building by-laws. It seems to me that the powers conferred on the PTC by s 20 of Chapter 251 may only be exercised subject to compliance with the laws of Zimbabwe, both

statutory and common law. In *Seward's* case, *supra*, to which GIBSON J referred, LORD SELBOURNE at p 68 expressed the principle:

"Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation . . . that earlier and special legislation is not to be held

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indirectly repealed, altered or derogated from merely by force of such general words, **without any indication of a particular intention to do so** (emphasis added)."

As I have endeavoured to point out earlier, I consider that there is a clear indication in s 3 of the Labour Relations Act, 1985 of an intention to modify the powers conferred on an employer by the common law, or on a parastatal by the Act creating the parastatal, in relation to employees. Thus paras 12 and 13 of the Schedule to Chapter 251, which I have set out earlier, empower the PTC to appoint persons "upon such terms and conditions as the Board may deem fit" and pay its employees "such remuneration and allowances and bonuses and grant such leave of absence as the Board may think fit." The intention of the Legislature in enacting the Labour Relations Act, 1985, was, in my view, to modify the unfettered discretion conferred on the PTC to fix conditions of service for its employees. The Legislature wanted, for example, to require the PTC to grant maternity leave to its employees (s 18 of the Labour Relations Act, 1985), whether or not the PTC Board deemed such leave to be fit. The Legislature intended to impose wage and salary controls in terms of Part V of the Labour Relations Act, 1985, over the PTC, whatever the PTC Board might think to be fit. It follows therefore, in my opinion that the Legislature intended to modify or regulate the powers conferred by the said para 12 on the PTC Board to suspend and dismiss employees, but not to repeal or remove them.

Where earlier and later statutes can reasonably be construed in such a way that both can be given effect to, this must be done - see *Re Chance* [1936] Ch 266 *per* FARWELL J: "If it is possible it is my duty so to read this section . . . as not to effect an implied repeal of an earlier Act." In the *City of Mutare* case *supra* at p 5 of the cyclostyled judgment REYNOLDS, J expressed himself thus:

"It is a well-recognized rule of statutory construction that 'where there are different statutes *in pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together, as one system and as explanatory of each other'".

In that case, however, he was dealing with a section of the Urban Councils Act [Chapter 214], as amended, which contained a specific provision, inserted after the enactment of the Labour Relations Act, 1985, that, notwithstanding any other law to the contrary, if the consent of the Minister to whom the administration of that Act had been assigned has been obtained for the discharge of an employee of a council, the council need not obtain the consent of any other Minister or authority. The intention of the Legislature to override the relevant

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provision of the Labour Relations Act, 1985 or regulations made thereunder could not be more clearly expressed.

In my view, for the reasons set out above, I consider that the purported dismissal of the applicant by the PTC Board in January 1991 was not valid because of the failure by the PTC Board to comply with the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985.

[His Lordship then reverted to the facts, and concluded:]

It is ordered that:

- (1) the suspension of the applicant on 5 June 1990 and the purported termination of his employment with effect from 31 January 1990 were unlawful;
- (2) the respondent pay to the applicant the difference between the salary paid to him after 5 June 1990 and the amount of the salary, allowances and other benefits that would have been paid to him after that date had he remained in the post of Deputy Postmaster-General and not been suspended and subsequently discharged, until such time as he is lawfully discharged or reinstated;
- (3) the respondent apply to the Minister of Labour, Manpower Planning and Social Welfare, within 30 days of the date of this order, for approval of the termination of his employment and if no such application is made or such approval is not obtained, the respondent shall reinstate the applicant in a post of Deputy Postmaster-General;
- (4) the respondent pay the applicant's costs.

Winterton, Holmes & Hill, applicant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

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MOBIL OIL ZIMBABWE (PVT) LTD v CHISPITE SERVICE STATION (PVT) LTD 1991 (2) ZLR 82 (SC)

Court **Supreme Court, Harare**

Manyarara JA, Korsah JA & Ebrahim JA

Civil appeal

29 July & 3 September 1991

Flynote

Landlord and tenant - statutory tenant - grounds for eviction - Commercial Premises (Rent) Regulations 1983 - s 22 - owner wishing to use premises itself - whether such constitutes good and sufficient grounds for eviction

- time in which to vacate.

Property - acquisition - whether the eviction of a statutory tenant is an acquisition of the goodwill of that tenant.

Headnote

The appellant, a petroleum company, owned the property on which was situated a service station. The respondent had for many years been a tenant and had operated the service station. The written lease between the parties expired and the respondent remained in occupation as a statutory tenant. The parties sought to negotiate the terms of a new lease, but no agreement was reached on several aspects, including the amount of rental to be paid. In addition, the appellant undertook extensive and costly alterations to the premises, which alterations were not to the satisfaction of the respondent. In the light of the disagreement, the appellant indicated to the respondent that it would operate the service station itself. On this basis, the appellant applied for the eviction of the respondent, contending that its wish to use the premises constituted good and sufficient grounds for the eviction in terms of s 22 of the Commercial Premises (Rent) Regulations 1983. The respondent opposed the application claiming that the true motive behind the application was the wish of the appellant to have more rental paid by the respondent for the premises. The High Court found in favour of the respondent on the basis that it was the respondent's refusal to pay a higher

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rental that was the motive for the application. The appellant appealed. In the appeal, the respondent also argued that the eviction would constitute an expropriation of its goodwill in the premises.

Held, where a land-owner wishes to use the premises for its own purposes, the court enquires only as to its *bona fides*, and not as to the reasons why it decided to use the premises for its own purposes.

Held, on the facts of the present matter, the decision by the appellant to use the premises for its own purposes was a legitimate and *bona fide* commercial decision, and thus constituted good and sufficient cause for the purposes of the Regulations.

Held, further, the eviction did not constitute an expropriation of any property belonging to the respondent.

Held, there was no power vested in a court to give a statutory tenant a reasonable period to vacate the premises in question.

Cases cited:

Boka Enterprises (Pvt) Ltd v Joowalay & Anor 1988 (1) ZLR 107 (SC)

Newman v Biggs 1945 EDL 51

Guthrie Holdings (Pvt) Ltd v Arches (Pvt) Ltd 1989 (1) ZLR 184 (SC); 1990 (2) SA 62 (ZS)

Moffat Outfitters (Pvt) Ltd v Hoosein & Ors 1986 (2) ZLR 148 (SC)

Johannesburg Board of Executors & Trust Co Ltd v Gordon 1947 (1) SA 92 (W)

Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd 1986 (2) ZLR 246 (SC)

Government of Malaysia & Anor v Selangor Pilot Association [1978] AC 337 (PC)

Bestafoam (Pvt) Ltd v Tynedale (Pvt) Ltd S-54-88 (not reported)

Commissioner of Taxes v F 1976 (1) RLR 106 (A); 1976 (2) SA 653 (RA)

A P de Bourbon SC for the appellant

M J Gillespie for the respondent

Judgment

Manyarara JA: The appellant is a limited liability company carrying on the business of distributing its petroleum products through various outlets in the country. One of these outlets is situated at Lot 8 Chisipite Township of Chisipite (Harare) and the appellant is the registered owner thereof. It is from this outlet ("the leased premises") that the respondent, also a limited liability company, has for many years operated the business of a retail petrol service station and garage workshop. Mr Cyril Start is the managing director and sole beneficial shareholder of the respondent.

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The relationship between the parties was conducted in terms of a written lease agreement, termed an operating lease, the last of which expired on 31 January 1988. Thereafter, the respondent became a statutory tenant in terms of the Commercial Premises (Rent) Regulations 1983 (SI No. 676 of 1983) ("the Regulations"). By consent of the parties, the appellant commenced a major reconstruction of the leased premises on 23 May 1988. The rent payable in terms of the expired lease before the commencement was \$1 639 per month. This was waived during the building operations to compensate the respondent for the disruption of his business. The building was completed on 21 April 1989 at a cost of \$622 075 before there had been any extension or renewal of the operating lease.

Major disagreements had arisen between the parties and these culminated in the appellant applying to the High Court for an eviction order. The application was dismissed with costs. It is against the dismissal that the appellant, represented by Mr *de Bourbon*, appeals to this court. Mr *Gillespie* appears for the respondent.

The chronology of the events is as follows:

During the currency of the operating lease, a "rent freeze" was introduced with effect from 24 June 1987 by the Emergency Powers (Control of Prices, Service Charges and Rents)

Regulations 1987 (SI No. 252A of 1987). This was extended on 20 May 1988 and finally repealed on 21 July 1989.

An offer for the extension of the operating lease had been made on 31 May 1988 but the matter was not finalised. Thereafter, a new operating lease commencing on 1 December 1988 was offered. The respondent rejected the rent proposal made in the offer and made a counter-offer which was not acceptable to the appellant either.

It appears that in July 1989, after the rent freeze was lifted, the appellant applied to the Rent Board for an increase in the rental, but the application was not heard because the Board wanted the parties to negotiate the issue between themselves. It is on such a basis that the case must be decided.

Several meetings were held by the parties and their legal representatives to negotiate a new operating lease, as appears from the considerable amount of correspondence which passed between them. The difference between the parties on rent was not great. The appellant wanted \$3 000 per month, rising to \$4 500 per month in the third year of the proposed lease. The respondent offered

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\$2 250 per month, rising to \$3 300 per month over the same period. At one stage the appellant offered to reduce the rent provided the duration of the operating lease would be one year but nothing was agreed. The appellant also hired valuation experts by the name of Knight, Frank and Rutley, whose estimate of a fair rental was \$5 850 per month. This was rejected by the respondent on the basis to which Mr Start averred as follows:

"The respondent decided that it could not adequately respond to the applicant until its financial statements for the period 1st April to 30th September, 1989, had been prepared so that it could see how its business had done during this period which started at a time when the re-building was virtually complete, and ended when the programme had to all intents and purposes been completed. The respondent instructed a chartered accountant, Mr D Playford, to prepare a report based on the accounts, and with the valuation of Knight, Frank and Rutley in mind. Mr Playford's report dated 20th November 1989, is annexed hereto marked Annexure T. His conclusion based on the accounts was that if the applicant increased the rent by the proposed amount there would be no economic business incentive to operate the service station."

The respondent requested further meetings and the appellant acceded to the request. Then on 17 January 1989 one of the appellant's directors, Mr Burr, addressed the following letter to the respondent:

"Dear Sirs

TENANCY : LOT 8 CHISIPITE TOWNSHIP

We refer to numerous discussions with you and correspondence between our respective legal practitioners during the past year.

It is evident that our negotiations have led nowhere and that any offers which have been made to you by Mobil have proved to be unacceptable.

All such offers are accordingly withdrawn.

We hereby give you notice that we are terminating your tenancy on 31 March 1989, on which date our representative will inspect the premises and collect all keys from you.

Should you wish to vacate on an earlier date, we will not raise any objection provided we are given reasonable notice of your intentions.

Please acknowledge receipt in the space provided at the foot of this letter. Yours faithfully RE BURR

DIRECTOR"

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Nonetheless, more meetings between the parties followed until 30 November 1989 when Mr Burr finally wrote to the respondent as follows:

"Dear Sir

RE: LEASE CHISIPITE SERVICE STATION (PRIVATE) LIMITED AND MOBIL OIL ZIMBABWE (PRIVATE) LIMITED

Despite our letter to your lawyers dated 27 November 1989 we have had no response to the proposals put forward by us at the meeting held on 22 August 1989.

We have been unable to reach agreement on a rental and Mobil cannot afford to keep on losing money. To avoid direct monthly loss we have no option but to run the Service Station ourselves.

We hereby give formal notice to terminate the lease on 31 January 1989. Our salesman will attend to the handover at close of normal business on that date.

Yours faithfully

R E BURR

DIRECTOR"

There is a typographical error in the penultimate sentence, where the year referred to is obviously 1990 and not "1989".

As the respondent was not willing to go voluntarily, the appellant applied to the High Court for an eviction order. The founding affidavit was sworn by the appellant's legal adviser, Ms Dulcie Mapondera, who averred in paragraph 14 of the affidavit as follows:

"14. In the absence of an agreement, in order to protect its investment and turn it to account profitably, the applicant decided to operate its own service station business with its own staff from the site with effect from 1 February 1990."

The deponent averred further that the decision was not isolated but based on a large number of factors, including -

(a) The highly competitive nature of the petroleum distribution industry;

- (b) The need to link the cost of investment in a retail outlet efficiently and properly with the sales from such an outlet;

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- (c) The high cost of building and maintaining a modern service station;
- (d) That the appellant corporation's policy is for its world-wide affiliates to operate their own service stations when it is advantageous to do so and this was a growing trend in the organisation;
- (e) That in keeping with such a trend the appellant had since built a new service station in Bulawayo which it was operating with its own staff; and
- (f) That the appellant's experience was that in many cases service stations operated by a petroleum company were more efficient and profitable and gave a better economic return than premises let to dealers.

The deponent mentioned five service stations which she averred were operated by its competitors within the Harare area and that its Malawi affiliate was operating fifteen service stations in that country.

The application was opposed. The ground of opposition emerges from the judgment dismissing the application, which reads as follows:

"It was argued for the applicant that refusal to pay increased rental is not the sole reason for wanting (the) respondent ejected. Mr *de Bourbon* concedes, however, that it 'was one of the factors that led to the decision by (the) applicant to run the business itself' and goes on to say that 'it is not by itself the basis of the present application', and he says 'A distinction must be drawn between an instance where a landlord wishes to evict a statutory tenant who will not pay more rental and the case where a landlord decides to use the premises for his own purposes - albeit motivated in part because the statutory tenant will not pay more rental', and that the latter is the position in this matter. With the greatest of respect, in the circumstances of this case, that is a distinction without a difference. For whichever way one looks at the facts in this case the refusal to pay an increased rental or rather the failure of the parties to agree on an increased rental is the *sine qua non* of everything that followed, including this application."

Mr *de Bourbon* takes issue with the learned judge's finding on the broad basis which he summarised in his written heads of argument as follows:

"If the appellant had not offered a three-year lease in the first place, and had sought the immediate eviction of the statutory tenant on the basis that it wished to occupy the premises itself, and run its own forecourt business,

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and thereby recoup its expenditure on the improvements, there can be little doubt that the appellant would have succeeded. The fact that it offered the lease should not in any way diminish the view of this Honourable Court as to its *bona fides*. Had the respondent committed itself to a three-years lease, on terms as to rental which went

some way towards recognising the appellant's expenditure on improving the property, the appellant would have had an incentive to contribute to the increased sales in the forecourt through training of staff, displays and the like. Because of the refusal by the respondent to enter into a three-year lease at a greater rental (albeit a rental below the true market rental), the appellant was bound to recognise that its commercial interests in maximising forecourt sales could only be served by taking possession of the service station and running it itself, thus guaranteeing the enhancement of the sale of its own products."

Mr *de Bourbon*'s first point is that, in order to constitute good and sufficient grounds for evicting a tenant of commercial premises, it is enough if the owner establishes his *bona fide* intention to utilise the premises for his own purposes. *Boka Enterprises (Pvt) Ltd v Joowalay & Anor* 1988 (1) ZLR 107 (SC).

The validity of Mr *de Bourbon*'s point is no longer open to doubt on the authority he cited which has settled the law thereon. His submission is that the learned judge below failed to correctly analyse the factual situation and to apply the proper interpretation of the legislation to that situation and thus arrived at a wrong decision.

Mr *Gillespie*'s response is that the law prohibits the ejectment of a statutory tenant unless the reasons for requiring possession are other than that the lessee has declined to agree to an increase in rent. And:

"The forbidden grounds for ejectment are designedly drafted in two sub-paragraphs in order to prevent frustration of the legislative intent. Thus if a desire to use one's own premises for oneself were in any case sufficient cause, only paragraph (ii) would be required. The inclusion of paragraph (i) shows that even if the premises are not to be re-let it can never amount to good and sufficient cause if the motivation for the ejectment is dissatisfaction with the rent."

GUBBAY JA (as he then was) explained in the *Boka* case *supra* that in the absence of a definition of "good and sufficient grounds" in the Regulations, other than the exclusion of refusal by a lessee to pay a higher rental and the lessor's wish to let the premises to a third party, each case of an owner seeking the use of leased

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premises must be assessed on its own merits. "The court would want to know the precise use to which it was intended to put the premises", he said. Having ascertained the intended use, a court should take this and any other factors of relevance to the application into account in exercising a value judgment either to refuse or grant the order.

In *Newman v Biggs* 1945 EDL 51, one of the authorities referred to with approval in the *Boka* case *supra* PITTMAN JP, at 54, said:

". . . it is difficult to see what more can ordinarily be required of a claimant than that he should assert his good faith and bring some small measure of evidence to demonstrate the genuineness of his assertion. He can normally scarcely do more, and it rests with the lessee resisting ejectment to bring forward circumstances casting doubt upon the genuineness of his claim."

It is these principles which must be applied to the instant case and I proceed to do so:

The appellant owns the leased premises and its business is that of distributing its products

therefrom. The decision on how to do so to the appellant's best advantage must be left to the appellant, as Mr Start of the respondent himself acknowledged in his lengthy opposing affidavit. This admits that the decision to take over the premises "was not isolated (but) based on (the) large number of factors" deposed to in the founding affidavit. Of significance are Mr Start's admissions-

- (a) That the petroleum distribution industry is highly competitive between very efficient competing companies; and
- (b) That a petroleum company looks to maximising the sale of its products from various retail outlets and, provided **it is achieving satisfactory sales of its products, it will not seek to take over the operation of a retail outlet.** (Emphasis provided).

It is common cause that both parties were perfectly happy with the arrangement between them during the currency of the operating lease agreement which expired on 31 January 1988; that the appellant was anxious to extend the lease agreement but the matter was not finalised; that thereafter a new lease was offered and rejected; that this was followed by protracted negotiations before the exercise was abandoned as hopeless; and that it was only in November 1989 G that the appellant's Mr Burr announced that because of the impasse in the negotiations the appellant found itself "with no option but to run the service station ourselves".

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Further correspondence exchanged by the parties at the time makes the point clearly. On 31 January 1989 the respondent's Mr Start addressed a letter to the appellant's Mr David Seaman in the following terms:

"Dear Dave,

I refer you to our telephone conversation this morning.

I am quite prepared to hold direct **negotiations concerning a three year lease** with yourself and Ralph Burr which will exclude our lawyers.

I must reserve my right to consult with my lawyers should our negotiations fail to reach any agreement.

I look forward to hearing from you.

Yours sincerely

(CF Start) (The emphasis is mine)."

Mr Seaman's reply thereto was as follows:

"Dear Cyril,

I am in receipt of your letter dated 31st January 1989 and am interested in the substance of the letter which does not coincide with my recollection of the telephone conversation.

I do recall quite clearly our telephone conversation, however, have no recollection at all of us agreeing to hold direct negotiations concerning a three-year lease.

I did, however, stress that it was important if we are to get together that our differences should be resolved in a business-like manner without reliance on lawyers other than for checking legal contents of a finally agreed legal text.

Fundamental issues require to be resolved and unless that is clearly understood there is little point in us getting together.

Your letter by implication clearly states that if we fail to reach an agreement, that recourse to lawyers will be necessary to resolve the key problem areas. Given the past history of problem areas that have resulted in your referring them to your legal advisers, I think it **would be desirable for you to set down on a piece of paper the key points that you wish to discuss and to what extent you are prepared to compromise on these points** so that we can determine whether or not there is any common ground for us meeting.

In the meantime our lawyer will continue to prepare a response to your letter, setting out Mobil's grounds for your vacating the premises.

Yours sincerely,

DAVID B SEAMAN (The emphasis is again mine.)

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It seems to me that the respondent had never been in any mood to reach any accommodation with the appellant either on rent or on any other of the latter's proposals. Mr Start deposed to his state of mind as early as July 1988 as follows:

"I decided to let the matter of the lease rest until the building operations had been completed and I could see how they turned out."

They turned out not to be to his liking and it is hardly surprising that agreement on a new operating lease was doomed from the outset of the negotiations.

In this regard, it is common cause that until then the relationship between the parties had been generally a "harmonious" one, as Mr *Gillespie* submitted. Ms Mapondera's answering affidavit avers as follows:

"By the 14th December 1989 the respondent's intransigent and belligerent attitude, which had worsened since May 1988, clearly demonstrated to the applicant that the desirable relationship between petroleum company and dealer had soured beyond reconciliation. It had become the applicant's best interest to operate its own service station which is the applicant's firm resolve and the cause of this application arising from its wish to avoid losses and operate profitably as stated in paragraph 14 of its founding affidavit."

The respondent was perfectly entitled to disapprove of what the appellant had achieved in its redesigning of the premises. But this serves to confirm, not destroy, the appellant's claim that it *bona fide* intended to maximise the sales of its products by rebuilding the premises as it did. My respectful view is that the learned judge erred in disregarding the facts I have summarised.

There was disagreement over rental, it is true. But rent was only one of the several issues separating the parties. There was the duration of the proposed lease, the *solus* agreement, and the business relationship of the parties to consider, on which Mr *de Bourbon* has made the following submissions:

- "7. Regard must also be had to the fact that from the appellant's point of view there is no security in having a statutory tenant. A statutory tenant can vacate at any time. A tenant on a lease must honour the terms of the lease, or pay damages for any breach by non-performance of the length of the lease. It was clearly not in the interests of the appellant to have to deal with a statutory tenant who could cause considerable embarrassment and possibly financial loss to the appellant at very short notice on termination of the lease. It is respectfully submitted that the

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learned Judge below failed to appreciate this vital distinction in the relationship between the appellant and the respondent.

8. Furthermore, the lease agreement also constitutes a *solus* agreement. The purpose for such a *solus* agreement is to ensure that the appellant's products are marketed, not simply to the exclusion of other competitors, but to the mutual advantage of both the appellant and the respondent. Thus a formal agreement is necessary in these circumstances."

And:

- "14. To the extent, if any, that the decision to operate the service station itself was as a result of a failure by the parties to enter into a new lease agreement, it is respectfully submitted that the appellant has made a normal and valid commercial business decision in determining that it rather than the respondent should run the service station. In order to maximise the return on its investment in the service station, the only realistic commercial decision that the appellant could make was to run the service station itself."

I find merit in the submissions. Mr JUSTICE GUBBAY in the *Boka* case *supra* laid down the correct approach to applications of this nature at 115H-116A of the reported judgment as follows:

"Section 22(2) of the Regulations provides that no order for the recovery of possession of commercial premises or for the ejectment of the lessee therefrom shall be made 'unless the court is satisfied that the **lessor** has good and sufficient grounds for requiring such order' (my emphasis). I share the view of the learned judge that the wording is clear and unambiguous. It is the position of the lessor that is to be looked to. If he has good and sufficient grounds that is the end of the matter. Nothing is said about the lessee, his needs or any other circumstance. That this is the meaning intended by the law-maker is fortified by reference to paras (i) and (ii) of subs (2) of s 22, both of which relate solely to grounds for requiring the order."

I respectfully suggest that that is good law and that the learned judge *a quo* in this case misled himself by overlooking the appellant's position.

It follows that Mr *Gillespie's* contention that it was proper to refuse an eviction order because "part of the landlord's motivation is a refusal by the tenant to pay

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a higher rental" must be rejected as unsound. Once an owner has established good and sufficient grounds for eviction, other than the prohibited grounds, the lessee loses his protection under the Regulations, and I am satisfied this is what has happened in this case. See *Guthrie Holdings (Pvt) Ltd v Arches (Pvt) Ltd* 1989 (1) ZLR 184 (SC); 1990 (2) SA 62 (ZS).

I respectfully suggest that the learned judge misled himself by failing to appreciate that this was not a case of "an unscrupulous landlord" seeking to increase the rent unjustifiably. It is a case of a large business concern which has invested a considerable sum of money in redesigning the premises for a specific legitimate purpose, which had to that end forgone rental during the rebuilding of the premises, which had thereafter sought to recoup some (only a small portion) of the investment by a negotiated increase in rental but was prevented from doing so by the respondent's insistence on dictating what that level of increase should be, despite the informed opinion of a valuator that the appellant was asking for a rental which was well below the open market rental value of the rebuilt premises. See *Moffat Outfitters (Pvt) Ltd v Hoosein & Ors* 1986 (2) ZLR 148 (SC) at p 151D, where it was taken for granted that an increase in rental would be inevitable after the reconstruction of the premises concerned.

If I may respectfully rephrase what MILLIN J stated in *Johannesburg Board of Executors & Trust Co Ltd v Gordon* 1947 (1) SA 92 (WLD) at 96, the respondent has been quite unable to deny any of the material facts on which the appellant relied. The opposition to the eviction order amounts to no more than a statement that eviction should be refused because it would be better that the appellant should be denied the opportunity of recouping its investment than that it (the respondent) should vacate the premises. MILLIN J continues as follows:

"The question is not who will suffer the greater hardship, the applicant if the respondent is not ejected, or the respondent if he is ejected; the question is simply whether the applicant has shown that it reasonably requires the leased premises for its own use."

I suggest that in the present cases the appellant has discharged the *onus* thus resting upon it successfully and is entitled to the eviction order it sought. See also *Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd* 1986 (2) ZLR 246 (SC).

Mr Gillespie's alternative argument is that, quite apart from the rent element, the appellant's intention to use the premises itself is not in all the circumstances reasonable. His first point under this head of argument is that the appellant's

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move would "amount to an acquisition, for no payment, of a substantial part of the respondent's business". *Government of Malaysia & Anor v Selanger Pilot Association* [1978] AC 337 (PC) at 354H-355B.

Briefly, the respondents in *Selanger's* case sold their pilot launches and equipment to the Malaysian Port Authority in circumstances which LORD SALMON, in a dissenting opinion, viewed at p 352G as follows:

"This appeal turns upon the true answer to the question whether the law enacted by the amendments to the Port Authorities Act 1963 was in breach of article 13(2) of the Constitution. This, to my mind, depends upon whether that law provided directly or indirectly for the compulsory acquisition by the authority of the respondents' business which had been in existence since 1946 and included amongst its assets its goodwill and prospects of making future profits."

LORD SALMON summarised his minority view of the position at the passage cited by Mr

Gillespie, as follows (pp 354H-355B):

"Apparently April 30, 1972, was the last day upon which the respondents carried on their business. Their customers whose vessels entered the port on that day would have seen the respondents' business being carried on as usual. On the following day nothing would appear to have changed. The same launches with the same pilots would have been carrying out the same services for the respondents' erstwhile customers as they had always done. It would in my view be wholly unrealistic to say that the authority had not acquired the respondents' business; and acquired it as a result of the amending Act of 1972. If a customer had asked the respondents whether they had any news they could no doubt have truly replied: 'Yes, bad news. The authority has today taken over our whole business. They are employing our pilots and using our launches. It is true that they are graciously going to pay us for the launches but they refuse to pay us any compensation for the loss of our goodwill and our prospect of making future profits which they have now acquired.' If they were then asked how did this acquisition come about, the respondents could reply, in my view, truly: 'Solely as the inevitable result of the recent legislation passed by the government'."

It will be seen that, even assuming that the learned LAW LORD was right, his reasoning does not apply to the present case.

As already mentioned, the present respondent's opinion is that the rebuilt

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premises are not suited to its business. Therefore, there is nothing of the respondent's "property" which the appellant will "acquire" by taking over the leased premises. The respondent may freely take that elsewhere.

Mr *Gillespie's* next point is that the appellant's usual business is to enter into a *solus* agreement and not to run a service station itself. This has already been considered when I dealt with the respondent's averment that a petroleum company will not seek to take over the operation of a retail outlet provided it is achieving satisfactory sales of its products therefrom. Mr Start's opinion is that the position reached when the building was completed satisfied this requirement for the taking over of the leased premises and that puts an end to the matter.

The same goes for Mr *Gillespie's* point that a *solus* agreement is more than a mere lease, which is common cause anyway.

The respondent's undertakings under the expired operating lease agreement include the following:

"UNDERTAKINGS BY THE LESSEE

Throughout the period of this Agreement and any renewal hereof the Lessee shall:

- 4.1 Use the Premises only as a garage, petrol filling station and for no other purposes without the prior written consent of Mobil.
- 4.2 Subject to the provisions of Clause 6 hereof relating to *vis major* or *force majeure*, only sell, store, handle or distribute in the Premises only petroleum fuels supplied by Mobil or its nominee.
- 4.3 Not without the prior written consent of Mobil (which consent shall not be unreasonably withheld) in any manner whatsoever trade or deal in lubricating oils, greases and other petroleum products which are

manufactured or supplied by a manufacturer or supplier, other than Mobil, of petroleum fuels.

Any such petroleum products shall be displayed only in such positions and in such manner as Mobil shall from time to time approve.

- 4.4 Display or permit the display on all parts of the Premises only such advertising signs and devices as Mobil shall approve in writing.
- 4.5 Carry on business on the Premises and maintain therein standards of service in accordance with the reasonable requirements of Mobil."

Whilst the appellant's main undertaking is as follows:

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"UNDERTAKING BY MOBIL

Mobil undertakes that, the Lessee paying the rent and otherwise observing the terms and conditions of this Agreement, Mobil shall:

- 5.1 Subject to the provisions of Clause 6 hereof provide the Lessee with petroleum products required by the Lessee for the business carried on on the Premises in accordance with the custom and usage of the trade, on terms and conditions applicable from time to time to businesses of the same class in the same or similar locality, at Mobil's wholesale list price ruling on the date of delivery."

Clause 6 exempts either of the parties from liability for failure to honour any of its undertakings by reason of "*vis major*" or "*force majeure*".

It will be evident that agreement was necessary on the respective undertakings of the parties before a new operating lease could be concluded, which never happened until negotiation was abandoned.

Finally, Mr *Gillespie* argues that even if the appellant does not "acquire" the respondent's property it will still unreasonably deprive the latter of its enjoyment by ejectment. He relies on *Bestafoam (Pvt) Ltd v Tynedale (Pvt) Ltd* S-54-88 (unreported).

With respect, Mr *Gillespie* has cited *Bestafoam* incorrectly. There were two issues in that case, and both were resolved in the lessor's favour. On the main issue, the court applied the same principles as I have suggested should be applied to the present case, with the same result in assessing good and sufficient grounds for granting an eviction order. The subsidiary issue was whether the lessee should be allowed to remain in occupation pending the completion of the alternative premises it was constructing. Here again this court held that it would be wrong so to indulge the lessee at the lessor's expense and upheld the eviction order in the terms granted by the court below.

At the end of the day, I am not persuaded by Mr *Gillespie*'s contention that "wherever part of the landlord's motivation is a refusal by the tenant to pay a higher rent ejectment must be refused". Nor am I convinced that this is "the statutory remedy against the perceived evil". *Commissioner of Taxes v F* 1976 (1) RLR 106 (A) at 113A-115D.

The "perceived evil" in s 22(2)(b)(i) of the Regulations is not an owner's request or even

insistence on a higher rental for the leased premises. It is the granting

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of an eviction order on an application based on the **lessee's refusal to pay a higher rental** than before which the provision strikes down. Put another way, an owner is not prevented from recouping his investment in the leased premises by increasing the rental. What he is prevented from doing is obtaining an eviction order only because the lessee refuses to pay more.

Mr *Gillespie* has asked that if the appeal is allowed the respondent should be allowed a reasonable period in which to vacate the premises. He suggests a period of three months as reasonable. Mr *de Bourbon* opposes the request as not founded on any legal principle and he is right. See the proviso to s 23 of the Regulations, which provides as follows:

"Provided that, notwithstanding anything contained in the contract of lease, a lessor who obtains an order for recovery of possession of the premises or for the ejectment of a lessee retaining possession as aforesaid shall not be required to give any notice to vacate to the lessee."

The provision applies squarely to this case as the respondent retains possession as a statutory tenant.

The result is that the appeal is allowed with costs. The order which the High Court made is set aside and the following order is substituted:

"That the application be and is hereby granted in terms of the Draft Order filed of record in the proceedings."

Korsah JA: I agree.

Ebrahim JA: I agree.

Atherstone & Cook, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

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S v BEAHAN 1991 (2) ZLR 98 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA, Korsah JA, Ebrahim JA & Sandura AJA

Criminal appeal

10 June & 4 September 1991

Flynote

Criminal procedure - jurisdiction - appellant arrested in Botswana and handed over to Zimbabwe Police

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informally at border - distinction between voluntary surrender of fugitive by State of refuge and violation by receiving State of international law through an abduction - discretion - whether court has a discretion to refuse to exercise jurisdiction.

Criminal law - accomplice - dissociation from common purpose - whether must attempt to frustrate the purpose in order to free himself from joint responsibility.

Headnote

In a case where a person is brought before a court on a criminal charge after an abduction or some other wrong under international law by which the prosecuting State affronts the sovereignty of the State of refuge from which the accused is taken, then that court does not have jurisdiction to try the accused.

A case of abduction or involving some other act of force or fraud by the receiving State must be distinguished from a case of a voluntary surrender of a fugitive by the State of refuge, notwithstanding that that surrender may be in contravention of the municipal law of the State of refuge.

Semble: Even where a court has jurisdiction it may in its discretion decline to exercise jurisdiction as part of its inherent power to prevent an abuse of its process.

An accomplice who wishes to dissociate himself from a criminal common purpose must, if he is to escape liability, take reasonable steps to frustrate the purpose where his contribution has been anything more substantial than

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assent prior to the event. Mere withdrawal will only avail him where he has done no overt act toward the completion of the crime.

Cases cited:

S v Beahan 1989 (1) ZLR 195 (HC); 1990 (2) SACR 59 (ZH)

S v Beahan 1989 (2) ZLR 20 (SC); 1990 (3) SA 18 (ZS)

S v Ndhlovu 1977 (2) RLR 17 (A); 1977 (4) SA 125 (RA)

Ndhlovu & Anor v Minister of Justice & Ors 1976 (4) SA 250 (N)

S v Mapane & Anor 1977 (1) RLR 240 (A); 1977 (3) SA 228 (RA)

S v Ebrahim 1991 (2) SA 553 (A)

Abrahams v Minister of Justice & Ors 1963 (4) SA 542 (C)

S v Ramotsi & Ors (unreported TPD) 1970 ASSAL 80 (Annual Survey of SA Law)

Ex parte *Ebrahim*: in re *S v Maseko & Ors* 1988 (1) SA 991 (T)

Nduli & Anor v Minister of Justice & Ors 1978 (1) SA 893 (A)

Ex parte Susannah Scott (1829) 9 B&C 446; 109 ER 166

R v Sattler (1858) Dears & Bell 539; 169 ER 1111

In re Parisot (1890) 5 TLR 344

R v Officer Commanding Depot Battalion RASC Colchester: ex parte Elliott [1949] 1 All ER 373 (KB)

R v Plymouth Magistrates' Court & Ors: ex parte Driver [1985] 2 All ER 681 (QB)

S v Brewster (1835) 7 Vt 118

Ker v Illinois (1886) 119 US 436; 30 L Ed 421

Frisbie v Collins (1952) 342 US 519; 96 L Ed 541

Gerstein v Pugh (1975) 420 US 103; 43 L Ed 2d 54

US v Toscanino (1974) 500 F 2d 267

US ex rel Lujan v Gengler (1975) 510 F 2d 62

US v Cordero (1981) 668 F 2d 32

Sinclair v HM Advocate (1890) 17 R (JC) 38

Youssef Said Abu Dourrah v Attorney General Palestine Supreme Ct Annual Digest 1941-1942, Case 97

R v Hartley [1978] 2 NZLR 199

R v Bow Street Magistrates: ex parte Mackeson (1981) 75 Cr App R 24 (DC)

R v Guildford Magistrates' Court: ex parte Healy [1983] 1 WLR 108 (QB)

R v Chinyerere 1980 ZLR 3 (A); 1980 (2) SA 576 (RA)

R v Njenje & Ors 1965 RLR 586 (A); 1966 (1) SA 369 (RA)

S v Ndebu & Anor 1985 (2) ZLR 45 (SC)

Ex parte Becerra and Cooper (1976) 612 Cr App R 212 (CA)

Ex parte Whitefield (1989) 79 Cr App R 36 (CA)

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R v Whitehouse [1914] 1 DLR 683

Ex parte Croft (1942-44) 29 Cr App R 169 (CCA)

S v Harington 1988 (2) ZLR 344 (SC); 1989 (2) SA 348 (ZS)

M J Gillespie for the appellant

Y Omerjee and A O Agyemang for the respondent

Judgment

Gubbay CJ:

A. INTRODUCTION

On 23 January 1989 the appellant was arraigned in the High Court before MTAMBANENGWE J upon a charge of contravening s 50(1) of the Law and Order (Maintenance) Act [*Chapter 65*]. It was alleged in the indictment that acting in concert with other persons and with intent to endanger the maintenance of law and order in Zimbabwe, he did commit or attempt to commit an act of terrorism or sabotage by conspiring with others to forcibly effect the release from the lawful custody of the Zimbabwe Prison Service of certain prisoners who were detained on charges relating to their involvement in acts of terrorism, sabotage or espionage, and to remove the said prisoners outside the borders of Zimbabwe, and did in pursuance of the plan enter Zimbabwe on 27 June 1988 at Kazungula Border Post, and act in a manner that was likely to cause serious bodily injury to or endanger the safety of any person within Zimbabwe, and did cause such serious bodily injury to the youth Doubt Chinhamo.

Pursuant to s 163(1)(f) of the Criminal Procedure and Evidence Act [*Chapter 59*] the appellant pleaded to this indictment that the court had no jurisdiction to try him for the offence. The raising of the special plea had been foreshadowed in the written notice given earlier to the Attorney-General in terms of s 162 of the aforementioned Act, which set out the ground of objection as being that:

"... [the accused] was unlawfully removed from Botswana by members of the Police Force of Botswana and handed to members of the Zimbabwe Republic Police at Plumtree. The removal of the accused from Botswana was not a deportation in terms of the law of Botswana, but amounted to an extradition from Botswana without any procedures in respect thereof being followed."

For the purpose of enabling the learned judge to determine the jurisdictional issue the following statement of agreed facts was placed before him:

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- "1.1 The accused entered Zimbabwe at Kazungula on a false British passport bearing the name of Henry Coleman and containing a photograph of the accused, at about 6.00 pm on 27 June 1988.
- 1.2 The accused was the leader of a group of armed terrorists whose objective was to forcibly effect the release from lawful custody of South African agents awaiting trial on allegations of sabotage, terrorism and acts of bombings carried out at the behest of the South African Government.
- 1.3 When the accused so entered Zimbabwe, he was in the company of one Jim Maguire. The two men drove to the Zimbabwe side of the Kazungula border in a motor vehicle.
- 1.4 Maguire was a member of the group of terrorists. Concealed in the vehicle in which the men drove to

Zimbabwe were ground to air communication radios necessary for the prosecution of the operation to release the above mentioned agents.

- 1.5 The accused and Maguire on being questioned by the Zimbabwean Police and Immigration officials absconded and swam their way across the Zambezi River into Botswana.
- 1.6 The other members of the group referred to in paragraph 1.2 above, who were within Zimbabwe by 28 June 1988, attempted by force to effect the release of the above-mentioned agents, but were thwarted by the Zimbabwe security agencies.
2. The accused was, at the time of his arrest, a resident of the Republic of South Africa, and a citizen of the United Kingdom.
3. The accused was arrested on 28 June 1988 at a roadblock within Botswana by members of the Botswana Defence Force. He was at the time still in the company of Maguire, who absconded when the pair were challenged.
4. Following his arrest by members of the Botswana Defence Force, the accused was placed in the custody of the member-in-charge of the main police station at Gaborone later on 28 June 1988.
5. The accused remained in the custody of members of the Botswana Police Force in Botswana from 28 June 1988 to 2 July 1988.
6. At no time during his detention in Botswana did the accused appear before a court, nor did he have access to legal representation.
7. On 2 July 1988 the accused was taken by members of the Botswana Police Force from Botswana and was handed to members of the

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Zimbabwe Republic Police at Plumtree. The Zimbabwe Republic Police detained the accused.

8. When the accused was brought into Zimbabwe from Botswana by the Botswana Police Force, he was not required to present himself to an immigration officer.
9. There does not exist any extradition treaty between Zimbabwe and Botswana.
10. No request for the extradition of the accused from Botswana to Zimbabwe was made to the Government of Botswana by the Government of Zimbabwe.
11. No documents purporting to show his deportation from Botswana to Zimbabwe were given to the accused at any stage.
12. Members of the Botswana Police Force became aware that the accused was wanted by the Zimbabwe Republic Police and agreed to hand him to the Zimbabwe Republic Police."

What remained in dispute between the prosecution and the defence was whether, with effect from 29 June 1988, a member of the Zimbabwe Republic Police had taken part in the interrogation of the appellant, or was present thereat, while he was being held in custody at the main police station in Gaborone. It was to this issue that Superintendent Bernard Jambawu of the Zimbabwe Republic Police and the appellant both testified. It was said by the former that a telephonic communication had been received from Botswana advising of the appellant's apprehension and that prior thereto no request had been made for his return. As investigating

officer Superintendent Jambawu had no knowledge of any member of the Zimbabwe Republic Police being present in Botswana in connection with the appellant. Such an officer, according to the appellant, was indeed present, for he later recognised him in Harare during the period he was being questioned by Superintendent Jambawu and again, when he appeared before the magistrate for remand. The learned judge determined this conflict in favour of the State. It was Superintendent Jambawu who impressed as a witness of the truth and not the appellant upon whom the *onus* rested to prove the allegation. The special plea was dismissed by MTAMBANENGWE J on 17 March 1989 in a lengthy judgment which is now reported *sub nom* *S v Beahan* 1989 (1) ZLR 195 (HC); 1990 (2) SACR 59 (ZH). An appeal was immediately noted against the correctness of the decision.

The trial of the appellant was resumed before CHIDYAUSIKU J on 15 May 1989, the date to which it had been adjourned. The appellant tendered a plea of not guilty. His counsel then applied for a stay of proceedings on the ground that the

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appellant's constitutional right to be afforded a fair hearing would be violated unless the Attorney-General were to ensure the attendance at the trial of the member-in-charge of the main police station at Gaborone and the other police officers who had taken part in his interrogation. The application was strenuously opposed and the learned judge dismissed it and ordered the trial to continue. An appeal as of right was noted against the interlocutory ruling. Thereupon, after entertaining submissions as to the effect of the noting the learned judge ruled that the trial proceed until the validity of the appeal, set down for 26 May 1989, was determined.

On 8 June 1989 this court dismissed the appeal. The judgment has been reported as *S v Beahan* 1989 (2) ZLR 20 (SC); 1990 (3) SA 18 (ZS).

After the State had adduced the evidence of twenty-five witnesses the trial court was informed that the appellant wished to alter his plea to one of guilty, subject to the qualification that he denied responsibility for any action taken by his co-conspirators in execution of the plan to free the lawfully detained prisoners, subsequent to his arrest in Botswana on 28 June 1988. Stated otherwise, it was accepted that the plan to rescue the prisoners and the entry into Zimbabwe by the appellant in furtherance of that plan, was likely to endanger the safety of any person within Zimbabwe and was thus an act of terrorism or sabotage as defined in s 50(6)(d) of the Law and Order (Maintenance) Act; but no more than that. This caveat to the plea was not acceptable to the prosecutor who closed the State case after producing a confirmed warned-and-cautioned statement recorded from the appellant on 5 July 1988. The defence led no evidence on conviction and intimated that it was not intended to contest the veracity of the version related by the witnesses for the State. It was simply a question of law as to whether the appellant was liable for the actions of his co-conspirators committed after 28 June 1988.

In returning a verdict of guilty the trial court absolved the appellant of criminal liability with regard to the shooting of, and serious injury to, the child Doubt Chinhamo on 30 June 1988, while he was playing in the grounds of the RS Davies Primary School, Kwekwe. It found that such an act was not proved to have been in furtherance of the common objective of the

conspirators and one that must have been foreseen by the appellant. However, the appellant was found accountable for the other incident which occurred on the same day - that involving the shooting of John Mzila, the security guard at the ZISCO Airstrip at Kwekwe and the deliberate damage to the National Airforce's Bell helicopter. For his part in the whole affair the appellant was ordered to undergo life imprisonment with labour. Leave to appeal against the sentence was granted.

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B. THE ISSUES

The issues which arise in the first appeal relate, of course, to the propriety of the conviction. They are these:

1. Whether the High Court had jurisdiction to try the appellant.
2. If jurisdiction existed, whether in the circumstances pertaining MTAMBANENGWE J in the exercise of his discretion, ought to have declined to entertain jurisdiction over the appellant.

In the event of a determination adverse to the appellant resulting in the confirmation of his conviction, the issues arising in the second appeal, concerning the sentence imposed, are broadly as follows:

1. Did the trial court misdirect itself in failing to hold that subsequent to his flight from Kazungula and his arrest in Botswana on 28 June 1988, the appellant had dissociated himself from any further action by his co-conspirators, and thus was not in law liable for the events which occurred on 30 June 1988.
2. Whether, in any event, the sentence is such as to justify interference by this court.

C. THE CONVICTION

(1) *The High Court's Jurisdiction*

After a full review of the authorities, MTAMBANENGWE J expressed what he considered to be the principle derivable therefrom in these words at 209H-210A:

"... while the court has jurisdiction to try a person properly brought before it **regardless of the means used to secure his presence before the court**, nevertheless the court can decline to exercise that jurisdiction in respect of a person irregularly or illegally brought before it and can decline to exercise jurisdiction as a mark of disapproval of the abuse of process" (emphasis added).

It is apparent that the learned judge trod a somewhat middle path. He adopted the conservative approach that no matter the circumstances under which a fugitive, accused of the commission of a crime, is brought within the jurisdiction, even if his removal from the State of refuge amounted to a breach

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of sovereignty, it is the duty of the court to ensure that he is amenable to justice. But he considered that by virtue of its inherent power the court has a discretion to refuse the exercise of jurisdiction, or to refuse to allow the accused person to stand trial, on the ground that grave impropriety attached to the manner in which he was brought within the territorial boundaries.

Although on the particular facts of this case, as I shall endeavour to show, it is strictly unnecessary to decide whether the first proposition enunciated by the learned judge is correct, namely, that courts in Zimbabwe are enjoined to try anyone found within the jurisdiction and lawfully arrested, no matter how his presence was secured, I deem it desirable to do so.

Certainly the proposition is afforded direct support from the only relevant decision in this country, that of *S v Ndhlovu* 1977 (2) RLR 17 (AD); 1977 (4) SA 125 (RAD). That case held that the fact the appellant had been abducted from Botswana (where he had been a lawful resident for several years), by the former Rhodesian security forces in violation of international law and brought to this country, did not constitute a bar to jurisdiction in a criminal trial (see at 127B and at 19C-D per MACDONALD CJ). In reaching this conclusion reliance was placed, *inter alia*, on *Ndhlovu & Anor v Minister of Justice & Ors* 1976 (4) SA 250 (N). The earlier decision in *S v Mapane & Anor* 1977 (1) RLR 240 (AD); 1977 (3) SA 228 (RAD) was distinguished on account of its special features.

Until the landmark decision of the South African Appellate Division in *S v Ebrahim* 1991 (2) SA 553 (A) was handed down on 26 February 1991, the courts in that country rarely hesitated to apply the rule, perceived to be correct, that the power of a court to try a person for a crime is not impaired by the manner in which he was brought within the court's jurisdiction. Once there was a lawful arrest within the boundaries of the country, the way in which the accused person had entered was irrelevant; it mattered not that he had been abducted from the foreign refuge State in violation of its territorial sovereignty. See for instance, *Abrahams v Minister of Justice & Ors* 1963 (4) SA 542 (C) at 545G-H; *S v Ramotsi & Ors* (unreported judgment of the Transvaal Provincial Division cited fully in 1970 Annual Survey of South African Law at p 80); *Ndhlovu & Anor v Minister of Justice & Ors supra* at 254F-255C; Ex parte *Ebrahim*: In re *S v Maseko & Ors* 1988 (1) SA 991 (T) at 1004I. Perhaps the first misgivings are to be found in *Nduli & Anor v Minister of Justice & Ors* 1978 (1) SA 893 (A). The appellants argued that they had been unlawfully abducted from Swaziland by members of the South African Police and that this constituted a bar to their being tried on charges

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under the Terrorism Act of 1967. Although there was a dispute over whether the arrest had in fact occurred in Swaziland, the court assumed that it had for the purposes of the case, but found that if this were so, the persons making the arrest had acted without the authority of the South African State. It accordingly held that there was no international delinquency since the State had not itself performed an act of sovereignty in a foreign State. After an examination of Anglo-American writings and decisions, RUMPF CJ said at 911H-912A :

" . . . it seems clear that in terms of international law, as it exists (and not perhaps as it should be), the appellants'

case would only have merited consideration if their abduction had been authorised by the Republic of South Africa . . . In the result it cannot be said that the jurisdiction of the court *a quo* was ousted according to international law . . ."

The appeal court was not invited to and did not consider the question as to whether the trial court should have exercised a discretion in refusing to allow the appellants to be tried even if jurisdiction so to try them existed.

The most authoritative and persuasive judgment insofar as this court is concerned is that of STEYN JA in *S v Ebrahim supra*. In that case the appellant, a South African citizen by birth, fled to Swaziland in December 1980 whilst restricted to the magisterial district of Pinetown in Natal. In December 1986 he was abducted from his home in Mbabane by persons acting as agents of the South African State and taken back to South Africa where he was handed over to the police and detained in terms of security legislation. He was subsequently charged with treason, convicted and sentenced to twenty years' imprisonment with labour. Prior to pleading to the charge the appellant launched an application seeking an order that the court lacked jurisdiction to try him in as much as his abduction was in breach of international law and thus unlawful. The application was dismissed. An appeal against the ruling succeeded. After an exhaustive examination of the Roman and Roman-Dutch law, STEYN JA came to the conclusion that under both these systems the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area was considered as tantamount to abduction. With regard to Roman law the learned JUDGE OF APPEAL said at 570C (in translation):

"It is completely unthinkable that the Roman authorities would have recognised, and allowed to stand, a conviction and sentence resulting from an abduction of an offender out of one Roman province into another Roman province, which abduction had taken place on the instructions of or with the co-operation of the provincial authority of the province into which the

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offender was taken. That would be not only an approval of unlawful action, and accordingly an undermining of authority, but it would also have threatened the internal inter-provincial peace of the Roman Empire."

His view concerning the effect of Roman-Dutch law is expressed at 579F (in translation):

"It is clear that according to the Roman-Dutch common law a Dutch court had no jurisdiction to try a person who was abducted from another jurisdiction by agents of the State authority exercising power in the area of jurisdiction of the court."

The learned Judge of Appeal proceeded to point out that the common law of South Africa is still for the most part the Roman-Dutch law as adapted to local circumstances, and that there was no existing legislation which abolished any extant limitation in the common law in respect of a court's jurisdiction in criminal cases; one such limitation being the rule that even if an offence was committed within the area of jurisdiction of the court, it does not have jurisdiction to try the offender if he was abducted from another area of jurisdiction by agents of the State. Under the heading "Evaluation" the judgment continues at 582C-E (in translation) as follows:

"Several fundamental legal principles are implicit in those rules (of the Roman-Dutch law), namely, the

preservation and promotion of human rights, good international relations and the sound administration of justice. The individual must be protected against unlawful detention and against abduction, the boundaries of jurisdiction must not be violated, State sovereignty must be respected, the legal process must be fair towards those who are affected by it and the misuse of the legal process must be avoided in order to protect and promote the dignity and integrity of the administration of justice. The State is also bound thereby. When the State itself is a party to a case, as for example in criminal cases, it must as it were come to court with 'clean hands'. When the State is itself involved in an abduction over territorial boundaries, as in the present case, its hands are not clean. Rules such as those mentioned are evidence of sound legal development of high quality."

This decision commends itself and I respectfully agree with it. Not only is it founded on the inherited principles of common law which this country shares with South Africa, it has the added quality of being in accord with justice, fairness and good sense. See the favourable remarks of Professor Dugard in (1991) 7 *South African Journal of Human Rights* 199 at 202.

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As yet the English courts have not expressly recognised that an abduction on foreign soil by agents of the United Kingdom Government is a violation of international law which bars the exercise of jurisdiction to try the abductee, no matter the nature of his crime.

The earliest case in which the effect of an accused's irregular apprehension abroad upon the jurisdiction of the court to try him was considered, is *Ex parte Susannah Scott* (1829) 9 B&C 446; 109 ER 166. Scott was arrested in Belgium by an English police officer to whom the warrant for her arrest on a charge of perjury was specially directed. She was brought in custody against her will to England where she was tried. It was argued on her behalf that the court had no jurisdiction to try her because of the improper manner in which she had been brought within the jurisdiction. Delivering judgment against her, LORD TENTERDEN CJ said at 167:

"The question, therefore, is this, whether, if a person charged with a crime is found in this country, it is the duty of the court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them. If the act complained of were done against the law of a foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it . . ."

This approach was followed, in similar type situations, in *R v Sattler* (1858) Dears & Bell 539; 169 ER 1111; *In re Parisot* (1890) 5 TLR 344 and in *R v O/C Depot Battalion RASC Colchester*, *Ex parte Elliott* [1949] 1 All ER 373 (KBD). In the latter case LORD GODDARD CJ said at 376F-G:

"The point with regard to the arrest in Belgium is entirely false. If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: 'I was arrested contrary to the laws of the State of A or the State of B where I was actually arrested'. He is in custody before the court which has jurisdiction to try him."

More recently, the principle was reaffirmed in *R v Plymouth Magistrates' Court & Ors*, *ex parte Driver* [1985] 2 All ER 681 (QB) at 697 *in fine*.

Courts in the United States of America have likewise adopted the maxim *male*

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captus, bene detentus. The first judgment that mentions a possible violation of the sovereignty of another State and lays down an express ruling is that of the Supreme Court of the State of Vermont in *State v Brewster* 7 Vt 118 (1835). The accused, a foreign citizen, claimed that the court had no jurisdiction to try him on a charge of theft as he had been forcibly removed from Canada and brought into Vermont to stand trial. His contention was rejected on the following ground:

"His escape into Canada did not purge the offence, nor oust our jurisdiction. Being retaken and brought in fact within our jurisdiction, it is not for us to inquire by what means, or in what precise manner, he may have been brought within the reach of justice. It becomes then immaterial whether the prisoner was brought out of Canada with the assent of the authorities of that country or not . . . The illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complains, it is a matter which concerns the political relations of the two countries, and in the aspect, is a subject not within the constitutional powers of this court."

This decision was followed by the United States Supreme Court in *Ker v Illinois* (1886) 119 US 436; 30 L Ed 421. The appellant pleaded that he had been kidnapped by an agent of the United States Government in a sovereign country, Peru, and forcibly brought to the State of Illinois where he was tried and convicted of theft. His protest was of no avail. It was said at 444:

"The question of how far his forcible seizure in another country, and transfer by violence, force or fraud to this country, could be made available to resist trial in the state court, for the offence now charged upon him is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court."

Nearly three-quarters of a century later in *Frisbie v Collins* (1952) 342 US 519; 96 L Ed 541, where the petitioner had been convicted and imprisoned in Michigan after forcible abduction from Illinois, JUSTICE BLACK said for an unanimous court at 520:

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"This court has never departed from the rule announced in *Ker v Illinois*, . . . that the power of a court to try a person for crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of a 'forcible abduction'. No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."

See also *Gerstein v Pugh* (1975) 420 US 103 at 119; 43 L Ed 2d 54.

It is refreshing to note, however, that a departure from the restricted concept embodied in the *Ker-Frisbie* rule is expressed in the bold judgment of MANSFIELD CIRCUIT JUDGE, in *United States v Toscanino* 500 F 2d 267 (1974). The pertinent facts were that the appellant, an Italian national, protested that agents of the United States had abducted him from Uruguay and taken

him to Brazil where he was held in custody and tortured. From there he was conveyed by aeroplane to the United States. He was arrested and brought to trial on a charge of conspiring to import narcotics into the country. The trial court held that jurisdiction over the person of a criminal defendant was not affected by illegality in the means by which it was obtained. The Court of Appeal, Second Circuit reversed this ruling. It considered that the trial court was bound to dismiss the charge if Toscanino's allegations of kidnapping and torture were substantiated and, accordingly, remitted the case in order for such determination to be made. The learned judge reasoned thus at 275:

"... we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights. This conclusion represents but an extension of the well-recognised power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud."

This *dictum* does not, of course, accurately reflect the law of the United States. Moreover, subsequent decisions of the Federal Court of Appeal have limited its application to situations in which the government's conduct was considered to be of a "most shocking and outrageous character". See *United States ex rel Lujan v Gengler* 510 F 2d 62 (1975) at 65; *United States v Cordero* 668 F 2d

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32 (1981) at 37. Nonetheless, it signifies to me a realistic and responsive approach for the need to recognise and enforce fair standards of criminal justice towards which every legal system should strive.

In my opinion it is essential that in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State. There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations. For abduction is illegal under international law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end justifies the means, thereby encouraging States to become law-breakers in order to secure the conviction of a private individual.

I have no difficulty, therefore, in holding that *S v Ndhlovu supra* was wrongly decided by this court's predecessor and ought not to be followed in future. We are free to depart from it. See Supreme Court, Practice Direction No. 2 of 1981. I am satisfied, as well, that MTAMBANENGWE J stated the applicable rule too broadly, excluding as he did the important exception relating to a violation of international law and the sovereign integrity of a foreign State.

However this may be, the circumstances under which the appellant was brought to this country

from Botswana cannot be likened to an abduction by agents of the Government of Zimbabwe.

The appellant, a fugitive from Zimbabwe, entered Botswana illegally in transgression of the immigration laws. He was apprehended by members of the Botswana Defence Force and handed over to the police. Upon it being ascertained that the authorities in Zimbabwe were anxious that he be returned to stand trial, he was conveyed in the custody of the Botswana Police to the border between the two countries and voluntarily surrendered to the Zimbabwe Republic Police, who promptly arrested him. That conduct did not constitute a violation of international law for it involved no affront to the sovereignty of a foreign State.

Even if it be assumed that a member of the Zimbabwe Republic Police had interrogated the appellant at the main police station in Gaborone and thereafter

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requested that he be returned, such action does not avail the appellant. It is irrelevant to the issue. The immutable fact is that the appellant was recovered from Botswana without any form of force or deception being practised by the agents of this country. The decision to convey him to Zimbabwe was made, and could only have been made, by the Botswana Police in whose custody he was.

Where agents of the State of refuge without resort to extradition or deportation proceedings surrender the fugitive for prosecution to another State, that receiving State, since it has not exercised any force upon the territory of the refuge State and has in no way violated its territorial sovereignty, is not in breach of international law. See Morgenstern 1952 *The British Year Book of International Law* 262 at 270-271; Oppenheim's *International Law* 8 ed vol 1 at p 703. In O'Connell, *International Law* 2 ed vol 2 at p 834 the matter is put thus:

"The case of a voluntary surrender of the offender, but in violation of the municipal law of the State which makes it, is different from that just discussed (ie illegal seizure on foreign territory). Even if the surrender is contrary to an extradition treaty it is still not a violation of international law since no sovereign is affronted, and the offender has no rights other than in municipal law."

The proposition is well supported by authority. In the *Savarkar* case (cited fully in Harris *Cases and Materials on International Law* 3 ed at p 233) an Indian revolutionary who was being returned to India from Great Britain under the Fugitive Offenders Act, 1881, escaped and swam ashore in Marseilles harbour. A French policeman arrested him and handed him over to the British policeman who had come ashore in pursuit. Although the French police in Marseilles had been informed of the presence of Savarkar on board, the French policeman who made the arrest thought he was handing back a member of the crew who had committed an offence on board. France alleged a violation of its territorial sovereignty and asked for the return of Savarkar to it as restitution. The Permanent Court of Arbitration decided in favour of Great Britain for the following reasons:

"... it is manifest that the case is not one of recourse to fraud or force in order to obtain possession of a person who had taken refuge in foreign territory, and that there was not, in the circumstances of the arrest and delivery of Savarkar to the British authorities and of his removal to India, anything in the nature of a violation of the sovereignty of France, and that all those who took part in the matter certainly acted in good faith and had no

thought of doing anything unlawful . . . while admitting that an irregularity

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was committed by the arrest of Savarkar and by his being handed over to the British police, there is no rule of international law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power."

In the case of *Sinclair v HM Advocate* (1890) 17R (JC) 38 (conveniently referred to in the judgment of STEPHEN BROWN LJ in *R v Plymouth Magistrates' Court & Ors; ex parte Driver supra* at 692f-694j) Sinclair was found in Portugal and arrested by the Portuguese authorities, who had been informed that a warrant had been issued by a Scottish magistrate for his arrest on charges of breach of trust and embezzlement. Although there was no extradition treaty at the time between Portugal and Britain, Sinclair was detained for a month by the Portuguese authorities without any charge being made against him or inquiry instituted or warrant produced. They ultimately placed him on a British ship and he was brought to Scotland. Having been convicted by a court, Sinclair applied to the Scottish Court of Justiciary to have the proceedings quashed on the ground, *inter alia* that his arrest in Portugal was unwarranted, illegal and oppressive. The application was dismissed. LORD MACLAREN, giving one of the judgments, said at 43:

"With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally, it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody."

To the same effect is the decision of the Palestine Supreme Court in *Youssef Said Abu Dourrah v Attorney-General*, Annual Digest 1941-1942, Case No 97, in which it was held that once a person has been surrendered he cannot raise any irregularity in the procedure adopted by the surrendering State as a bar to the courts of the requesting State exercising criminal jurisdiction over him.

It necessarily follows that I am unable to agree with the contention urged on the appellant's behalf, that the failure by the Botswana authorities to have recourse

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to proper deportation procedures (there being no extradition treaty with Zimbabwe) constituted a bar to the High Court exercising jurisdiction over him. MTAMBANENGWE J was undoubtedly right in assuming jurisdiction.

(2) *The Exercise of Discretion*

MTAMBANENGWE J accepted the submission urged upon him by the appellant's counsel that where a court is firmly of the opinion that an abuse of process has occurred in the manner in which the accused person has been brought before it for trial it may, in its inherent power, refuse to exercise jurisdiction over him as an expression of displeasure. His approach was influenced directly by the judgment of the New Zealand Court of Appeal in *R v Hartley* [1978] 2 NZLR 199 at 216-217, which was followed in *R v Bow Street Magistrates: Ex parte Mackeson* (1982) 75 Cr App R 24 (DC) at 33 and accepted, but distinguished, in *R v Guildford Magistrates' Court; Ex parte Healy* [1983] 1 WLR 108 (QBDC) at 112E-113A. It was, however, strongly disapproved of by STEPHEN BROWN LJ (STUART-SMITH and OTTON JJ concurring) in *R v Plymouth Magistrates' Court & Ors; ex parte Driver supra* at 697j-698c - holding that the power of the court to prevent abuse of its own procedures does not encompass the means by which a suspected individual is brought within the jurisdiction.

Before this court counsel for the respondent placed no reliance on the last mentioned decision. They acknowledged that a court has an inherent power to enquire into the circumstances under which a person in the position of the appellant is brought for trial before it; such power, to be exercised with proper circumspection, being designed to ensure the protection of the fundamental rights of all persons and that law enforcement agencies and indeed the Executive authorities do not act in a way which savours of abuse of process.

In the light of this concession and without the benefit of argument to the contrary, I am prepared to assume that a discretion vested in the learned judge *a quo* to refuse to exercise jurisdiction. Although much attracted by the concession, for the purposes of this case it is not necessary to make any firm ruling on its validity.

The circumstances pertaining to the voluntary surrender of the appellant differ markedly from those in *R v Hartley* and *Ex parte Mackeson supra*. In the former case what offended WOODHOUSE J's sense of justice and fairness was that imperative requirements relating to extradition, well-known to the New Zealand Police and frequently used by them, had been deliberately ignored. Bennett had entered Australia lawfully but on the basis of the merest suspicion of being

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a party to the murder committed by Hartley, had been put on the first direct flight to Auckland by the Melbourne Police. There was a clear infraction of domestic law by the New Zealand authorities in the manner in which Bennett was brought back to the jurisdiction.

In *Ex parte Mackeson* the British Police resorted almost to chicanery to get the applicant back from this country where he was legitimately residing to face charges of fraud. Appreciating that extradition was not lawfully possible, they connived with the local Department of Immigration to achieve it by the back-door, even to the extent of obtaining Mackeson's passport and re-validating it so that the only way it could be used was to return him to the United Kingdom. There was also the additional consideration that at the time Mackeson was sent back legality had returned to Zimbabwe, yet no application was made by the British authorities to extradite

him.

After correctly distinguishing both these cases, MTAMBANENGWE J went on to say at 216G-217B:

"... the point must not be lost sight of that the accused had entered Zimbabwe and left the country **illegally** and he was merely returned here. To the complaint, therefore, that he was not brought back through immigration, the answer should be very simple: the accused is merely taking advantage of his illegal actions both in respect of his departure from this country and his entry into Botswana, and it is difficult to see what rights of his have been infringed by anybody in these circumstances - whether by the Zimbabwe authorities in receiving him on his being returned here after he had left the country illegally, or by the Botswana Police in handing him back after he entered that country illegally.

It seems to me that it would be taking to absurd lengths the concept of personal liberty to insist that a man in these circumstances acquires a right to remain free to complain if apprehended, as the accused here was, after his own flagrant violation of the immigration laws of both countries, and to insist that he should benefit from such acts and escape being brought to justice."

I can find no fault with this reasoning, especially as the appellant's return by the Botswana Police was brought about without any irregular or improper conduct on the part of the Zimbabwe Republic Police. See *Ex parte Healy supra* at 112E. There was here no manipulation or misuse of procedure by the agents of this country, and it matters not that statutory deportation procedures were not

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complied with. In prosecuting the appellant the hands of the State were not soiled.

The principles justifying interference by an appellate court with the exercise of a discretion are firmly entrenched. It must appear that some error has been made in exercising the discretion. If the court below acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some material consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution.

In my view the exercise by the learned judge of his discretion exhibits no defect. It is unassailable.

(3) Conclusion

Since the issues of jurisdiction and discretion have been decided adversely to the appellant's contentions, the appeal against conviction must be dismissed.

D. THE SENTENCE

(1) The Alleged Misdirection

The factual background relevant to a determination of whether the appellant ought not to have been found responsible by the trial court for the criminal actions of his co-conspirators after his

escape from Kazungula, is as follows:

Early in May 1988 the appellant, who was then employed as an hotel security manager in Johannesburg, was telephoned from Frankfurt in Germany by a complete stranger who gave his name as Allen. He informed the appellant that he had a proposition to put to him and asked him to take a flight to Frankfurt. It was arranged that R8 000 would be paid, as indeed it was, into the appellant's bank account. The overwhelming probability is that Allen was aware that the appellant was a mercenary and had previously been a member of the Rhodesian Army.

The appellant agreed, and duly met Allen in Frankfurt. Allen told him that he wished to recruit suitably experienced persons willing to effect the release of certain white prisoners being held at Chikurubi Prison in Harare. The appellant exhibited interest in the project. He proffered advice as to the number of persons necessary to execute it. He supplied the names of Maguire and Cormack as possible participants. While in Frankfurt he was introduced by Allen to another man who called himself Jeff.

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Back in South Africa the appellant maintained contact with Allen and Jeff, and personally approached Cormack to join the enterprise. He also suggested Namibia as a possible training location.

On 16 June 1988 the appellant, Maguire, Cormack and a few other men, assembled on a farm about 300 kilometres north of Windhoek. They were provided with military equipment. The appellant participated in the training program. He had complete knowledge of the plan which included the use of weapons. At least four rifles, two pistols and plastic explosives were provided. He was further aware that an aircraft was to be used in the final stages of the exercise, and more specifically that it was to be the means of escape from Zimbabwe.

On 25 June 1988 the appellant and Maguire flew to Swaziland. There they met Jeff and were able to assure him that everything was in order. The next day they made their way to Maun in Botswana where a Toyota truck awaited them. They drove to Chobe Lodge where they spent the night.

Shortly before 6.00 pm on 27 June 1988 the appellant and Maguire crossed the border at Kazungula. Once they became aware that it was the intention of the custom officials to search the truck, they abandoned it and fled to the Zambezi river. They boarded a police boat that was anchored at the bank. When challenged both men dived into the water and swam towards the Zambian side of the river. There they stole a dugout boat and rowed back to Botswana. About 200 metres short of the shore the dugout sank so they swam the rest of the way. Thereafter they proceeded to Chobe Lodge. It was there that Maguire telephoned to Allen in Frankfurt and using the given code advised him that "the boat has sunk". The appellant fully associated himself with the making of that telephone call.

This then was the extent of the appellant's involvement in what can only be described as a most daring and dangerous criminal enterprise. Unquestionably he must have appreciated the very real possibility that resort might be had to the use of the firearms and explosives

possessed by his associates, both in order to procure the release of the prisoners from the custody of prison officials and in the escape of the party from Zimbabwe.

In holding that the appellant had not dissociated himself from the subsequent actions of his co-conspirators, CHIDYAUSIKU J relied upon the fact that upon his arrest he had failed to inform the Botswana Police of the plan to rescue the prisoners, which by a timely warning might have prevented what occurred on

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30 June 1988. In short, there was nothing in the appellant's conduct that envisaged an intention to dissociate himself from the objective to free the prisoners.

In general a conspirator is liable for the crime perpetrated by his co-conspirators. But where he has effectively withdrawn from the conspiracy, he does not remain liable for the commission of any subsequent criminal acts. The terms "withdrawal" and "dissociation" which are often used in this context of the law, refer to voluntary action by a conspirator which is legally effective to terminate his relationship to the conspiracy.

The dominant policy of the law in allowing such a defence is to encourage the conspirator to abandon the conspiracy prior to the attainment of its specific object and, by encouraging his withdrawal, to weaken the group which he has entered.

In *R v Chinyerere* 1980 ZLR 3 (AD) at 8E; 1980 (2) SA 576 (R AD) at 579G; LEWIS JP said that:

"... a conspirator can withdraw from the enterprise even at the last moment, and in the event of his withdrawal he is entitled to his acquittal on the main charge, and is liable to be convicted only of the offence of conspiring to commit the crime in question."

This view reiterated that in the earlier case of *R v Njenje & Ors* 1965 RLR 586 (AD) at 594C-E and 595F-G; 1966 (1) SA 369 (SRAD) at 376B-C and 377B-C. The learned JUDGE PRESIDENT expressly rejected the suggestion by State counsel that it is necessary at the same time for the person withdrawing to attempt to frustrate the plan which is the subject of the conspiracy. In other words an attempt to frustrate the plan is not a pre-condition of withdrawal.

In *S v Ndebu & Anor* 1985 (2) ZLR 45 (SC) this court left the point open. While acknowledging that *R v Chinyerere* had been correctly decided on its facts, McNALLY JA at 50D-E was careful to point out that:

"It may be necessary, in the light of different sets of circumstances, to analyse more fully what is meant by the phrase 'dissociate himself from', and to look at the reliability of the English requirements that in certain cases something more positive is required of the one seeking to dissociate himself than merely to run away."

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The position in English law is well stated in Glanville Williams *Textbook of Criminal Law* 2 ed at

p 363:

"There need not even be an express withdrawal of advice and consent, if the inciter (conspirator) has made his change of heart clear by conduct, as by quitting the gang. . . .

The above rule applies only when the defendant has done no more than encourage or otherwise incite the commission of the crime, as by agreeing to take part in it. **If he has acted positively to assist the crime, he must, it seems do his best to prevent its commission, by warning the victim or by other means, short perhaps of going to the police**" (emphasis supplied).

Smith and Hogan *Criminal Law* 6 ed at p 157 write in the same vein:

"The position might be different where D has supplied E with the means of committing the crime. Arguably, D must neutralise, or at least take all reasonable steps to neutralise, the aid he has given. If E ignores D's countermand and uses the thing or information with which D has supplied him to commit the crime, he has in fact been aided by D in doing so. **Aid may be less easily neutralised than advice**" (emphasis supplied).

The authority relied on for this proposition is Ex parte *Becerra and Cooper* (1976) 62 Cr App R 212 (CA). The evidence was that Becerra, Cooper and a third man, set out to commit a burglary. Becerra had given Cooper a knife to use against anyone who might interrupt them. After they had broken in and used the knife to cut the telephone wires, someone was heard approaching. Becerra said: "Come on, let's go" and went out through the window. Cooper stayed and stabbed to death the man who was approaching. In an application for leave to appeal against his conviction for murder, Becerra argued that he had withdrawn from the common design and was not responsible for the death. It was held that there was no evidence of an effective withdrawal. In the words of ROSKILL LJ at 219:

"On the facts of this case, in the circumstances then prevailing, the knife having already been used and being contemplated for further use when it was handed over by Becerra to Cooper for the purpose of avoiding (if necessary) by violent means the hazards of identification, if Becerra wanted to withdraw at that stage, he would have to 'countermand', to use the word that is used in some of the cases or 'repent' to use another word so used, in

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some manner vastly different and vastly more effective than merely to say 'Come on, let's go' and go out through the window."

The learned LORD JUSTICE contemplated the possibility that the only way Becerra could have freed himself from joint responsibility would have been by physical intervention so as to prevent the use of the knife.

Ex parte *Whitefield* (1984) 79 Cr App R 36 (CA) fell on the other side of the line. The appellant was convicted of burglary. He informed his co-conspirator, Gallagher, that the flat next to his was unoccupied and agreed to break into that flat. Subsequently he decided that he would not take part and advised Gallagher before the burglary had taken place. However he knew that the burglary was to take place on a particular night. He heard it being committed and did nothing to prevent it. In allowing the appeal DUNN LJ said at 40:

"In this case there was, if the jury accepted it, evidence in the answers given by the appellant to the police that he had served unequivocal notice on Gallagher that if he proceeded with the burglary he would do so without the aid

or assistance of the appellant. In his ruling the judge stated that such notice was not enough, and that in failing to communicate with the police or take any other steps to prevent the burglary he remained 'liable in law for what happened, for everything that was done that night'. In the judgment of this court, in making that statement the judge fell into an error of law."

See also *R v Whitehouse* [1941] 1 DLR 683 at 685.

In an article by an anonymous author in 1958-1959 Vol 72 *Harvard Law Journal* at pp 959-960 the suggestion made is this:

"But when the defendant is indicted as an accomplice to a substantive crime, there is reason to demand not only that he give notice of withdrawal, but also that he make reasonable efforts to nullify the effect of his contribution. Thus, if the defendant has supplied a gun, he should be required to try to recover it, or if his aid consisted of guidance or of services rendered, a *bona fide* attempt to dissuade his cohorts should be required. Only on those rare occasions when it is impossible for the defendant to comply with the less drastic requirement of withdrawal because of the unavailability of any means of communicating with his associates, as when the defendant is in jail, should he be required to exculpate himself by timely disclosure to the authorities."

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Professor Feltoe, writing in (1990) *Legal Forum* vol 2 no 3 at p 16 agrees that where a conspirator has done more than simply reach agreement with others on the commission of a crime, a more stringent requirement for a legally effective withdrawal is necessary. He says:

"Thus if (the conspirator) has played a prominent role in devising a plan which is likely to ensure the successful implementation of the criminal venture, he should be obliged to go further than simply physically withdrawing from the group; he should be obliged to do something wholly to deprive his prior complicity of its effectiveness or to negate the consequences flowing from his previous participation. What this means is that he must actively try to dissuade his co-conspirators from acting on his plan and, if it is clear that they are not prepared to drop the plan, to report to the police that this crime is to be committed by the co-conspirators, so that the police can try to stop the crime from occurring."

See also Millar *Rhodesian Accomplice Law* (unpublished thesis) at pp 148-149.

I respectfully associate myself with what I perceive to be a shared approach, namely, that it is the actual role of the conspirator which should determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the substantive crime. I would venture to state the rule this way: Where a person has merely conspired with others to commit a crime but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner something further than a communication to the co-conspirators of the intention to dissociate is necessary. A reasonable effort to nullify or frustrate the effect of his contribution is required. To the extent, therefore, that the principle enunciated in *R v Chinyerere supra* at 8E is at variance, I would with all deference depart from it.

The two features relied upon by the appellant as evidencing a timely and effective withdrawal were his absence from Zimbabwe on the day upon which the criminal enterprise to free the prisoners was to be carried out, and the notification two days earlier that the boat had sunk.

The first is of no significance whatsoever. Clearly mere absence of physical presence from the crime, or a physical change of place or flight from the scene, even if in consequence of voluntary action, may not, depending on the

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circumstances, serve to dissociate a co-conspirator for the ensuing criminal activity. See *Ex parte Croft* (1942-44) 29 Cr App R 169 (CCA) at 173; *R v Whitehouse supra* at 685; *Ex parte Becerra and Cooper supra* at 219; *S v Ndebu & Anor supra* at 506. But where his absence is involuntary either by reason of arrest or as in the present matter, by flight intended to evade detection and apprehension, it does not undo any aid and encouragement that the co-conspirator may have already given. He remains responsible in the eyes of the law for all the actions the others do and continue to do, as much as if he had done them himself, provided they fall within the scope of the common objective. See Smith and Hogan, *op cit* at p 158; Felton, *op cit* no. 4 at p 40.

The second feature must be looked at in the context that the appellant's participation in the implementation of the dangerous plan put at risk the lives of innocent people. The facts reveal that the role he played was substantial. It far exceeded mere agreement. The appellant was undoubtedly one of the leaders. He recommended Maguire and Cormack as suitable recruits; he offered advice; he relayed messages at the request of Allen and Jeff; together with Maguire he approached Cormack and put the proposition to him; he undertook trips by motor vehicle and aeroplane; he engaged in a training exercise in which the rescue was rehearsed and he had knowledge of the complete plan. All this activity convinces me that in order to effectuate a withdrawal, it was incumbent upon the appellant to take reasonable measures to nullify or frustrate the consequences of his contribution. He ought to have taken some form of positive action to prevent his cohorts from implementing the plan - by alerting the Zimbabwe law enforcement agencies or the Botswana Police of the next steps in the plan. And there was a lack of explanation as to why no effort had been made to contact the perpetrators already in Zimbabwe in order to try to persuade them to desist.

But this apart, I am quite unable to accept that the notification to Allen, in its terms, translates into an unequivocal desire to dissociate from the common objective. In my opinion it amounted simply to the passing of information to the top man that something had gone wrong; it was a warning. If the telephone call had been made at a time when the appellant was in Zimbabwe, and free, as opposed to having escaped to Botswana and in the process of making his way back to South Africa, the argument that such communication evidenced repentance and a change of heart would have been more persuasive.

For these reasons I am entirely satisfied that the trial court did not misdirect itself in rejecting the appellant's contention.

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(2) The Severity of the Punishment

It cannot be gainsaid that the appellant committed a crime of considerable gravity; one which violated this country's sovereignty, security and territorial integrity. The success of the common objective would have resulted in the freeing of persons who were to face due process of law on allegations of bombings, murder and sabotage.

The rescue bid was boldly conceived, meticulously planned and well co-ordinated. It was to be daringly executed by professionals. On his own admission the appellant has an impressive background as a combat soldier with intimate knowledge of the topography of Zimbabwe. Six other carefully chosen persons including a regular officer in the Air Force of Zimbabwe took part in the criminal venture, which involved the theft of a helicopter and the use of a Dakota aeroplane. Lethal weaponry comprising assault rifles, pistols, ammunition, hand grenades, explosives, as well as sophisticated radio equipment and maps, were smuggled into the country. Their possession by the group signified an intention to employ deadly force in pursuit of their avowed goal, with scant regard for their own safety and even less for the safety and well-being of the inhabitants of this country.

In making their escape an innocent security guard at the airstrip was gratuitously fired at and the stolen helicopter deliberately and extensively damaged.

A further factor that aggravated the appellant's moral reprehensibility was that he was motivated by financial gain and was not, primarily at any rate, acting out of a misguided sense of loyalty to the prisoners and justification for the cause.

There was, as the learned judge rightly observed, little standing in favour of the appellant. That the rescue went awry was because of a fortuitous intervention by an individual - something that the highest degree of planning could not have envisaged - and not on account of any lack of resolve on the part of the appellant's associates. And the fact that he never got beyond a few kilometres into the country was due to the vigilance of the immigration and custom officials.

The learned judge did, however, appreciate that the actions which endangered the lives of Zimbabweans and the damage caused to property occurred when the appellant was outside the country and under arrest.

Nonetheless the sentence imposed was very severe, being virtually the maximum permitted by the Legislature. In his assessment the learned judge regrettably

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adopted a somewhat passionate and emotional approach. He gave vent to certain vengeful remarks concerning the appellant which do not befit a judicial officer. As stressed by DUMBUTSHENA CJ in *S v Harington* 1988 (2) ZLR 344 (SC) at 359H; 1989 (2) SA 348 (ZSC) at 358F-G:

"Fairness and justice exclude a passionate approach to sentencing. Courts should also, when assessing sentence, avoid insensitivity to one side or an exaggerated sense of the wrong done to society."

I stand second to no one in my condemnation and revulsion of this offence as well as in my acceptance that factors of deterrence and public expectations regarding punishment must be viewed as paramount. But what has to be guarded against when exemplary sentences such as the present are passed is the risk that an excessive devotion to the cause of deterrence may lead to a punishment which is disproportionate to the offender's deserts.

I regard this sentence as having that effect. It excludes a measure of mercy. Too harsh a sentence is as misguided and unjust as one that is too lenient.

This court is accordingly free to interfere.

(3) Conclusion

I would allow the appeal against the sentence of life imprisonment by substituting therefor a definitive term of twenty years' imprisonment with labour.

Manyarara JA: I agree.

Korsah JA: I agree.

Ebrahim JA: I agree.

Sandura AJA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

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CRUNDALL BROTHERS (PVT) LTD v LAZARUS NO & ANOR 1991 (2) ZLR 125 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

25 July & 10 September 1991

Flynote

Exchange Control - trust - whether is a person or can have residence for the purposes of the enactment.

Contract - pre-emptive right - enforcement of rights by holder of right of pre-emption - doctrine of notice - court's discretion to refuse specific performance.

Costs - de bonis propriis - not appropriate for unfounded but reasonably entertained allegation of bad faith.

Legislation - Exchange Control Regulations 1977, s 10(1)(a).

Headnote

The appellant and the first respondent entered into an agreement in terms of which the latter

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sold to the former certain shares held by the trust of which he was the trustee. The sale was subject to a pre-emptive right over the shares held by the second respondent. The second respondent could buy the shares only with the approval of the exchange control authorities. It was a condition of the pre-emptive right that such approval be obtained within a specified time. The approval was obtained only after the expiry of the time limit and the shares were transferred to the second respondent. The appellant sought to enforce transfer of the shares to itself claiming an earlier right on the grounds of the failure of fulfilment of the condition attached to the second respondent's pre-emptive right. This claim was resisted on the basis that the appellant's agreement required exchange control approval, the trust having foreign beneficiaries and thus being a non-resident; and that the appellant failed to show an entitlement to specific performance of its agreement. On appeal from the judgment reported at 1990 (1) ZLR 290.

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Held: A trust is not a person for the purposes of exchange control legislation and can have no residence. A trustee is the party whose residence is relevant for such purposes.

Held: The holder of a pre-emptive right is entitled in principle to enforce his right *in forma specifica* against a subsequent purchaser with notice of the earlier claim.

Held: A genuinely held but incorrect view that the earlier claim is bad in law will not protect the later purchaser from the consequences of his knowledge that the claim is being asserted.

Held: A court has a discretion, notwithstanding the breach of the earlier right and the necessary knowledge of the second purchaser, to refuse specific performance.

Held: On the equities specific performance ought to be refused despite the breach of the appellant's right

Cases cited:

Macape (Pty) Ltd v Executrix Estate Forrester 1991 (1) ZLR 315 (SC)

Friedman & Ors NNO v Commissioner for Inland Revenue: In re Phillip Frame Will Trust v Commissioner for Inland Revenue 1991 (2) SA 340 (W)

Madan v Macedo Heirs & Anor 1991 (1) ZLR 295 (SC)

Associated South Africa Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en andere 1982 (3) SA 893 (A)

Hirschowitz v Moolman & Ors 1985 (3) SA 739 (A)

Dithaba Platinum (Pty) Ltd v Erconovaal Ltd & Anor 1986 (4) SA 615 (T)

BP Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd & Anor 1964 RLR 7 (G); 1964 (2) SA 21 (SR)

Lindsay v Matthews & Anor 1972 (1) RLR 186 (G); 1972 (3) SA 133 (R)

Barnard v Thelander 1977 (3) SA 932 (C).

M J Gillespie for the appellant

A P de Bourbon SC for the respondents

Judgment

The Full Bench: The judgment in the court *a quo* in this matter is reported in 1990 (1) ZLR 290. The facts are set out by the learned judge at pages 291-297. It would be tedious to repeat them. It is enough to say that the dispute is about the right to purchase the entire share capital of two companies. The shares were held by a trustee, Mr Lazarus, ("the trustee"). The appellant ("Crundalls") contracted with him to buy them. PG Industries (Zimbabwe) Limited ("PG") had a right of pre-emption over them, subject to certain conditions. PG

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FULL COURT

purported to exercise that right. Crundalls contended that the conditions had not been fulfilled. The trustee transferred the shares to PG, not, as we will show, on the basis of the right of pre-emption, but because he believed his contract with Crundalls was invalid. Crundalls objected and sought to have the transfer set aside. They lost. They now appeal.

The issues that were argued before us were as follows:

1. The validity or otherwise of the agreement entered into between Crundalls and the trustee for the purchase and sale of the shares;
2. Whether the transfer of the shares by the trustee to PG was in breach of Crundalls' contractual rights;
3. Whether Crundalls waived or abandoned their right to enforce their agreement with the trustee;
4. Whether Crundalls are entitled to an order of specific performance against PG;
5. Whether the learned judge was justified in making the punitive order as to costs which he made.

1. THE VALIDITY OF THE AGREEMENT BETWEEN CRUNDALLS AND THE TRUSTEE

PG, acting through their legal adviser Mr Cook, contended that the agreement was invalid because it fell foul of the provisions of s 10 of the Exchange Control Regulations 1977. Indeed it was Mr Cook's positive belief in this regard which led him to urge the trustee to transfer the shares to PG. He was confident enough to offer the trustee an indemnity against any possible claim by Crundalls. By that stage he was convinced that it was not a question of a right of pre-emption at all. There was nothing or nobody to pre-empt. PG were simply buying the

shares. The contract with Crundalls was a nullity.

The basis for Mr Cook's belief was twofold: The contract of sale of the shares by the trustee to Crundalls was, he contended, "an act which involves, or is in association with or is preparatory to" the transferring of such shares. It thus fell within the scope of s 10(3) of the Regulations and was unlawful if, but only if, the transfer of those shares was prohibited by subss (1) or (2) of the same section. He was satisfied that it was.

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We do not think it is necessary to deal with the first part of this argument. His Lordship in the court *a quo* held that a contract of sale of shares was to be distinguished from the transfer of those shares. While that is true, it is less easy to say that the contract to sell the shares is not an act preparatory to the transfer of those shares. See the discussion of the similar but not identical provisions of ss 7 and 8 of the same Regulations in *Macape (Pty) Ltd v Executrix, Estate Forrester* 1991 (1) ZLR 315 (SC).

The real question is whether Mr Cook was correct in his belief about the non-resident status of the Trust. His contention was that the Trust was non-resident because, as was common cause, three of the four beneficiaries were non-resident. He therefore relied on the provisions of s 10(1)(a), which read as follows:

"Subject to the provisions of section 23, unless authorised by the Minister, no person shall transfer any security which is registered in Zimbabwe unless -

(a) he or the person, if any, for whom he is a nominee is a Zimbabwean resident . . ."

The provisions of s 23 do not apply. The Minister had declined to authorise the transfer. So Mr Cook's argument is correct unless the provisions of subs (a) apply. He claimed they did not. He contended that the Trust must be regarded as a non-resident *persona* because of the status of the beneficiaries. Alternatively, and additionally, if the Trust can be said to be a nominee of the beneficiaries they, by a majority, are not Zimbabwean residents.

We agree with the learned judge in his rejection of this argument. A trust is not a person. The trustee is the person to be considered for the purposes of the Regulations. The trustee is a Zimbabwean resident. That is the end of the matter. But, for good measure, we also agree that the trustee is not to be regarded as the nominee of the beneficiaries.

We do not think it necessary to elaborate on the reasoning of the learned judge at pages 298-300 of the reported judgment, save to add a reference to *Friedman & Ors NNO v Commissioner for Inland Revenue: In re Phillip Frame Will Trust v Commissioner for Inland Revenue* 1991 (2) SA 340 (W), and to suggest that a reference to ss 15, 22(1), 22(5), 23 and 27(2) of the Regulations confirms that the Regulations are not to be construed as creating a new type of *persona*. A provision such as that contained in s 23 for foreign-controlled companies could easily have been made for trusts with non-resident beneficiaries, had that been the intention.

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We conclude therefore, as did the learned judge, that the agreement between Crundalls and the trustee was a perfectly valid agreement.

2. WHETHER THE TRANSFER OF THE SHARES BY THE TRUSTEE TO PG WAS IN BREACH OF CRUNDALLS' CONTRACTUAL RIGHTS

Crundalls' contractual rights were subject to PG's right of pre-emption. That right had to be exercised within fourteen days. It was. But in turn the right was exercised conditionally. PG was a foreign-controlled company. It could only acquire the shares with Exchange Control approval. The document founding the right of pre-emption provided that such approval had to be obtained within six weeks of the offer having been advised. So PG's exercise of its right of pre-emption was subject to the condition that Exchange Control approval was granted within six weeks.

The period of six weeks lapsed on 27 June 1989. But the parties had miscalculated the period and thought it lapsed on 5 July 1989. Crundalls accepted that, and the learned judge correctly ruled that they could not go back on what they had agreed. But even by 5 July 1989 Exchange Control approval had not been obtained. In fact formal approval was not given until 8 August 1989. By then, say Crundalls, the right of pre-emption had lapsed. Their own contract was perfected. But, instead of transferring the shares to Crundalls, the trustee, on 8 September 1989, transferred the shares to PG. Crundalls point to this as a clear breach of their contractual rights.

This is a powerful argument. The respondents counter it by the following contentions:

1. On 4 July 1989, realising that they would not be able to meet the deadline, PG approached the court for a rule *nisi* calling upon various persons (but not Crundalls, though a copy of the rule *nisi* was served on them and they later applied to be joined so as to oppose confirmation), to show cause why the period of six weeks should not be extended to six months;
2. The return day of the rule, after two extensions, was 21 September 1989;
3. By that date, Exchange Control permission for the transfer of the shares to PG had been obtained (on 8 August 1989) and the shares had been transferred to PG (on 8 September 1989) so there seemed little point in pursuing the matter. The rule *nisi* was never confirmed.

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It seems clear that the reason why the matter was not pursued was that PG had by then convinced itself that the Crundall agreement was invalid and therefore the whole extension exercise was pointless.

If PG had gone through with the application, and if the rule had been confirmed on 21

September 1989, the situation might have been different. We have some doubts as to whether it would have been confirmed. His Lordship below made the point that the six-week period was contained in a court order. Therefore what had been laid down by the court could be varied by the court. Certainly, it would have been a reasonable variation. We are not sure, however, with respect, that it was correct to refer to the period of six weeks as being part of a court order. Reference to the order shows clearly that the court did not "order" the period. It made an order, and then proceeded to record, under the heading "IT IS RECORDED", the agreement about the right of first refusal (as it is called). It is in that part of the "order" that the six-week period is mentioned. It does not seem to us that what is "recorded" in an order of court can be said to be an order of court. If it was not a court order, but a contract, how could the court vary it?

Be that as it may, His Lordship then correctly went on to point out that the rule nisi did not extend the six-week period. There was no temporary interdict or order declaring that pending the return day the period was to be deemed to be six months. The rule simply provided, in the normal way, that on the return day, and in the absence of objection, the court would be asked to alter the period. In the event it was not asked. The period remained unchanged.

Thus, as His Lordship again correctly concluded, the trustee should not have sold and transferred the shares to PG. His action was in breach of his contractual obligations to Crundalls.

No doubt the trustee was influenced by the fact that, in deference to Mr Cook's opinion, he had applied for Exchange Control permission (insofar as it might be necessary) to transfer the shares to Crundalls and had not received approval. The Exchange Control authorities, however, do not make rulings of law. Naturally, if invited to assert their authority, they will tend to do so. We are satisfied, however, that in this case their authority was not necessary, and their refusal of authority could not have blocked the transfer of the shares to Crundalls.

We conclude therefore that the second issue between the appellant and the respondents must also be decided in favour of the appellant.

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3. WHETHER CRUNDALLS WAIVED OR ABANDONED THEIR RIGHTS TO ENFORCE THE TERMS OF THE AGREEMENT

We did not understand Mr *de Bourbon* to press this submission in this form, and certainly we are satisfied that there is no basis for it. What Mr *de Bourbon* did argue was that since Crundalls' legal advisers failed to take steps which they easily could have taken, and which they were invited to take, to delay the share transfer, Crundalls should not now be granted the remedy of specific performance which they seek, but should be left to a remedy in damages if they can establish it.

In other words, he incorporated this argument into his submissions on the fourth issue, and we will deal with it there.

4. IS THE APPELLANT ENTITLED TO AN ORDER *IN FORMA SPECIFICA* AGAINST THE

SECOND RESPONDENT?

In the lower court this question became confused with another question, namely whether or not the respondents were *mala fide*. It seems to us, however, that the *bona fides* of the respondents is only one aspect of the question. The real issue is whether, in a case of double sale where the second purchaser takes transfer with notice of the first purchaser's rights, the court must order specific performance in favour of the first purchaser, or whether it has a discretion, or whether it is limited to an award of damages.

The two extreme cases are clear enough: When the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed. *Per contra*, when the second purchaser knowingly and with intent to defraud the first purchaser takes transfer, his real right can and normally will be overturned subject to considerations of practicality.

This case falls in-between. The second purchaser (PG) knew of the rights of the first purchaser (Crundalls) but considered them to be of no legal value.

Madan v Macedo Heirs & Anor 1991 (1) ZLR 295 (SC) is a recent example in this court of the first category. The second purchaser (described in that case as the third party purchaser) was aware only of facts which it correctly understood as giving the first purchaser (the holder of the right of first refusal) no rights. It was not aware of the full facts. It was thus in the position of a transferee in good

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faith and for value. The court could not and did not interfere with the real rights thus acquired.

In the present case PG had full knowledge of the rights of Crundalls at the time it took transfer of the shares, in the sense that it knew all the relevant facts. They put a wrong legal interpretation upon them. It was not an unreasonable interpretation. It was one that was supported by the Reserve Bank, which is the authority administering the Regulations in question. Their interpretation is worthy of respect, despite the fact that their interpretation was wrong.

PG in short had full knowledge of Crundalls' rights. In the circumstances their situation is analogous to that of the appellants in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd & Ors* 1982 (3) SA 893 (A).

We must confess that we have some difficulty in understanding the effect of the order made in the *Bakeries* case - a difficulty apparently shared by the two Judges of Appeal who dissented in that case, and by Professor Kerr *The Law of Sale and Lease* pp 297-299.

However, the matter was further considered in *Hirschowitz v Moolman a& Ors* 1985 (3) SA 739 (A). The case was decided on a different point, but in passing CORBETT JA (as he then was) noted that the court had endorsed the view that "in principle the holder of a right of pre-emption is entitled (in addition to claiming an interdict or damages in appropriate circumstances) to seek

the positive enforcement of his rights" (p 762D). PREISS J in *Dithaba Platinum v Erconovaal Ltd & Anor* 1985 (4) SA 615 (TPD) at 627C-I took the *Bakeries* case to mean that "specific performance can be granted to enforce a pre-emptive right. At the same time, the court's discretion to refuse specific performance in certain circumstances was confirmed". Finally, this court's decision in *Madan supra* confirmed, at p 10, that the traditional approach was to be maintained.

This approach was set out as follows by Professor McKerron in (1935) 4 SA Law Times 178 and repeated with approval by Professor Burchell in (1974) 91 SALJ 40:

"It is submitted that where A sells a piece of land first to B and then to C - and the position is the same *mutatis mutandis* in the case of a sale of a movable of which the court would decree specific performance - the rights of the parties are as follows:

(1) . . .

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(2) Where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of sale or at the time he took transfer, of the prior sale to B, and B's only remedy is an action for damages against A

If, however, C had knowledge at either of these dates, B, **in the absence of special circumstances affecting the balance of equities**, can recover the land from him, and in that event C's only remedy is an action for damages against A "

It is relevant at this stage, since the question of *mala fides* has been canvassed extensively in argument, to point out that the doctrine of notice, as it is called, requires nothing more than notice or knowledge of the prior claim. It is not necessary to prove *mala fides* or fraud. See *Madan supra* at pp 10-11 and the *Bakeries* case *supra* at 910G-H, where VAN HEERDEN AJA said:

"It is thus apparent that to speak of fraud or *mala fides* within the framework of the doctrine of notice - at least so far as it concerns a sale in contravention of a pre-emptive right - is superfluous and can possibly create confusion."

We turn therefore to the facts of the case to determine whether there are special circumstances affecting the balance of equities. In doing so we bear in mind that the primary right of the wronged purchaser is to the remedy of specific performance. As Professor Joubert puts it in his *General Principles of the Law of Contract* at p 224:

". . . in English law the doctrine of the common law is that the creditor is only entitled to damages, but that in equity he can be granted a decree of specific performance, if there is some equitable reason for doing so, whereas under Roman-Dutch principles he has a right to specific performance unless there is some equitable reason disqualifying him from obtaining such relief."

See also *BP Southern Africa (Pty) Ltd v Desden Properties Ltd & Anor* 1964 RLR 7 (GD) at 11H-I; *Lindsay v Matthews & Anor* 1972 (1) RLR 186 (GD) at 192 *in fine* - 193D; *Barnard v Thelander* 1977 (3) SA 932 (C) at 938F-G (translation at 706).

There are a number of such special circumstances which convince us that the remedy of

specific performance is not appropriate in this case. We list them below:

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1. There was no deliberate deceit or *mala fides* on the part of the respondents. They acted on an honest and reasonable belief as to the law, which turned out to be wrong. Although in the past such conduct has been characterised as "a species of fraud", the better and later view (see the *Bakeries* case) is that such persons are simply deemed to have notice of the other party's prior claim.
2. Even to describe Crundalls' claim as "a prior claim" is, in a sense, misleading. Before ever Crundalls came on the scene, PG had a pre-emptive right. When Crundalls purchased the shares they knew that PG had a pre-emptive right; they knew that they wanted to exercise that right; they knew that they would have done so if the Exchange Control authorities had not been so dilatory. So in effect Crundalls were seeking to take advantage of PG's misfortune. There was nothing unlawful about that, but it is relevant when considering equitable factors.

These two are persuasive and general considerations which alone would not tip the scale. But the two following considerations are, in our view, conclusive:

3. The events with which we are concerned took place in July - September 1989. The affidavits filed by PG disclose that complex financial transactions and staff dispositions have taken place since then which would be difficult if not impossible to "unscramble". It is not simply a question of re-transferring shares.
4. The transfer of the shares to PG by the trustee could have been prevented by Crundalls' legal adviser. He was given notice on 7 September 1989 by the trustee of his intention to transfer the shares to PG on 8 September 1989. The trustee went so far as to undertake to delay the transfer of the shares if Crundalls indicated an intention to seek an interdict. Such an intention was not indicated. Although the parties are not in accord as to what exactly was said, Mr Passaportis concedes that he was not in a position, owing to extreme pressure of work, to prepare an urgent application for an interdict. He simply said that if the transfer went ahead the appellant would impeach it. It is clear therefore that on either version he considered and rejected the idea of applying for an interdict. He did, however, institute the notice of motion proceedings now before us on 29 September 1989.

It is likely that on 7 September 1989 Mr Passaportis was not sure of the strength of his client's legal claim. Since the trustee's original uncertainty had been overridden by Mr Cook's confident view, it is not surprising that

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Mr Passaportis may also have been uncertain. That may have been an additional reason for his failure to institute interdict proceedings. Whatever the reason, he allowed the

transfer of the shares to go through. He reserved his rights. To use an analogy already referred to, it is always easier to stop the cook breaking the egg than to order him to unscramble it.

It is strange, too, that Mr Passaportis should not have been able to file a petition for an interdict, because on that very day, 8 September 1989, he filed an affidavit by Mr Crundall in the related proceedings concerning the extension of the six-week period. The affidavit had been signed by Mr Crundall the previous day. That very affidavit could have been used to found an interdict application. An urgent application could have been made in terms of Rule 237.

It is true that it is easy to be wise after the event. But it remains a fact that the appellant could have stopped the transfer of the shares and did not do so.

In the light of these considerations we conclude that the respondents have discharged the *onus* of showing that this is not a case in which specific performance should be ordered. Accordingly, although for somewhat different reasons, we would concur with the ruling to that effect made by the judge *a quo*.

5. COSTS

There are two aspects of the question of costs: The first is the question whether the learned judge was correct in ordering that the costs of the two respondents should be paid by Mr Russell Guy Crundall on a legal practitioner and client basis *de bonis propriis*. The second is whether a special order as to costs should be made in this court.

5.1 *The punitive order in the court below*

It is noteworthy that nowhere in the papers (as opposed to the heads of argument) did either the trustee or PG ask for punitive costs against Mr Crundall. The trustee asked for costs against Mr Passaportis *de bonis propriis* on a legal practitioner and client scale. PG simply prayed that the application be dismissed with costs.

The learned trial judge was particularly concerned that allegations of bad faith had been made against two senior members of the legal profession and had been persisted in in the answering affidavit. He found that there was no basis for such allegations.

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If one stands back a little from the heat of battle the subjective attitude of Mr Crundall becomes easier to understand. We must make it clear that we do not dissent in any way from the learned judge's finding that the two senior legal practitioners acted throughout completely *bona fide*. But, looking at the matter from Mr Crundall's point of view, and in the light of the law as we have declared it to be, his confusion and frustration are understandable.

He (representing the company) had a right to purchase the shares. Mr Cook told him he was wrong. But he was not wrong. By adopting a wrong view of the law, and persuading the trustee to change his mind, Mr Cook obtained for his client, PG, the transfer of the shares. Mr

Crundall's company was entitled to those shares. They should have been transferred to Crundalls. They were not. The position might have been different had the respondents pursued and won their application to extend the period. But they did not.

The trustee should not have transferred the shares on 8 September 1989 to PG. He was acting on a wrong view of the law, a view which was disputed and which he himself had not originally held. The learned judge, in upholding his claim to punitive costs, said at page 308D:

"The first respondent (the trustee) believed that he was required to sell the shares to the second respondent (PG) because the latter had properly exercised its right of pre-emption."

That, with respect, is not correct, although there are passages in the trustee's affidavits where he conveys that impression. For instance, in para 5 on p 28 of the papers he says:

"I admit that if the second respondent (PG) had taken no action on or before 5 July 1989, its right to acquire the shareholdings in DST and ITC would have lapsed."

There he is clearly speaking of the right of pre-emption. But the "right of pre-emption battle front" was abandoned when the rule *nisi* was abandoned. The first respondent (the trustee) was persuaded, when Exchange Control permission was granted in favour of PG rather than Crundalls, that his contract with Crundalls was invalid or ineffective. He sold the shares to PG, not on the basis that it had exercised a pre-emptive right, but on the ground that it was the only valid bidder. This is proved by his assertion in para 11 of his opposing affidavit, ending with the words:

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"In the premises I put in issue the applicant's submission that an agreement between it and myself had become effective on 5 July 1989."

In his affidavit at para 11(a) the trustee said:

"I believed (and so did Mr Passaportis) that there was a rule *nisi* in existence in terms of which the six-week period which the second respondent had within which to obtain exchange control approval had been provisionally extended to six months."

While it is correct that he and Mr Passaportis believed that there was a rule *nisi* in existence (the fact that a judge had postponed the return day without actually using the formula "and the rule is extended" did not mean that the rule had lapsed) they could not, or should not, have believed that the rule provisionally extended the period. It did not do so. The question whether or not the period was to be extended was to be debated on the return day. Meanwhile the period remained six weeks, and that period had long since expired. The return day never eventuated.

Therefore the trustee could not have thought that he was transferring the shares to PG in terms of their right of pre-emption.

The learned judge further misdirected himself when he said, at 308F-G:

"With regard to case No. HC 2777/89 which concerned the application to extend the six-week period to six

months, the applicant had been given leave on 9 August to intervene, but it did not file its opposing affidavit until 8 September, 30 days later. The first respondent could well be excused for believing that the applicant did not intend pursuing its application further."

The applicant had in fact only been given leave on 30 August. There was no reason at all for the trustee not to believe that it was pursuing its application. If he had asked Mr Passaportis the latter would undoubtedly have told him that he was pursuing his application. All that the trustee knew was that Crundalls were not pursuing their opposition by the method of applying for an interdict.

In the ultimate analysis, therefore, there was some confusion in the mind of the trustee as to the basis on which he was transferring the shares to PG. In fact he did not act in terms of the so-called right of pre-emption at all. He acted on an incorrect interpretation of the law which led him to believe that his contract with Crundalls was invalid.

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If he was confused as to his own state of mind it becomes more understandable that Mr Passaportis, and through his eyes, Mr Crundall, were confused. They interpreted his actions as revealing *mala fides*. That was a wrong interpretation. But each side is to a degree to blame for the confusion which led to the misinterpretation. The respondents' confusion has led them, ironically, to victory. That should suffice. It would be inequitable further to penalise the appellant by a punitive order as to costs.

In all these circumstances, we consider that a punitive order of costs was not justified.

5.2 *The costs of appeal*

The appellant appealed on two major grounds: The first was that the learned judge should have found in its favour on the merits. The second was that the punitive order for costs was not warranted. It has failed on the first and succeeded on the second. While we do not consider that its success on the subsidiary issue of costs is enough to carry the costs of appeal, we also do not consider that its failure on the merits justifies an order of costs against it. It must be borne in mind that the respondents maintained, on appeal, their contention that the agreement between Crundalls and the trustee was invalid by reason of the Exchange Control point. They have been found to be wrong on that point. They have succeeded only on the basis that we have agreed with the trial judge that the wrong done to Crundalls cannot be undone. In the circumstances it is appropriate that no order be made as to the costs of appeal.

Accordingly we make the following order:

1. The appeal on the merits fails and is dismissed;
2. The appeal in relation to the order of costs is allowed, and the order of the court *a quo* is amended to read:

"The application is dismissed with costs";

3. There will be no order as to the costs of appeal.

Honey & Blanckenberg, appellant's legal practitioners

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

Atherstone & Cook, second respondent's legal practitioners

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CARGO CARRIERS (PVT) LTD & ANOR v NETTLEFOLD & ANOR 1991 (2) ZLR 139 (SC)

Court Supreme Court, Harare

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

23 July & 12 September 1991

Flynote

Appeal - costs - when special order awarded - consequences of extravagant claims in notice of appeal.

Costs - appeal - when special order made.

Damages - mitigation - quantum increased as result of plaintiff's delay in authorizing repairs - nature of onus on defendant in such situation - how discharged - circumstances in which plaintiff may claim increased amount despite delay - plaintiff's duty not to aggravate damages by own wanton or careless conduct - if, in attempt to mitigate, plaintiff actually aggravates the damages, the greater amount may still be recovered if plaintiff acted reasonably.

Negligence - contributory negligence - minimum assessment normally 10% - court may have regard to contributory negligence even if not pleaded - driver - duty when dazzled - standard of care required.

Headnote

In an appeal over the award of \$50 000 damages to respondents arising from a motor accident, appellants had argued that they ought not to bear \$10 000 of the repair costs as these were attributable to a delay by the respondents in authorizing the repairs.

Held, that since the actual repair costs had been \$70 000, of which \$10 000 was attributable to the delay, and since respondents had been found to have been 10% responsible, the award of \$60 000 was inconsistent with either of these findings.

Held, further, that there was a delay, attributable to respondents, and as a result, the repairs had cost \$70 000 instead of \$60 000.

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Held, further, that insofar as there was an onus on appellants, it was thus discharged.

Held, further, that the respondents had not justified the delay, and, accordingly, it could not be said that the delay was reasonable or that it was in consequence of an intention to mitigate damages.

Held, further, that the reasonable cost of repair was \$60 000, subject to considerations of contributory negligence.

Held, further, that on the facts that first respondent was 20% responsible for the accident.

Held, further, that the appeal succeeded with costs in that respondents were awarded \$48 000 after the figure of \$70 000 had been reduced by \$10 000 and then by 20%.

Held, further, that the circumstances did not warrant a special order of costs.

Cases cited:

AA Mutual Insurance Association Ltd v Nomeka 1976 (3) SA 45 (A)

The Solihull [1983] 1 Lloyd's Rep 605 (CA)

Gebruder Metelmann & Co v NBR (London) Ltd [1984] 1 Lloyd's Rep 614 (CA)

Taunton Enterprises (Pvt) Ltd v Minister of Defence & Anor S-73-85 (not reported)

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

Viriri v Wellesley Estate (Pvt) Ltd 1982 (1) ZLR 200 (SC); 1982 (4) SA 308 (ZS)

South British Insurance Co Ltd v Smit 1962 (3) SA 826 (A)

Minister of Defence & Anor v Jackson 1990 (2) ZLR 1 (SC); 1991 (4) SA 23 (ZS)

E W W Morris for the appellants

A P de Bourbon SC for the respondents

Judgment

McNally JA: This is an appeal arising out of a motor accident. The appellants do not dispute their own liability for negligence. The driver, the second appellant, was clearly negligent for leaving his vehicle without lights or warning triangle at night on the main road from Masvingo to Harare just outside Chivhu. The first appellant was vicariously liable for its employee's negligence.

The dispute was over the amount of the damages awarded by the trial judge to the first respondent. That amount was \$60 000. There are two arguments put forward by the appellants: The first is that the first respondent herself caused the delay which led to a \$10 000 increase in the cost of repairs. That increase,

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it is submitted, should not be charged to the appellants. Secondly, it is submitted that the first respondent's contributory negligence should have been assessed at a figure far higher than the 10% which the learned judge found. (The fact that contributory negligence is an issue is not in dispute, although it does not appear to have been pleaded; compare *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (AD) at 55D.)

It must be said that it is not easy to grasp how the learned judge in the court *a quo* came to the figure of \$60 000. It was common cause that the actual cost of repair of the first respondent's vehicle was to be taken as \$70 000. It was also accepted that \$10 000 of that figure was attributable to the delay. However, the learned judge declined to deduct the \$10 000, saying "the defendant must take his victim as he finds him".

On the question of contributory negligence the court found that "her blame is only up to 10%". Yet the award of \$60 000 is arithmetically consistent with neither of those findings.

I propose to start from the figure of \$70 000. The evidence was quite clear that the delay in starting the repairs added \$10 000 to the cost of repair. The General Manager of the Passenger Division of the local Mercedes agents, Mr Dartnall, said so explicitly in his reply to Mr *Morris*' final question in cross-examination:

"Q. To the best of your ability as an expert in this field, would you say that had the Nettlefolds given you instructions to proceed immediately you could have done the job for \$60 000?";

A. I would say that that is fair and reasonable."

The evidence as to the reason for the delay also came from Mr Dartnall. Mrs Nettlefold was not asked about it. Mr Nettlefold did not give evidence. No evidence was led on behalf of the defendants. So all we have is the following from Mr Dartnall:

"There was some discussion at the beginning as to whether after we had supplied the estimate the owners would bring the parts for the car in themselves or ask us to supply the parts. This took some time to resolve."

At the appeal hearing Mr *de Bourbon* took the stance that it was for the appellants to show that this delay was unreasonable. The evidence showed that spare parts were difficult to get and that they had to be imported as foreign

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currency allocations permitted. In the absence of any evidence by the appellants the court had to assume the delay was reasonable.

Mr *Morris*' contention was that once the respondents conceded that the delay caused the increased cost, they took upon themselves the onus of justifying that delay.

Neither counsel cited authority in support of his contentions. The result of my unaided research

is as follows:

I begin with the statement of SIR JOHN DONALDSON MR in *The Solhult* [1983] 1 Lloyd's Rep 605 (CA) at 608:

"A plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly caused . . . by the defendant's breach of duty."

The same learned judge, in *Gebruder Metelmann & Co v NBR* (London) [1984] 1 Lloyd's Rep 614 (CA) at 631 said:

"It is no doubt true that the burden of proof lies on the defendant."

Roman-Dutch authority is to the same effect: See generally Corbett and Buchanan *The Quantum and Damages in Bodily and Fatal Injury Cases* 2 ed at p 10 para 8. There the point is made (relying on *Halsbury*) that there is a further duty on a plaintiff not to aggravate his damages by his own wanton or careless conduct: "If he does so aggravate his loss, then he will not be entitled to recover damages in respect of the damage attributable to such conduct on his part. Again the onus of establishing such aggravation lies upon the defendant". Broadly the same principles are enunciated in McKerron *The Law of Delict* 7 ed at p 139.

Finally it is clear that even where a plaintiff, in an attempt to mitigate his damages, actually aggravates them he can recover the greater amount if it can be shown that he acted reasonably. As BROOWNE-WILKONSON LJ put it in *Metelmann supra* at 634 Col 2:

"If I am right in holding that the sale on the terminal market on Jan 21 was a reasonable attempt to mitigate the loss two results follow. First, any

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additional loss suffered by Metelmann as a result of such sale is recoverable from NBR. Therefore in addition to the basic damages Metelmann is entitled to be compensated for the additional damage flowing from the attempt to mitigate."

Reverting to the facts of this case, it seems to me clear on the evidence that if the Nettlefolds had authorised the repairers to go ahead with the repairs when they were ready to do so, those repairs would have cost \$60 000. They chose to delay, and as a result the repairs cost \$70 000. The fact of the delay is established. Insofar as there is an *onus* on the defendants, it is thus discharged. It was for the Nettlefolds to justify the delay. They did not do so. Mr Dartnall's explanation was colourless from the point of view of justification. Accordingly, and in the absence of evidence from the Nettlefolds as to why the delay occurred, it cannot be said the delay was reasonable or indeed that it was in consequence of an intention to mitigate damages. The reasonable cost of repair was \$60 000. That must be the figure of damages subject to considerations of contributory negligence, to which I now turn:

The case of *Taunton Enterprises (Pvt) Ltd v Minister of Defence & Anor* S-73-85 was relied upon by both parties. In that case, as in this, a Mercedes driver, dazzled by the lights of an

on-coming car, collided with an unlighted vehicle parked partly on and partly off the road. In *Taunton* the driver of the Mercedes was found, by a majority of this court, to have been 15% to blame. (The dissenting judge said 50%.) In the present case the court *a quo* found her 10% to blame (I take the finding "up to 10% to blame" to mean "10% to blame" on the basis that courts normally do not go below 10% in such assessments).

The only evidence as to the facts of the accident was given by Mrs Nettlefold herself. It is true that she called the driver of the vehicle whose lights dazzled her, but he did no more than confirm that the offending vehicle had been abandoned, partly on the road, for many hours.

Mrs Nettlefold told the court that she was driving her newly purchased Mercedes back from Durban with her husband. On 1 October 1986 she took over the driving just before Chivhu. It was dusk. They were travelling slowly. Twenty-three kilometres beyond Chivhu, at about 7 pm, when it was dark, she hit an unlighted truck parked on her side of the road and protruding so that it blocked approximately half of the Harare-bound carriageway. For some while before the collision she had been bothered by the lights of an on-coming vehicle and had been flashing her lights in an attempt to persuade the on-coming driver to dip his lights. She never saw the stationary vehicle until immediately before

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she hit it. She was travelling slowly, because of the dazzle from the on-coming vehicle, at about 50 kilometres per hour. She said that the on-coming vehicle did eventually dip its lights, just before it passed her, and this was confirmed by Mr Mafika, the driver of that vehicle, who said he dipped his lights just before they passed each other, in response to her dipping her lights. He did not seem to have noticed her attempts to make him dip his lights. He also confirmed that he heard the crash just after they had passed each other and went back to assist. He was a frequent traveller on the road and had seen the stationary vehicle several times before on that day.

It seems it was a large truck, described as an articulated Mercedes Benz truck with a trailer attached, and with pipes protruding from the back. These pipes grazed the top of Mrs Nettlefold's Mercedes when the two vehicles collided. But we have no measurements or description of the truck.

Mrs Nettlefold said she first saw Mr Mafika's vehicle when it was (she estimated) about two kilometres away. She had been dazzled for "quite a long time", and she was not able to see outside the range of her "heavy" lights. She had slowed down, but she admitted that if she had been driving within the range of her lights she would have seen the vehicle that she hit. In fact (she estimated) she only saw it from about 10-15 feet, when it was too late to stop. Her husband was knocked unconscious from hitting the windscreen and was otherwise uninjured. She was trapped for a while in the vehicle but was, apart from bruises, not hurt at all. All this indicates support for her claim that she was travelling quite slowly. (Her vehicle was, I should indicate, a left-hand drive model.)

I do not think it is necessary to rehearse the legal issues, and in particular the "driver's dilemma"

issue, which were fully covered in the *Taunton* case *supra*. It is, however, appropriate to say that, insofar as reliance may be placed on the passage in *S v Ruzario* 1990 (1) ZLR 359 (SC) at 366C-F, that passage should not be taken out of context. I do not understand it as seeking to re-introduce the theory that the driver's dilemma is a rule of law. All it said was that in the circumstances in which Mr Ruzario found himself, he was negligent not to reduce his high speed so as to be able to stop within the range of his vision. We are saying the same thing in relation to Mrs Nettlefold's far lower speed in her particular circumstances.

There is no dispute about the fact that Mrs Nettlefold was negligent. That is not in issue. There is thus no conflict with *Ruzario supra*. We are concerned here, not with the question whether or not Mrs Nettlefold was negligent, but with the question "to what extent was she negligent?".

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In this case I am satisfied that it was very negligent indeed for the lorry driver to leave his vehicle unlighted, unprotected by the mandatory reflective triangle, and protruding over at least half the north-bound carriageway on a main road at night. I consider it was negligent, but much less negligent, for Mrs Nettlefold to have proceeded slowly but not slowly enough when she was dazzled by the lights of an on-coming car. She was undoubtedly travelling much more slowly than the driver in *Taunton supra*.

On the other hand, there is no evidence, as there was in *Taunton supra*, that the stationary vehicle was particularly difficult to see. In *Taunton* the vehicle was camouflaged - designed to be invisible. In this case it was a large reticulated commercial vehicle and trailer with pipes sticking out of it. In *Taunton* the silhouette of the stationary vehicle was masked by a line of trees behind it, from the point of view of the approaching Mercedes. In the present case there is no such evidence. The on-coming vehicle was first seen about two kilometres away by Mrs Nettlefold.

It is very difficult to accept that a large shape, such as the appellant's vehicle must have been, would not have shown up either in the lights of Mrs Nettlefold's own vehicle, or as a silhouette against the skyline, or as a shape or a reflection in the lights of the on-coming vehicle.

Indeed the very fact that negligence is not disputed indicates that the test set out by BARON JA in *Viriri v Wellesley Estate (Pvt) Ltd* 1982 (1) ZLR 200 (SC) at 206B-C has been satisfied, namely:

"[A driver] will be guilty of negligence provided the State or the plaintiff, as the case may be, has proved that the obstacle was one which was capable of being seen in good time by a driver keeping a proper look-out."

One cannot demand of all drivers the caution of the ultra-cautious driver. One cannot realistically expect every driver on a national road to slow down to a crawl or stop whenever his or her vision is partially impaired by on-coming lights. But the carnage on the roads is such that the courts must not allow the standard of the reasonable driver to slip. I am satisfied that a reasonable driver, dazzled or blinded or troubled by on-coming lights must make a conscious adjustment of his or her driving. The law must require some combination of the ordinary safety measures that are appropriate in such circumstances. This will involve some degree of slowing

down, perhaps with the foot removed from the accelerator and poised over the brake; some degree of extra care in looking out for possible obstructions; and generally a heightened degree of disaster-

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preparedness which will enable the driver to react quickly if an emergency occurs.

I repeat what I said in *Taunton supra* at p 30:

"It is a matter of common knowledge that one is often dazzled (and I use the word here to encompass everything from a slight impairment of peripheral vision to total temporary blindness) when about to enter a stretch of road which has previously been clearly illuminated either by one's own lights, or by the oncoming car's lights, or indeed by some other source of light. It seems to me that a driver in such circumstances is entitled to rely on his knowledge that the road is clear and to drive into the darkness, concentrating most of his attention on the danger presented by the oncoming vehicle which is the cause of the dazzle.

But where, as here, the stretch of road to be traversed has not previously been illuminated, there must surely be a greater duty of care on the motorist who drives along it partially or wholly unsighted. One who is dazzled by full headlights has a clear duty to slow down - that is the essence of the decision in *van Deventer's case supra*. But even a person who is partially dazzled must take some action. What action he should take precisely may be impossible to determine. It will depend on the amount of dazzle, the extent of the impairment of his vision and perhaps many other factors. It may well be impossible to say, in the majority of cases, that beyond any reasonable doubt he should have slowed down to such and such a speed. But one may be able to say that on a balance of probabilities the situation was such that a reasonable motorist would have slowed down to some extent and would then have been able to avoid the accident."

The learned judge in the court below did not give any particular reason for finding a degree of negligence lower than that in *Taunton*, except that Mrs Nettlefold was travelling more slowly than Mr *Taunton*. But that simply means that her failure to keep a proper look-out was *pro tanto* greater. In my view, the driver in this case was more negligent than Mr Taunton because:

1. The vehicle she hit was very much larger and was not camouflaged;
2. The lights of the on-coming vehicle had been visible for about two kilometres, and over that distance there must have been occasions when, either in her own lights or in the other vehicle's lights, she could have picked out the shape or silhouette of the abandoned vehicle;

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3. For the same reason, she had ample warning of the danger of being blinded as the on-coming vehicle came closer. If she could not see adequately she should have slowed down more.

Conscious as I am of the difficulty and subjectivity of assessments of relative degrees of responsibility for collisions (see *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (AD) at 837F-G), and after consultation with my colleagues, I have come to the conclusion that 10% is

too low a figure. Not only is it lower than the figure in *Taunton*, which it should not be, but also account must be taken of the fact that *Taunton* was a majority decision. The then CHIEF JUSTICE, who dissented, favoured a figure of 50%. So the *Taunton* figure, to use the classic phrase, "if it errs at all, errs on the side of leniency".

I consider that a figure of 20% more accurately reflects the relative responsibility of Mrs Nettlefold for the accident.

In the circumstances, the appeal succeeds to the extent that the sum of \$70 000 is to be reduced first by deducting \$10 000 to reach a figure of \$60 000 and then by 20%, to achieve a final figure of \$48 000.

As far as the costs of appeal are concerned, Mr *de Bourbon* relied on the decision in *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (SC) at 29 for the proposition that there should be a special order. Certainly the notice of appeal was cast in such all-embracing terms that it forced the respondent to come to court. Appellants who make such extravagant claims (in this case that the first respondent's degree of negligence should have been assessed at not less than 100%) may in proper cases be deprived of all or part of their costs. However, in the present case I understand that Mr *Morris* made it clear at an early stage to Mr *de Bourbon* that he would not be claiming a 100% reduction in the first respondent's claim.

The appellant has achieved success on both the issues argued. It has reduced the *quantum* from \$70 000 to \$60 000 and it has increased the first respondent's percentage of negligence from 10% to 20%. It does not seem to me that a special order is warranted.

Accordingly, I would allow the appeal with costs. The order of the court *a quo* is altered to read:

"There will be judgment in favour of plaintiffs as follows -

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1. First plaintiff \$48 000 and costs;
2. Second plaintiff \$1 000 and costs."

Gubbay CJ: I agree.

Korsah JA: I agree.

N H Franco & Co, appellants' legal practitioners

Surgey, Pittman & Kerswell, respondents' legal practitioners

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YOUNG v VAN RENSBURG 1991 (2) ZLR 149 (SC)

Editor's Note:(1)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Civil appeal

3 June & 16 September 1991

Flynote

Contract - illegality - in *pari delicto* rule - applicability and relaxation of rule.

Exchange control - contract for purchase of land in Zimbabwe - purchase price payable outside Zimbabwe - single transaction - not prohibited by regulations - meaning of 'carrying on' business or trade - single act not sufficient.

Legislation - Exchange Control Regulations 1977 - ss 8 (1) and 7 (1).

Headnote

The respondent, then residing in South Africa, entered into an agreement of sale in respect of a farm situated in Zimbabwe with the seller, also a resident of South Africa. Payment was to be made in South Africa. To avoid any contravention of the law of Zimbabwe, the land was transferred into the name of the appellant, then a resident of Zimbabwe, who was to manage the land. The appellant then laid claim to the land as his own. In addition he contended that the agreement between the respondent and the seller was illegal, and could not be enforced as it contravened the exchange control legislation. The respondent denied the illegality and in the alternative claimed relaxation of the *pari delicto* rule. The respondent succeeded in the High Court (GIBSON J) and the appellant appealed.

Held, in the circumstances of the present case, the single transaction of the sale of the farm did not constitute the carrying on of a trade or business such as to render the transaction contrary to s 8(1) of the Exchange Control Regulations 1977.

Held, the payment to the seller in South Africa was not a payment prohibited by

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s 7 (1) of the Exchange Control Regulations 1977, following *Macape (Pty) Ltd v Executrix Estate Forrester* 1991 (1) ZLR 315 (SC).

Held, in any event, this was a case where justice and equity required a relaxation of the *pari delicto* rule.

Cases cited:

Smith v Anderson (1880) 15 Ch D 247 (CA)

R v Lionda 1944 AD 348

R v Bayedza 1947 SR 135; 1947 (4) SA 777 (SR)

R v Kapakasa 1963 R&N 684 (SR)

Macape (Pty) Ltd v Executrix Estate Forrester 1991 (1) ZLR 315 (SC)

Barclays National Bank Ltd v Thompson 1985 (3) SA 778 (A)

Dube v Khumalo 1986 (2) ZLR 103 (SC)

Jajbhay v Cassim 1939 AD 537

D R Drury for the appellant

A P de Bourbon SC for the respondent

Judgment

Korsah JA: The appellant was the unsuccessful defendant in proceedings commenced at the instance of the respondent in the High Court, Harare, wherein the court granted the respondent's prayer for a declaration that:

- (1) The respondent is the rightful owner of the farm described as the remainder of Rupurara, measuring 1 383,738 hectares;
- (2) The appellant, failing him the Deputy Sheriff at Harare, should sign all necessary documents for the purpose of effecting transfer of the farm to the respondent; and
- (3) The appellant pay the costs of the action.

The appellant, being a brother to the respondent's mother, is the maternal uncle of the respondent. The respondent is a citizen of Zimbabwe by birth and is the holder of a Zimbabwe passport, but is resident in South Africa where his business offices are situated. He had no office in Zimbabwe, but does a lot of business here and, for that purpose, frequents Harare every six to eight weeks.

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The respondent's family had for some time not been happy living in South Africa and was desirous of returning to Zimbabwe. An additional impetus for making such a move was the convenience of Harare as a base for his company's headquarters in respect of its PTA connections.

Some time in 1985 the respondent's brother, Frank Michael van Rensburg, learnt from Mr Don Green, for whom he was erecting a fence round some property in Johannesburg, that the Greens had a farm situated in Nyanga which they wanted to sell. Frank later passed this information over to the respondent and the respondent requested Frank to go and view the

property the next time he was in Zimbabwe. The respondent furnished Frank with the necessary funds and Frank visited the property at Nyanga and returned a favourable report. The respondent decided to enter into negotiations for its purchase.

It was the respondent's case that in the latter part of 1985 he entered into an agreement of sale of land with Mr Green and his mother, Mrs Nora Green. The land the subject matter of the agreement was an undeveloped tract measuring some 4 000 acres and situate at Juliasdale in the Nyanga area, designated as Rupurara Farm.

It was agreed between the parties that the purchase price was to be R25 000 of which R10 000 was to be paid as a deposit and the remainder in monthly instalments of R350, with interest on the outstanding R15 000 at the rate of 16% per month payable after the capital is repaid.

Believing that it was illegal to pay for property situate in Zimbabwe in foreign currency outside the country, the parties agreed that the respondent's legal practitioners should be instructed to draw up an agreement of sale reflecting a purchase price of Z\$20 000, of which Z\$2 000 would be the deposit payable in advance with a mortgage bond of Z\$18 000 to secure the payment of the purchase price in South Africa.

When this decision was taken the respondent's brother, Frank, who had expressed an interest to come and look after the property while the respondent wound up his business affairs in South Africa, had consented to the use of his name as the nominee registered owner. To this end, Frank moved to Zimbabwe and later went with the respondent to instruct Mr Chadwick to draw up an agreement of sale using the name of Frank as the nominee purchaser.

After Frank had been in Zimbabwe for about five months, the respondent intimated that the appellant, who was living on the charity of the respondent at

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the respondent's home, was to join Frank in looking after the property. Frank took exception to this arrangement and withdrew from the transaction.

The appellant welcomed the idea of becoming the caretaker of the property for the respondent and travelled at his own expense to Zimbabwe to look after the property. Later, the appellant suggested that to facilitate dealing with the squatter problem the property be registered in his name and the respondent agreed to have the agreement so registered.

Before the transfer of the property into the name of the appellant, the respondent also visited the property and, together with the appellant, walked all over the property. This inspection took some six hours, at the end of which the appellant was in such physical distress that the respondent was fearful that he was about to have a heart attack. In order to secure his investment in the land and not put at risk his family's money, he requested the appellant to make a will bequeathing the farm to him. This the appellant did. The respondent then returned to South Africa in the belief that he had done all that was legally necessary to secure his investment in the property against any loss which might arise from the untimely demise of the appellant. He did not envisage the loss of the property in the lifetime of the appellant. Such was

his faith.

Although the proposed memorandum of an agreement of sale was in the appellant's name, the respondent it was who signed the document, with his wife as a witness to his signature; but as previously arranged the property was transferred into the name of the appellant.

It was common cause that on 25 February 1986 the property was registered in the name of the appellant and a mortgage bond of Z\$18 000 registered against the property, requiring the appellant to pay Z\$18 000 to the Greens if and when the Greens called in the bond.

Mr *Drury* contended that, because of the illegality attaching to the contract between the Greens and the respondent, the agreement between the respondent and the appellant is tainted and, therefore, unenforceable by the respondent.

He referred to ss 8(1)(b)(i) and (ii) of the Exchange Control Regulations 1977 (RGN 399 of 1977) which recite that:

"8. (1) . . . Unless otherwise authorised by the Minister -

(a) . . .

(b) no foreign resident carrying on any trade, business or any other

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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."

Counsel submitted that the activity of purchasing land by the respondent (a non-resident) from the sellers (also non-residents) constitutes the carrying out of a gainful activity in Zimbabwe. Accordingly any payment made in pursuance of such an agreement outside the country offends sub-para 8(1)(b)(i) of the Regulations.

Alternatively, counsel for the appellant submitted that once the respondent acquired the land at Nyanga and continued to effect monthly payments or incurred obligations to continue to do so, the provisions of sub-para 8(1)(b)(ii) were breached.

It seems to me that sub-para 8(1)(b)(i) envisages a situation where a foreign resident is "carrying on" a trade, business or other gainful occupation or activity. The phrase "carrying on" connotes an on-going activity, an advancing process, a continuing thing or conduct. As was said by BRETT LJ in *Smith v Anderson* (1880) 15 ChD 247 (CA) at 277-8:

"The expression 'carrying-on' implies a repetition of acts, and excludes the case of an association formed for doing one particular act which is never to be repeated."

The mere fact that a person walks into a shop and buys or sells one piece of jewellery is not evidence that he is carrying on trade or business or other gainful occupation or activity there. The phrase conceives of more than just a single act. See *R v Lionda* 1944 AD 348 at 351; *R v Bayedza* 1947 SR 135; 1947 (4) SA 777 (SR); *R v Kapakasa* 1963 R&N 684 (SR).

As Mr *de Bourbon* rightly submitted, sub-para 8(1)(a), which stipulates that:

- "(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" (emphasis supplied),

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recognises the performance of a single act; therefore the law-giver was envisaging different situations when these sub-paragraphs were enacted. If the Legislature had intended a single act by a foreigner to be illegal then it would have said so.

Mr *de Bourbon* conceded that "gainful activity" need not necessarily have to be a profitable activity, but that there has to be a concept of gain which has not been established in this case. Gainful implies the concept of deriving some benefit or profit and that there has to be an element of gain before the prohibition arises.

It may perhaps be arguable that, in fact, the Greens were the party that gained because for a Zimbabwean asset they received foreign exchange. But, in my view, once the concept of "carrying on" is accepted as the phrase governing both occupation or activity, then that is the end of the matter.

This conclusion is reinforced by the invocation of the *eiusdem generis* rule, that, in the construction of statutes, general terms following particular ones apply only to such persons or things as are of the same kind as that designated in the preceding particular expression. "Activity", expressed in the same breath in the sub-paragraph with carrying on trade, business or any other gainful occupation, cannot assume a character different from those particular expressions preceding it. In other words, the only interpretation that must logically be placed on it is that, like the particular expressions preceding it, the activity must be an on-going one.

It seems to me that the contra-distinction between "do any act" and "carrying on" in the separate sub-paragraphs is reflective of the intendment of the Legislature that it did not mean the performance of a single act to be caught under ss 8(1)(b) (i) and (ii) of the Regulations. I am, therefore, in agreement with Mr *de Bourbon*'s submission that to purchase, on a single occasion, a farm in Zimbabwe does not constitute "carrying on . . . gainful occupation or activity".

In his heads of argument Mr *de Bourbon* conceded that the payments made by the appellant on behalf of the respondent, or indeed on behalf of the Greens, were in contravention of s 7(1) of

the Regulations, but retracted this concession in view of the recent decision of this court in *Macape (Pty) Ltd v Executrix Estate Forrester* 1991 (1) ZLR 315 (SC). That retraction was well made. Section 7(1) recites that:

"7 (1) Unless otherwise authorised by the Minister, no person shall, in Zimbabwe -

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- (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 acknowledgment or recording of such payment."

In the instant case, there was an agreement between the Greens and the respondent, both of whom were resident outside Zimbabwe, for the sale of land in Zimbabwe. That agreement was not the subject-matter of litigation, but was of evidential value only. There was a second agreement which was between the respondent and the appellant creating the appellant a nominee for the respondent, that on demand the appellant would transfer the farm to the respondent. It was this second agreement between the respondent and appellant which the respondent was seeking to enforce and which was the subject of the litigation between the parties.

Under the agreement, the subject-matter of this litigation, a deposit of \$2000 had been made to the attorney of the Greens towards the purchase price of the farm at Nyanga. The evidence was that that amount was still in the trust account of the attorneys and had not been paid to the Greens.

As McNALLY JA pointed out in the *Forrester* case, *supra*:

"...there is a clear difference between ss 7 and 8. The former prescribes only the **actual payment**. The latter proscribes both the payment and the underlying agreement to pay" (emphasis supplied).

The proviso to s 7(1) is couched in unambiguous terms that "when a foreign resident", such as the respondent was at the time of the deposit of \$2000, "has paid a sum in or towards the satisfaction of a debt due by him", as in this case towards the settlement of the purchase price of the farm, "the provisions of this paragraph shall not prohibit the acknowledgement or recording of such payment". In other words, the authority of the Minister is required, not for payments in Zimbabwe towards the settlement of a debt due to a foreign resident, but only when the actual funds are to be transferred out of the country in settlement of the acknowledged debt. Were it not so, it would be impossible for persons and companies in Zimbabwe to participate in foreign and international trade; for foreign companies invariably want some assurance that monies are available,

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subject to Reserve Bank permission for payment abroad, before the release of goods to a purchaser in some other country.

It is abundantly clear to me that the law-maker intended s 7 of the Regulations to strike down, not the payment of legitimate debts due and owing in Zimbabwe to a foreign resident, but the transfer of such funds abroad without authorisation from the Reserve Bank. This is implied in, and is the logical sequel to, the decision in the *Forrester* case *supra*, that an agreement to pay a debt due to a foreign resident to an agent in Bulawayo is not tainted with illegality and is therefore enforceable at law; and where McNALLY JA quoted with approval the following words adopted by HOEXTER JA in *Barclays National Bank Ltd v Thompson* 1985 (3) SA 778 (A) at 797F:

"The plaintiff is entitled to his judgment, and Treasury permission is a hurdle which can be jumped when it is reached."

I can only conclude that the agreement in Zimbabwe appointing the appellant a nominee for the respondent in respect of the purchase of the farm at Nyanga did not offend any law of Zimbabwe and is therefore not illegal.

Another aspect of this matter is that the South African agreement to pay in Rands was between the Greens and the respondent. The Greens are not party to the instant action. That contract is not the subject for resolution. The issue here is whether the appellant was the nominee of the respondent in the purchase of the farm. What is sought here, if the appellant is to be found to be a nominee of the respondent, is that an agent should fulfil his obligation to his principal. This has nothing to do with the agreement in South Africa between the respondent and the Greens. Whereas the agreement between the respondent and the Greens cannot be enforced in Zimbabwe, the nominee agreement in Zimbabwe is enforceable, and the transfer of the property into the name of the respondent does not infringe any law of this country.

Even supposing that, because of the illegalities attaching to the agreement between the respondent and the Greens, the nominee agreement between the appellant and the respondent is tainted, which I do not accept, it would hardly be just to allow the appellant, who knew all along of the illegality attaching to the South African agreement, to take advantage of such illegality to acquire an asset without paying a cent.

Speaking of the maxim *in pari delicto potior est conditio possidentis*, ie where the parties are equally in the wrong, he who is in possession will prevail, in *Dube*

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v Khumalo 1986 (2) ZLR 103 (SC), GUBBAY JA (as he then was) said at p 109F:

"The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy should properly take into account the doing of simple justice between man and man."

The learned JUDGE OF APPEAL then referred to the following passage in the judgment of STRATFORD CJ in *Jajbhay v Cassim* 1939 AD 537 at 544-545 in expatiation of the pronouncement above:

"... Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court could not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment."

Mr *de Bourbon* submitted that the appellant, who was found by Her Ladyship to be *in pari delicto*, had neither a legal nor a moral claim to the property and hence no basis to claim any equitable rights from this court. No third parties had acquired any rights to the property and the only person to benefit from the refusal of relief is the appellant, and the only person to suffer is the respondent. Whereas the appellant has given no value for the property and has done nothing to improve the property, the respondent has paid for the property and has made considerable improvements thereon. In the circumstances a refusal to accord the respondent the relief sought would result in the unjust enrichment of the appellant.

I am in agreement with Mr *de Bourbon* that even if it is accepted that the agreement between the respondent and the appellant is tainted with illegality,

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KORSAH JA

which I do not accept, the refusal to enforce it will unjustly enrich the appellant. So that whichever basis is adopted for determining the matter the appeal must fail.

Accordingly the judgment of Her Ladyship in the court below is confirmed and the appeal is dismissed with costs.

Gubbay CJ: I agree.

McNally JA: I agree.

Gollop & Blank, appellant's legal practitioners

Condy, Chadwick & Elliot, respondent's legal practitioners

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MACHOKOTO v MABIKA 1991 (2) ZLR 159 (HC)

Court High Court Harare

Adam J

Civil action

21 August & 18 September 1991

Flynote

Procedure - declaration introducing different cause of action to that on face of summons - whether plaintiff may obtain judgment on new cause of action revealed in declaration.

Husband and wife - damages for seduction - factors to be considered in assessment thereof.

Headnote

Plaintiff appeared personally to apply for default judgment following the service of her summons and declaration upon defendant who had not entered appearance. The summons merely claimed damages for seduction and lying-in expenses whereas the declaration included a claim for damages arising from breach of promise to marry.

Held, that the action for seduction is in delict and breach of promise to marry is founded both in delict and contract.

Held, further that as plaintiff's declaration introduced a new and totally different cause of action which was not mentioned in the summons, plaintiff could not obtain judgment based on that new cause of action.

Held, further that in assessing the *quantum* of damages for seduction regard must be had to all the circumstances of the case including the social standing of the parties and the manner in which seduction took place.

Cases cited:

Hermansberg Mission Society v Minister of Native Affairs & Ors 1910 TPD 832

Katekwe v Muchabaiwa 1984 (2) ZLR 112 (SC)

1991 (2) ZLR p160

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Botha v Peach 1939 WLD 153

De Stadler v Cramer 1922 CPD 16

Hart v Yates (1896) 3 OR 201

Mafukidze v Matsinde S-118-87 (not reported)

Plaintiff in person

Judgment

Adam J: The plaintiff filed her summons with her declaration on 10 July 1991 and service was effected at the defendant's residence on 16 July 1991 who failed to enter an appearance to defend. In her summons the plaintiff originally sought seduction damages of \$34 600 but in her declaration, para 7 initially provided for damages of \$34 600, described as damages of \$10 100 for injured feelings, loss of good name and reputation; loss due to promise to marry and in preparation for the intended marriage of \$10 500; loss of virginity resulting in her no longer having a good prospect of marriage calculated at \$13 000 and lying-expenses and maintenance of \$3 000. In the affidavit filed on 2 August 1991 the plaintiff averred that her feelings were greatly injured because of the seduction and breach of promise and her claim was \$13 000 for seduction damages; \$10 000 as general damages for breach of promise; \$10 500 as special damage for breach of promise and \$2 100 for lying-expenses and \$900 for maintenance.

In court the plaintiff, who appeared in person, applied to amend her summons and declaration and affidavit, which was granted so that the summons now sought seduction damages of \$24 000; while the declaration claimed \$24 000 by deletion of the claim of \$10 500 for loss due to breach of promise and preparation for intended marriage and of the lying-expenses and amending maintenance to a claim of \$900; and the affidavit was amended by the deletion of the claim of special damages of \$10 500 and lying expenses of \$2 100.

The High Court of Zimbabwe Rules, 1971 provides in Rule 11 that a summons shall contain a general statement of the nature of the claims and of the relief or remedy sought in the action. Rule 59 allows judgment in default of appearance or in default of plea upon the summons or declaration. While Rules 109 and 110 indicate that the declaration shall state specifically the relief claimed and where the relief was for several distinct claims or causes of complaint based upon separate grounds they shall be stated separately.

In *Hermansberg Mission Society v Minister of Native Affairs & Ors* 1910 TPD 832 WESSELS J at 837 said:

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"... though we have no rule providing that the declaration shall not vary from the summons, I think it is inherent in the very nature of pleadings that there should be some practice whereby the declaration shall not materially vary from the summons. Otherwise, supposing a man were to be allowed to issue summons for libel, and then, in his declaration, ask for an account, or for payment for goods sold and delivered, it would be impossible to connect the declaration with the summons. Yet there must be some concatenation in the pleadings from beginning to end. Therefore, the summons must contain an indication of what the defendant is to expect in the declaration; but it need contain no more than that. The declaration must not introduce a new and totally different cause of action, of which no mention was made in the summons."

The summons in this matter relates to seduction damages, particulars of which are said to be found in the plaintiff's declaration annexed to the summons. But as mentioned above the plaintiff's declaration also concerns damages for breach of promise to marry.

The delict of seduction under Roman-Dutch common law is *sui generis*, whereas the remedy for breach of promise is founded on an action of breach of contract and on an action in delict.

As the plaintiff's declaration has introduced "a new and totally different cause of action" that

was not mentioned in the summons, the plaintiff cannot obtain judgment based on that cause of action.

In *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (SC) at 125-128 DUMBUTSHENA CJ observed:

"The action for seduction embraces in our general law two claims: one is for satisfaction for the defloration of the girl and the other for lessening her chances of a successful marriage. The girl seduced is entitled to be compensated for the loss of her virginity, and for her diminished chances of making a suitable marriage. See *Bull v Taylor* 1965 (4) SA 29 (AD) at 39.

According to van den Heever

'there are three requisites to a claim of damages on the ground of seduction: (1) that the woman has been seduced, (2) that there has been sexual intercourse, and (3) that the woman was a virgin up to the time of seduction' (see *Breach of Promise and Seduction* at p 45).

The difference between an action for seduction in the general law and under

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customary law is that only the guardian of a woman is entitled to claim and keep damages for seduction under customary law. Another difference is that under customary law a woman need not be a virgin at the time she is seduced. . . .

In my view the right under the general law to seduction damages is personal to the person seduced. It is a delict. It cannot be surrendered to the guardian by an adult woman . . . Seduction in customary law is based, so it seems to me, on the concept of ownership. The father owns the daughter. If she is seduced and thus wronged, it is the father who is wronged and who is entitled to damages. That might have been so under customary law as long as the woman remained a minor under the guardianship of her father.

. . .

Does the father still have the right to sue for damages for the seduction of his major daughter? The answer is simple. He has not because his daughter is a major and cannot vest her own right in her father. He has lost his right under customary law to sue for damages for seduction. . . The daughter can sue for damages for seduction under the general law of Zimbabwe, she has now the capacity to do so. That she was given, so to speak, by s 3 of Act 15 of 1982."

In *Card v Sparg* 1984 (4) SA 667 (E) at 670C ZIETSMAN J said:

"The action for damages for seduction is not an action founded on *injuri* since seduction implies consent on the part of the plaintiff and where there is consent there can be no *injuria*. However the principle of *volenti non fit injuria* is not applicable to the action which is seen as an action *sui generis*. Seduction implies that the plaintiff has been 'led astray' by the defendant and has fallen as a result of his seductive efforts, and she is accordingly held to be entitled to claim compensation from him for the loss of her virginity and the consequent impairment of her marriage prospects.

See in this connection McKerron *The Law of Delict* 7 ed at 162; Lee and Honoré *The South African Law of Obligations* 2 ed para 610-613; *Bull v Taylor* 1965 (4) SA 29(A); and *Claassen v Van der Walt* 1969 (3) SA 68 (T). Where the seduction has resulted in pregnancy and the birth of a child the plaintiff is entitled to claim also the lying-in expenses incurred in connection with the pregnancy, birth and care of the child . . . JANSEN J (as he then was) in the case of *Lourens v Van Biljon* 1967 (1) SA 703(T) . . . held, however, that the plaintiff could claim maintenance for herself for the period immediately before and after the birth of the child. Such maintenance is regarded as being not for the benefit of the mother but for the

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benefit and in the interests of the child who requires the care of its mother during this period, and the amount awarded is regarded as part of the plaintiff's lying-in expenses."

In assessment of damages regard must be had to all the circumstances of the case including the social standing of the respective parties and the manner in which the seduction took place, with factors that incline to raise awards being such as the defendant's taking advantage of the plaintiff's intoxication (*Botha v Peach* 1939 WLD 153 at 157) or the defendant being much older than the plaintiff (*De Stadler v Cramer* 1922 CPD 16 at 20) or the plaintiff was seduced under a false promise of marriage (*Hannah Hart v Myer Yates* (1896) 3 OR 201).

In her affidavit in terms of Rule 60 the plaintiff averred that in 1990 she fell in love with the defendant when each promised to marry the other on December 28, 1990; that on January 6, 1991 the defendant called her to his residence for purposes of finalising their marriage arrangements and upon this having been done he seduced her when she was aged 24 years; that she was a person of repute from the fact that she had remained a virgin to the age of 24 years and was a respectable member of the Roman Catholic Church; that she never had sexual intercourse with anyone until she was seduced by the defendant; that she became pregnant as a result; that in February 1991 the defendant refused to marry her falsely asserting that he was already married; that he refused to maintain her during the pregnancy and that her feelings were greatly injured because of the seduction. She indicated that she had finished advanced typing in 1990 and was due to start a course on computers and so did not take a job. She averred that the defendant, a resident of Seke, has been employed as an experienced stores clerk for years and so a high-class person. She maintained that she lost her virginity and no longer has prospects of entering into a suitable marriage and because of this she suffered damages in the amount of \$13 000.

In *Mafukidze v Matsinde* S-118-87, the parties were both teachers who had promised to marry each other in 1985. The appellant became pregnant in December 1985 and the award to her by the magistrate's court of seduction damages of \$600 was held by KORSAN JA not to be out of line with damages awarded in similar cases. This was in 1987.

Taking all factors into account and on the basis of *ex aequo et bono* the plaintiff is certainly entitled to compensation and accordingly she is awarded seduction damages of \$1 100 and maintenance before, at the time of and soon after the confinement of \$900 and costs on the magistrates court scale.

L v COMMISSIONER OF TAXES 1991 (2) ZLR 164 (HC)

Court High Court, Harare

Smith J

Income tax appeal

11 January & 18 September 1991

Flynote

Income tax - medical expenses - deduction as expenses incurred in trade or business - expenses of a capital nature - domestic or private expenses.

Income Tax Act [Chapter 181] - ss 15(2)(a) and 16(1)(a) & (b).

Headnote

The appellant, a legal practitioner, incurred medical expenses in undergoing an operation to her eyesight. She sought to deduct from her taxable income the total amount of the medical expenses, maintaining that such expenses were essential to enable her to carry on her profession as a lawyer. The respondent Commissioner disallowed the claim as a deduction relying on ss 15(2)(a) and 16(1) of the Income Tax Act [Chapter 181]. The appellant objected to the assessment and thereafter appealed.

Held, medical expenses are not of the nature of expenditure incurred for the purposes of trade or in the production of income, and as such are not deductible under s 15(2)(a).

Per incuriam, the medical expenses claimed did not fall to be classed as being of a capital nature.

Held, in any event, medical expenses were of the nature of domestic or private expenses, and the deduction of such expenses is prohibited by s 16(1)(a) and (b).

Cases cited:

Port Elizabeth Electric Tramway Co v Commissioner for Inland Revenue 1936 CPD 241; (1936) 8 SATC 13 (C)

Commissioner for Inland Revenue v Genn & Co (Pty) Ltd 1955 (3) SA 293 (A); (1955) 20 SATC 113(A)

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New State Areas Ltd v Commissioner for Inland Revenue 1946 AD 610; (1946) 14 SATC 155 (A)

Smith v Secretary for Inland Revenue 1968 (2) SA 480 (A); (1968) 30 SATC 35 (A)

Norman v Golder [1945] 1 All ER 352 (CA)

Murgatroyd v Evans - Jackson [1967] 1 All ER 881 (Ch)

Prince v Mapp [1970] 1 All ER 519 (Ch)

Mallalieu v Drummond [1983] 2 All ER 1095 (HL)

ITC 833 (1956) 21 SATC 324 (C)

Case 50 (1955) 5 CTBR (NS) 329

Case 22 (1981) 25 CTBR (NS) 165

Case 24 (1983) 26 CTBR (NS) 556

Commissioner for Inland Revenue v Hickson 1960 (1) SA 746 (A); (1959) 23 SATC 243 (A)

ITC 1132 (1969) 31 SATC 155 (R)

A P de Bourbon SC for the appellant

M J Gillespie for the respondent

Judgment

Smith J: The appellant is a legal practitioner. She developed cataracts in both eyes and decided to obtain treatment urgently to restore her eyesight. She ascertained that the only place in Africa where she could obtain the necessary treatment was Cape Town. By March 1987 she had lost virtually all sight in one eye and had only limited vision in the other. She was unable to travel on her own or drive herself. Consequently she asked her mother to accompany her, undertaking to pay all her mother's expenses. The two went to Cape Town where an operation was performed to replace the defective lens of one eye. The appellant incurred expenditure amounting to \$4 200 on air tickets, accommodation and the hire of a car in Cape Town, fees for medical treatment and hospital and drug charges. When submitting her return for income tax purposes she claimed that expenditure as having been incurred for the purpose of trade or in the production of income and therefore deductible. The claim was disallowed. She objected and the respondent disallowed the objection insofar as the claim was made in terms of s 15(2)(a) of the Income Tax Act [*Chapter 181*] (hereinafter referred to as "Chapter 181"). He allowed the maximum disability abatement of \$2000 in terms of s 16 of the Finance Act [*Chapter 179*] in relation to the expenditure of the \$4200. The effect of allowing that abatement was to reduce the tax payable by the appellant by \$633,28 and the taxable income of the appellant by \$1 055, leaving a balance claimed by the appellant in terms of s 15(2)(a) of Chapter 181 of \$3 145 (hereafter referred to as "the disputed amount"). The appellant's case was that she was entitled to a deduction of the

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disputed amount as being expenditure incurred in repairing her eyesight. The expenditure was not covered by s 16(1) of Chapter 181 in that it was not a cost incurred by her in the maintenance of herself and neither was it a domestic or private expense in the circumstances. Furthermore, it was not expenditure of a capital nature in that it consisted of a repair to an existing facility which enabled her to carry on her trade. Alternatively her case was that s 15(2)(a) of Chapter 181 allowed expenditure to the extent it was incurred for the purposes of

trade or in the production of income and that, to the extent of at least 50%, the expenditure was so incurred in that that was the prime purpose of having her eyesight repaired.

The respondent's case was that even were it not for the appellant's professional need for the sense of sight, she would in any event have incurred expense in having it restored and any extent to which such restoration advanced her professional capabilities was irrelevant. He averred that the expenditure was not deductible because it was of a capital nature and it was not incurred in the production of income for the purposes of trade as provided in s 15(2)(a) of Chapter 181. Any deduction was prohibited under s 16(1)(a) and s 16(1)(b) of Chapter 181 in that the expenditure was for the maintenance of the taxpayer or for private and domestic purposes. Alternatively, if it were held that the expenditure was not of a capital nature and would not have been incurred but for the professional pursuits and requirements of the appellant, that portion of the expenditure relating to her mother was nevertheless not so incurred and any portion of the expenditure allowed as a deduction to the extent that it was incurred in the production of income but would not otherwise have been incurred ought not to exceed one-third of the total expenditure.

The appellant gave evidence in support of her case. She said that she became a partner in a firm of legal practitioners in 1984 and handled civil, as opposed to criminal, work, in conveyancing, estates, contracts and commercial fields. Her work involved a lot of reading and paper work. In September 1986 she discovered that cataracts had formed in her eyes and she began to experience difficulty in reading. Thereafter her vision deteriorated rapidly. She had started wearing spectacles for reading purposes only during her first year at university but after leaving university she began wearing spectacles regularly. By February 1987 her right eye was very bad and she had it operated on in March. In her left eye the condition deteriorated at a slower pace and it was operated on in September 1987. By the time her right eye was operated on her vision was minimal. She had to use a magnifying glass in order to be able to read. This had harmful effects in that it slowed up her rate of working, made her lose her self-confidence and caused embarrassment with clients.

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She got behind in her work, had to work longer hours and could not handle such things as urgent petitions. A local ophthalmic surgeon said that an operation to her eyes could be performed in Zimbabwe if she waited until the cataract grew over the entire lens. The lens would be removed and she would have to wear spectacles with thick lenses or contact lenses. It would necessitate her waiting 18 to 24 months. She visited a specialist in the Republic of South Africa who advised her that a new kind of operation had been perfected which was simpler and more advantageous than the old-style operation that was being performed in Zimbabwe. It would improve her vision in a few days. There were, however, divergent views amongst ophthalmic surgeons as to the risks involved in the new operation.

The appellant felt that if she wanted to continue practising law she could not wait to have an old-style operation in Zimbabwe. She had to have the operation as soon as possible which meant that she would have to go to the Republic of South Africa. She went to Cape Town and had a lens implanted. The operation was very successful and she was able to see objects within

a few days of the operation, although her eyes had to be bandaged for three weeks. She was in South Africa from 1-13 March and was accompanied by her mother as she needed a sighted person to help her cope. She received a certificate from the ophthalmic surgeon to the effect that she needed a travelling companion and with that she was able to get a foreign currency allocation from the Reserve Bank of Zimbabwe to cover the expenses of herself and her mother. Whilst in South Africa she spent one day at a clinic and the rest of the time she stayed in a flat she and her mother rented. After the operation on her right eye the appellant went to the United Kingdom to have a similar operation on her left eye. Since the operations she has been able to resume her legal practice. She appears in court, handles urgent applications and is able to carry out research. Without the operations she would not have been able to continue her practice of law. She said that had she not been a legal practitioner or engaged in some other commercial field she might well have waited for a more convenient time, possibly when on holiday in Cape Town, to have the operation. It is because she wanted to retain her practice and her partnership in a legal firm that she had decided to have the first operation done as soon as possible.

The relevant provisions of Chapter 181 on which the facts of this case hinge are s 15(2)(a) and s 16(1)(a) and (b). Section 15 of Chapter 181 provides for the deductions allowed in the determination of taxable income. Para (a) of s 15(2) allows as a deduction:

"(a) expenditure and losses to the extent to which they are incurred for the

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purposes of trade or in the production of the income except to the extent to which they are expenditure or losses of a capital nature."

Section 16 provides for cases in which no deduction shall be made. The relevant paras in subs (1) are as follows:

- "(a) the cost incurred by any taxpayer in the maintenance of himself, his family or establishment;
- (b) domestic or private expenses of the taxpayer. . ."

Mr *de Bourbon* pointed out that Chapter 181 does not contain a provision similar to that in the Income Tax Acts of South Africa (s 23(g)) and England which prohibits as a deduction any moneys which are not wholly or exclusively laid out or expended for the purposes of trade. A similar prohibition had been contained in para (b) of s 24 of the Income Tax Act 1954 (No. 16 of 1954) of the former Federation but had been repealed by s 12 of Act No. 26 of 1954 of the Federal Legislature. Mr *de Bourbon* said that there could be little doubt that the applicant needed her eyesight in order to be able to practise as a legal practitioner. Without being able to read she would not be able to work effectively and therefore her ability to earn an income would be impaired. Any expenditure she incurred to improve her situation in that regard would be deductible. He argued that the appellant would not have incurred the expenditure in question but for the need to carry on the practice of a legal practitioner. Even though it was a one-off payment, it enabled her to continue as a legal practitioner and was not a capital payment. Mr *Gillespie* argued that the expenditure in question was not deductible because it was not so closely connected to the professional practice of the appellant that it may be regarded as the cost of performing it - *Port Elizabeth Electric Tramway Co v Commissioner for Inland Revenue*

(1936) 8 SATC 13 (C); 1936 CPD 241 where at p 246 WATERMEYER AJP said:

"...all expenses attached to the performance of a business operation *bona fide* performed for the purpose of earning income are deductible whether such expenses are necessary for its performance or attached to it by chance or are *bona fide* incurred for the more efficient performance of such operation provided they are so closely connected with it that they may be regarded as part of the cost of performing it."

In *Commissioner for Inland Revenue v Genn & Co (Pty) Ltd* (1955) 20 SATC 113 (A); 1955 (3) SA 293 (A), at pp 120, 121 in SATC SCHREINER JA, after referring to the *Port Elizabeth Electric Tramway* case, *supra*, referred to *New*

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State Areas Ltd v Commissioner for Inland Revenue (1946) 14 SATC 155 (A); 1946 AD 610 where the then Chief Justice said:

"The problem which arises when deductions are claimed is, therefore, usually whether the expenditure in question should properly be regarded as part of the cost of performing the income-earning operations or as part of the cost of establishing or adding to the income-earning plant or machinery."

SCHREINER JA at p 121 went on to say:

"In deciding how the expenditure should properly be regarded the Court clearly has to assess the closeness of the connection between the expenditure and the income-earning operations, having regard both to the purpose of the expenditure and to what it actually effects."

In my opinion the expenditure in question cannot be said to be so closely connected with the performance of the appellant's legal practice as to be regarded as part of the cost of performing it. Undoubtedly the expenditure was necessary to enable the appellant to be able to carry on her legal practice, but it does not automatically follow that it can be regarded as part of the cost of performing it. There are many things people do to maintain their health and which could therefore be regarded as being necessary for the more efficient performance of their business or income-earning operations. However expenditure on such things cannot, in my view, be regarded as part of the cost of performing such operations. In my opinion, expenditure on medical operations to the body of a taxpayer is more analogous to expenditure on the taxpayer's "machinery for producing income" than on his "income-producing operations". Accordingly expenditure on maintaining or improving one's health is, I feel, not a deduction provided for in s 15(2)(a) of Chapter 181. It is too remote from the income-producing operations of the appellant.

In the light of my conclusions set out above, it is not necessary to investigate whether or not the expenditure in question was of a capital nature. In *Smith v Secretary for Inland Revenue* (1968) 30 SATC 35 (A); 1968(2) SA 480 (A) at p 488C-E STEYN CJ said:

"'Expenditure of a capital nature' is, of course, not a precise expression. It connotes a relation between expenditure and capital close enough to draw the expenditure into the ambit of capital. The features of that relationship are not readily definable with any precision and our Courts have not attempted any comprehensive definition. The words 'of a capital nature' qualify 'expenditure'. The Court below paraphrased these words as

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meaning 'of a nature akin to that of capital'. As a description of the kind of expenditure contemplated that may not be a misstatement. The Court, however, applied this meaning, not to the expenditure, but to the concept of capital, and found that the 'structure' surrounding the appellant's income-earning capacity is akin to capital, ie of a capital nature, and from that premise concluded that the expenditure is of a capital nature. That, I consider, is begging the issue."

At p 490 he continued:

"Good health, an energetic disposition, initiative, tact, a winning personality, all these and others are qualities which would be correctly described as assets in the production of income, but it does not follow that, for the purposes here in question, they are assets in the same sense as capital assets. As a general proposition it cannot be said that income postulates capital, no matter how the income is produced, so that every factor contributing to its production is to be characterized as a capital asset. . . .

In the absence of any indications to the contrary - and I have found none - the word 'capital' has to be given its ordinary meaning. Broadly speaking and for present purposes, it may be said to connote money and every form of property used or capable of being used in the production of income or wealth. Such a commercial or business sense is the sense in which one expects it to be used in the context here in question, and it is to capital in that sense that, for the purposes of sec 11(2)(b) *bis* at any rate, expenditure is to be related in order to determine whether or not it is expenditure of a capital nature."

Although HOLMES JA dissented from the decision of the majority which was delivered by STEYN CJ, it was on the basis that the expenditure under consideration in that case was for the purpose of defending the goodwill of the taxpayer's professional practice and could therefore be classed as expenditure of a capital nature. I concur with the views so ably expressed by STEYN CJ and consider that expenditure incurred on medical treatment could not be classed as expenditure of a capital nature.

Even if I am wrong in my conclusions concerning s 15(2)(a) of Chapter 181, I consider that paras (a) and (b) of s 16(b) of Chapter 181 prohibit a deduction of the expenditure in question as being incurred by the appellant in the maintenance of herself or as being a domestic or private expense. In *Norman v Golder* [1945] 1 All ER 352 (CA) at 354 LORD GREENE MR said:

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"It is quite impossible to argue that a doctor's bills represent money wholly and exclusively laid out for the purposes of the trade, profession, employment or vocation of the patient. True it is that if you do not get yourself well and so incur expenses to doctors you cannot carry on your trade or profession, and if you do not carry on your trade or profession you will not earn an income, and if you do not earn an income the Revenue will not get any tax. The same thing applies to the food you eat and the clothes you wear. But expenses of that kind are not wholly and exclusively laid out for the purposes of the trade, profession or vocation. They are laid out in part for the advantage and benefit of the taxpayer as a living human being. Para (b) of the rule equally would exclude doctor's bills, because they are, in my opinion, expenses of maintenance of the party, his family, or a sum expended for a domestic or private purpose, distinct from the purpose of the trade or profession."

The above-quoted extract was cited with approval in *Murgatroyd v Evans - Jackson* [1967] 1 All ER 881 (Ch), *Prince v Mapp* [1970] 1 All ER 519 (Ch) and *Mallalieu v Drummond* [1983] 2 All

ER 1095 (HL). In *Murgatroyd's* case *supra* where a trade mark agent claimed that changes for treatment in a private nursing home were deductible PLOWMAN J held that he could not draw any distinction between the case before him and *Norman's* case *supra* where LORD GREENE took the view that the medical expenses in question were excluded from deduction because they were "expenses of maintenance of the party, his family, or a sum expended for a domestic or private purpose". In *Prince's* case *supra* the taxpayer was a draughtsman who played a guitar part-time, partly as a hobby and partly as a profession. He severed a tendon in his little finger which impaired his dexterity with the guitar and so he underwent a tendon-grafting operation. He claimed the expenditure on the operation as a deduction. PENNYCUICK J at p 526 said:

"I do not see how the expense of this operation could on any ordinary use of the words be treated as an expense of maintaining the taxpayer, his family or establishment. On the other hand, the second limb of para (b) is more or less automatically satisfied where para (a) is satisfied, that is to say: a sum which is expended in part for the purposes of a trade and in part for the purposes of a hobby is a sum expended for some other domestic or private purpose distinct from the purposes of the profession."

He emphasized that he based his conclusion on the finding that the expense was incurred to enable the taxpayer to continue to practise his hobby of playing the guitar as well as to exploit his skill professionally by playing it. If the finding

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had been that the taxpayer would not have undergone the operation had he not wished to continue to play the guitar professionally, then he might well have come to a different conclusion. In ITC 833 (1956) 21 SATC 324 (C) HERBSTEIN J was of the view that the words "domestic or private expenses" were used in their ordinary natural signification and not in any technical sense, and that one could do no better than to adopt what was said in Case 50 in (1955) 5 CTBR (NS) 329 at pp 331-2:

"The words 'private or domestic' appearing in s 51 we take to be used in their ordinary natural signification and not in any technical sense. Without attempting an exhaustive definition of either variety of expenditure, losses or outgoings of a private nature we take to mean here losses or outgoings relating solely to the person incurring them as an individual member of society where that society is the society of human being, eg, travelling expenses incurred by a person to and from his place of employment (see particularly 12 CTBR Case 34 (3)). Losses or outgoings of a domestic nature we take to mean here losses or outgoings which relate solely to the house, home, or family organisation, of the person incurring them, eg, expenses paid by a person to a domestic to enable the former to carry on his or her own employment."

In the case before him HERBSTEIN J held that the cost of wages of a domestic servant employed to enable the taxpayer's wife to take employment was expenditure of a domestic nature and so inadmissible as a deduction. He held that the expenditure was laid out "at any rate in part, for the advantage or benefit of the taxpayer as a living human being. . . It was laid out for the purposes of comfortable living" In *Australian Income Tax Law and Practice* by Mannix and Harris vol 2 at p 2018 in the section dealing with private or domestic expenditure the following cases are mentioned;

"The cost of treatment by a hypnotherapist for speech defects was held to be of a private nature notwithstanding that it had been suggested to the employee by his employer [(1981) 25 CTBR, (NS) Case 22].

At a compulsory medical examination an airline pilot was advised to undertake a physical fitness course. It was held in (1981) 25 CTBR (NS) Case 26 that the cost of the course was of a private or domestic nature and was not an allowable deduction . . .

In (1981) 25 CTBR (NS) Case 43 a cine-camera operator engaged in filming news items who sought to improve his standard of work purchased sun glasses and a digital watch, and both items were used only on work

1991 (2) ZLR p173

SMITH J

assignments. His employer gave evidence that sufficient equipment was issued to the taxpayer and the Board held that the expenditure was of a private nature and not deductible. And see 26 CTBR (NS) Case 73 . . .

Expenditure on facilities necessitated by physical disabilities is private expenditure. So also is expenditure on an attendant : (1982) 25 CTBR (NS) Case 96.

A professional dancer successfully claimed deductions for hairdressing for a specific role, leg-waxing to improve the appearance under the theatre lights, and massage treatment from a chiropractor to maintain her physical condition. Expenses associated with evening-wear necessary when meeting guests at official receptions was held to be of a private nature and not an allowable deduction: (1982) 26 CTBR (NS) Case 24 . . .

A primary producer claimed that a hearing aid used by him in connection with his business was a loss or outgoing incurred by the partnership of which he was a member. It was established that the hearing aid was necessary because of the taxpayer's hearing difficulty, but his argument that it was akin to a business radio was rejected on the grounds that the expenditure was of a private nature: (1983) 26 CTBR (NS) Case 82."

In Case 22, which is the first case referred to above, the Chairman of the Board, Mr KP BRADY said at p 166:

- "3. We do not need to consider whether the expenditure came within the phrase 'incurred in gaining or producing the assessable income' for we are clearly of the opinion that it was in any event expenditure of a private nature, and as such excluded from deductibility. Expenditure of a private nature has been described to mean 'losses or outgoings relating solely to the person incurring them as an individual member of society where that society is the society of human beings' (refer (1955) 5 CTBR (NS) Case 50, 329 at 331-332). The fees paid to the hypnotherapist fall within this description, and so represent expenditure of a private nature, which is expressly excluded from deduction by s 51(1).
4. Too much should not be made of our omission to discuss whether the outgoings concerned fall within the first positive limb of the section or not. We would simply repeat that because of the conclusion expressed in para 3 above, the question cannot arise. But we might add a statement from the judgment of MENZIES J in *FCT v Hatchett* (1971) 71 ATC 4, 184 at 4,186; 2 ATR 557 at 560, which seems apposite. His

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SMITH J

Honour said that 'it must be a rare case where an outgoing incurred in gaining assessable income is also an outgoing of a private nature. In most cases the categories would seem to be exclusive. So, for instance, the payment of medical expenses' (or, one might interpolate, of quasi-medical expenses such as are concerned in the present case) 'is of a private nature and is not incurred in gaining assessable income notwithstanding that sickness would prevent the earning of income'."

Similarly in Case 82, which is the last case referred to above, the Chairman of the Board, Mr KP BRADY said at p 557:

- "4. It came out in the evidence that the hearing aid was purchased for A's own use. He informed us that his hearing was so bad that the shearers refused to work unless he wore the hearing aid so that they could communicate with him. He also had a need to communicate with stock agents. He reported that their first question on arriving at his property was, 'have you got your hearing aid?' From our own observations we would agree that communications would have been extremely difficult, if not impossible, had he not been using the hearing aid. We therefore see the hearing aid as a means of ameliorating his disability in the earning of his assessable income.
5. Despite that connection between the outlay of the partnership and A's income, we see the primary cause of the expenditure as being the correction of a disadvantage personal to A. It is in that vital aspect that the hearing aid differs from those items alleged by A to be similar, such as radios, inter-com systems, two-way radios, head-phones and telephones. These latter items, being items of capital, may or may not be deductible by way of depreciation allowances depending upon the use to which they may be put. We see the outlay on the hearing aid as not being 'necessarily incurred in carrying on a business for the purpose of gaining or producing (assessable) income', but as one incurred to help overcome an unfortunate disability suffered by A. We therefore regard the outlay as being of a private nature, and as such specifically excluded from deduction under the terms of s 51(1)."

In *Commissioner for Inland Revenue v Hickson* (1959) 23 SATC 243(A); 1960 (1) SA 746(A) BEYERS JA said at p 750-1

" 'Domestic and private expenses' are, I should say, without attempting an exhaustive definition, expenses pertaining to the household, and to the

1991 (2) ZLR p175

SMITH J

taxpayer's private life as opposed to his life as a trader."

This statement was quoted with approval by WHITAKER QC in ITC 1132 (1969) 31 SATC155 (R).

It appears to me that in all the cases I have referred to, medical expenses incurred to maintain the health or well-being of the taxpayer are regarded as "domestic and private expenses". The only case where an exception might have been made was in *Prince's case supra* where PENNYCUICK J said that if the taxpayer had undergone the tendon-grafting operation solely in order to be able to continue to play the guitar professionally then he might have held that the expenditure was not "domestic and private". Such cases would not be likely to occur very often.

In the light of the above, I have no hesitation in holding that the expenditure incurred by the appellant in connection with the operation to restore the sight in her right eye was a private expense, notwithstanding that blindness would prevent her earning an assessable income, and was therefore a prohibited deduction in terms of s 16(b) of Chapter 181.

The appeal is dismissed.

Atherstone & Cook, appellant's legal practitioners

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

1991 (2) ZLR p176

DW HATTINGH & SONS (PVT) LTD v COLE NO 1991 (2) ZLR 176 (SC)

Court Supreme Court, Harare

Manyarara JA, Korsah JA & Ebrahim JA

Civil appeal

29 July & 23 September 1991

Flynote

Practice and procedure - special plea - *lis alibi pendens* - court has discretion - balance of equities and convenience.

Headnote

Appellant issued summons claiming transfer of a ranch. Having encountered difficulties in service of summons he took the matter no further. Respondent subsequently applied on notice of motion for cancellation of the agreement of sale and ejection. Appellant then filed a plea in abatement of *lis alibi pendens*.

The special plea was dismissed. The appellant thereafter appealed.

Held, although the issue of summons rather than service marked the commencement of proceedings when considering whether an action has been commenced in time, this rule is not immutable for other purposes.

Held, further, that the court has a discretion whether to order or grant a stay of proceedings on the grounds of *lis alibi pendens* having regard to the equities and balance of convenience in the case.

Appeal accordingly dismissed.

Cases cited:

Nxumalo v Minister of Justice & Ors 1961 (3) SA 663 (W)

Marine & Trade Insurance Co Ltd v Reddinger 1966 (2) SA 407(A)

Baldwin v Baldwin 1967 RLR 289 (G)

Bains Motors v Piek 1955 (1) SA 534 (A)

Macape (Pty) Ltd v Executrix Estate Forrester 1991 (1) ZLR 315 (SC)

Young v van Rensburg 1991 (2) ZLR 149 (SC)

1991 (2) ZLR p177

KORSAH JA

D P Carter for the appellant

A P de Bourbon SC for the respondent

Judgment

Korsah JA: This is an appeal against a judgment of MUCHECHETERE J in the High Court Bulawayo in which he granted the respondent's prayer:

- (a) that the agreement of sale between the parties has been validly cancelled;
- (b) that the appellant shall forthwith vacate the farm and that the Registrar of the High Court is authorised forthwith to issue a writ to eject from the farm the appellant and all those claiming under it; and
- (c) that the appellant shall bear the costs of the proceedings.

The uncontroverted facts set out in the respondent's heads of argument from which the following chronology of events is culled are as follows.

On 16 July 1985, the deceased Albertus Lambertus Prinsloo sold Welkom Ranch to the appellant at a price of \$65000 payable as follows:

\$5 000 payable on the 30th September 1985

\$5 000 payable on the 30th September 1986

\$5 000 payable on the 30th September 1987

\$5 000 payable on the 30th September 1988

\$5 000 payable on the 30th September 1989

\$42 000 payable not later than 30 September 1990.

Clause 7 of the said agreement provided that:

"In case of non-payments of any indebtedness on the prescribed date the seller may in his discretion cancel the sale and repossess the property and hold the buyer liable for any losses whatsoever the seller may have incurred and which can be claimed through the courts. All monies paid up to that date will be forfeit to the seller."

Between July 1985 and the end of 1988, the appellant paid a total of \$18 000 in respect of the farm. Such payments were often late and the deceased often had to resort to the use of attorneys in order to enforce payment.

The demise of Albertus Lambertus Prinsloo occurred on 30 July 1989. In accordance with the wish expressed in his last will and testament, his wife, Anna Aletta Prinsloo was appointed to be the executrix testamentary to his estate. On

KORSAH JA

6 October 1989, Albertus Lambertus Prinsloo Jnr, being the son of the deceased and the executrix, describing himself as acting for and on behalf of the executrix of the deceased's estate, wrote to the appellant drawing his attention to the fact that the instalment for 30 September 1989, had not been paid. The appellant denied receipt of this letter even though it was correctly addressed to the *domicilium* stated in the agreement of sale.

On 19 October 1989, a registered letter was dispatched by Prinsloo Jnr, to the *domicilium* of the appellant stipulated in the agreement of sale, giving the appellant until 27 October 1989, to make payment, failing which the agreement would be cancelled. The appellant admits receiving the letter of 19 October 1989, and claims that it immediately forwarded a cheque to the relevant Bank in Bulawayo in settlement of the outstanding instalment of \$5000. However, this cheque was post-dated for 15 November 1989.

Not having received payment by 27 October 1989, Prinsloo Jnr again wrote to the appellant at its *domicilium* on 30 October 1989, cancelling the agreement of sale. On 21 December 1989, Webb, Low & Barry, representing the estate of the late AL Prinsloo wrote to the appellant confirming cancellation of the deed of sale agreement and intimating that that firm of attorneys had been instructed to apply for an order of ejectment. On 12 January 1990, Webb, Low & Barry again wrote to the appellant complaining that the appellant had neither responded to their letter of 21 December 1989, nor taken any steps to vacate Welkom Ranch, and confirmed that they were proceeding with an application for an order of ejectment.

On 16 January 1990, Mr Hattingh, on behalf of the appellant, telephoned the respondent's duly appointed representative, Mr Robert Hepburn Cole, senior partner in Webb, Low & Barry, to inform him that he (Mr Hattingh) had returned from holiday to find the threatening letters from both Prinsloo Jnr and Mr Cole.

On 14 February 1990, the attorney of the appellant wrote to the deceased averring that the appellant had complied with all its obligations in terms of the agreement of sale and has a last payment of \$42000 due on 30 September 1990. In that same letter appears the following paragraph:

"I am advised by my client that you have been advertising the property in South Africa as a swap of the property in Mwenzi for a property in South Africa. As you know this is a clear breach of the Exchange Control Regulations."

1991 (2) ZLR p179

KORSAH JA

On 12 March 1990 the appellant commenced proceedings by summons in case no. HC 889/90 claiming an order that the respondent take all necessary steps to transfer to the appellant the farm called Welkom Ranch against payment of the balance of the purchase prices of \$42 000. Service of the said summons was attempted on the respondent on 16 March 1990, without success, because of Mr Cole's refusal to accept service on the ground that he was not the administrator of the deceased's estate. Up to date that summons resides in the Registry and has yet to be properly served.

Acting in terms of letters of executorship issued by the Master of the Supreme Court in Cape Town, South Africa, Anna Aletta Prinsloo executed a power of attorney on 2 October 1989, in favour of Prinsloo Jnr to generally manage the estate of the deceased and take all such actions that he deems necessary for the benefit of the deceased's estate. Clause 15 of the power of attorney recites that:

"This power of attorney and instruction is also applicable to any assets of the estate which is situate outside the Republic of South Africa."

On 21 December 1989 the respondent received letters of instruction from Prinsloo Jnr with copies of the letters dated 6 September, 19 October and 30 October 1989, aforementioned, addressed to the appellant, enclosed. It was upon the receipt of these instructions that Webb, Low & Barry, as attorneys for Prinsloo Jnr, directed correspondence dated 21 December 1989 and 12 January 1990 to the appellant, confirming cancellation of the deed of sale and subsequently applied for the grant of letters of administration to the respondent.

It was only on 14 July 1990, that the letters of administration of the respondent were signed by the Master. Thus clothed with the legal authority to commence proceedings for and on behalf of the estate, the respondent initiated proceedings by way of notice of motion, as *nomine officii*, against the appellant for the prayer granted by the trial court and with which the appellant is aggrieved and dissatisfied.

To the respondent's application, the appellant filed a plea in abatement of *lis pendens*, contending that he had instituted proceedings by summons in respect of the same subject-matter against the respondent anterior to the commencement of the motion proceedings and that the motion proceedings should be stayed to abide the decision in case no. HC 889/90. The same issue is again raised in this appeal.

The general rule is that the issue of a summons, and not the service of it,

1991 (2) ZLR p180

KORSAH JA

constitutes the commencement of proceedings. This rule may be absolute only where a statute requires a person to institute proceedings within a specific period. In such case, the issue of the summons within the stipulated period, even without the service of it, constitutes a commencement of proceedings to stop the cause of action being prescribed by the effluxion of time. See *Nxumalo v Minister of Justice & Ors* 1961 (3) SA 663 (W); *Marine & Trade Insurance Co Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D-E.

The rule, however, is not otherwise immutable. As LEWIS J said in *Baldwin v Baldwin* 1967 RLR 289 (G) at 190D:

"The court has a discretion to order or refuse a stay of proceedings on the grounds of *lis alibi pendens*, and in the exercise of that discretion it will have regard to the equities and to the balance of convenience in the matter. (See *Michaelson v Loweinstein*, 1905 S 324; *Osman v Hector* 1933 CPD 503; and *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T).)"

In the instant case, clause 7 of the agreement provided for the cancellation of the agreement in

the event of non-payment of an instalment on the agreed date. In order to bring about this situation it was necessary to place the appellant in *mora*. Since by 2 October 1989, Prinsloo Jnr had been granted a power of attorney by the executrix to act as her lawful attorney in all matters pertaining to the deceased estate, the letters of 6 and 19 October 1989, which were sent to the *domicilium* did precisely that. Even if it is accepted that the first of these letters went astray, it is admitted that the second letter was received by the appellant.

Instead of making payment by 27 October 1989 as demanded, the appellant dispatched a post-dated cheque, the date of payment of which was beyond the period given for the making of payment. Whereas by modern commercial practice it has become acceptable for a debtor to effect payment by cheque and for a creditor to accept a cheque in payment of a debt, unless otherwise agreed by the parties a post-dated cheque does not relieve the debtor of the obligation to make payment on due date.

[As Professor Christie points out in his work *Business Law in Zimbabwe* at p 104:

"Unless the contract or (where admissible in evidence) the surrounding circumstances indicate to the contrary, performance must be exact (in *forma specifica*) and equivalent performance (*per acquipollens*), even if equally or more advantageous to the creditor, will not be acceptable.

1991 (2) ZLR p181

KORSAH JA

This principle was well expressed by BEADLE ACJ in *Holmes v Palley* 1975 (2) RLR 98 (A) 105:

'If A agrees to buy a particular white cow from B and B is unable to supply that white cow but is able to supply a black cow, and the evidence proves clearly that the black cow is every bit as good as the white cow, perhaps even a better cow than the white cow, B cannot insist on making A accept the black cow instead of the white cow because, in terms of the contract, it was the white cow which A agreed to buy and not the black cow. It is not for the court to remake the contract of the parties.']

The appellant, having been placed in *mora*, was given up to 27 October 1989 to make good his default. Instead of complying with the demand and sending a cheque which was payable on due date, he dispatched a post-dated cheque to the respondent. This does not constitute compliance with the demand to pay or payment on due date, and the court cannot compel the respondent to accept a payment which does not comply with the agreement between the parties. In the circumstances the appellant cannot rely on payment by a post-dated cheque which at best represents only a hope of being in funds at the date of maturity, in order to avoid the consequences of being placed in *mora*. In any event the cheque was referred to drawer and not met.

With regard to the *lex commissoria* it was clear and unambiguous and there was no acceptable evidence from the appellant that the deceased waived any rights in terms of the agreement, particularly in respect of the due date of payment. There is indeed evidence to the contrary on record that the deceased personally wrote two letters to the appellant to insist on compliance with due date and eventually had to resort to lawyers at one stage to enforce payments. Such evidence does not accord with any waiver of rights under the *lex commissoria* to sustain a belief by the appellant that the late payment of instalments was acceptable to the deceased. As VAN DEN HEEVER JA said in *Baines Motors v Piek* 1955 (1) SA 534 (A) at p 544A:

"A *lex commissoria* was itself a *pactum adjectum*. If agreed upon without further qualifications, it merely resulted in the rescission of the sale, both parties making restitution (Voet 18.3.2. and 3)."

Accordingly there was no defence which could defeat the respondent's right to evict the appellant from the premises. And such right having crystallised earlier than the remedy sought by the appellant in case no. HC 889/90, the balance of convenience lay with proceeding with the notice of motion proceedings, and the

1991 (2) ZLR p182

KORSAH JA

learned trial judge cannot be faulted in the exercise of his discretion to entertain the respondent's application despite the earlier issue of summons in case no. HC 889/90.

It was also contended on behalf of the appellant that the agreement of 7 July 1985 was tainted with illegality because it was alleged that to ensure that the deceased received the proceeds of sale of Welkom Ranch, a director of the appellant who was living in South Africa entered into a collateral agreement with the deceased in South Africa on **10 July 1985** to pay the instalments stipulated in the agreement of **7 July 1985** in rands to the deceased, who was also resident in South Africa at the time; and that he did pay such instalments to the deceased on due date and that as far as could be recollected the last payment was sent to Prinsloo Jnr via his bankers in Nelspruit where he was living at that stage.

In fact, the agreement produced as evidence of this South African transaction was dated 30 September 1985. The amounts stipulated in the collateral agreement produced as evidence of illegality are different from those stated in the agreement which the respondent was seeking to enforce. The amounts in the alleged collateral agreement are stated in rands which are not the equivalent of the same amounts stated in Zimbabwe dollars in the agreement of 7 July. Furthermore, the original allegation of illegality was that Prinsloo Jnr had advertised the farm for a swap of property in South Africa and not that the deceased had sold property in Zimbabwe and accepted payment abroad. As Mr *de Bourbon* rightly pointed out, if the payments in South Africa were to be a form of guarantee it is surprising that the document signed was not simply a guarantee and that moneys were actually paid to the deceased.

The letter from Mare Kruger & Lourens (Attorneys) dated 20 July 1988, written at the instance of the deceased to the appellant reads:

"Dear Sir,

AL Prinsloo: Deed of Sale: Welkom Ranch

We have been instructed by our client as above-mentioned that you have neglected to pay the instalment of \$5000-00 of the purchase price of the above property, which became due and payable on 30th September 1987.

Our client has instructed us to grant you the opportunity to pay the said amount into his account No. 0779962 **at the Beit Bridge** Branch of Standard Bank on or before the 10th August 1988 failing which our client shall exercise his rights as set out in paragraph 7 of the above Deed of Sale."

1991 (2) ZLR p183

KORSAH JA

It was not denied that this letter was received by the appellant.

If the collateral agreement in South Africa had been entered into on either 10 or 30 September 1985, and all payments had been made in rands on due date to the deceased in South Africa as deposed to by Frederick Carel Hattingh, why would the deceased employ the services of an attorney to demand due compliance with the terms of the original agreement or suffer the consequence spelt out in paragraph 7 of that agreement? Why, indeed, would the deceased direct that payment be made into his account at Beit Bridge in conformity with paragraph 4.2 of the original agreement if he has already received payment in rands.

Paragraph 4.2 reads:

"All monies shall be paid into the Account of ALK Prinsloo Standard Bank Beit Bridge, Account No. 077992 and all payments shall be free of any commission, exchange rates or any deduction whatsoever."

I am in agreement with Mr *de Bourbon* that these facts militate against the assertion that there was a collateral illegal agreement entered into by the deceased and the appellant in South Africa.

Even if such an agreement were entered into by the deceased with the appellant, that collateral agreement is not the one which the respondent sought to enforce, and the agreement sought to be enforced is not tainted by any illegality attaching to the collateral agreement entered into in South Africa. See *Macape (Pty) Ltd v Executrix Estate Forrester* 1991 (1) ZLR 315 (SC) and *Young v van Rensburg* 1991 (2) ZLR 149 (SC).

The issue was raised for the first time in the appellant's heads of argument, and contended by Mr *Carter*, that the provisions of the Conventional Penalties Act [*Chapter 42*] do not appear to have been considered by the trial court. He submitted that the granting of the application resulted in a penalty on the appellant which was unfairly out of proportion to the prejudice suffered by the respondent.

He also contended that in cases of this nature, where a *lex commissoria* falls for determination, motion proceedings are an inappropriate vehicle by which to conduct the matter, and that this aspect of the case should have been considered by the trial court in the exercise of its discretion.

Although in the written submissions to the trial court counsel for the appellant

1991 (2) ZLR p184

KORSAH JA

stated that:

"In the absence of reliance upon the *lex commissoria* the breach is not sufficient to justify cancellation of the contract",

the Conventional Penalties Act was not expressly mentioned and the trial court cannot be faulted for paying no heed to it. It could only exercise its discretion on the basis of the issues

canvassed by the parties. In any event Prinsloo Jnr deposed to the fact that he offered "to alleviate matters for the appellant by means of entering into a short term lease agreement to enable them solve their problems apropos foot and mouth disease restrictions etc . . ."

Moreover, if the appellant has suffered any loss it could still bring an action to recover any amount it considers due to it.

In the result the appeal is dismissed with costs.

Manyarara JA: I agree.

Ebrahim JA: I agree.

Ali Ebrahim, appellant's legal practitioners

Webb, Low & Barry, respondent's legal practitioners

1991 (2) ZLR p185

AGRAMAC (PVT) LTD v CHISVO & ANOR 1991 (2) ZLR 185 (SC)

Editor's Note:(2)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

23 September 1991

Flynote

Practice - superior court - representation in - company can only be represented by legal practitioner.

Headnote

A company, being a fictitious person and incapable of appearing in person, can only be represented in the High Court or Supreme Court by a legal practitioner. No postponement allowed to enable such representation to be obtained since appeal had no prospect of success.

Cases cited:

Alino & Anor v Alino; Frylink v Dudhia & Anor HH-181-90 (not reported)

Ramsey v Fuchs Garage (Pty) Ltd 1959 (3) SA 949 (C)

Dormehl's Garage (Pty) Ltd v Magagula 1964 (1) SA 203 (T)

Stuart Nixon Estate Agency (Pty) Ltd v Brigadoon (Pty) Ltd & Anor 1970 (1) SA 97 (N)

Yates Investments (Pty) Ltd v Commissioner for Inland Revenue 1956 (1) SA 364 (A)

A director of appellant in person

First respondent in person

Judgment

McNally JA: Mr and Mrs Chisvo sued Agramac (Pvt) Ltd and the Registrar of Deeds in the High Court seeking an order that the company (which I will call Agramac) should sign all necessary papers to effect transfer of 95 Chiltern Drive, Waterfalls (the property) to them. Failing that, they asked that the Deputy Sheriff be directed and empowered to sign the relevant papers.

1991 (2) ZLR p186

McNALLY JA

The application was made on notice of motion and was subsequently referred to trial. The Registrar of Deeds opted to abide by the decision of the court. On 18 July 1990 an order was made, with costs, substantially as prayed. The company then appealed.

At the appeal hearing the company/appellant was represented by Mr van der Merwe while Mr Chisvo appeared in person and on behalf of his wife.

At the outset I asked Mr van der Merwe whether he (as a non-lawyer) had any authority to appear for the company, and whether in any event a company could appear in the Supreme Court otherwise than through a legal practitioner. Understandably, he was unable to answer the latter question. As to the former, he undertook to lodge a proper resolution by the company authorising him to represent it. It appears that it is a family company, of which he is the moving spirit. The resolution was to be lodged by 4 pm on Friday 27 September. (This has been done.) Compare *Alino & Anor v Alino*; *Frylink v Dudhia & Anor* HH-181-90 (not reported).

The latter question is more difficult. In my view, however, a company can only be represented in the High Court or the Supreme Court by a legal practitioner. See *Ramsey v Fuchs Garage (Pty) Ltd* 1959 (3) SA 949 (C); *Dormehl's Garage (Pty) Ltd v Magagula* 1964 (1) SA 203 (T); and *Stuart Nixon Estate Agency (Pty) Ltd v Brigadoon (Pty) Ltd & Anor* 1970 (1) SA 97 (N) at 102D-E. In *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* 1956 (1) SA 364 (A) the Appellate Division in South Africa refused to hear an individual who claimed to be the sole beneficial shareholder in the appellant company. I am convinced there have been similar decisions in this jurisdiction, though none seem to have been reported. The simple logic is that we allow a person to appear either in person or through a legal practitioner (the position is different in the Magistrate's Court by reason of the provisions of Order 4, Rule 1 of the Rules - SI 290 of 1980). But a fictitious person cannot appear in person. Therefore it must appear through a legal practitioner. Compare the English practice as set out in Order 5 Rule 6(2) of the Rules of the Supreme Court.

Korsah JA: I agree.

Ebrahim JA: I agree.

S v HUSSEY 1991 (2) ZLR 187 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Criminal appeal

14 September 1991

Flynote

Criminal procedure - bail pending trial - factors to be considered - Criminal Procedure and Evidence Act [Chapter 59] s 106(3) - onus on applicant.

Headnote

The appellant was arrested and charged with two counts of theft of a motor vehicle. He applied to a judge in Chambers for bail. Bail was refused and he appeals against that decision.

Held, that in a consideration of an application for bail the judicial officer must take into account the provisions of s 106 (3) of the Criminal Procedure and Evidence Act [Chapter 59].

Held, that an *onus* lies on an applicant to show, on a balance of probabilities, that his admission to bail would not prejudice the interests of justice.

Held, that the fact that an applicant is facing a serious charge is never enough to justify him being held in custody.

Held, that the prosecutor should place before the court cogent reasons, supported by information and evidence in opposing an application for bail.

Held, that the prosecutor had failed to do this and this had led to the learned judge *a quo* misdirecting himself in refusing to grant bail.

Held, that the appellant was entitled to bail subject to terms and conditions.

Cases cited:

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

S v Maratera S-93-91 (not reported)

Attorney-General v Blumears 1991 (1) ZLR 118 (SC)

McNabb v United States 318 US 332

EBRAHIM JA

S v Fourie 1973 (1) SA 100 (D)

J B Colegrave for the appellant

A Guvava for the respondent

Judgment

Ebrahim JA: The appellant is to face trial on a charge of two counts of theft of motor vehicles. He applied to a judge in Chambers for bail. The learned judge refused to grant the appellant bail. He appealed against that decision to this court.

The granting of bail to an offender in this country is governed by the provisions laid down in s 106(3) of the Criminal Procedure and Evidence Act [*Chapter 59*]. These provisions were given consideration by DUMBUTSHENA CJ in the case of *S v Chiadzwa* 1988 (2) ZLR 19 (SC) where, at p 20E-F, he stated:

"In my view, it is not proper to refuse bail just because the court has set down the date of hearing of the case. It does not seem to me that that approach safeguards the liberty of the accused, who must decide whether to attend his trial when out on bail or to remain in custody for reasons beyond his means of control. In the instant case the 19th September 1988 was far away. There may be exceptional cases when the date set down for trial is a few days away and the releasing of the accused would create transport or accommodation problems for him. This reason alone is not good enough. There must be other reasons which, when coupled with a fixed trial date, compel the court to refuse bail."

See also *S v Maratera* S-93-91.

The Attorney-General, who opposed the granting of bail to the petitioner when he applied for bail before a judge in Chambers, did so on the grounds that the appellant was likely to interfere with witnesses and that he was likely to abscond and not face the charges laid against him at his trial. The State also relied on the fact that the charges levelled against the appellant were serious charges and that the appellant has a known association with a convicted criminal.

The learned judge *a quo* gave three reasons for refusing bail. These are -

1. The nature of the crime and the risk of a long term of imprisonment;
2. A well-grounded fear of interference with witnesses re 2 of the 4 counts where investigations are still in progress; and

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EBRAHIM JA

3. His business association with one Raphael Chakanetsa, who has been convicted of the same offence.

In this country the law requires a judge or magistrate who is considering a bail application to take into account the provisions laid down in s 106(3) of the Criminal Procedure and Evidence

Act [Chapter 59]. Subsection (3) reads:

"(3) In any case in which the judge or magistrate has power to admit the accused person to bail, he may refuse to admit such person if he considers it likely that if such person were admitted to bail he would -

- (a) not stand his trial or appear to undergo the preparatory examination or to receive sentence; or
- (b) interfere with the evidence against him; or
- (c) commit an offence;

but nothing in this subsection shall be construed as limiting in any way the power of the judge or magistrate to refuse to admit an accused person to bail for any other reason which to him seems good and sufficient."

Two of the above matters were considered by the judge *a quo*. The third matter, that is, whether if admitted to bail the appellant would "commit an offence", was not considered. It was never part of the State's allegation that the appellant was likely to commit further offences should he be allowed to go free on bail.

It is true that there lies an *onus* on the appellant to show, on a balance of probabilities, that his admission to bail would not prejudice the interests of justice. It is equally true that the factor that the crimes with which the appellant is charged, if he is convicted, would result in him facing a long term of imprisonment. These are factors which the learned judge *a quo* could properly have regard to in determining whether the appellant should have been granted bail. See *S v Chiadzwa supra* and *S v Maratera supra*. A careful scrutiny of both these cases, however, reveals that there were more than bald assertions made by the State that the accuseds were likely to interfere with witnesses who may be called by the State.

In the *Chiadzwa* case *supra* the police made serious allegations against Chiadzwa that he was likely to interfere with witnesses and there was evidence put before the judicial officer to that effect even though the appellant denied it. In the *Maratera* case *supra* there was evidence that there had been an interference with the course of justice and that factor, taken together with other factors, provided sufficient reasons for the refusal of bail.

1991 (2) ZLR p190

EBRAHIM JA

I do not understand that either the *Chiadzwa* or the *Maratera* cases *supra* are authority for the proposition that the mere fact that an offender is facing a serious charge, albeit a very prevalent offence, justifies his incarceration pending his trial. It is clearly a factor that should be taken account of, together with other factors, in determining whether a person should be kept in custody until the time of his trial, but it can never be the only factor to justify keeping alleged offenders in custody. It is a well-established principle of our law that a man is innocent until proved guilty. To disregard this very well-founded principle and to incarcerate an individual purely because he faces a serious offence would be in disregard of this very valid and important principle and weaken respect for the law and the social condemnation of those who break it.

I have also had regard to s 13(2)(e) of the Constitution of Zimbabwe and in particular to what GUBBAY CJ said in that context in the case of *Attorney-General v Blumears* 1991 (1) ZLR 118

(SC). At p 122B-D he made the following observations:

"The standard for deprivation of personal liberty under s 13(2)(e) of the Constitution is 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."

The CHIEF JUSTICE, when he made this observation, was considering that constitutional provision in the context of the arrest and remand of accused persons and the procedures pertaining to that event in this country. It is my view that what he said, as outlined above, applies with equal force when consideration is given to whether an accused person should be granted bail.

I have also had regard to the wise words of JUSTICE FRANKFURTER in *McNabb v United States* 318 US 332 at 343:

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EBRAHIM JA

"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 or judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counselled that safeguards must be provided against dangers of the over zealous 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 participants upon whom the criminal law relies for its vindication."

I shall now consider the merits of this appeal, bearing in mind what I have said above:

From the record of appeal it emerges that the State placed no information before the learned judge *a quo* outlining why it was feared that there was a possibility that the appellant would interfere with investigations. From the record it appears that this possibility was put forward as a bald assertion by counsel representing the State. There were no affidavits put in as was done in the *Chiadzwa* case *supra* indicating on what premise the fear of interference with investigations was based. There was no information, as was the case in the *Maratera* case *supra* that there had been an interference with the course of justice.

The allegation that the possibility of the applicant absconding could not be disregarded was not supported in any way. In any event, against these allegations must be considered the fact that the appellant is aged 57, has a minor child aged three-and-a-half years old and his wife is expecting their second minor child. He is Zimbabwean born and has resided in this country all his life. He owns his own business and has been in custody since 17 July 1991. This fact alone should have afforded the investigating authority time to progress with their investigations.

Granted the appellant is facing serious charges, but, as I have already stated earlier in this

judgment, the mere fact that an accused is facing serious charges does not in itself justify his incarceration pending his trial. It may well be a significant factor to be considered, taken together with other factors, for the conclusion to be drawn that the likelihood of an accused person attempting to escape from a severe sentence of imprisonment cannot be discarded. It is my view that the fact that an accused person is facing a serious charge alone is never enough to justify him being held in custody but this fact, taken together with

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other considerations, may lead a judicial officer properly to refuse the granting of bail.

Here again I would like to make reference to what GUBBAY CJ said in the *Blumears* case *supra*. At p 126C-E he said:

"... I consider that prosecutors would be well advised to be more open and forthright when informing a remand court of the facts relied upon to establish 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 unco-operative 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."

I do not suggest that in approaching the bail application before the judge *a quo* that the State was deliberately concealing or being unco-operative, but it seems to me that by its failure to be open it placed itself at a disadvantage. There was nothing of substance before the judge *a quo* to justify him refusing the appellant bail. There was nothing, save an allegation that he would interfere with investigations and would abscond. In *S v Fourie* 1973 (1) SA 100 at 101G-H MILLER J stated:

"It is a fundamental requirement of the proper administration of justice that an accused person stand trial and if there is any cognizable indication that he will not stand trial if released from custody, the Court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence. (Cf *S v Mhlawli and Others*, 1963 (3) SA 795 (C) at p 796B-C.) But if there are no indications that the accused will not stand trial if released on bail or that he will interfere with witnesses or otherwise hamper or hinder the proper course of justice, he is *prima facie* entitled to and will normally be granted bail."

As I have said earlier, the State, by its failure to place cogent reasons supported by information before the judge *a quo*, put itself at a disadvantage which should have precluded the decision to refuse the granting of bail in this matter. The learned judge *a quo* misdirected himself in refusing to grant bail in this case.

1991 (2) ZLR p193

EBRAHIM JA

It is for these reasons that the appellant was successful in his appeal in this court and was granted bail in the following terms:

- "1. The appellant is granted bail in the sum of \$30 000 (thirty thousand dollars) provided that:
2. The appellant surrenders all his travel documents to the Clerk of the Court, Harare Magistrates' Court;
3. The appellant does not communicate with any of the officials of the Central Vehicle Registry until after the completion of his trial;
4. The appellant does not communicate with any of the officials of the Customs and Excise Department of this country until after the completion of his trial;
5. The appellant remains within the confines of Plot D, Solitude of Alexandra, Marondera until after his trial is completed, save -
 - (i) that he is to report to Marondera Police Station once daily between the hours of 7.00 am and 9.00 am, travelling there and returning by the most direct route;
 - (ii) that he may leave these premises in order to attend his trial wherever that may be held; and
 - (iii) that he may leave these premises when he is required to attend the Magistrates' Court, Harare, for the purposes of remand in connexion with this case.

McNally JA: I agree.

Korsah JA: I agree.

Stumbles & Rowe, appellant's legal practitioners

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MAGAMA & ANOR v TOWN CLERK OF CITY OF HARARE & ANOR 1991 (2) ZLR 194 (HC)

Court **High Court, Harare**

Adam J

Notice of motion

19 & 25 September 1991

Flynote

Urban Councils Act [Chapter 214] - interpretation of s 78(1) - locus standi in judicio - whether nominated election candidates qualify as persons having an enforceable right - completion of general election of councillors - only after polling complete at all stations.

Headnote

The petitioners who were nominated candidates in a municipal election but the elections for whose wards had yet to take place obtained a temporary interdict restraining the respondents from proceeding with the election of a mayor, deputy mayor and chairpersons of committees of the city council on the grounds that to do so before the election of all councillors had taken place would contravene s 78(1)(b) of the Urban Council Act. The confirmation of the rule was

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opposed on the grounds that s 78(1) could be interpreted as meaning that all councillors need not have been elected before the election of the mayor, deputy mayor and chairpersons but merely that a series of elections must have taken place despite special vacancies remaining and further that petitioners had no *locus standi in judicio* to institute the proceedings.

Held, that for the purposes of s 78(1) of the Urban Councils Act [Chapter 214] a general election has not taken place until polling has taken place at all stations.

Held, further that the election of mayor, deputy mayor and the appointment of chairpersons of committees cannot take place until all councillors have been elected.

Held, further that nominated candidates have *locus standi in judicio* in proceedings

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of this nature by virtue of the harm that they might suffer if the election of mayor, deputy mayor and the appointment of chairpersons of committees were to take place before the completion of polling in their wards.

Cases cited:

Patz v Green & Co 1907 TS 427

Roodepoort - Maraisburg Town Council v Eastern Properties (Pty) Ltd 1933 AD 87

Salisbury Bottling Co (Pvt) Ltd & Ors v Central African Bottling Co (Pvt) Ltd 1958 R&N 17; 1958 (1) SA 750 (FSC)

CD of Birnam (Suburban) (Pty) Ltd & Ors v Falcon Investments Ltd 1973 (3) SA 838 (W)

Charlestown Town Board & Anor v Vilakazi 1951 (3) SA 361 (A)

G C Mararike for the petitioners

M J Gillespie for first respondent

Judgment

Adam J: The petitioners were granted a rule *nisi* on 29 August 1991 by this court, which rule operated as a temporary interdict restraining the first and second respondents from proceeding with the election to the office of the mayor, the deputy mayor and chairpersons of committees for the Harare City Council. The petitioners aver that on 2 August 1991 this court directed that municipal elections for Ward 31 and Ward 32 be postponed until the voters' rolls had been corrected and that the petitioners are standing as independent candidates for the two wards. They indicate that on 21 August 1991 their legal practitioners wrote to the first respondent informing him that the election of the mayor and the deputy mayor would be in contravention of s 78(1)(b) of the Urban Councils Act [Chapter 214] which the petitioners stated provided that they could only be elected after the general election of councillors. The petitioners maintain they sought clarification from the first respondent about a notice issued advising councillors that

there would be elections to elect the mayor, the deputy mayor and chairpersons of committees on 29 August 1991 and they were informed that the second respondent in terms of the Urban Councils Act had written on 27 August 1991 to the first respondent stating that they could proceed with the elections notwithstanding that the election had yet to be held in Ward 31 and Ward 32. The petitioners aver that to proceed with the elections is extremely prejudicial to the petitioners. The petitioners state that the communication from the second respondent whilst conceding that elections have not yet been completed brazenly flouts the law.

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I should point out that the second respondent did not file a notice of opposition nor an opposing affidavit. But the first respondent in his opposing affidavit agrees that the second respondent had indeed written to him on 27 August 1991 but disputes that the petitioners sought clarification from him. He further indicates that neither petitioner has intimated to him that he intends, if elected as councillor, to contest for election as the mayor or the deputy mayor. He takes issue with the petitioners that there is nothing in law to prevent the holding of elections for the mayor, the deputy mayor and the chairpersons of committees. He avers that at present the administration of the Harare City Council is effectively paralysed as the bulk of that daily administration is done through various committees which, due to the issue of the rule *nisi*, have not yet been formed. He mentions that this is causing grave difficulties including concern in the recovery of revenue.

In his answering affidavit the first petitioner indicates that it is sufficient, as his legal practitioner's letter of 21 August 1991 addressed to the first respondent stated, that no elections be held because it was potentially prejudicial to the petitioners who, no doubt, had an obvious interest in the matter. He maintained that to carry out the elections was a flagrant contravention of the clear provisions of the legislation.

In the petitioners' heads of argument their legal practitioner submitted that the petitioners have established a clear right. Mr *Mararike* argues that to conceive of s 78(1)(a) of the Urban Councils Act as read with s 2 as susceptible to any interpretation other than the literal meaning of it is to stretch the canons of interpretation.

In his heads of argument the first respondent's legal practitioner submits that the grounds for an applicant seeking an interdict are those set out in *Setlogelo v Setlogelo* 1914 AD 221 at 227. As for clear right, the questions to be determined are whether it affords the petitioners any cause of action and whether the provisions of the legislation are as claimed by the petitioners. Mr *Gillespie* argues that "after the general election of councillors" in s 78(1)(a) is ambiguous and susceptible of meaning either after councillors have been elected in all wards or after the series of election held on the first Wednesday and Saturday (or Sunday) in August. He suggests that the latter interpretation is to be preferred because the elections are over although special vacancies remain, because the postponement of polling at a station does not mean the postponement of the general election (s 44 of the Act) and because it is more conducive to a smooth transition and thus more consistent with the legislative intent. Mr *Gillespie* also submits that in the event that it be held that the general elections are not over until

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after all polling at all stations, even those where polling is lawfully adjourned then a mayor and the deputy mayor may not be elected but committees may still function and a chairman be elected (ss 42(2)(b), 72(1), (3), (4) and (5) and 78(1)) and that it is a dereliction of duty for councillors to fail to meet to consider these matters.

[The learned judge then dealt with the principles on which a temporary interdict is granted and continued:]

Looking at the Urban Council Act, s 2 defines "general election" as meaning a general election of councillors referred to in s 38(2). Section 38(2) is as follows:

"(2) . . . a general election of councillors shall be held in every fourth year -

(a) within the areas that have been declared to be specified areas in terms of section nineteen, on -

(i) the first Saturday or Sunday in August; or

(ii) the first Saturday and the immediately following Sunday whichever the council may resolve;

(b) within every other part of the council area, on the first Wednesday in August."

Section 78 states:

"78. (1) At . . . the first meeting held -

(a) after the general election of councillors, . . .

the councillors present at that meeting shall elect -

(i) in the case of a municipal council, one councillor to be mayor and thereafter another councillor to be deputy mayor; . . .

(2) A person elected in terms of subsection (1) shall forthwith enter upon his office and, . . . shall hold office until the election of his successor in office."

It appears that a councillor retires from office on polling day (s 40(10)) and a councillor shall assume office on the day following polling day (s 42(2)). Section 40(9) allows when a nominated candidate dies (after close of nomination and before or after poll) to declare that election to be void and to treat that as a special vacancy. On the other hand s 50(1) allows the adjournment of the poll due to interruption or disruption by any public violence to the following day and if necessary, may adjourn until there is no further such interruption or disruption and to continue the poll thereafter. Section 50(2) states that if no poll

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takes place for any other reason than public violence, the poll shall be adjourned until the same day the following week. Section 50(3) permits the councillor that would have retired to continue in office until the day following that on which the poll is held. Section 60(1) states that council

shall meet for the dispatch of business as it thinks fit. Section 61(1) provides that one-third of the total membership of a council together with one other councillor shall be the quorum at a council meeting. Section 72(1) permits appointment of a finance and any other committee for such general or specific purposes as the council considers to be necessary or desirable and may at that time appoint a chairman and vice-chairman of those committees. Section 72(2) states that such committees shall have not less than three members. Section 72(4) provides that a committee member ceases to be a member after the general election held for the council or if he ceases to be a councillor.

It was forcefully submitted on behalf of the first respondent that the legislation does not give the petitioners a cause of action and therefore no *locus standi*. It was stressed that a statutory prohibition or obligation may be interpreted as providing an enforceable right of action depending on whether it is enacted in favour of a particular person or class of person as against the public interest generally and only where the availability of the remedy arises expressly or by necessary intendment in the legislation - *Patz v Greene & Co* 1907 TS 427 at 433; *Roodeport - Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 87 at 96 and *Salisbury Bottling Co (Pvt) Ltd & Ors v Central African Bottling Co (Pvt) Ltd* 1958 R&N 17.

In *CD of Birnam Ltd & Ors v Falcon Investments* 1973 (3) SA 838 (W) at 844 MARGO J said:

"... the applicants' *locus standi* must be tested against the principle stated in *Patz v Greene*, 1907 TS 427, per SOLOMON J at p 433 namely -

'Everyone has the right . . . to protect himself by appeal to a Court of law against loss caused to him by doing of an act by another, which is expressly prohibited by law. Where the act is expressly prohibited in the interests of a particular person, the Court will presume that he is damnified, but where the prohibition is in the public interest, then any member of the public who can prove that he has sustained damage is entitled to his remedy.'

In *Roodeport-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 87 at p 96, the first part of this statement of law was amplified. It is not necessary that the act should be expressly prohibited in the interests

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of the particular person who claims the interdict. It is enough if the prohibition is in the interests of a class of person of which he is a member, and if the prohibition is impliedly in the interests of such class."

With the foregoing I turn to examine the status of the petitioners. But before doing so it is clear from Mr *Gillespie's* submission that the phrase "after the general election of councillors" is susceptible to two meanings, one of which being after councillors have been elected in all wards. This meaning Mr *Gillespie* suggests postulates an unworkable transitional period between the commencement and termination of polling where polling extends beyond the prescribed date and points out that the mayor continues in office until his successor's election, while a councillor enters his office the day after polling which results in that a mayor may therefore lose his seat on the council but still remain a mayor for a period despite another occupying his council seat. He asserts that this period should surely be as short as possible. He argues that this interpretation leads one to the conclusion that no councillors assume office until after the last polling is complete. Mr *Gillespie* states that there is no provision for a "lame duck" administration. He maintains that a true interpretation of the Act discloses that a general

election is that process which occurs on the specified polling day and is not supposed to cover adventitious (and extended) delays in polling at individual stations. He submits that by looking at it in this way the newly elected councillors can get on with the job of running the city and electing a mayor but leaving any delay or dereliction to be dealt with by the Minister under s 262(1) of the Act.

Section 262(1) in the marginal notes declares "Correction of errors and omission" and reads as follows:

"262. (1) If any act or thing required to be done by or in terms of this Act is omitted to be done or is not done in the manner or within the time so required, the Minister may order all such steps to be taken as in his opinion are necessary or desirable to rectify such act or thing, and the said 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:

Provided that no person shall be deprived in terms of this section of any right which he may have acquired before the Minister makes an order in terms of this section."

Mr *Gillespie* does not elaborate how the Minister could deal with delay as a result of an adjourned poll or dereliction when there are express statutory

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provisions that apply which would assist the petitioner. Nor does he elucidate the stage during the series of elections held on the first Wednesday and on the the first Saturday (or Sunday) or on the first Saturday and Sunday in August that it can be said a general election has taken place. As is clear from the Urban Council Act a quorum for the council to function is a membership of one-third plus one councillor of all the councillors. Would series of elections held on the first Wednesday and on the first Saturday or Sunday, or on the first Saturday and Sunday in August which results in the number of councillors to constitute a quorum be sufficient to declare that a general election has taken place or what higher percentage of councillors have to be elected before it can be said that a general election has taken place. I would seem to me that whatever number of councillors above the quorum is selected that would be arbitrary. In the instant case to leave it at the number of councillors presently elected without councillors for Ward 31 and Ward 32 is also arbitrary.

I should point out that Mr *Gillespie* does concede that the alternative interpretation that a general election is not over until after all polling at all stations does not paralyse the council from functioning as the outgoing mayor continues in office and the council is free to appoint committees.

There are also many disadvantages in adopting the solution suggested by Mr *Gillespie*. For example polling in specified areas can be held on the first Saturday or Sunday in August or on the first Saturday and Sunday in August and in every other part of council area on the first Wednesday in August. If there are sufficient elected councillors from the specified area or for that matter from the other part of council area to constitute a quorum, it would seem on the interpretation being relied upon by the first respondent, such an elected council could, if it so desired, elect the mayor and deputy mayor, appoint committees and chairpersons of these

committees either on the Tuesday where the polling was on the first Saturday or Sunday or the first Saturday and Sunday in August, or on the Friday where the polling was on the first Wednesday in August (depending whether the first Saturday or Sunday was earlier in the month of August than the first Wednesday of that month of August) without awaiting the poll either on the first Wednesday or on the first Saturday or Sunday or first Saturday or Sunday as the case may be. This state of affairs would prevail even where a nominated candidate was unopposed as such a person only becomes a councillor the day following polling day. Surely the legislature could not have intended that such persons would be deprived of the right to stand for mayor, deputy mayor or of the right to be appointed to committees and as chairpersons of such committees.

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ADAM J

In my view the disadvantages of this approach far outweigh the so-called "unworkable transitional period". The alternative interpretation mentioned by Mr *Gillespie* does not seem to have the effect of infringing upon any persons' right nor working prejudicially to the functioning of the council. The presently newly-elected councillors have been council members since the day following the polling day and as the mayor and deputy mayor continue in office until their successors are elected pursuant to ss 60 and 72 of the Act, a meeting of the council could be held to despatch business and to appoint committees and their chairpersons. Hardly an unworkable situation.

Furthermore, as SCHREINER JA in *Charlestown Town Board & Anor v Vilakazi* 1951 (3) SA 361 (A) at 370D observes:

"... such enactments too must be dealt with in the light each of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other."

The phrase "after the general election of councillors", therefore, does not have the meaning ascribed to it by Mr *Gillespie*. For purposes of this case I hold that a general election of councillors has not taken place for purposes of s 78(1) and that the elections for Ward 31 and Ward 32 are not those for special vacancies. It follows that the first meeting of the council after the general election of councillors cannot be held in order to elect the mayor and the deputy mayor.

Looking at the issue of the petitioners' *locus standi*, it could not be disputed that had all the nominated candidates been cited as petitioners in this matter that they would have qualified as belonging to a particular class of persons who would "have an enforceable right". As MARGO J observed it was enough if he were a member of that particular class. The petitioners certainly fall into that category.

Turning to the interdict, the petitioners have shown that they do have a *prima facie* right though open to some doubt. They have established that there is well-grounded or reasonable apprehension of irreparable harm if an election for the mayor and the deputy mayor were to take place prior to the polling for Ward 31 and 32 as this would deprive the successful candidates from participating in that election. The candidates in Ward 31 and Ward 32 do not have a clear right but do have a *prima facie* right. A mayoralty election prior to the polling for

Ward 31 and Ward 32 would not only be prejudicial, but also such elections would have not been in accordance with the provisions of s 78(1) of the Act. I am also satisfied that the balance of convenience favours the petitioners in that the

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ADAM J

Harare City Council is not hampered in any way in the carrying out of its responsibilities under the Act, having a mayor and a deputy mayor and being able to hold meetings of the council and being able to appoint committees. In short, the Harare City Council is not prejudiced in any manner other than not being able to conduct the election of a mayor and a deputy mayor until the completion of elections in Ward 31 and Ward 32. The petitioners have also shown that they do not have an alternative satisfactory remedy or an adequate ordinary remedy. It can hardly be maintained that an approach to the Minister in terms of s 262(1) of the Act would give the petitioner such a remedy, more so as according to the papers filed in this matter the Minister had previously directed the first respondent that elections for the mayor and deputy mayor be conducted by the Harare City Council. Further, there is no certainty from the provisions of s 262(1) that the Minister could in any case provide the petitioners a satisfactory remedy.

[The learned judge then dealt with other issues not relevant to this report.]

Accordingly it is ordered -

That the first and second respondents be and are hereby interdicted from proceeding with the elections of office of the mayor and deputy mayor pending the completion of the election of councillors to Ward 31 and Ward 32.

That this order does not prevent the Harare City Council pursuant to the provisions of ss 60 and 72 of the Urban Councils Act from holding meetings or appointing committees whose term shall only be until the completion of the election of councillors to Ward 31 and Ward 32.

That this order be discharged upon the completion of the election of councillors to Ward 31 and Ward 32.

That the first respondent pay the costs of this application.

Mararike & Partners, petitioners' legal practitioners

Honey & Blanckenberg, first respondent's legal practitioners

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MAYHEW v ALCOCK NO 1991 (2) ZLR 203 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

16 & 30 September 1991

Flynote

Company law - carrying on business of company in a fraudulent manner or for a fraudulent purpose - personal liability of directors.

Companies Act [Chapter 190] - s 281 - application and effect.

Headnote

The appellant was a director of a company which was the subject of a winding-up order. The liquidator sued the appellant for a declaration in terms of s 281 of the Companies Act [Chapter 190] to render him personally liable for certain debts of the company, on the basis that the appellant had conducted the business of the company for a fraudulent purpose and with intent to defraud creditors. The High Court found in favour of the respondent, see 1990 (2) ZLR 346 (HC). The appellant appealed.

Held, to render a director personally liable there must be at least an element of dishonesty in the manner that he carried on the business of the company.

Held, on the facts, that the respondent had shown that certain transactions were undertaken for a fraudulent purpose, and thus the decision to render the appellant personally liable was correct.

Cases cited:

Young v van Rensburg 1991 (2) ZLR 149 (SC)

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

Gordon NO and Rennie NO v Standard Merchant Bank Ltd & Ors 1984 (2) SA 519 (C)

Dorklerk Investments (Pty) Ltd v Bhyat 1980 (1) SA 443 (W)

Re Sarflax Ltd [1979] Ch 592; [1979] 1 All ER 529 (Ch)

1991 (2) ZLR p204

McNALLY JA

Howard v Herrigel & Anor 1991 (2) SA 660 (A)

R v Grantham [1984] QB 675; [1984] 3 All ER 166 (CA)

A P de Bourbon SC for the appellant

E W W Morris for the respondent

Judgment

McNally JA: This case raised for the first time in this jurisdiction the question of the meaning and effect of s 281 of the Companies Act [*Chapter 190*]. The section was introduced first as s 275 of the Companies Act 1951 (47 of 1951) and has remained unchanged since then. It was presumably modelled on the equivalent provision of the English law. Both in England and in South Africa the equivalent sections (332 in England, 424 in South Africa) have been amended and updated. Our section has not. Subsection (1) reads as follows:

"281. (1) If in the course of a winding up or the judicial management of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the Master, or the liquidator or judicial manager or any creditor of or contributory to the company, may, if it thinks proper so to do, declare that any of the directors, whether past or present, of the company or any other persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

I think two points may be made at the outset: The first is that the section comes into play in three situations, namely, where "any business of the company has been carried on" -

1. with intent to defraud creditors of the company;
2. with intent to defraud creditors of any other person; or
3. for any fraudulent purpose.

So, clearly, as Mr *Morris* put it, the genus is "fraud" rather than "creditors". Without wishing to define the phrase "for any fraudulent purpose", I can say that the purpose need not be to defraud existing creditors.

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The second point is that, in the phrase "any business of the company has been carried on . . . for any fraudulent purpose", the words "any business" mean "any business transaction" and the words "carried on" mean simply "transacted". Mr *de Bourbon*, for the appellant, sought to convince us that "carrying on business" is a continuous process and that the phrase cannot be used of an isolated transaction. In the proper context that is quite right. See *Young v van Rensburg* 1991 (2) ZLR 149 (SC). But in this context the legislator is not speaking in the present or past continuous tense. There is no reason to go behind the ordinary meaning of the words. The use of the word "any" before "business" instead of "the" indicates that a single transaction undertaken in pursuance of any of its objectives for a fraudulent purpose is covered by the section.

Having made those general observations, I return to the facts of the case:

Mr Alfred Mayhew was one of two directors of a company called Cool Air Zimbabwe (Pvt) Ltd. He owned 50% of the paid-up shares in the company. The other 50% was owned by one Gary Vincent Mayhew who was also a director. His relationship to Alfred Mayhew is not stated. Although Alfred Mayhew is not formally described as managing director he clearly played the

part of managing director in the major transaction which is the main subject of this case.

It is also relevant to note that a sister company of Cool Air Zimbabwe (Pvt) Ltd exists. That company is called Cool Electro-Plating (Pvt) Ltd.

I will speak of the various relevant parties as "Alfred Mayhew", "the liquidator", "Cool Air", and "the sister company" respectively.

On 25 January 1989 Cool Air went into provisional liquidation. On 22 February 1989 a final order was granted. Liquidation was at the instance of the company itself. The liquidator found that at the date of liquidation Cool Air had no assets, apart from certain disputed legal claims which he decided not to pursue. It had creditors estimated to be claiming some \$78 037,09.

Investigation by the liquidator revealed two sets of transactions by Cool Air which seemed to him to be *prima facie* such as to fall within the scope of s 281(1):

1. AIR TICKETS

He found that Cool Air had purchased on credit (and had not paid for) air tickets worth over \$15 000, which had been used by various persons as follows -

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Mr AW Mayhew	Harare-Lusaka-Gaborone-return
Mr G Mayhew	London-Geneva-London-Los Angeles-Harare
Mrs L Ellis (daughter)	Harare-Gaborone-Harare
Miss CR Mayhew	London-Harare
Mr and Mrs Mayhew	Harare-London-Toronto- Calgary-Toronto-London-Harare
Mrs Ellis (daughter)	Harare-Gaborone.

The tickets were for flights between June and October 1987, and the liquidator contended that they could not have been for official business since neither Mrs Ellis nor Miss Mayhew nor Mrs Mayhew were company employees. Nor was there any evidence in the books to show that the journeys were undertaken on behalf of Cool Air.

In reply Alfred Mayhew said that his wife, Mrs Mayhew, did in fact do the books of Cool Air as well as a lot of secretarial work. She was not paid because it was "a family business". As for the rest, he said their trips were made "to negotiate the purchase of compressors relating to refrigeration, and to fulfil contracts for work done by the company in liquidation". In particular he said:

"Mrs Ellis is my daughter. She made the trips referred to in Annexure 'C' for the company. She brought into the

country controls and piping for the company. She used her own currency to purchase the items referred to.

Mrs Mayhew accompanied me on a business trip in September, 1987. The reason for this trip was to examine the potential for a joint venture scheme for the company with Canadian Aid.

Miss Mayhew was at the time living in Geneva. She had brought in thermostats for the company. The company resolved to pay her air fare in payment for the thermostats.

All the trips were taken during this period because the company was facing severe shortages in spare parts and components. As a result the company was losing work and in order to revamp the company trips were made for barter deals and to arrange joint venture schemes. Business was in fact conducted with these countries and the statement far flung cities is quite incorrect."

These allegations are attacked as being bald and unsatisfactory. Indeed they are. The liquidator comments that there is nothing in the books of Cool Air to bear

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out these allegations. The learned trial judge came to the conclusion that there was no proof that these transactions involved a fraud on creditors, but that that aspect of the company's business was knowingly carried on for a fraudulent purpose. He was satisfied on a balance of probabilities that Alfred Mayhew was not acting in the interests or for the benefit of the company, but in his personal interest, when he committed Cool Air to pay for these air tickets.

2. THE SALE OF COOL AIR'S IMMOVABLE PROPERTY

Cool Air sold its premises to Turnall Holdings (Pvt) Ltd in May 1987 for \$220 000. However, the liquidator's research revealed quite beyond doubt that Alfred Mayhew had used the transaction to syphon off \$100 000 of Cool Air's money to its sister company.

This is how it was done: Turnalls wanted to buy the premises, and also to buy certain other movable assets from the sister company. Alfred Mayhew negotiated both deals, representing both Cool Air and the sister company (whose directors were again himself and G V Mayhew). Turnalls' offer was \$320 000 for the premises of Cool Air, \$100 000 for the movable assets of the sister company, and \$80 000 for certain chemicals of the sister company.

The evidence was that Alfred Mayhew telephoned Mr Plunkett of Turnalls and asked him to amend the values of the individual items so as to reduce the price for the premises by \$100 000 and to increase the price for the movable assets by the same amount. Mr Plunkett agreed. It seemed to make no difference to his company since the total amount remained the same. In due course the assets were purchased. A cheque for \$220 000 was paid to Cool Air. A cheque for \$280 000 was paid to the sister company.

It will be apparent that the result was to pay Cool Air \$100 000 less than it would otherwise have received, and to pay the sister company \$100 000 more. The evidence was that \$320 000 was a reasonable price for the premises. Turnalls were willing to pay that price. Mr Alfred Mayhew said in his affidavit that the two companies were not sister companies. He made no comment on the fact that they had the same directors and similar names. He claimed that it

was not he who suggested the reduction in the price of the premises but Mr Plunkett.

The reason, he said, was that certain building operations were not completed. This totally fails to explain why the price of the movable assets was increased by an identical amount.

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McNALLY JA

This is the kind of situation in which a judge may properly disbelieve a written statement on oath without calling for *viva voce* evidence. That is what MR JUSTICE REYNOLDS did. He was absolutely correct. The court was not being asked to decide credibility as between conflicting pieces of paper (see my remarks in *Public Service Commission & Anor v Tsomondo* 1988 (1) ZLR 427 (SC) at 441E). It was a situation where the court was being asked to believe something which could not be true. We are required to be cautious, not credulous.

I now propose to look at the law as to the application of s 281 of the Companies Act to those facts:

THE LAW AS TO THE APPLICATION OF SECTION 281

Basically, as REYNOLDS J said, the purpose of the provision is:

"... to render personally liable any person who is knowingly a party to the carrying on of any business of a company in a ... fraudulent manner" (*per* DE KOK J in *Gordon NO and Rennie NO v Standard Merchant Bank Ltd & Ors* 1984 (2) SA 519 at 528G).

It is not sufficient to prove an intent to prefer one creditor over another - see *Dorklerk Investments (Pty) Ltd v Bhyat* 1980 (1) SA 443 (W) at 447 and *In re Sarflax Ltd* [1979] 1 All ER 529 at 545. And, although the case turned on the question of "recklessness", which is not part of our statute, the decision in *Howard v Herrigel & Anor NO* 1991 (2) SA 660 is useful because of its reference to the liquidator's right to choose between motion proceedings and action (664E). The respondent must establish at least some element of dishonesty - see *R v Grantham* [1984] 3 All ER 166 (CA) at 171.

THE APPLICATION OF THE LAW TO THE FACTS

His Lordship found, in regard to the air tickets, that there was no fraud on creditors. Certainly there is no evidence that creditors were prejudiced. His Lordship then went on to consider whether the facts established "any fraudulent purpose". He asked whether the journeys undertaken "were indeed for the benefit of the company, or whether they were for the personal benefit of the respondent and his family". He concluded, on a balance of probabilities, that Alfred Mayhew was acting "for personal benefit at the company's expense".

While I have much sympathy with that conclusion on a balance of probabilities,

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I am not certain, with respect, that that was the right test. When one is dealing with motion

proceedings, as I said earlier in this judgment, one must be wary of deciding matters on the basis of the relative credibility of pieces of paper. I am doubtful whether one can reject as untrue, without *viva voce* evidence, the statements made by Alfred Mayhew in his affidavit. Moreover three of the six journeys were undertaken by Alfred and Mr G Mayhew, the two directors of the company. I am doubtful that it is possible, on affidavit evidence alone, to reject his explanations that the journeys were for the benefit for the company. Had Alfred Mayhew been examined at the second meeting of creditors the position might well have been different. He would have had difficult questions to answer.

Speaking for myself, I would prefer to leave this matter open. As will become apparent, I agree with the main conclusion of the learned judge on the second leg of the argument, and thus with the order he made. It is therefore unnecessary to decide whether or not he was right on the question of the air tickets.

In relation to the \$100 000, the learned judge found that this transaction "was carried on with the intention to defraud creditors of the company and for a fraudulent purpose".

I do not think the first part of this finding can be supported. The liquidator's report states: "The monies received from the sale of the immovable property was (*sic*) used to pay off creditors outstanding at that time". So there were no existing creditors to be defrauded or prejudiced at the time the \$100 000 was "syphoned off" to the sister company. All creditors could be paid in full, and were paid in full, out of the reduced amount of \$220 000 received from the sale of the premises.

But however one defines the general term "fraudulent purpose" (and I do not seek to do so), it seems to me to be clear that this transaction falls within the definition. The company itself was caused gratuitously to suffer a loss of \$100 000, to the unearned benefit of its sister company. The Fiscus was potentially prejudiced in regard to Capital Gains Tax on the immovable property. Potential creditors were put at risk in dealing with a company for a further two years which had no premises from which to operate, and which was gratuitously impoverished to the extent of \$100 000. As things turned out, they were indeed prejudiced. See the reference to "milking a company of funds" at p 1192 of *Palmer's Company Law* 23 ed.

While we cannot say exactly why Alfred Mayhew chose gratuitously to reduce

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the assets of Cool Air, we can say that his explanation of his motive is unacceptable. In all those circumstances, I am satisfied that REYNOLDS J was correct in holding that the transaction must have been undertaken, and therefore was undertaken, for a fraudulent purpose.

In a proper case it might well be appropriate for the court to limit the extent to which the director concerned should be personally responsible. But in this case the amount owing to creditors - some \$78 000 - is less than the amount of the fraudulent transaction. So there is no need for any limitation.

I would dismiss the appeal with costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

Ali Ebrahim, appellant's legal practitioner

Atherstone & Cook, respondent's legal practitioners

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CHIBANDA v HEWLETT 1991 (2) ZLR 211 (HC)

Court **High Court, Harare**

Sandura JP

Opposed motion

4 July & 9 October 1991

Flynote

Landlord and tenant - option to renew lease - tacit relocation - renewal thereby of original terms and conditions incident to relationship of landlord and tenant but not those so onerous that preclude automatic renewal unless expressly undertaken - termination of lease on tacit relocation.

Commercial Premises (Rent) Regulations 1983 - whether option granted by expired lease preserved by s 23.

Headnote

In 1982 the applicant let certain business premises to the respondent for a period of five years with an option to renew the lease for a further five years. The first five-year period expired on 17 March 1987 but the respondent remained in occupation, continuing to pay rent as he had previously done.

On 21 September 1987 the applicant wrote to the respondent indicating that, as the respondent had not exercised his option to renew the lease, he had become a monthly tenant. Thereafter on 8 October 1987 the applicant wrote to the respondent and purported to exercise his option to renew the lease for a further five-year period. To this the applicant did not respond but the rental paid by the applicant was subsequently increased by agreement.

The learned judge having rejected the respondent's contention that he had verbally exercised his right to renew before the expiry of the initial five-year period, in an application for the respondent's ejectment,

Held, that a lessee who wishes to exercise his option to renew (the lease) must communicate his acceptance of the offer to the lessor.

Held, further, that the conduct of the parties in continuing the previous

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arrangement, *viz* occupation of the premises by the respondent and acceptance of the rental by the applicant, amounted to a tacit relocation.

Held, further, that where a relocation occurs there is a presumption that the property is relet at the same rent and that those provisions which are incidental to the relationship of landlord and tenant are renewed and that an option to renew the original lease is a provision incidental to the relationship of landlord and tenant.

Held, further, however, that it does not automatically follow that an option to renew would become a term of the tacit lease and that in the case of conditions which are harsh or onerous, a party will not be taken as having submitted thereto in the absence of express agreement, an option to renew being an onerous condition in this regard.

Held, further, that where a tacit relocation has occurred, either party may terminate the relationship on reasonable notice.

Held, further, that, whereas the respondent had become a statutory tenant by virtue of the provisions of the Commercial Premises (Rent) Regulations 1983, s 23 of which provides *inter alia* that a lessee who retains occupation by virtue of s 22 shall be entitled to the benefit of all the terms and conditions of the original contract of lease in so far as the same are consistent with the regulations, s 22 must be restrictively interpreted to mean those terms and conditions incident to the beneficial use and enjoyment of the tenant's statutory right of occupation and thus the respondent's original right of renewal was not thereby preserved.

Held, further, that the applicant having shown good and sufficient grounds for the respondent's ejection, the applicant was entitled to succeed.

Cases cited:

Bowhay v Ward 1903 TS 772

Cope v Zeman & Anor 1966 (1) SA 431 (SWA)

Doll House Refreshments (Pty) Ltd v O' Shea & Ors 1957 (1) SA 345 (T)

Levy v Banket Holdings (Pvt) Ltd 1956 (3) SA 558 (FSC); 1956 R&N 98 (FSC)

Rhodie v Curitz 1983 (2) SA 431 (C)

A J Dyke for the applicant

G S Wernberg for the respondent

Judgment

Sandura JP: This is an application for the eviction of the respondent from certain business premises at Kwe Kwe. It is opposed by the respondent.

The facts of this case are these. At the beginning of 1982 the applicant leased

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his business premises at Kwe Kwe to the respondent for a period of five years with effect from 17 March 1982 at a rental of \$250 per month. The lease agreement provided that the respondent would have the option to renew the lease for another five years and thereafter for a further period of five years subject to an escalation of rental as agreed between the parties for the final five year period of the said lease. The initial five-year period of the lease expired on 17 March 1987 by which time the respondent had not exercised the option to renew the lease for a further period of five years. Nevertheless, the respondent continued occupying the premises and paying rent to the applicant as he had done before the expiration of the lease. On 21 September 1987 the applicant sent a letter to the respondent informing him that as he had not exercised his option to renew the lease he (the respondent) had become a monthly tenant. Thereafter, on 8 October 1987 the respondent, in a letter addressed to the applicant, purported to exercise his option to renew the lease for a further period of five years. There is nothing to indicate that the purported renewal of the lease was accepted by the applicant. However, the rental for the premises was subsequently increased by agreement from \$250 to \$450 per month. Finally, on 6 July 1990 the applicant gave the respondent one month's notice to vacate the premises, but the respondent refused to leave. These are the circumstances in which the eviction order is sought.

Mr *Wernberg*, who appeared for the respondent, advanced the following defences on behalf of the respondent:

- "A. That he had verbally exercised his right to renew the lease for a further period; alternatively,
- B. That his later written exercise of this right was valid because there had been a tacit relocation in regard to the premises in question which had preserved respondent's right to exercise his option to renew the lease beyond the date of its initial expiry; alternatively,
- C. That the respondent's right of renewal was preserved beyond the date of the expiry of the initial lease period by virtue of respondent having become a statutory tenant thereafter, which meant that by operation of law, the original agreement together with all its terms and conditions continued in force.
- D. That in the event that respondent did not validly renew the option agreement at all, respondent is a statutory tenant and applicant has not shown good cause for his ejection."

I now wish to examine each of these defences and determine whether or not any of them is valid.

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With regard to the first defence the respondent avers as follows:

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- "4.2. I repeat the submissions which I have made in Paragraph 3 above namely that there was no legal obligation upon me to give notice of my intention to renew the lease for further periods thereof after the initial five years.
- 4.3. However at the beginning of 1987 I verbally informed the applicant as a matter of courtesy that I would be continuing with the lease in terms of the initial arrangements which we had made in 1982 namely I would remain in occupation for the full period of the remaining ten years of the lease."

It is clear from these two paragraphs that the respondent alleges that he verbally exercised his option to renew the lease although he was under no obligation to give the applicant notice of his intention to renew the lease. It is, I think, incorrect for the respondent to say that he was under no obligation to notify the applicant that he intended renewing the lease. Cooper in his well known book, *The South Africa Law of Landlord and Tenant* (1973 ed) has this to say at p 317:

"A lessee who wishes to exercise his option to renew must communicate to the lessor his acceptance of the latter's offer."

In the circumstances, I am satisfied that if the respondent wished to renew the lease he was obliged to notify the applicant. Having said that, I would like to determine whether or not the respondent notified the applicant verbally in 1987 that he intended renewing the lease. The respondent says he did but this is denied by the applicant. In order to determine this issue, it is necessary to look at the correspondence between the applicant and the respondent. On 21 September 1987, the applicant wrote the following letter to the respondent:

"I notice that you did not renew your lease agreement when your first term of lease expired.

I assume you were not interested in renewing it and I have now decided to place you on a month to month lease.

The Butchery is now open to any interested party and I would consider offers of rentals.

Thank you for our cordial business relationship during the past five years."

On 8 October 1987 the respondent wrote the following letter to the applicant:

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"I thank you for your letter of the 3rd instant and wish to advise that I have exercised my option to **renew for 5 years** with effect from 1st October 1987. However, the rent will be negotiated when next you are in Kwekwe and could you please contact me on Kwekwe 2092 or Chakari 491, to make the appointment."

After perusing this letter it can be observed that the respondent makes no mention of the allegation that he had verbally exercised his option to renew the lease at the beginning of 1987. In my view, this is significant. If he had exercised his option to renew the lease at the beginning of 1987, he would have said so in his letter to the applicant. Furthermore, in the letter set out above, the respondent states that he has exercised his option to renew the lease for five years with effect from 1 October 1987. Such a statement would have been unnecessary if the option had already been exercised. In the circumstances, I am satisfied that the respondent did not verbally exercise his option to renew the lease at the beginning of 1987. His first defence to the applicant's claim, therefore, fails.

I now proceed to deal with the respondent's second defence. In this regard, it was submitted on

behalf of the respondent that the respondent's exercise of his option to renew the lease for a further five years which was communicated to the applicant by means of a letter dated 8th October 1987 was valid because there had been a tacit relocation in regard to the premises in question which had preserved the respondent's right to exercise his option to renew the lease beyond the date of its initial expiry. The question which must be considered here is whether the option to renew the lease for a further five years has been duly exercised by the respondent, either before the expiration of the initial five-year period on 17 March 1987 or subsequently.

As already stated, a lessee who wishes to exercise his option to renew a lease must communicate to the lessor his acceptance of the lessor's offer. The lessee must communicate his decision to the lessor during the period stipulated in the lease. If no such period is stipulated in the lease, then the decision must be communicated to the lessor before the lease has been lawfully terminated or has lapsed through effluxion of time: *Bowhay v Ward* 1903 TS 772; *Cope v Zeman & Anor* 1966 (1) SA 431 (SWA). In the present case I am satisfied that the respondent did not exercise his option to renew the lease before 17 March 1987, the date when the initial period of five years expired. This is so because I have already found that the respondent did not verbally exercise his right to renew the lease at the beginning of 1987 as alleged by him. The only question remaining for consideration, therefore, is whether the purported exercise of the option to

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renew the lease which was communicated to the applicant by means of the letter dated 8 October 1987 was valid. In this regard, it was argued by Mr *Wernberg* that the exercise by the respondent of his option to renew the lease on 8 October 1987 was valid because there had been a tacit relocation in regard to the premises in question which had preserved the respondent's right to exercise his option to renew the lease after the expiry of the initial period of five years on 17 March 1987. Before dealing with that submission I would like to set out very briefly what tacit relocation means.

The learned author, Cooper, defines tacit relocation at p 319, *op cit*, as follows:

"A tacit relocation is an implied agreement to relet and is concluded by the lessor permitting the lessee to remain in occupation after the termination of the lease and accepting rent from the lessee for the use and enjoyment of the property."

That is the test which must be applied to the facts of this case in order to determine whether or not there was a tacit relocation of the premises in question after the expiry of the initial five-year period on 17 March 1987. In my view, there can be no doubt on the facts before me that there was a tacit relocation because after 17 March 1987 the applicant permitted the respondent to remain in occupation of the premises in question and accepted rent from the respondent for the use and enjoyment of the premises.

Having said that I now proceed to consider what terms of the original lease would be embodied in the tacit lease concluded after the expiry of the original lease. Dealing with this question RAMSBOTTOM J had this to say in *Doll House Refreshments (Pty) Ltd v O' Shea & Ors* 1957

(1) SA 345 (T) at 348F-H:

"Assuming that there was a tacit relocation in July, 1953, the question which has to be decided is whether that relocation included the grant of a right of pre-emption. It is, I think, clear that a relocation after a lease has expired is a new contract which may be express or tacit. If the reletting is express the question which of the terms of the expired lease form part of the new contract is a question of interpretation as is explained in *Webb v Hipkin* 1944 AD 95. Where the relocation is tacit, there is a presumption that the property is relet at the same rent and that those provisions that are incident to the relation of landlord and tenant are renewed. But provisions that are collateral, independent of and not incident to that relation are not presumed to be incorporated in the new letting."

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After discussing a number of authorities, the learned judge concluded that a right of pre-emption in the original lease does not become a term of a tacit lease concluded after the termination of the original lease.

In the present case the question which I must determine is whether an option to renew the original lease would become a term of the tacit lease concluded after the expiry of the original lease. Stated differently, the question is whether an option to renew a lease is a provision which is incident to the relation of landlord and tenant or whether it is collateral, independent of and not incident to that relation: *Doll House's case supra*. This is not an easy question to answer as can be gathered from what TREDGOLD CJ said in *Levy v Banket Holdings (Pvt) Ltd* 1956 (3) SA 558 (FSC) at 564H:

"The difficulty lies in deciding what is incident to the relationship of landlord and tenant and what is not. But the fact that in borderline cases it may not be easy to apply does not affect the soundness of the principle. In fact, unless an agreement to extend a lease *simpliciter* is to be taken to extend every other stipulation in the same document, I can see no other satisfactory logical principle upon which a distinction can be made."

However, in the present case it seems to me that an option to renew the original lease is a provision which is incident to the relationship of landlord and tenant. Although counsel have not referred me to any authority on this issue I am satisfied that the conclusion I have reached is both logical and sound. However, that conclusion does not end the matter. It does not automatically follow that an option to renew the original lease would become a term of the tacit lease after the expiry of the original lease. The learned author, Pothier, appears to acknowledge that there are exceptions to the principle that where there is a tacit relocation there is a presumption that those provisions which are incident to the relationship of landlord and tenant are renewed. In his *Treatise on the Contract of Letting and Hiring (Mulligan's Translation)*, Pothier has this to say in para 363 and 364:

"363. Relocation is taken to be made at the same rent as that of the preceding lease and upon the same conditions. The respective undertakings of the lessor and the lessee are the same as those in the preceding lease.

364. If, by the terms of his lease, the lessee had made himself liable to arrest and imprisonment should he fail to carry out his obligations under the lease, is he to be held to have also made himself liable to arrest and imprisonment in respect of his obligations under the relocation? I

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should not think so. Imprisonment is so harsh that no-one can be taken to have submitted himself to it, unless he has done so in express terms."

I agree and would like to add that an option to renew a lease is so onerous to the lessor that the lessor should not be taken to have agreed to it unless he has done so in express terms. In the present case, therefore, the option to renew the original lease was not a term of the tacit lease concluded after the expiry of the original five-year lease. It follows, therefore, that the purported exercise of the option to renew the lease by the respondent in October 1987 was of no force or effect.

As for the duration of a tacit lease Cooper *op cit* has this to say at p 321-322:

"In general our courts have . . . made the duration of a tacit lease dependent upon the rent period. Thus, the effect of a tacit relocation of premises originally let for one year at a monthly rent ... is to renew the lease from month to month, and each time only for one month. The same has been held in respect of the tacit renewal of a monthly lease. On this reasoning, upon the expiration of a period the lessee should be entitled to vacate the premises and the lessor to claim his eviction, but the courts held that the tacit relocation can be terminated unilaterally only upon reasonable notice being given. . ."

In my view reasonable notice was given to the respondent on the 6th July 1990. In the circumstances, the second defence raised by the respondent cannot succeed.

I now proceed to consider the respondent's third defence. That defence was that the respondent's right to renew the lease was preserved beyond the date of expiry of the initial lease period by virtue of the respondent having been a statutory tenant thereafter, which meant that by operation of law, the original agreement, together with all its terms and conditions continued to be in force. The argument was that as the option to renew the lease was provided for in the lease the respondent was entitled to the benefit thereof and could renew the lease at any time during his statutory tenancy. Before dealing with that submission I must determine whether or not the respondent is a statutory tenant.

Section 22(2) of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) reads as follows:

"No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having

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expired, either by effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee-

- (a) continues to pay the rent due, within seven days of due date; and
- (b) performs the other conditions of the lease;

unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that -

- (i) the lessee has declined to agree to an increase in rent; or
- (ii) the lessor wishes to lease the premises to some other person."

Looking at these provisions and bearing in mind the fact that the applicant terminated the tacit lease by giving the respondent one month's notice on 6 July 1990 I am satisfied that the respondent is a statutory tenant in terms of the Commercial Premises (Rent) Regulations.

I now turn to consider the effect of that conclusion. Section 23 of the said Regulations provides as follows:

"A lessee who, by virtue of section 22, retains possession of any commercial premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of lease, so far as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease or, if no notice would have been so required, on giving reasonable notice. . ."

It was submitted by respondent's counsel that as the respondent was a statutory tenant he was entitled to the benefit of the option to renew the lease and could renew it at any time during his statutory tenancy. Both counsel have not referred me to any cases dealing with this point either in this country or in South Africa, and I have been unable to find any such case law on the point. However, the issue was raised in *Rhodie v Curitz* 1983 (2) SA 431 (C), but was left undecided. In that case BERMAN AJ had this to say at p 439-440:

"Section 34(1) of the Rent Control Act 80 of 1976 provides, insofar as is relevant to Mr Jacob's contention now under consideration, that a lessee who continues in personal occupation of the leased premises after the expiry of his lease is entitled to the benefit of all the terms and conditions of such lease. Mr Jacobs contended that as an option to renew the lease beyond 30 June 1981 was provided for in the lease . . . respondent was entitled to the benefit thereof and to avail himself thereof at any time during his statutory tenancy.

1991 (2) ZLR p220

SANDURA JP

This is, at first blush, an appealing argument . . . There is no case law directly bearing upon this point in this country. Dr Cooper, in his work *The Rent Control Act* 1st ed 1977, in a persuasive passage, questions the validity of this contention and expresses an adverse view thereon. I am fortunately not required in this particular action to decide this point."

The learned acting judge then left the issue undecided. However, I feel that I must now determine the matter because it is necessary to do so before resolving the real issues between the parties in this case. Before making a decision on the point it would be helpful to look at the relevant passage in Dr Cooper's book. It is at p 160 and reads as follows:

"Although s 34(1) states that a statutory tenant is entitled to the benefit of all the terms and conditions of the original lease, these words, it is submitted, should be restrictively interpreted. It could not have been the legislature's intention, it is submitted, that the statutory lessor should continue to be bound, for example, by an option to purchase (which had to be exercised during the currency of the original lease) or by a clause preventing him personally . . . from competing with the lessee. It is accordingly submitted that the phrase should be interpreted as meaning the terms and conditions incident to the beneficial use and enjoyment of the statutory tenant's statutory right of occupation."

I entirely agree. In my view, to hold that a statutory tenant is entitled to the benefit of the option to renew the lease and can renew such lease at any time during his statutory tenancy would

create an absurd situation. I therefore agree with Dr Cooper that the words 'All the terms and conditions of the lease' must be interpreted respectively to mean all the terms and conditions incident to the beneficial use and enjoyment of the statutory tenant's statutory right of occupation. In the circumstances, the third defence advanced by the respondent cannot succeed.

I now come to the respondent's fourth defence. That defence is that the respondent as a statutory tenant should not be evicted from the premises in question because the applicant has not established good and sufficient grounds for the eviction. In his founding affidavit the applicant avers that he would like to renovate and alter the premises and then conduct his own business on the premises. He avers that he intends to carry out extensive alterations and additions so as to convert the existing premises into a complex comprising a supermarket, a bakery and a wholesale centre. He has had plans drawn up in respect of the proposed additions and alterations and has annexed to his

1991 (2) ZLR p221

SANDURA JP

application a number of documents to support his averments. In the circumstances, I am satisfied that the applicant has established good and sufficient grounds for the respondent's eviction.

It is, therefore, ordered as follows:

- (1) That the respondent vacate the leased premises on the remaining portion of Lot 2 of Stand 1312 A, Amaveni, Kwekwe, on or before the 31st day of October, 1991.
- (2) That the respondent pay the costs of this application.

Danziger & Partners and *Atherstone & Cook*, applicant's legal practitioners

Wilmot & Bennett, respondent's legal practitioners

1991 (2) ZLR p222

MUDEHWE v MUKONDOMI 1991 (2) ZLR 222 (SC)

Court **Supreme Court, Harare**

Manyarara JA, Korsah JA & Ebrahim JA

Civil appeal

14 October 1991

Flynote

Customary law - seduction damages - no award to be made by court without evidence to prove such damages.

Headnote

In a claim for damages for seduction the presiding magistrate in granting a judgment in default assessed damages without hearing evidence. The plaintiff appealed against the *quantum* of damages, complaining that the magistrate should not have assessed damages without hearing evidence on the matter.

Held, on appeal, whereas a tribal court presided over by a chief or headman, assisted by assessors chosen by him from the area of his jurisdiction, all of whom have a general, if not an intimate knowledge of the parties in the dispute, and receiving audience or spectator participation, may be imbued with knowledge of the characters and worth of the parties which will enable them, without the benefit of evidence, to make what may, in the modern day, appear to be an oracular pronouncement of damages a magistrate sitting alone is denied such knowledge. He is expected to have no intimate knowledge of the parties before him, and if he has such knowledge of the parties he should recuse himself. In such circumstances, the *quantum* of damages should only be assessed on the basis of evidence adduced before him.

Held, that as no such evidence had been led only the entry of the default judgment could be confirmed on appeal. The award of damages must be set aside and the matter remitted for the assessment of damages after hearing evidence.

1991 (2) ZLR p223

KORSAH JA

Case cited:

Katekwe v Muchabaiwa 1984 (2) ZLR 112 (SC)

The appellant in person

No appearance for the respondent

Judgment

Korsah JA: The appellant commenced proceedings by summons against the respondent in the court of the Provincial Magistrate, Harare, claiming damages for seduction as well as damages for breach of promise to marry in the sum of \$5 000. What portion was to be allocated to seduction and which to breach of promise was not specified.

Apart from the particulars of claim endorsed on her summons, the appellant deposed to an affidavit reciting how after six years of a romantic association, during which she preserved her virginity, she was eventually persuaded by the respondent on 4 May 1986 to succumb to an act of sexual intercourse. Her second experience of sexual intercourse with the respondent resulted in her pregnancy. The respondent later admitted responsibility for her pregnancy and she went to live at his rural home until she gave birth on 5 July 1989. Thereafter, continued the affidavit, the respondent's family started ill-treating her and accusing her of imposing a child, who was not their son, upon them. They took the appellant back to her family and the respondent has indicated that he will not marry her.

On 18 December 1989, the respondent having been duly served, and not having entered appearance within the time limit for indicating that he intended to defend the action, the appellant applied to have a default judgment entered against him. The trial court acceded to the appellant's request and, without hearing any evidence, entered judgment as follows:

"Default judgment entered for three hundred dollars only and costs."

The complaint of the appellant was that she was not given a hearing before judgment was pronounced.

Dealing with the assessment of compensation by tribal courts in their work *African Law and Custom in Rhodesia* Goldin and Gelfand have this to say at p 124:

"Evidence is rarely adduced concerning the amount of compensation claimed. No proof of damages sustained or alleged is required. A plaintiff

1991 (2) ZLR p224

KORSAH JA

is awarded what is considered a proper and just amount but it never exceeds the amount claimed."

No doubt a tribal court, such as the learned authors were cognisant of, presided over by a chief or headman, assisted by assessors chosen by him from the area of his jurisdiction, all of whom have a general knowledge, if not an intimate knowledge, of the parties in the dispute, and receiving audience or spectator participation, may be imbued with knowledge of the characters and worth of the parties which will enable them, without the benefit of evidence, to make what may, in modern day, appear to be an oracular pronouncement of damages.

The same cannot be said of a court constituted by a District Magistrate sitting alone. Such knowledge of the parties as was available to the chief and his assessors is denied him. He is expected to have no intimate knowledge of the parties before him, and, having such knowledge, to recuse himself. The *quantum* of damages thus becomes an issue for assessment by him upon evidence adduced by one or other party, or both. A District Magistrate, not having the advantage of the chief or headman, cannot suck a figure out of the air and award it as fair and adequate compensation for seduction.

My views in this regard are reinforced by the following passage from J G Storry's *Customary Law in Practice*, which is a more recent work in time than Goldin and Gelfand's. At p 60 of *Customary Law in Practice*, the learned author has this to say:

"Damages are awarded not only to compensate the girl's guardian for the diminution in the *lobolo* he can expect when the girl marries, but also for any other financial loss suffered by him through the wrongful act of the seducer - *Percy Budiyo v Peter Chimivedzi* 1974 AAC 13. In assessing such damages certain factors should be considered, viz whether the girl was a virgin, whether pregnancy resulted, the character of the girl, the social standing of both parties, and whether intercourse was persisted in - *Aggrey Chingombe v Tonderai Mudzi* 1973 AAC 32; *Edward Ndhlovu v Dogo Malaba* 1959 SRN 639."

It seems to be a necessary inference from the above passage that the matters to be considered before an award is made can be placed before a tribunal only through evidence adduced by witnesses.

It is also well to remember that time has not stood still, and, since the Legal Age of Majority Act 1982, a woman of over eighteen years of age is bestowed with

1991 (2) ZLR p225

KORSAH JA

the right to claim seduction damages personally - *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (SC). A claimant in a seduction suit is, therefore, no longer necessarily the father or guardian of the victim, and the presiding officer over such actions no longer has the advantage of his predecessor in assessing the *quantum* of damages without the benefit of evidence.

Since the trial court heard no evidence before awarding damages the award is without proper foundation and must be set aside.

The above are our reasons for making the orders that:

1. The appeal succeeds and the appellant is awarded costs of \$30,00;
2. The default judgment is to stand;
3. The award of damages is hereby set aside; and
4. The matter is remitted to the District Magistrate's Court for the assessment of damages either by the magistrate who presided over the matter or any other magistrate.

Manyarara JA: I agree.

Ebrahim JA: I agree.

1991 (2) ZLR p226

SATELLITE TELEVISION USERS ASSOCIATION v POSTS AND TELECOMMUNICATIONS CORPORATION 1991 (2) ZLR 226 (HC)

Court **High Court, Harare**

Smith J

Opposed motion

2 & 16 October 1991

Flynote

Statutes - Radiocommunication Services Act [Chapter 252] - power to declare satellite receivers to be radio stations.

Interpretation of statutes - reasonableness of subsidiary legislation - licensing fees - test.

Headnote

The respondent promulgated subsidiary legislation declaring "satellite receive-only stations" to be radio stations for the purposes of the Radiocommunication Services Act [Chapter 252], and imposed an initial issuing fee of \$1500 and an annual fee of \$500. The applicant was an association of users and owners of satellite dishes for television reception. It alleged that the legislation declaring the receivers to be radio stations was *ultra vires* the enabling legislation. It also argued that the amount of the fees imposed was so out of proportion to other fees charged under the Act as to render the fees as unreasonable.

Held, the clear wording of the Radiocommunication Services Act [Chapter 252] precluded a declaration of satellite receivers as radio stations.

Held, further and in any event, the fees raised by the respondent were grossly unreasonable, and thus also invalid.

Cases cited:

S v Nyamapfukudza 1983 (2) ZLR 43 (SC)

PF-ZAPU v Minister of Justice, Legal & Parliamentary Affairs (2) 1985 (1) ZLR 305 (SC); 1986 (1) SA 532 (ZS)

1991 (2) ZLR p227

SMITH J

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

Delew v Brakpan Town Council 1937 TPD 439

A P de Bourbon SC for the applicant

G S Wernberg for the respondent

Judgment

Smith J: The Radiocommunication Services Act [Chapter 252] (hereinafter referred to as "Chapter 252") provides for the control of and supervision over radiocommunication services within, into and from Zimbabwe. In terms of s 14(1) thereof no person is allowed to have in his possession a radio station specified or defined in the Schedule to Chapter 252 otherwise than in accordance with the terms and conditions of a licence issued by the respondent (hereinafter referred to as the "PTC") and on payment of such fee as may be prescribed. The Schedule to Chapter 252 classifies and describes various radio stations. Section 31 of Chapter 252 confers powers on the PTC to make by-laws. In terms of subs (2)(b) thereof such by-laws may provide for the classification of radio stations, **other than broadcasting stations and radio stations used solely in connection with broadcasting and diffusion services**, and in so doing may amend the Schedule or vary the definition of a radio station specified in the Schedule (emphasis my own). Certain terms used in, or necessary for interpreting, this provision are set out in s 2 of

Chapter 252. They are as follows:

" 'broadcasting service' means a radiocommunication service for reception by members of the general public;

'broadcasting station' means a radio transmitting station used for the purposes of carrying on a broadcasting service;

'Hertzian waves' means electromagnetic waves of frequencies between ten kilohertz and three million megahertz propagated in space without artificial guide;

'radiocommunication service' means the transmission, emission or reception of writing, signs, signals, pictures, impulses and sounds of all descriptions whatsoever wholly or partly by means of Hertzian waves

'radio receiving station' means apparatus referred to in paragraph (b) of the definition of 'radio station';

'radio station' means -

- (a) apparatus, other than generating apparatus, capable of being used for the transmission or emission of writing, signs, signals, pictures, impulses and sounds of all descriptions whatsoever wholly or partly by means of Hertzian waves; or
- (b) apparatus capable of being used for the reception of writing, signs,

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SMITH J

signals, pictures, impulses and sounds of all descriptions whatsoever wholly or partly by means of Hertzian waves; or

- (c) apparatus referred to in paragraph (a) of this definition and apparatus referred to in paragraph (b) of this definition in combination;

'radio transmitting station' means apparatus referred to in paragraph (a) of the definition of 'radio station', whether in combination with apparatus referred to in paragraph (b) of that definition or otherwise. . ."

The Broadcasting Act [*Chapter 248*] (hereinafter referred to as "Chapter 248") in s 31 makes it an offence for a listener to have a receiver in his possession unless he has a licence. Licences are issued by the Zimbabwe Broadcasting Corporation (hereinafter referred to as the "ZBC") which is empowered to fix licence fees which are paid into its general fund. A listener is defined in s 2 of Chapter 248 as any person who has in his possession a receiver (with certain exceptions which are not relevant) and a receiver is defined as follows -

"'receiver' means an apparatus -

- (a) in respect of which no licence is required in terms of the Radiocommunication Services Act [*Chapter 252*]; and
- (b) which is capable of being used for the reception of a broadcasting service . . ."

The term broadcasting service has the same meaning as in Chapter 252.

On 6 July 1990 the Radiocommunication Services (Classification of Television Receive - Only Stations) By-laws 1990 were published (SI 146 of 1990). The effect of those by-laws was to classify a radio receiving station used exclusively for the purpose of receiving a broadcast service direct from a satellite broadcasting service as a television receive-only station

(hereinafter referred to as a "TVRO station"). The PTC fixed the fee for the issue of a TVRO station licence at \$1500 and the annual renewal fee at \$500 (see SI 145 of 1990).

The applicant has instituted this action seeking an order that the licence fees fixed by the PTC for a TVRO station are *ultra vires* Chapter 25 and therefore of no force and effect.

[The learned judge then set out the contents of the affidavits filed in the matter, and continued:]

The validity of the licence fees for TVRO stations was attacked on three grounds. Firstly, Mr *de Bourbon* submitted that SI 146 of 1990 was *ultra vires*

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s 31(2)(b) of Chapter 252. In terms of the said s 31(2)(b) the Minister may only classify radio stations which are not broadcasting stations or radio stations used solely in connection with broadcasting and diffusion services. As TVRO stations are used solely for receiving broadcasting services they could not be classified as radio stations for the purposes of Chapter 252. Mr *Wernberg* argued that in the context of s 31(2)(b), although the term "radio station" is used, the intention of the Legislature was to refer to radio transmitting stations and therefore receiving stations could be classified as radio stations. Alternatively, the reference to broadcasting service means a local and not a foreign service. Secondly Mr *de Bourbon* submitted that a receiving station could be classified as a radio station only if it is capable of being used for the reception of signals wholly or partly by means of Hertzian waves. In terms of the definition of Hertzian waves, electromagnetic waves which are propagated in space with an artificial guide are excluded from the definition. As a satellite in orbit is an artificial guide, the signals received by a TVRO station are not transmitted by means of Hertzian waves. Mr *Wernberg* argued that a satellite in orbit was not an artificial guide. Finally Mr *de Bourbon* submitted that the level of the fees fixed by the PTC is grossly unreasonable and therefore *ultra vires*. Mr *Wernberg* argued that the fees are reasonable having regard to the administrative costs involved in the monitoring of TVRO stations.

In my view s 31(2)(b) of Chapter 252 very clearly and expressly precludes the PTC from classifying as a radio station those radio stations which are used solely in connection with broadcasting services. In s 2 of Chapter 252 the terms radio receiving station, radio station and radio transmitting station are all defined. Where any provision in Chapter 252 contains one of those terms then it must be presumed that the Legislature intended to use that particular term and not one of the others. In terms of s 11(1) of the Interpretation Act [*Chapter 1*], definitions contained in an enactment **shall** apply to the construction of the provisions of the enactment which contain those definitions. That provision may only be negated if the application thereof would give to the provision concerned an interpretation inconsistent with the context - see s 2(1)(b) of the Interpretation Act [*Chapter 1*]. Despite the arguments advanced by Mr *Wernberg*, I can find nothing in Chapter 252 to indicate that to give the term radio station where it is used in s 32(1)(b) the meaning as given in the definition in s 2 would be inconsistent with the context. In fact the contrary is the case. Section 31(2)(b) of Chapter 252 excludes from radio stations which may be classified in the Schedule to that Act broadcasting stations and radio stations used solely in connection with broadcasting and diffusion services. As the term "broadcasting station"

means radio transmitting station used for the purpose of carrying on a broadcasting service, it seems to me to be clear that the second

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part of the exclusion would constitute radio receiving stations used solely in connection with a broadcasting service because radio transmitting stations used for such purpose are covered by the term broadcasting station. Therefore the context requires that the term radio station where it is used in s 32(1)(b) must be given its defined meaning or at least the narrower meaning of a radio receiving station. It is significant that at the head of the Schedule to Chapter 252 it is stated "In this Schedule, "radio station" does not include a broadcasting station or a radio **receiving** station used solely in connection with a broadcasting or diffusion service (emphasis my own). Thus in the heading to the Schedule the Legislature has clearly stated that radio receiving stations used solely in connection with a broadcasting service may not be classified as a radio station in that Schedule. I can see no basis for the argument that the term broadcasting service when used in s 32(1)(b) of, or the Schedule to, Chapter 252 must be limited to broadcasting services transmitted by the ZBC. Had that been intended by the Legislature it could easily have said so. It did not. As TVRO stations are clearly radio stations that are used solely for the purpose of receiving television programmes which are transmitted for reception by members of the general public, it must follow that the Radiocommunication Services (Classification of Television Receive-Only Stations) By-laws 1990 (SI 146 of 190) are *ultra vires*. Such a finding is, I would point out, consistent with the provisions of Chapter 248. In terms of Chapter 248 the ZBC is entitled to fix and collect licence fees which are paid into the funds of the ZBC and help to pay for its operations. The ZBC is entitled to fix the fees that are payable by listeners - that is persons in possession of a receiver, the definition of which has been set out earlier. If the PTC were to be able, in terms of Chapter 252, to classify radio receiving stations used solely for the reception of broadcasting services as being radio stations which are required to be licensed in terms of Chapter 252, the ZBC would be liable to be deprived of a substantial part of its income. In this connection I would point out that the ZBC may demand licence fees from listeners even though they cannot receive ZBC broadcasting services. Mere possession of a receiver as defined renders a listener liable to pay the fee prescribed. The possessor of a television set who stays at Beitbridge and cannot receive signals from ZBCTV but receives foreign broadcasting services cannot refuse to pay the licence fee on the grounds that he does not receive a service from the ZBC. TVRO station owners would be in a similar position. As I have found that the classification of TVRO stations is invalid it must follow the PTC cannot fix fees for TVRO station licences.

Having concluded that the by-laws in question are *ultra vires*, it is not necessary for me to decide whether or not the signals received from a satellite in orbit

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SMITH J

would be regarded as Hertzian waves and whether or not the fees fixed by the PTC are unreasonable. However I would like to comment on the two issues. In my opinion, it is not

possible to determine on the papers whether the television broadcasts are propagated in space without artificial guide. Certainly the satellite in orbit is an artificial object and not a natural phenomenon. When the signals are broadcast they are propagated in space. It may well be that when transmitted they are propagated without artificial guide, although presumably they are directed at the satellite, in which case they would fall within the definition of Hertzian waves. However once the signals are received by the satellite they are then redirected or guided back to a receiving station on earth. *Prima facie*, therefore, it would appear that there is some basis for holding that the satellite in orbit is an "artificial guide". I consider, however, that further technical evidence would be necessary before a finding could be made on this issue.

The final issue is the reasonableness of the fees fixed by the PTC for TVRO stations. It is accepted by our courts that by-laws and other subsidiary legislation may be struck down on the grounds of unreasonableness. In *S v Nyamapfukudza* 1983 (2) ZLR 43 (SC) at p 46D GEORGES JA, when dealing with the argument that the regulations under consideration in that case were unreasonable, said:

"There is no dispute as to the proper test to be applied. It is that laid down in *Kruse v Johnson* [1898] 2 QB 91 at 99; [1895-9] All ER Rep 105 at 110:

'... I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid, because unreasonable. But unreasonable in what sense? If for instance, they were found to be partial and unequal in their operation between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the eyes of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there.'

The *onus* is on the person challenging a regulation as unreasonable to show that this is so."

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SMITH J

The test referred to above was also cited with approval in *PF-ZAPU v Minister of Justice* (2) 1985 (1) ZLR 305 (SC), 1986 (1) SA 532 (ZS). DUMBUTSHENA CJ referred also to the grounds of "illegality", "irrationality" and "procedural impropriety" that were enunciated in *CCSU v Minister for the Civil Service* [1984] 3 All ER 935 (HL). The applicant has pointed out that fees fixed under Chapter 252 for radio stations other than TVRO stations do not exceed \$30 and in some cases are as low as \$6 for the issue of a licence and \$3 for a renewal. In the case of such radio stations they transmit as well as receive signals and therefore the PTC is responsible for allocating frequencies and monitoring the use of the equipment.

The inordinate difference between the fees fixed by the PTC for TVRO stations and those for other radio stations does *prima facie* support the applicant's contention that the fees are "partial, unequal and grossly unfair". There is no evidence from the respondent to rebut that contention. The statements by Messrs Makira and Matavire which were filed by the respondent were not sworn before a commissioner of oaths and so are not properly before the court. However a

glance at the contents of those statements shows that if they had been properly made as affidavits they would not have sufficed to rebut the applicant's contention. It is obvious that the respondent is scratching around and, like a drowning man, grasping at any straw to justify the high level of fees. Factors such as the high capital cost of a TVRO station, much of it in foreign currency, that TVRO station owners constitute a small minority group, that three Harare hotels use them to entice patrons, that video clubs use videos recorded by TVRO station owners, that video recordings from them are used by clubs for commercial public screening, that so-called "pirated" signals should not be lightly licensed by the PTC are, or should be, completely irrelevant in determining the level of fees. They are completely extraneous considerations. The attempts by the two officials to establish the cost to the PTC of monitoring TVRO stations are noteworthy for their vagueness and lack of any particularity. There is no statement of the type of equipment needed or number of technicians that would need to be employed, no estimate of the anticipated costs and no estimate of the number of TVRO station owners and therefore of the anticipated income from fees. Had the issue been necessary for me to decide on the papers filed, I would have had no hesitation in concluding that the TVRO station fees were manifestly unjust and possibly disclosed bad faith on the part of the PTC in that the true reasons for fixing fees at the level of \$1500 and \$500 have not been disclosed. One wonders whether the motivation was "let's soak the rich" or "it's only the small minority so it doesn't matter" or whether it was to deter members of the public from having access directly to foreign television broadcasting services. The PTC cannot, of course, prescribe a fee which is so unreasonable that it in

1991 (2) ZLR p233

SMITH J

effect makes the keeping of a radio station prohibitive. That is clear from the judgment of TINDALL AJP in *Delew v Brakpan Town Council* 1937 TPD 439 at p 443:

"Where such a power (ie to fix licence fees) is given the Court cannot interfere on the mere ground that it considers the fee unreasonably high. The size of the fee, however, might in certain circumstances be a factor in considering whether the Council genuinely exercised its powers of licensing and regulating, or *mala fide* used such powers for achieving an ulterior object such as prohibition. For instance, the Council might prescribe a licence fee so outrageously high that the only reasonable inference was that the object was to prohibit the business in question entirely."

As the applicant has been successful it is entitled to its costs.

It is ordered that -

- (1) the Radiocommunication Services (Classification of Television Receive - Only Stations) By-laws, 1990 (SI 146 of 1990) classifying television receive-only stations as radio stations are *ultra vires* and therefore null and void;
- (2) the Radiocommunication Services (Amendment) By-laws, 1990 (No. 8) (SI 145 of 1990) prescribing fees for television receive-only station licences are *ultra vires* and therefore null and void;
- (3) the respondent pay the applicant's costs.

Scanlen & Holderness, applicant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

1991 (2) ZLR p234

S v DELTA CONSOLIDATED (PVT) LTD & ORS 1991 (2) ZLR 234 (SC)

Court Supreme Court, Harare

Manyarara JA, Korsah JA & Ebrahim JA

Criminal appeal

17 June & 30 October 1991

Flynote

Statutes - subsidiary legislation - doctrine of ultra vires - inherent jurisdiction to declare subsidiary legislation null and void where it does not accord with the intention of legislature - onus of proof - regulations ultra vires because of unreasonableness - onus on the party which makes such allegation - intention of legislature - presumption that legislature intends that subsidiary legislation will only be imposed where reasonably necessary to further the objects of an act.

Control of Goods Act [Chapter 280] - s 3(1) as read with s 19 - Control of Goods (Price Control) Regulations, 1989 (SI 153B of 1989) - Fourth Schedule - regulations not ultra vires - promulgation of subsidiary legislation - no specific duty to consult with those likely to be affected thereby before promulgation - legitimate expectation of traders that they would be consulted.

Criminal procedure (sentence) - price control regulations - failure of Government to explain and consult with traders concerning price control regulations - mitigatory feature in considering sentence - caution and discharge appropriate.

Headnote

While courts are reluctant to exercise this jurisdiction (bordering as it does on a transgression of the divide between the judicial and legislative functions of Government), it does have an inherent jurisdiction to declare null and void subsidiary legislation on the ground that it is *ultra vires* if it cannot be construed so as to accord with the intention of a reasonable Legislature.

The *onus* of proving that regulations are *ultra vires* on the ground of unreasona-

1991 (2) ZLR p235

bleness is on the person who seeks to prove their unreasonableness.

In dealing with the review of an executive decision, it is an essential precondition that the decision-maker should have followed a prescribed procedure of logic in arriving at his decision. If he does not do so, his decision can properly be reviewed. Similarly, a regulation made in terms of an enabling instrument of primary legislation must fulfil the same overriding presumption of reasonableness because it is presumed that Parliament, which is the maker of

primary legislation, intended that regulations should be imposed only where reasonably necessary to further the objects of the primary legislation.

The appellants had been convicted of contravening s 3(1) of the Control of Goods Act [Chapter 280] as read with s 19 and the Fourth Schedule of the Control of Goods (Price Control) Regulations, SI 153B of 1989. It was contended upon their behalf that the regulations were *ultra vires* their parent act because they were unreasonable. In support of this contention, evidence was led at the trial that the appellants had repeatedly attempted to contact the relevant government departments in efforts to seek clarification of the contentious provisions of the regulations, which imposed price controls upon a wide variety of products. Despite the far-reaching implications of these price control regulations for both traders and the public as a whole, the relevant government departments maintained an uncompromising silence in regard thereto.

Held, that while it could not be said that the regulations were *ultra vires* the parent act upon grounds of unreasonableness, given the peculiar nature of these particular regulations, the failure of Government to explain them constituted a valid ground justifying intervention.

Held, further, that while there is no specific duty upon makers of subordinate legislation to consult anyone before promulgating laws, in the peculiar circumstances appertaining to these regulations, traders had a legitimate expectation that at least they would be fully informed regarding the contents thereof.

Held, further, that the fines which had been imposed upon all the appellants should be set aside and the sentences in each case be altered to a caution and a discharge.

Cases cited:

S v Nyamapfukudza 1983 (2) ZLR 43 (SC)

Sinovich v Hercules Municipal Council 1946 AD 783

Kruse v Johnson [1898] 2 QB 91; [1895-9] All ER 105 (CA)

CCSU v Minister for the Civil Service [1895] AC 374; [1984] 3 All ER 935 (HL)

1991 (2) ZLR p236

EBRAHIM JA

PF-ZAPU v Minister of Justice 1985 (1) ZLR 305 (SC); 1986 (1) SA 532 (ZS)

R v Secretary of State, ex parte Brind [1990] 1 All ER 469 (CA)

R v General Medical Council, ex parte Colman [1990] 1 All ER 489 (CA)

Staatspresident en Andere v United Democratic Front en 'n Ander 1988 (4) SA 830 (A)

Mafuya & Ors v Mutare City Council 1984 (2) SA 124 (ZHC); 1983 (2) ZLR 226 (HC)

R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators Association [1972] 2 QB 299

(CA); [1972] 2 All ER 589 (CA)

Port Louis Corporation v Attorney-General of Mauritius [1965] AC 1111 (PC)

R v Hull Prison Board of Visitors [1979] 1 All ER 701 (CA)

O'Reilly v Mackman & Ors [1982] 3 All ER 1124 (HL)

Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346 (PC)

Castel NO v Metal & Allied Workers Union 1987 (4) SA 795 (A)

Makoena & Ors v Administrator, Transvaal 1988 (4) SA 912 (W)

A P de Bourbon SC for the appellants

A V M Chikumira for the respondent

Judgment

Ebrahim JA: The appellant companies contend that their convictions, sustained in various courts of the Provincial Magistrate in Bulawayo, were wrong. The State preferred against each company a charge of contravening s 3(1) of the Control of Goods Act [*Chapter 280*] (which I will refer to as "the Act"), as read with s 19 and the Fourth Schedule of the Control of Goods (Price Control) Regulations, SI 153B of 1989 (which I will refer to as "the Regulations"). Less technically, the appellants were accused of contravening the Price Control Regulations by selling various items at prices in excess of those permitted by the Regulations. It is noted here that the word "sell" is so defined in the Act as to include an offer to sell. Hence the Regulations are contravened when a trader displays goods and indicates the price in excess of that permitted by the Regulations; it is not necessary that goods be exchanged for value.

The appeals were heard together because of the similarity of the defences raised in the courts *quo* and in the grounds of appeal noted before this court.

The first appellant is a furniture shop in Bulawayo known as Pelhams. The charge was that a cooking stove, a Nuchef, was sold for \$2 218,30, whereas the regulated price was \$2 136,14. On conviction, the accused was fined \$75. The citation of the accused in this case calls for comment: Pelhams is but one of eighteen shops belonging to the Furniture Division of Delta Consolidated

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(Private) Limited. The citation inculpated one John Rouse representing Delta Consolidated and nothing further. In the circumstances this citation was inadequate. The name Pelhams ought, in my view, to have featured therein. This was a criminal charge and it is a matter of public interest that those so charged should be identified with precision. In this case the factor of partiality should also have been considered. The other appellant companies are cited by their commonly known names. As John Rouse is a director of Delta Consolidated (Private) Limited the error is

not fatal.

The second appellant is the Bulawayo Branch of OK Bazaars. It is one of twenty-four departmental retail shops the OK Bazaars organisation operates throughout the country. The organisation is itself owned by Delta Consolidated (Private) Limited, the company involved in the first case. OK Bazaars was convicted of selling a hot plate for \$107,00, whereas the regulated price was \$103,19. Delta Consolidated, which, as the parent company, had been charged, was fined \$75.

The third appellant is Paul of Carnaby Street (Private) Limited, a company which owns a gentlemen's clothing shop. It was convicted of selling a "Pierre Cardin" suit for \$695,95, whereas the regulated price was \$480,94. Paul of Carnaby Street was fined \$100,00.

The fourth appellant is a company named Cullen and Kuhn (Private) Limited. It operates a men's clothing shop which trades under the name of "Members".

This conviction related to a "Firenzi" suit which was sold for a price of \$389,00, whereas the regulated price was \$329,06. The accused company was fined \$100,00.

All allegations outlined above were common cause between the State and the accused companies, yet pleas of not guilty were entered in each case. The explanation for this situation is that the accused companies challenged not merely their convictions but the validity of the law in terms of the parent Act under which they were charged. Both before the courts of first instance and now before this court, counsel for the defence has urged that the Regulations are invalid by reason that they are *ultra vires* the Act. Courts have an inherent jurisdiction to declare null and void subsidiary legislation on the ground that they are *ultra vires* if they cannot be construed so as to accord with the intention of a reasonable Legislature. (See, for instance, *S v Nyamapfukudza* 1983 (2) ZLR 43 (SC); *Sinovich v Hercules Municipal Council* 1946 AD 783; and *Kruse v Johnson* [1895-9] All ER (Rep) 105.)

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Naturally courts are reluctant to exercise this jurisdiction. It borders closely on a transgression of the divide between the judicial and legislative functions of government, so fundamental to our constitutional law. It will be noted that the jurisdiction to strike down legislation is normally confined to subordinate legislation. It will not normally be exercisable in relation to Acts of the Legislature. Laws can be tested in this way only by reference to a given context; and that context is the intention of the Legislature, as expressed in the Act in terms of which the subordinate legislation has been formulated. The courts, in claiming the jurisdiction to strike down legislation do not, in other words, lay claim to any power to say by what laws people ought to be governed. This is the exclusive preserve of the Legislature. The jurisdiction claimed serves to entitle courts to rule that a particular by-law is procedurally unsound (and therefore unenforceable) in terms of its own parent Act.

The standard judicial test for unreasonableness was set out many years ago in the case of *Kruse v Johnson supra* by LORD RUSSELL of KILWONEN. After alluding to the fact that there may be occasions when a court will condemn regulations as invalid on the grounds of

unreasonableness, His Lordship continued (at p 110):

"But unreasonableness in what sense? If, for instance, they were found to be partial or unequal in their operation between different classes; if they were manifestly unjust; if they disclosed bad faith, if they involved such oppressive and gratuitous interference with the rights of those subject to them as could find no justification in the mind of reasonable men, the court might well say 'Parliament never intended to give authority to make such rules, they are unreasonable and *ultra vires*'. But it is in this sense, and this sense only, so I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there."

This passage was quoted in *Nyamapfukudza's case supra* at p 46D-F. GEORGES CJ added that the *onus* was on the person challenging the regulations in question to prove their unreasonableness.

Since *Nyamapfukudza's case supra* the House of Lords has elaborated on the *Kruse v Johnson* definition of unreasonableness, making it more specific in order to better conform with the somewhat more exacting requirements of contemporary law. *CCSU v Minister for the Civil Service* [1985] AC 374;

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[1984] 3 All ER 935 (HL) was not a challenge to legislation but an application to review an allegedly unreasonable decision of the Minister. (She had ruled that employees at a communications establishment were excluded from membership of the applicant trade union.) In the course of his opinion LORD DIPLOCK proposed three new grounds on which to base an application to review any matter (including the reasonableness or otherwise of legislation). These grounds were accepted by other Law Lords in that case and have subsequently been adopted in other cases in superior courts in England and in this country. Notably, for present purposes, DUMBUTSHENA CJ adopted and applied the *ratio* of the *CCSU* case in the leading local case of *ZAPU (PF) v Minister of Justice* 1985 (1) ZLR 305 at 324.

Both the *CCSU* case *supra* and the *PF-ZAPU* case *supra* involved applications for the review of executive decisions and not of subsidiary legislation. But the process is precisely the same. The Executive - and any member thereof - is bound to reach decisions on the basis of some or other prescribed rule or code of practice. If the decision is - on the analysis in the *CCSU* case - "illegal", "irrational" or "procedurally improper" in the context of the instrument in terms of which it was reached, it will be null and void. This is because it must be presumed in any well-ordered and democratic society that prescriptive rules are based on reason and intended to be applied only after a rational appreciation of the situation which necessitates the making of the decision in question. Moreover, it is an essential pre-condition that the decision-maker should have followed a prescribed procedure of logic in arriving at his decision. If he does not do so, the decision can be properly reviewed. Similarly a regulation made in terms of - on the basis of - an enabling instrument of primary legislation must fulfil the same overriding presumption of reasonableness. It is assumed that Parliament, the maker of primary legislation, intended that regulations should be imposed only where reasonably necessary to further the objects of the primary legislation, only where the delegated authority has applied its mind to the area where it

considers the object requires furthering and has evolved a design to remedy the shortcoming, only where the design falls within the jurisdiction of the delegated authority to implement, and, finally, only where the delegated authority, in implementing the design, has followed procedures prescribed either by the general law (eg the rules of natural justice) or by the instrument itself which would enable the decision to be reviewed.

There has been some judicial discussion in Britain as to whether LORD DIPLOCK, in mentioning separately "illegality", "irrationality" and "procedural impropriety", intended to expound three new grounds for review. Certainly, in this case, counsel for the appellants appears to have taken the view that he did.

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In the pleadings the challenged Regulations are alleged to be unreasonable and irrational. I do not think this is a valid distinction. The difference between the definitions, in this context, is slight: if the Regulations are irrational they are also unreasonable, and *vice versa*. In the broader context I am of the opinion that the three grounds described by LORD DIPLOCK in the *CCSU* case *supra* were not intended as separate bases from which to launch attacks on a decision to have it reviewed. The justification for applying to have a decision reviewed remains the assertion that the decision was unreasonable. LORD DIPLOCK'S grounds were a contemporary response to LORD RUSSELL'S question in the *Kruse v Johnson* case *supra*: "But unreasonable in what sense?". They are, in my view, a convenient categorisation of the aspects of unreasonableness entertained by the English courts in the late twentieth century. A fine-tuning of a legal tenet to make it more accessible to modern requirements. My opinion in regard to the fact that LORD DIPLOCK was not setting new grounds for review is fortified by the opinions expressed by LORD DONALDSON MR in *R v Secretary of State, ex parte Brind* [1990] 1 All ER 469 at 480h, and RALPH GIBSON LJ in *R v General Medical Council, ex parte Colman* [1990] 1 All ER 489 at 504e. Both these authorities are opinions expressed in the English Court of Appeal.

Apart from the general ground of unreasonableness, the following grounds of appeal were common to all cases. I propose to deal with these grounds before deciding the question of unreasonableness or otherwise of the Regulations:

The first such additional ground of appeal is that the magistrates erred in holding that the appellants bore the *onus* of proving what incidental charges were incurred in connection with the purchase of the commodity in question. Incidental charges are defined costs which may, in terms of s 4 of the Regulations, be added to the permitted cost price and mark-up allowance for the purpose of obtaining a selling price. The interpretation section of the Regulations defined incidental charges, at the time of the offence, as meaning (a) customs duty and clearing charges, (b) interest, bank and finance charges, and (c) purchasing, shipping and confirming commissions incurred in connection with the importation or purchase of any commodity. Having regard to the diverse nature of these costs and the likelihood that they will vary with each consignment of commodities if not with each commodity, I do not think it is at all unreasonable to assume that the *onus* of proving these costs was to be borne by a person or company accused of contravening the Regulations. This is a necessary exception to the general rule in

criminal trials, which requires the State to prove its assertions. In my opinion, the magistrates did not err in holding that the primary *onus* of proving incidental charges lay on the appellants, and on this aspect the appeal must fail.

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The second additional ground of appeal was that the magistrates had erred in holding that transport costs between storage and selling facilities within the same business organisation could not be included in the "pre-sale cost" of a commodity. There is, I think, considerable merit in this argument. The relevant provision appeared as item (b)(iii) of the definition of "pre-sale cost" at the material time. (It has since been re-categorised.) It provides:

" 'Pre-sale cost' means -

- (b) if the seller is the manufacturer, wholesaler, dealer or retailer of the commodity in question, the total of the charges incurred per unit by the seller in respect of -

...

- (iii) transport costs to the factory or **business premises** of the seller ..." (my emphasis).

In my opinion the clear meaning of this provision is that where the end-seller also manufactures, sells by wholesale or retail, or deals in the commodity in question, he ought to be permitted to offset the cost of transport of that commodity to his factory or place of business. No mention is made of the place of origin of the commodity. I can see no good reason for distinguishing, in respect of transport costs, between a commodity which is stored in a warehouse belonging to the same company as the end-seller and a commodity stored in the warehouse of an independent contractor. In both cases transport costs will be incurred by the seller. There seems no good reason to discriminate against the seller who has his own warehouse by not allowing him to include transport costs in his selling price. I draw particular attention to the fact that a valid integer of "pre-sale cost" is the allowance to a seller/dealer of transport costs to the business premises of the seller.

In my opinion, the clear implication of this provision is that where an "end-seller" also manufactures, distributes by wholesale or retail, or deals in the commodity in question, he may integrate into his pre-sale costs expenditure on transport to his factory or place of business. No specific reference is made to the point of origin, although it may fairly be assumed that this is the place of manufacture or dealing or place from which wholesale or retail distribution is made. In these circumstances I can see no good reason for discriminating against a seller who, by reason of the size of his business or through, perhaps, completely unrelated circumstances, owns storage facilities of his own. It is trite that laws cannot be unequal in their application. A seller who owns storage facilities will incur costs of transporting his commodities to his factory or business premises in the same way as a seller who does not. It would be a most

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unequal application of this law if the latter was entitled to factor transport costs into his pre-sale costs, while the former was prohibited from doing so. For these reasons it is my view that there is merit in this ground of appeal.

The third ground is that the magistrates erred in accepting that the State had established the correct selling price of the commodities involved. It follows from what I have said in regard to the second ground that if the transport costs were incorrectly excluded from the alleged price then the total must have been incorrect. Therefore, the appeal on this ground has merit. The impact of this decision on the individual convictions will be discussed below.

The fourth ground constitutes the essential defence that the Regulations are *ultra vires* the Act, particularly in that the concepts of "incidental charges" and "pre-sale costs" (both of which are essential components in the calculation of the controlled price) are "vague, uncertain, unreasonable and irrational". The law and evidence in this regard will be discussed in detail below.

The fifth ground common to all cases was a challenge to the magistrates' rejection of the appellants' submission that the prices at which the relevant articles were offered for sale were not so unreasonable as could not be accommodated within the terms of the Regulations.

In other words, as I understand it, this ground was offered as an alternative to the fourth ground. The appellants seem to be saying that, even if the court holds that the concepts of "pre-sale cost" and "incidental charges" were correctly found to be reasonable, the magistrates ought to have found that the prices were reasonable in reality and the alleged excess over the controlled price ought to have been included in the calculation of the total price under the item "incidental charges".

In respect of the appellants Pelhams and OK Bazaars I would be inclined to accept this submission. The excess over the controlled price alleged in the charges against them was low - 3,85% and 3,69% respectively. I have mentioned above that I think transport charges are an allowable pre-sale cost to these appellants, notwithstanding the fact that the transport was between departments of the same company. In these circumstances it is quite conceivable that these small percentages might represent the itemised transport costs. Unfortunately no evidence was led as to what were the actual transport costs, so it is impossible for me to say whether or not the magistrates did err in this respect. It is insufficient to suspect that an inferior court may have reached a wrong conclusion on a ground of appeal. An appellate tribunal must be certain

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that there has been a misdirection in order to avail itself of the jurisdiction to interfere. The fifth ground of appeal must therefore fail.

In respect of the appellant Cullen and Kuhn (Private) Limited, trading as "Members", an additional ground of appeal was noted. The company had been charged with selling a suit for \$389,00 when the maximum permitted price was \$329,06. The suit had been obtained from the supplier at a cost of \$195,00. In terms of the Regulations the company was permitted a 50%

mark-up. In fact they had taken one of 76%. Before the magistrate the company's representative contended that, in the light of his own costs, a 50% mark-up was inadequate to make what he considered to be a reasonable profit. (His costs included, apart from the normal running costs of a shop, the repayment on a large loan taken in order to purchase the business.) The magistrate took the view that a 50% mark-up was reasonable and enforceable. (I think there is a typing error in the notice of appeal - "unreasonable" in Ground 6 ought to read "reasonable".) It is against this decision that the company appeals. In my opinion, subject to what will be said below in regard to the general appeal, a 50% mark-up cannot be said to be unreasonable **in terms of the regulations** and it was most certainly enforceable on the view the magistrate took of the matter. This ground of appeal is therefore without merit.

I come now to consider whether the Regulations are so unreasonable as to justify striking them down. The magistrates considered that, although they might well bear heavily on businesses of a certain type, they could not be held to be unreasonable in the context of the trading community as a whole. With respect, while there may well be some truth in this observation, it hardly does justice to the merits of these cases in the context of the wealth of learning on the subject. By adopting this simplistic approach the magistrates *a quo* denied the cases the mature judicial consideration deserved. A plethora of cases and many thousands of words of learned writers provide a fertile environment for the due consideration of whether or not the Regulations may be declared null and void.

I take as a point of departure a distinction drawn by SCHREINER JA in the case of *Sinovich v Hercules Municipality supra*. At p 802 the learned judge pointed to a distinction between excess of power and unreasonableness. It was important, he said, to maintain this distinction, if the "dangerous error" of treating such matters as questions of interpretation was to be avoided. It should, I respectfully agree, be emphasised that the jurisdiction of the court in these matters consists in more than merely ruling on the meanings of words. SCHREINER JA's contention in this regard was fairly recently applied in the case *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A) at 869A. This

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said, before any decision can be taken in regard to the fate of the challenged Regulations, the court has to be certain of the extent of the powers granted to the subordinate legislator. This implies interpretative investigation.

The regulations were published in terms of s 3 of the Act. Subsection (1) of this parent provision gives the President, "whenever it appears to (him) expedient or necessary", wide powers to control the import into or export from Zimbabwe of any goods or the distribution, disposal, purchase and sale or the wholesale or retail prices of any goods and the charges which may be made for (a) services relating to the distribution, disposal, purchase and sale of the goods, and (b) delivery of goods subject to price control under this section.

Subsection (2) (in para (a)) requires persons carrying on or employed in business specified in the relevant Regulations to produce to a person (also specified in any such Regulations) any books, accounts and other documents relating to that business. (The paragraph also requires

"any person" to furnish to a specified person "such estimate or returns as the President considers desirable to obtain for the effectual exercise of any of his powers under this section". This requirement does not directly bear upon the issues discussed in this case.)

The issue of unreasonableness has been raised in respect of two aspects of the Regulations, namely the definitions of "incidental charges" and "pre-sale costs". The actual wording of the challenge is that the definitions are "vague, uncertain, unreasonable and irrational". However, respectfully adopting the approach taken in the *ex parte Brind* case *supra*, I propose to deal with all these complaints as one, labelled "unreasonableness".

Reference to s 2 of the Regulations reveals that the definitions at the time of the offence were as follows:

" 'Incidental charges' means -

- (a) customs duty and clearing charges;
- (b) interest, bank and finance charges;
- (c) purchasing, shipping and confirming commission incurred in connexion with the importation or purchase of any commodity."

"'Pre-sale costs', in relation to any commodity sold by a seller, means -

- (a) if the seller is an importer of the commodity in question -
 - (i) the cost, insurance, freight value of the commodity, whether the commodity was originally sold to him inclusive of 'cost, insurance freight' or on any other terms; and

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- (ii) the total of the charges, if any, referred to in paragraph (b) that are incurred by the seller after the importation of the commodity into Zimbabwe;
- (b) if the seller is a manufacturer, wholesaler, dealer or retailer of the commodity in question, the total of the charges incurred per unit by the seller in respect of -
 - (i) the factory cost or cost from the supplier;
 - (ii) the cost of packing and dispatching by the factory or supplier as detailed on the factory or supplier's packing note;
 - (iii) transport costs to the factory or business premises of the seller;
 - (iv) all insurance costs prior to arrival at the factory or business premises of the seller;

less any trade discount and the value of free commodities allowed by the factory or supplier, and not including incidental charges."

The definitions find practical application in the terms of s 19 of the Regulations, which provide for the control of prices on commodities with specified mark-ups. Subsection 19(2) refers to retail dealers, and so is relevant in the present circumstances. It provides:

"(2) No retail dealer shall sell any commodity listed in the Fourth Schedule from any business premises at a price

greater than that obtained by applying to the pre-sale cost of such commodity the percentage mark-up pertaining to that commodity stated in the fourth column of the Fourth Schedule."

With this provision must be read s 4, which provides:

"4. (1) Where incidental charges are incurred by the seller, the seller shall, in arriving at any price in terms of sections 9, 10, 11, 19, 20 or 28, first apply the mark-up to the pre-sale cost of the commodity, then add such incidental charges to the total thus obtained;

(2) For the purposes of subsection (1), where a seller has added any incidental charges to the prices of any commodity, he shall keep a record of all incidental charges incurred in respect of such commodity, specifying the amount and description of each incidental charge thus incurred."

I do not think it can be seriously maintained that any of the provisions cited above in any way exceed the regulatory powers vested in the President by s 3 of the Act. Indeed, such was not contended by Mr *de Bourbon*, who represented the companies, both individually in the magistrates' court and collectively

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before this court. The thrust of his argument for them was that the mentioned provisions were conceptually unreasonable. The departure point of his argument was to compare the 1989 Regulations with their predecessors, the 1982 Regulations. The former, he implied, were reasonable in their provisions, the latter not.

The 1982 Regulations, to which Mr *de Bourbon* referred, were, in fact, directions published as an Order in terms of the Control of Goods (Price Control) Regulations, 1954, FGN 255 of 1954. (See Control of Goods (Price Control) Order, 1982.) The concepts of the landed costs being used as a basis for the computation of prices and the inclusion of interest, bank and finance charges in the stipulated percentage mark-up, to which learned counsel adverted for purposes of comparison, were part of a scheme which originated some 35 years prior to the new Regulations coming into force. It was a tried and trusted scheme, although regarded, perhaps, with some disapproval by those to whom they applied, as is almost inevitable with controls of this nature.

However, the 1954 Regulations were introduced and, until 1980, were maintained by successive administrations which, for want of a more concise description, were oriented towards a capitalist economy in which free-market forces were, as far as was practical, encouraged. In 1980 the new administration which formed the post-independence Government adopted a very different economic philosophy based on socialist principles. It is not within our competence to expound in more than the broadest outline what this philosophy consists of, but it appears to be widely recognised that socialism implies a more interventionist approach by central Government on behalf of the common man. Market forces are not relied on to the same degree to determine prices and this results in increased regulation of the detailed activities of the trader. This recognition is borne out by the most cursory comparison of the 1982 Order with the 1989 Regulations. The latter imposes more stringent controls on the methods to be used in calculating the selling price of any article. I refer here particularly to the concepts of "incidental charges" and "pre-sale costs". In this connection, too, it is instructive to note the increased

particularisation of items whose prices are subject to control.

Now, there can be no objection to the Government of the day tailoring the law to suit its own ideology. Indeed the essence of a democratic society is that law should reflect the will of the people. But when a political party does form a Government it is trite constitutional law that it assumes a different character. It becomes responsible for the affairs of State and for the good governance of all citizens. *Inter alia* this must mean that any changes it proposes must be made

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with the minimum disruption to their lives. Here we touch what I perceive to be the nub of the appellants' case. They do not object to the fact of price control, nor even to the fact of change therein. The essential objection, which appears clearly from the evidence given in the magistrates courts, is that the changes were effected without consultation or explanation before or after promulgation. Repeatedly representatives of the appellants recounted attempts to contact the relevant Government departments in efforts to seek clarification of the contentious provisions of the Regulations, but to no avail. For reasons of its own, the Ministry concerned maintained an uncompromising silence in regard to these Regulations, despite the far-reaching implications for both traders and the public as a whole.

In my view, this refusal to explain the Regulations constitutes a valid ground on which the court may justify intervention in this matter. The evidence in this regard was not led in a great deal of detail, but it is abundantly clear that the civil servants concerned were quite unwilling to countenance any dialogue on the subject. This is surely a quite inexcusable attitude when the subject of the enquiries was a new price control regime which, depending on its proper interpretation, had the potential of ruining the businesses of many enquirers and making the conduct of normal trading extremely difficult for others. Further, it seems obvious from the bewilderment of the appellants that either no prior consultation had taken place regarding the Regulations or the authors thereof had disregarded any recommendations arising from such consultation.

There is no specific duty on makers of subordinate legislation to consult anyone before promulgating laws. However, a situation where legislators possess untrammelled power to legislate against the wishes and possibly to the detriment of individual subjects is not in keeping with modern constitutional law and practice. In the United States of America the Federal Administrative Procedure Act of 1946 gives a right, albeit subject to various exceptions, to interested persons to participate in "rule-making" through the submission of written data, views or arguments. Of the situation in this regard in England Professor Wade comments (at p 865 of the Sixth Edition (1988) of his book *Administrative Law*):

"Consultation before law-making, even when not required by law, is, in fact, one of the major industries of government."

Particular British statutes often require, Professor Wade adds, particular interests to be consulted, or advisory committees or councils set up in terms of various Acts must be consulted before rules are made. All of this adds up to less prescriptive and more democratic

government.

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Developments in administrative law, particularly as regards the concept of "legitimate expectation" and the device of suspending an action pending the application of the *audi alteram partem* rule (see *Mafuya & Ors v Mutare City Council* 1984 (2) SA 124 (ZHC); *R v Liverpool Corporation*, ex parte *Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 (CA); and *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111 (PC)) enable me to grant limited relief to the appellants.

It may well be that, in the absence of a contrary provision in the enabling statute, the authors of subsidiary legislation are under no obligation to consult those whom a by-law will affect before they promulgate it. However, in the light of the peculiar circumstances appertaining to these by-laws, I am of the opinion that the appellants and other traders had a legitimate expectation that they would at least be fully informed regarding the contents of the Regulations on the basis that to be forewarned is to be forearmed. There was evidence in the OK Bazaars case of the immense cost to the company of a compulsory price change. It was said that a recent alteration in sales tax rates cost the company in excess of \$50 000 just to relabel merchandise. While OK Bazaars is doubtless an extreme case due to their large volume of goods, the cost of the changes necessary to comply with the Regulations, I would imagine, would in none of these cases be insignificant.

"Legitimate expectation" is a concept developed by the English courts during the last decade or so: see *R v Hull Prison Board of Visitors* [1979] 1 All ER 701; *O'Reilly v Mackham* [1982] 3 All ER 1124 (HL); and *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC). It is designed to grant relief to a subject who has been disadvantaged by his reliance on a substantial indication that the Executive would take a course of action which it did not, in fact, take. It has been accepted into South African law in cases such as *Castel NO v Metal and Allied Workers Union* 1987 (4) SA 795 (A), and *Makoena & Ors v Administrator, Transvaal* 1988 (4) SA 912 (W). In the *CCSU* case *supra* at 954f LORD ROSKILL said of legitimate expectation:

"The principle may now be said to be firmly entrenched in this branch of law. As the cases show, the principle is closely connected with the right to be heard. Such an expectation may take many forms. One may be an expectation of prior consultation; another may be an expectation of being allowed to make representations, especially where an aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure."

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It is significant that LORD ROSKILL chose to single out prior consultation as an example of a legitimate expectation.

Closely related to legitimate expectation as a ground of unreasonableness is a seeming contradiction in legislative policy. In normal circumstances no court would enquire into this field,

but an examination of reasonableness involves an essentially practical rather than a strictly legalistic approach.

The anomaly here is the nature of the Regulations in the light of the economic structural adjustment programme ("ESAP") which is presumably sponsored, at least partially, by the same Ministry. The thrust of ESAP is the liberalisation of trade and the lessening of central control on the economy. This amounts to a major change in economic policy: the legal philosopher, Hans Kelsen, would have viewed it as a change of the economic norm. It is, on any view, a change of approach so fundamental that this court cannot ignore its implications. Into this new environment the Regulations still allow for a price control regime which seeks to increase central control (see, for instance, the expanded range of goods whose price is specifically controlled) and inhibit the ability of traders to modify their profit margin to suit their trading conditions. The necessity of some form of price control in an economy such as ours would be unquestionable, even if it was open to the courts to pronounce on it. Competition is too weak to allow total freedom to traders in this area. But controls must be reasonable. They must not impose such an administrative burden on the individual trader that they are impossible, or even difficult to operate, neither should they impose theoretical restrictions on profit margins which are unworkable in practice. I refer here particularly to the definitions of pre-sale costs and incidental charges, which appear to me academic and artificial.

Before concluding, I would like to comment on one aspect of the evidence in the cases against Paul of Carnaby Street and Cullen and Kuhn. It was alleged that the suppliers dictated, by unwritten pacts, minimum retail prices and threatened to withdraw their prestigious franchises if such prices were not maintained. This I regard as a thoroughly obnoxious and insidious practice and one which would mitigate considerably the offences of these two appellants. Further, it seems to me that provision ought to be made to eradicate this type of practice.

The order I propose reflects my finding that the applicants had a legitimate expectation that they would be consulted before the Regulations were published. I have noted my opinion that some form of price control is necessary in the economy of Zimbabwe so I am unable to say the Regulations are wholly

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EBRAHIM JA

unreasonable. It would be rather presumptuous of me, as one unversed in economics in general and local trade in particular, to sift through the provisions declaring this or that section to be unreasonable. Moreover such a course would be unwise, as many potential *lacunae* would be opened thereby. Instead I would venture to suggest that the operation of current Regulations should be suspended for a period to allow the responsible Ministry time to reconsider the terms of the necessary legislation and to attempt to reach a consensus with those whom they will affect on how best to implement an effective system of price control.

The appeals against sentence succeed in respect of all the appellants, and the sentences are altered to read "Cautioned and Discharged". The appellants succeeded in this appeal only insofar as I was persuaded that they had a legitimate expectation of being consulted and that this was not done. I suggested the suspension to allow a consultative dialogue to proceed, not

because I have ruled that any specific section was unreasonable. My opinion in regard to the appellants' frustrated expectation is mitigatory, but it does not mean I am satisfied that the magistrates wrongly convicted the companies.

Manyarara JA: I agree.

Korsah JA: I agree.

Winterton, Holmes & Hill and Ben Baron & Partners, appellants' legal practitioners

1991 (2) ZLR p251

MANGA v MANGA 1991 (2) ZLR 251 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Gubbay CJ, McNally JA & Manyarara JA

Civil appeal

24 & 31 October 1991

Flynote

Mandament van spolie - joint possessors - order available at the instance of one joint possessor against the other.

Husband and wife - one spouse removing jointly held matrimonial property from the matrimonial home - order to restore.

Headnote

When one of two joint possessors of a thing illegally takes exclusive possession of that thing a *mandament van spolie* will lie at the instance of the other possessor in the same way as if the applicant had enjoyed exclusive possession.

The respondent, who was married to the appellant, left the matrimonial home taking with him certain items which had up to then been in possession of both spouses. The appellant delayed for some five months in bringing her application in the court *a quo*, although the commencement of the action was preceded by several demands for restoration of the claimed items.

Held, that the appellant was entitled to a spoliation order.

Held, that the appellant's delay in instituting proceedings did not amount to acquiescence in the dispossession.

Cases cited:

Petersen v Petersen 1973 (2) RLR 270 (R)

Rosenbuch v Rosenbuch & Anor 1975 (1) SA 181 (W)

Oglodziniski v Oglodziniski 1976 (4) SA 273 (D)

Coetzee v Coetzee 1982 (1) SA 933 (C)

Jivan v National Housing Commission 1977 (3) SA 890 (W)

1991 (2) ZLR p252

GUBBAY CJ

A J Dyke for the appellant

R Makarau for the respondent

Judgment

Gubbay CJ: The appellant, who was the applicant in the court below, is the wife of the respondent, their marriage having been solemnised in terms of the Marriage Act [*Chapter 37*]. Until 4 February 1989 they lived together for several years in a block of flats in Harare and jointly possessed all the furniture and household effects, as well as an Alpha Romeo motor vehicle. At some stage serious disharmony arose between them, which culminated in the respondent's departure from the matrimonial home on the date afore-mentioned.

There is a dispute as to whether the respondent was driven out by the appellant, but whether he was or not is of no relevance to the present issue. What is common cause between the parties is that when he did leave, he removed those household goods, and the motor vehicle, enumerated and described by the appellant.

Considering herself aggrieved by the respondent's action, the appellant instituted proceedings for a spoliation order. She deposed in para 4 of her affidavit, filed in support of the notice of motion, that:

"... prior to the respondent's dispossessing me, I enjoyed lawful, peaceful and undisturbed possession of the property."

In his opposing affidavit the respondent did not dispute the allegations in para 4 and did not suggest that the appellant had, either expressly or tacitly, acquiesced in the removal of the property in question. That was not his defence. The justification for his conduct was worded in this way:

"The applicant and myself enjoyed lawful, peaceful and undisturbed possession of the property **jointly** since we are married and stayed together in the matrimonial home. When the applicant chased me from the matrimonial home all I did was to simply take **my** property (having purchased all of it either prior to or during the marriage) to my new residential home." (Emphasis added.)

While appreciating that a defence of ownership of the spoliated thing is not permissible, the learned judge who heard the application dismissed it on the ground that the *mandament van spolie* does not lie at the suit of a person who holds jointly with others - exclusivity of possession

being an essential requirement.

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GUBBAY CJ

Even in relation to the special situation of husband and wife, I am in respectful disagreement with that proposition as being a correct reflection of the law. The only case which affords it some support is *Petersen v Petersen* 1973 (2) RLR 276 (R). There, a matrimonial action was pending between the spouses. Both claimed to own the household property, but neither's right to possession thereof was inferior to the other's. BECK J (as he then was), having regard to the applicant's obligation to provide his wife and children with a suitable home, decided to allow her to retain the goods she so needed, and ordered the remaining goods to be returned to the husband. He considered that the principles of spoliation were an unsatisfactory basis on which to determine a dispute between the spouses *pendente lite* (see at 271G-H). This approach undoubtedly provided an equitable and practical solution.

With all deference, however, I prefer the reasoning of COLMAN J in *Rosenbuch v Rosenbuch & Anor* 1975 (1) SA 181 (W). In that case the husband, married out of community of property, applied for a spoliation order against his wife, who had left the matrimonial home taking with her certain furniture and household effects. On the assumption that the articles concerned had been jointly possessed by the spouses up to the time of their removal by the wife, the learned judge held the husband entitled to the spoliation order sought. He said at 183F-G:

"(It) seems to me that in principle a joint possessor who has been deprived of his share of the possession of something should be entitled to the remedy of a spoliation order if the other factors requisite for such relief are present. When one of two joint possessors of a thing illicitly takes exclusive possession of that thing against the will of his co-possessor the *ratio* underlying the remedy of a spoliation order would seem to me to be as fully applicable as in the case where a person has been wrongfully deprived of exclusive possession."

COLMAN J rejected a contention that the ordinary principles of spoliation did not arise because the husband had in fact driven the wife from the joint household and thus wrongly deprived her of the possession of her share of the household goods. He explained at 184A-D:

"I do not know whether the husband did that or not; he denies it, and that is one of the issues which will fall to be determined in the pending action; it certainly cannot be determined at this stage. But even if the husband did commit the type of constructive desertion suggested I find it difficult to see how that can assist the wife in the present proceedings. A spoliator cannot

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GUBBAY CJ

justify his conduct, and avoid the consequences of that conduct, by saying that he was the victim of prior spoliation. If he was, he had a remedy in law, but not the right to take the law into his own hands. If the wife in this case was driven out of her home and thus deprived of the use of the goods which she reasonably required she had her remedy in an application to this Court for maintenance *pendente lite* or possibly for some specific relief. But it would be flying in the face of the well established principles underlying our law of possession and spoliation if it were to be said that in such circumstances she had the right, against the will of her husband, to take for herself whatever she needed or thought she needed."

In *Oglodzinski v Oglodzinski* 1976 (4) SA 273 (D) at 276B LEON J likewise approved of the

remarks of COLMAN J and what was held to be the position in the *Rosenbuch* case *supra*.

Notwithstanding the absence of any argument to the contrary, I have considered whether, in contra-distinction to the restoration of the household furniture and effects, the appellant is entitled to the remedy of spoliation with respect to the Alpha Romeo motor-vehicle. I think she is. The allegation was made, and not denied, that the motor-vehicle was one of the assets jointly possessed by the parties at the time it was removed by the respondent. One can only assume, therefore, that it was in use for the purposes of the matrimonial home. Certainly the respondent did not suggest otherwise. It is true that the appellant admitted that the motor vehicle was purchased by the respondent, though adding that she enabled him to save money for its purchase by personally meeting all the household expenses. It may well be that her prospects of being able to resist a vindictory claim are weak, but she cannot on that ground be denied the relief of having the *status quo ante* restored. See *Coetzee v Coetzee* 1982 (1) SA 933 (C).

Finally, it was urged on the respondent's behalf that this court should decline to interfere with the judgment of the court *a quo*, on the ground that the appellant had failed to seek a spoliation order within a reasonable time after the date of dispossession, albeit the lodging of the application, on 10 July 1989, had been preceded by numerous demands for restoration of the property.

A similar argument was presented to STEYN J in *Jivan v National Housing Commission* 1977 (3) SA 890 (W). He considered that the bar of one year, which under the common law is imposed in the case of the *mandament van complainte*, should be a guide to modern practice as regards the *mandament van spolie*; but that the court was not necessarily bound to refuse an order sought after a year, or to allow an order if less than a full year had elapsed, especially if, on account

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GUBBAY CJ

of the delay, no relief of any practical value could be granted (see at 892 *in fine*-893C). The learned judge held that the delay of eight months, in the matter before him, was not so gross, nor had it such self-defeating consequences, as to justify the refusal of relief.

I am satisfied that *in casu* a delay of five months cannot be regarded as consistent only with acquiescence on the part of the appellant in the dispossession. Nor was the delay so extensive as to disable the court *a quo* from granting any practical relief.

In the result, the appeal succeeds with costs. The order of the High Court is altered to read:

- "1. The respondent is ordered to restore possession to the applicant of the property listed in Annexure A to the Notice of Motion within seven (7) days of the service of this order upon him, failing which the Deputy Sheriff be and is hereby directed to effect restoration of possession to the applicant.
2. The respondent is to pay the costs of suit."

McNally JA: I agree.

Manyarara JA: I agree

Coghlan, Welsh & Guest, appellant's legal practitioners

Gambe, Chinyenze & Associates, respondent's legal practitioners

1991 (2) ZLR p256

KATSUMBE v BUYANGA 1991 (2) ZLR 256 (HC)

Editor's Note:(3)

Court **High Court, Harare**

Robinson J

Civil trial for damages

31 October 1991

Flynote

Husband and wife - adultery - damages - factors to be considered - quantum.

Headnote

The plaintiff sued the defendant for damages for adultery, claiming \$3000. The defendant did not appear at the trial. The court considered the various factors relevant to the assessment of damages for the delict of adultery.

Held, in the absence of mitigatory circumstances, the court should take a strong and principled stand by awarding high levels of damages for adultery, otherwise the court will be a party to unlicensed promiscuity.

Held, the *contumelia* suffered by the plaintiff justified an award of damages of \$3000.

Cases cited:

Doyle v Salgo 1957 R&N 840; 1958 (1) SA 36 (FSC)

Viviers v Kilian 1927 AD 449

Potgieter v Potgieter & Anor 1959 (1) SA 194 (W)

Smit v Arthur 1976 (3) SA 378 (A)

JR Devittie for the plaintiff

1991 (2) ZLR p257

ROBINSON J

Judgment

Robinson J: At the conclusion of the hearing of this action on 31 October, 1991 I ordered that judgment be entered for the plaintiff against the defendant in the sum of \$3000 together with costs of suit in respect of the damages sustained by the plaintiff by reason of the defendant's adultery with the plaintiff's wife and said that I would give a written judgment recording the facts and reasons on which my order was based. This I now do.

The plaintiff mounted his action against the defendant, who was described as a protocol official in the Ministry of Foreign Affairs, on 29 December 1986 claiming the sum of \$3 000 as damages allegedly sustained by the plaintiff as a result of the defendant's adultery with the plaintiff's wife, whom the plaintiff had married in South Africa in 1980 and to whom the plaintiff is still married, over the period February 1986 to November 1986. (At that time the ceiling of jurisdiction in the magistrates court for unliquidated claims was \$2 000.)

I now turn to address the first legal issue, that of liability.

Although the plaintiff said that he had instructed his original legal adviser fully about the acts of adultery which, according to his wife's confession, had taken place between her and the defendant in South Africa ("the South African acts of adultery"), the plaintiff's then legal adviser has pleaded and relied upon only the acts of adultery committed by the defendant with the plaintiff's wife in Harare over the period February 1986 to November 1986 ("the Zimbabwean acts of adultery"). It is, therefore, solely with the Zimbabwean acts of adultery that this court is concerned. However, I allowed the plaintiff to lead evidence on what has happened in South Africa, albeit some of it may have been hearsay, to explain the background to the Zimbabwean acts of adultery.

By admitting the Zimbabwean acts of adultery in his plea, the defendant has conceded the plaintiff's allegations in regard to liability and given credence to the plaintiff's wife's disclosures to the plaintiff in that respect.

Accordingly, in the light of the plaintiff's unchallenged denial that he was aware at the time that the defendant was committing adultery with his wife and that he raised no objection thereto, the way is clear for me to proceed to the next issue, namely, the *quantum* of damages to be awarded to the plaintiff.

In approaching this matter, I am mindful of the caution issued by TREDGOLD CJ in *Doyle v Salgo* 1957 R&N 840 (FSC) at 841B-C; 1958 (1) SA 36 (FSC) at 37B (an undefended case involving a claim for adultery damages) that the fact that an action for damages is undefended does not relieve the trial judge from the

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ROBINSON J

obligation of scrutinising the evidence closely; further, I must disregard completely the South African acts of adultery.

Next, it is crucial to note that, in this action, there is no question of damages being awarded to the plaintiff for the loss of his wife's *consortium*, that is to say, for "the loss of the comfort, society and services of his wife" (see *Viviers v Kilian* 1927 AD 449 at 456) as a result of the defendant's adultery with the plaintiff's wife since the plaintiff elected to condone his wife's acts of adultery and to remain married to her, to the extent of having two further children with her.

This being the case, the plaintiff's claim for damages is confined to one based on *contumelia*, that is to say, for the injury, hurt, insult and indignity inflicted upon the plaintiff by the defendant as a result of the latter's adultery with the plaintiff's wife. In assessing damages under this head, it is not relevant for the court to have regard to factors such as those raised by the plaintiff - that he cannot trust his wife any more and that he always has a picture of the defendant when he has sexual intercourse with his wife; nor may the court accept as a factor aggravating the damages to be awarded under the head of *contumelia* that the defendant caused the plaintiff's wife to fall pregnant by him by requiring her to have her contraceptive loop removed since this was something which arose out of the South African acts of adultery, which were not included in the plaintiff's pleadings.

Before addressing myself to the *quantum* of damages to be awarded to the plaintiff. I wish to say that, in my view, where a third party is shown to have intruded sexually upon a marriage and to have contributed to the breach of the duty of marital fidelity which each spouse owes the other by committing adultery with the one spouse, the courts, in the absence of mitigating circumstances, should be seen, in their award of damages, to come down hard on the adulterer or adulteress as opposed to treating him or her with kid gloves for a variety of expedient reasons. The courts should ensure, as far as is reasonably possible, that an aggrieved spouse who approaches them is not made to feel, after their award of damages, that the adulterer or adulteress has been the winner and that it would have been better for the aggrieved spouse to have taken the law into his or her own hands. Hopefully, we have not reached the stage where we have to be told that adultery is something to be eschewed and condemned.

Accordingly, unless they are prepared to take a strong and principled stand in this regard in support of the vital institution of marriage, the courts will only be party to society's further slide down the slippery slope to the unlicensed promiscuity which scoffs at the spiritual prohibitions against pre-marital and

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ROBINSON J

extra-marital sex and which has landed the world in the sexual morass over which the monster, AIDS, now presides in all its frightening aspects.

Turning now to the *quantum* of damages in this case, I find the following to be features in aggravation of the damages to be awarded to the plaintiff for the *contumelia* suffered by him, namely -

- (a) that the defendant resorted to an insidious lie to ensnare the plaintiff's wife sexually by telling her that the plaintiff was planning to divorce her so that he could marry a girlfriend;

- (b) that, to compound matters, in committing adultery with the plaintiff's wife, the defendant betrayed the plaintiff's friendship in a most despicable way, to the point of having sexual intercourse with the plaintiff's wife even in the plaintiff's home in Hatfield;
- (c) that when his acts of adultery with the plaintiff's wife became known to the plaintiff, the defendant, far from showing any sign of contrition, behaved in a most brazen fashion, to the extent of compelling the plaintiff to prove his marriage to his wife and by alleging that the plaintiff had corruptly acquiesced in the commission of the Zimbabwean acts of adultery and also by trying, through various threats, to intimidate the plaintiff into dropping his action against the defendant.

In the circumstances there can be no doubt about the grave and humiliating indignity felt by the plaintiff, particularly within the circle of his business friends, as a result of the defendant's adultery with his wife. Indeed, one can perhaps understand why it was that the plaintiff should have been driven to the desperate point of wanting to kill the defendant because of the latter's sexual escapades with the plaintiff's wife.

At the end of the day, it might be said of the defendant that he was truly a ram in sheep's clothing and one can only feel pity for a profligate man such as this who has brought shame not only upon himself and his adulterous partner but also upon his family and upon the Government, as his employer.

A high award of damages is clearly called for in the circumstances of this case, an award which will recognise the serious *injuria* inflicted upon the plaintiff in the light of the cunning misuse of his position and friendship by the defendant and the subsequent contempt with which he treated the plaintiff. See *Potgieter v Potgieter & Anor* 1959 (1) SA 194 (W) at 195D. There being a penal element

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ROBINSON J

in the form of damages for *contumelia*, this is certainly a case which cries out for the adulterer to be penalised, see *Potgieter's* case *supra* at 195F.

In *Smit v Arthur* 1976 (3) SA 378 (A) at 387B-C MILLER AJA, when dealing with an award of damages for adultery, said that in "assessing an adequate award to compensate the appellant, who was undoubtedly humiliated and deprived by the wrong done to him, it is necessary to bear in mind, when looking at awards made in the past, the decreased value of money".

Because, in my view, the courts have tended to pay only lip service to their condemnation of adultery, their awards of damages for adultery have been relatively low, even where damages have been awarded for both *contumelia* and loss of *consortium*. However, even if one looks at a past award such as that made in *Doyle v Salgo supra* one finds that the court awarded the plaintiff the sum of £50 sterling as damages for *contumelia* arising out of the defendant's adultery with the plaintiff's husband, in circumstances which lacked the aggravating features found in the present case. In my view, had this case been before the Federal Supreme Court then, that court would have awarded the plaintiff a much higher amount which, translated into today's monetary terms, would certainly have exceeded the sum of \$3000 which the plaintiff is

claiming.

Accordingly, in view of the attitude which I adopt towards adultery and having regard to the aggravating features in this case, to the business callings and financial and social circumstances of the parties and to the value of money in present day Zimbabwe, I consider the plaintiff is entitled to every dollar of the \$3000 which he is claiming (and which, of course, is worth much less now than when he instituted his action in December, 1986) from the defendant on the ground of the defendant's acts of adultery with the plaintiff's wife in Zimbabwe.

It is for these reasons that I ordered that judgment be entered for the plaintiff against the defendant in the sum of \$3000 together with costs of suit.

Atherstone & Cook, plaintiff's legal practitioners

1991 (2) ZLR p261

THE PRESBYTERIAN CHURCH OF SOUTHERN AFRICA v SHIELD OF ZIMBABWE INSURANCE LTD 1991 (2) ZLR 261 (HC)

Court High Court, Bulawayo

Muchechedere J

Trial action

25 September & 8 November 1991

Flynote

Insurance - meaning of the word "riot" in policy - whether a term of legal art as recognised in English Law - terms of contract only to be accorded the status of a term of legal art where so recognised by the country in which it is contemplated by the parties that the loss will occur.

Insurance - interpretation, of insurance contracts - no special rules of interpretation applicable thereto - ordinary grammatical meaning to apply in the absence of an absurd result - application of the contra proferentem rule.

Insurance - onus - reverse onus clause in insurance contract - what an insurer is liable to prove to bring such a clause into operation in his favour in order to rely on an exception in the policy.

Headnote

In the action against the defendant in respect of two policies of insurance provided by the latter in favour of the plaintiff in which certain exceptions absolved defendant from liability for loss occurring due to riot, it was contended for the defendant that whereas the term "riot" is, in English law visited with the status of a term of legal art and as such not necessarily defined in accordance with the popular belief that, *inter alia*, a riot involves noise or disturbance the English Law definition ought to be applied in Zimbabwe.

Held, that a word or phrase can only be a term of legal art if it is recognised as such by the law

of the country in which it was envisaged by the parties that the loss would occur.

MUCHECHETERE J

Held, further that in the interpretation of contracts of insurance there are no special rules of construction peculiar to the interpretation of insurance policies and that in the absence of an absurd result, the plain ordinary and popular meaning of words will be applied.

Held, further, after a review of various dictionary definitions of the word "riot", that in summary the term appears to mean "uproar, tumult, and disorderly behaviour of a crowd or mob of the populace".

Held, further, that in interpreting the term "riot" thus, the defendant was also caught by the *contra proferentem* rule.

Held, further that where an insurance policy contains a reverse *onus* clause and the insurer wishes to rely upon exceptions contained in the policy, where there is a loss which, *prima facie* falls within the risk insured against, the insurer must adduce evidence pointing to the applicability of the exception in order to have the reverse *onus* clause operate in his favour.

Cases cited:

Field & Ors v The Receiver of Metropolitan Police [1907] 2 KB 853; [1904-07] All ER Rep 435 (KB)

S v Sharp [1957] 1 All ER Rep 577 (CCA)

London & Lancashire Fire Insurance Co Ltd v Bolands Ltd [1924] AC 836; [1924] All ER Rep 642 (ML)

Commercial Union Fire, Marine & General Insurance Co Ltd v Fawcett Security Organisation Bulawayo (Pvt) Ltd 1985 (2) ZLR 31 (SC); 1986 (1) SA 432 (ZS)

S v Mayers 1970 (1) RLR 198 (A); 1970 (3) SA 720 (RA)

Quick v Goldwasser 1956 R&N 302; 1956 (2) SA 525 (SR)

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

Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd 1990 (3) SA 373 (C)

D M Campbell for the plaintiff

J B Colegrave for the defendant

Judgment

Muchechetera J: The plaintiff issued summons against the defendant claiming the sums of \$25

000 and \$1 000 in terms of policies of insurance numbers 9250313465 and 3150312572 respectively.

The facts in the matter are that on 8 July 1987 the defendant insured the plaintiff in terms of the above policies of insurance. In the first one the defendant agreed to indemnify the plaintiff against the loss or destruction or damage to buildings

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MUCHECHETERE J

and their contents at Gloag Ranch Mission, Turk Mine, (hereinafter referred to as "the Mission"), caused by fire, riot and strike and riot fire as defined in the policy up to an amount of \$97 277. In the second policy the defendant was to be indemnified against the loss of or damage to a Landrover motor vehicle registration number 320-781Z (hereinafter referred to as "the landrover") up to an amount of \$1 000. On 8 July 1987 while both policies were in full force and effect the buildings and contents at the Mission were lost, destroyed and/or damaged by fire and the landrover was also destroyed by fire. In connection with the said buildings and contents thereof the plaintiff also claims in the alternative that they were caused by "riot fire" or "riot and strike as defined in the Special Extensions to the relevant policy. The plaintiff claims that it suffered loss in the amounts it claims.

The parties agreed, at a pre-trial conference of 7 June 1991 that the following happened on 8 July 1987 at the Mission:

- "a) On the day in question four armed men arrived at the school and collected together staff and pupils;
- b) Under the direction of the armed men all were ordered to pile furniture and books together, to pour diesel fuel thereon and to set the pile on fire which was done;
- c) The school tuck shop was damaged and thereafter set on fire;
- d) Property left in the tuck shop was damaged and thereafter set on fire;
- e) Many buildings and their contents were destroyed by the fires thus started.
- f) The armed men then stole the landrover after the children loaded it with stolen goods and it was later found some distance from the school, burnt out and abandoned;
- g) The activities outlined above were carried out in an orderly and methodical fashion without any element of tumult, unruliness or uproar."

The defendant maintains that the loss and damage suffered by the plaintiff was sustained by or in consequence of a "riot". It therefore contends that in the circumstances it is not liable to the plaintiff by virtue of the provisions of Clause 1(c) and Clause 4 of the General Exceptions to the first and second policies respectively. Clause 1(c) of the General Exceptions to the first policy reads:

"Unless specifically stated to the contrary in any particular section this policy does not cover

- 1) Loss destruction or damage whatsoever or any legal liability of

MUCHECHETERE J

whatever nature directly or indirectly caused by or arising from or in consequence of or contributed to by ...

- (c) Mutiny riot military or popular rising insurrection rebellion revolution military or usurped power martial law or state or siege or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege. . . "

And Clause 4 of the General Exceptions to the second policy reads:

"4. The Company shall not be liable in respect of: Any accident injury loss damage and/or liability directly or indirectly proximately or remotely occasioned by contributed to by or traceable to or arising out of a or in connection with War Invasion the Act of Foreign Enemy Hostilities or Warlike Operations (whether war be declared or not) Civil war Strike Riot Civil commotion Mutiny Rebellion or Usurped Power or by any direct or indirect consequence of any of the said occurrences and in the event of any claim under this Policy the Insured shall prove that the accident loss damage and/or liability arose independently of and was in no way connected with or occasioned by or contributed to by or traceable to any of the said occurrences or any consequences thereof and in default of such proof the company shall not be liable to make any payment in respect of such claim."

The parties also agreed at the said pre-trial conference that the question as to whether what happened at the Mission amounted to "riot" within the meaning of the said clauses would be argued *in limine*. It was also agreed that the question as to the party upon whom the *onus* in connection with the calling into operation of the general exceptions and the special exceptions to the riot extensions in the first policy rested would also be argued at the same time. This judgment is therefore concerned with these two issues only.

On the first issue of "riot" Mr *Campbell*, for the plaintiff, submitted that under the law of England the concept of "riot" is well settled and for its definition see *Field & Ors v The Receiver of Metropolitan Police* [1907] 2 KB 853 at 860 to 861. He also submitted that there it is a term of legal art especially in the interpretation of insurance policy provisions. See *R v Sharp* [1957] 1 All ER 577 at 579H where LORD GODDARD said:

"The word 'riot' is a term of art and, contrary to popular belief, a riot may involve no noise or disturbance of the neighbours though there must be some force or violence."

MUCHECHETERE J

In *London and Lancashire Fire Insurance Co Ltd v Bolands Ltd* 1924 AC 836 at 847 LORD SUMMER said:

"It is true that the uninstructed lay man probably does not think, in connection with 'riot', of such a scene as is described in the case stated. How he would describe it I know not, but he probably thinks of something, if not more picturesque at any rate more noisy. There is, however, no warrant here for saying that, when the proviso uses a word which is emphatically a legal term of art, it is to be confined, in the interpretation of the policy, to circumstances which are only within popular notions on the subject, but are not within the technical meaning of the word. It clearly must be so with regard to martial law; it clearly, I think, must be so with regards to acts of foreign enemies; and I see no reason why the word 'riot' should not include its technical meaning here as clearly as

'burglary' and 'housebreaking' do."

Mr *Campbell* thereafter submitted that "riot" is not a term of legal art in Zimbabwe and that in the circumstances it must be given its plain, ordinary and popular meaning. See *Commercial Union Fire, Marine & General Insurance Co Ltd v Fawcett Security Organisation (Bulawayo) (Pvt) Ltd* 1985 (2) ZLR 31 (SC). In that case GUBBAY JA (as he then was) referred to *London and Lancashire Fire Insurance Co Ltd v Bolands supra* and other English cases and thereafter stated at pages 35-36:

"... In the first place as stressed by LORD SUMMER, it is only where a word is 'emphatically a term of legal art', that is, one which has acquired a recognised technical meaning in law that the wider or narrower popular meaning attaching to it is displaced ...

Secondly, the word or phrase must be a term of legal art according to the **law of the particular country where the parties contemplated the loss covered by the policy might occur**" (the emphasis is mine).

In this connection Mr *Campbell* pointed out that "riot" is not an offence as such in Zimbabwe and that its common law kindred offence is public violence and that there are a number of statutory offences which could apply appropriately in situations of riotous behaviour. In *S v Mayers* 1970 (1) RLR 198(A) at 200-201 it was held that the word "riotous" imparted some form of public violence or "general brawl" which accords with the popular perception of riot. Further in the *Oxford English Dictionary* the word "riot" is defined as follows:

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MUCHECHETERE J

"violence, strike, disorder, tumult, esp. on the part of the populace. A violent disturbance of the peace by an assembly or body of persons; an outbreak of active lawlessness or disorder among the populace."

In *Collins English Dictionary* it is defined as follows:

"a disturbance made by an unruly mob or (in law) three or more persons (ie English Law); tumult or uproar."

And in American Webster's Dictionary it is also defined as:

"Any public disturbance of a boisterous and violent nature, usually caused by a large crowd."

In conclusion he submitted that the feature common to the plain, ordinary and popular meaning of the word "riot" appears to be uproar, tumult and disorderly behaviour on the part of a crowd or mob of the populace. Mr *Campbell* thereafter submitted that since it is admitted that the activities at the Mission on 8 July 1987 "were carried out in an orderly and methodical fashion without any element of tumult unruliness or uproar" the events which gave rise to the loss and damage in this case did not constitute riot within the meaning of the said clauses of the general exceptions.

Mr *Colegrave* for the defendant submitted that if the word "riot" were to be given its plain, ordinary and popular meaning, that is, as it is understood by the man in the street then he would concede that what happened at the Mission on 8 July 1987 could not be described as a "riot". He also accepts the dictionary definitions of the word "riot" which have been quoted above. He however submits that the plain ordinary and popular meaning should not be given to the word "riot" in the context of policies of insurance because therein it is used as a term of legal art. He

also cites the above English cases to indicate its acceptance as a term of legal art and argues that there is no reason why a Zimbabwean court should not follow the English Courts on the matter. He goes on to state that our courts and those of South Africa frequently look to English cases for guidance in matters of insurance because the case law there is richer. He goes on to argue that it is particularly important in insurance cases for the English cases to be followed because of the international nature of contracts of insurance.

I do not agree with the submissions of Mr *Colegrave*. In the first instance it should be restated that the interpretation of insurance contracts is not a matter peculiar to the law of insurance. In *Quick v Goldwasser* 1956 (2) SA 525 (SR) BEADLE J (as he was then) stated at page 528D:

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MUCHECHETERE J

" . . . The General principle, however, unquestionably is that there are no special rules of construction peculiar to the interpretation of insurance policies. . . "

See also *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465 where WESSELS CJ stated:

"It has been repeatedly decided in our courts that in construing every kind of written contract the court must give effect to the grammatical and ordinary meaning of the words used therein."

The above in my view implies that if a word used in an insurance policy can be given its proper plain, ordinary, popular and grammatical meaning there is no reason to look anywhere else for another meaning just because it involves an insurance policy. In the circumstances one does not therefore have to look to English law in this case when a proper meaning of the word "riot" is available just because the word is used in an insurance contract. In my view the question of looking at meanings other than the plain, ordinary and popular one would only come to play if the ordinary sense of the word leads to some absurdity or to some repugnance or inconsistency with the rest of the policy. This is not the position in this case. Secondly I agree with GUBBAY JA's above stated view that a word must be a term of legal art according to the law of the country where the loss covered might occur for it to be acceptable as such. It is significant that the learned judge's comments were made in the course of interpreting words in an insurance policy. In this case it was contemplated by both parties that the loss covered would occur in Zimbabwe where there is no precedent for using the word "riot" as a term of legal art. Thirdly I am also of the view that the defendant in this case is caught by the *contra proferentem* rule which requires a written document to be construed against the person who drew it on the ground that it was for him to express himself in plain terms. Furthermore the defendant is caught by the further rule that the court should lean towards upholding the policy and against producing a forfeiture. For the above propositions see Getz and Davis's *The South African Law of Insurance* 3 ed, pp 226-229.

In conclusion I am of the view that the events which gave rise to the loss and damage in this case did not constitute "riot" within the meaning of the general exceptions contained in either of the policies.

On the question of *onus*, Mr *Campbell* submitted that the defendant must at least adduce some

evidence to provide a factual basis for bringing the loss within such of the exceptions as it contends for and not merely reach into the "grab bag" and

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MUCHECHETERE J

scatter them before the plaintiff requiring it to negative such as the defendant may produce. See *Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd* 1990 (3) SA 373 (C) where it is stated as follows in the headnote:

"Held that it could never have been the intention of the parties that the defendant could invoke the reverse *onus* clause and transfer the *onus* of proof to the plaintiff merely by alleging that one of the excepted risks applied without there being any evidence pointing to the existence of an excepted risk as the cause of the loss.

Held, accordingly, that if the reverse *onus* clause was interpreted in the foregoing manner, there was no room for the finding that the provision was contrary to public policy; for the clause to operate the defendant would have to adduce some evidence to provide a factual basis for bringing the loss within the ambit of the relevant exception. . ."

And at page 385D SELIGSON AJ said:

". . . Suffice it to say that, where it is established that there is a loss which *prima facie* falls within the risk insured against, the insurer would have to adduce evidence pointing to the applicability of an exception in order to have the reverse *onus* clause operate in his favour."

Mr *Campbell* went on to submit that in this case the defendant merely points to a number of possible exceptions. He thereafter argued that some evidence must however be adduced by the defendant to provide a factual basis for bringing the loss within the exceptions contented. And that in particular the defendant will have to adduce evidence to show that the gang of men responsible for the destruction were acting on behalf of or in connection with the political organisation called PF-ZAPU and that its activities were directed towards the overthrow by force of the Government of Zimbabwe or to the influencing of it by terrorism or violence.

I agree with Mr *Campbell's* submissions. I consider it not satisfactory to simply allege that because it is common cause that violent malcontents were causing havoc throughout Matabeleland at the relevant time this should trigger the reversal of the *onus*. In my view the defendant should go further and adduce evidence indicating that the malcontents were politically allied or acting on behalf of a political organisation or otherwise acting in concert.

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MUCHECHETERE J

In the circumstances I am of the view that the *onus* still rests with the defendant in this matter.

For the reasons given above I make the following order:

- (a) That the events which gave rise to the loss and damage in this case do not constitute "riot" within the meaning of the general exceptions contained in either of the policies.

- (b) That the *onus* in this case still rests with the defendant.
- (c) That the costs of this action are reserved for the main case.

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

Winterton, Holmes & Hill, defendant's legal practitioners

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MINISTER OF PRIMARY AND SECONDARY EDUCATION & ANOR v RAMHEWA 1991 (2) ZLR 270 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

29 October & 11 November 1991

Flynote

Statutory interpretation - effect to ordinary grammatical meaning.

Public service - Public Service (Officers) (Misconduct and Discharge) Regulations 1986 - s 20(1)(f1) - meaning
- not applicable where salary not paid.

Headnote

The respondent was discharged from his employment by the Public Service Commission. The court *a quo* ordered his re-instatement with payment of remuneration as it considered his discharge was unlawful because certain procedures had not been followed by the Commission.

The Commission thereafter purported to act in terms of the penalty provisions of the Regulations by ordering the forfeiture of his salary to be paid to him for the period of his unlawful suspension.

Held, that the wording of the penalty section in the Regulations should be construed strictly. That the order of forfeiture by the Commission was improper in that the penalty section provides for the recovery of remuneration paid to an officer and not to remuneration that has not been paid or received by him.

Held, that if there are two constructions of a penalty provision that are open to interpretation then the more lenient construction should prevail.

Held, that the court *a quo* was correct in its interpretation of the meaning of the penalty section s 20(1)(f1) of the Regulations and that the order of forfeiture imposed on the respondent by the Commission was improper and was set aside properly by the court *a quo*.

GUBBAY CJ

Case cited:

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

H Simpson for the appellants

D M Foroma for the respondent

Judgment

Gubbay CJ: This is an appeal against the judgment of ADAM J in which he ordered, in effect, that:

- (1) The Minister of Primary and Secondary Education (now the first appellant) pay to the applicant (now the respondent) the salary and other benefits for the period 28 November 1986 to 30 April 1988 in the sum of \$24 169.
- (2) The determination of the Chairman of the Public Service Commission (now the second appellant) to the extent that it stated that the applicant be paid no remuneration for the period 28 November 1986 to 18 May 1988 be set aside as amounting to a penalty not permissible under s 20 (1) of the Public Service (Officers) (Misconduct and Discharge) Regulations 1986.

The relevant historical events giving rise to the dispute between the parties may be summarised as follows:

- (1) The respondent was employed as a principal executive officer in the Ministry of Primary and Secondary Education.
- (2) On 28 November 1986 the Commission purported to discharge the respondent upon a finding that he was guilty of misconduct. He had not been suspended from service under the Regulations at any time prior thereto.
- (3) The respondent brought the decision of the Commission on review before the High Court, and on 13 April 1988, GREENLAND J set aside the finding that he was guilty of misconduct as well as the decision to discharge him. The learned judge indicated that in the event of disciplinary proceedings being reinstituted against the respondent, an enquiry was to be held in terms of s 16 of the Regulations. See *Ramhewa v Secretary of the Public Service Commission* 1988 (1) ZLR 257 (HC) at 269D-F.
- (4) On 18 May 1988 the respondent was suspended from service with the Ministry pending the holding of an enquiry into whether he had committed an act of misconduct.

GUBBAY CJ

- (5) On 19 October 1989 REYNOLDS J in an application brought before him, ordered the Minister to pay the respondent his arrear salary and other benefits for the period 28 November 1986 to 30 April 1988, in the sum of \$24 169. He reasoned that as the act of discharge on 28 November 1986 was a nullity, the respondent had remained an employee of the Ministry until lawfully suspended from service on 18 May 1988. As such, the respondent was entitled to be paid his salary during that period. An appeal was noted against this judgment.
- (6) On 8 December 1988 the respondent was advised in writing that he had been found guilty of misconduct by the Commission and was discharged from the Public Service. The letter further informed him that:

"The Commission also determined that you be paid no remuneration for the period 28th November, 1986 to 18th May, 1988 or alternatively any remuneration paid to you for that period be recovered in full. You should also accrue no leave during the same period."

- (7) The Commission believed that it was empowered to impose this penalty by virtue of the provisions of s 20(1)(f1) of the Regulations, which read:

". . . direct that the full amount of any remuneration paid to the officer since the misconduct or such part of that amount as the Commission may determine, be recovered from him, where the Commission considers that the officer concealed the true nature of the misconduct and that the misconduct was such as to justify the officer's suspension."

his sub-paragraph was inserted into the Regulations on 15 July 1988, by Statutory Instrument 111/1988; that is, two months after the respondent had been suspended from service.

- (8) In its letter of 9 January 1989 the legal practitioners acting on behalf of the respondent protested that the determination that he should not be paid for the period 28 November 1986 to 18 May 1988 was impermissible in law and had the effect of ousting or overruling the decision of REYNOLDS J
- (9) The response was that the determination made was wholly competent in that it effected a set-off of the judgment debt owed to the respondent by the State against an equivalent debt created by the imposition of the penalty, and thereby owed by the respondent to the State. The judgment of REYNOLDS J, therefore, had not been overridden, for the consequence of the set-off was to discharge the judgment debt.

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GUBBAY CJ

- (10) Confident in the correctness of this contention, on 28 December 1989, the Minister formally abandoned the appeal noted against the judgment of REYNOLDS J

As a result of the impasse, the respondent instituted proceedings for relief by way of notice of motion. In allowing the application ADAM J pointed out, correctly to my mind, that the penalty imposed by the Commission that the respondent should not, **at that time**, be paid any remuneration for the period 28 November to 18 May 1988 was not sanctioned by any of the

provisions of s 20 of the Regulations. This is not now in contention.

The crisp issue, which relates to the alternative penalty, is whether the learned judge *a quo* was right in holding that as, in fact, no remuneration had been paid to the respondent for the period in question, the penalty under s 20 (1)(f1), which permits of the **recovery** from the officer of any remuneration or part thereof **paid** to him since the misconduct, could not be imposed by the Commission; what had not been paid could not be recovered.

Mr *Simpson*, who appeared for the appellants, was not constrained to argue that the learned judge had erred in his interpretation of s 20(1)(f1) and did not advance the set-off contention which figures so prominently in the opposing affidavit of the Commission's Chairman. Mr *Foroma*, on the other hand, strongly supported the reasoning of the learned judge.

It is a well-established principle of interpretation that it is only if the legislative intention is not disclosed with sufficient certainty by the clear and unambiguous meaning to be assigned to the words of the enactment, read in its proper context, that recourse to other canons of construction is justified. This may occur where an adherence to literalism would lead to absurdity or an anomaly so glaring that the law-maker could not possibly have intended it; or where the language used is, in fact, ambiguous.

In my opinion, effect can be given to the wording of s 20(1)(f1) of the Regulations taken in its plain and ordinary meaning. The critical phrases are "any remuneration **paid** to the officer" and "to be **recovered** from him". Read together they convey the meaning that the remuneration must have been actually received by the officer - payment thereof must have been made. The penalty is designed to enable the Commission to **recover** from the officer any remuneration, or part thereof, he had actually received from his Ministry subsequent to having committed the act of misconduct in question.

1991 (2) ZLR p274

GUBBAY CJ

Section 20(1)(g) reflects exactly the same legislative intent. It allows for the recovery as a penalty of any allowance or part thereof paid to the officer during the period he was under suspension.

If the intention of the law-maker was to make it competent for the Commission to impose a penalty depriving the officer of an amount due and payable from a Ministry either under a judgment debt or otherwise, but not yet paid, it would have used the words "paid or payable" before the words "to the officer" in both sub-paragraphs (f1) and (g).

Even if the wording of s 20(1)(f1) were not, as I deem it to be, against the view adopted by the Commission in correspondence, it must at least be held to be doubtful. The principle must accordingly be applied that if there are two constructions of a penalty provision that are reasonably open the more lenient should prevail. In short, a court should strive to avoid adopting a construction which penalises the person in a way which was not made absolutely clear by the law-maker.

It follows that the learned judge was correct in the meaning he assigned to s 20(1)(f1) of the

Regulations.

This conclusion makes it unnecessary to consider the alternative argument raised by Mr *Foroma*. This was to the effect that as the penalty prescribed in sub-paragraph (f1) only came into operation on 15 July 1988, and as the respondent's claim related to a period prior and up to 18 May 1988, it was, in any event, incompetent for the Commission to deprive him of, or interfere with, existing acquired rights.

Mr *Simpson*, in a plea *ad misericordiam*, attempted to persuade this court that it ought not to countenance a situation in which an officer in the Public Service, who had been properly found guilty of an act of misconduct, should be entitled to enforce a judgment for the payment of an amount in respect of salary and benefits covering a period subsequent to his having misconducted himself.

No doubt it was to prevent what was perceived to be an inequitable retention of remuneration by an officer that the penalty prescribed in sub-para (f1) was made available to the Commission. Its imposition at the discretion of the Commission, is, I think, unobjectionable. But whether it is or not is beside the point. In order to have recourse to it the requirements of the enactment creating it must be strictly complied with. If not, the penalty is liable to be set aside as invalid. This is precisely what has occurred here.

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GUBBAY CJ

Whether the result would have been different if the judgment debt of \$24 169 had been paid to the respondent **before** the Commission purported to impose the penalty does not fall for determination.

I would, therefore, dismiss the appeal with costs.

Korsah JA: I agree

Ebrahim JA: I agree

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

Sawyer & Mkushi, respondent's legal practitioners

1991 (2) ZLR p276

ASHARIA v PATEL & ORS 1991 (2) ZLR 276 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

28 October & 11 November 1991

Flynote

Contract - mora in persona - interpellatio - reasonable time - notice of cancellation - what is sufficient.

Headnote

Where time for the performance of a contract has not been agreed upon between the parties, performance is due on conclusion of the contract or so soon thereafter as is reasonably possible in the circumstances. But the debtor does not fall into *mora ipso facto*. He must know he has to perform. This is known as *mora ex persona* and only arises after *interpellatio* or demand. If the time stipulated in the demand for performance is unreasonably short, the demand will be invalid.

Both demand and notice of rescission are necessary for cancellation of a contract for non-performance; commonly the two are contained in the same notice which then fulfils a double function of fixing a time for performance after which the debtor will be in *mora*, and creating a right of cancellation on account of that *mora*.

In order to constitute a notice of rescission, the language must clearly and unequivocally convey an intention to cancel.

The question of on whom rested the *onus* of proving the *interpellatio* reasonable discussed but not decided.

Cases cited:

Nel v Cloete 1972 (2) SA 150 (A)

Flugel v Swart 1979 (4) SA 493 (E)

Ver Elst v Sabena Belgian World Airlines 1983 (3) SA 637 (A)

Fluxman v Brittain 1941 AD 273

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GUBBAY CJ

Mackay v Naylor 917 TPD 533

Wellington Board of Executors Ltd v Schutex Industries (Pty) Ltd 1952 (3) SA 170 (C)

Rae v Rohrs & Anor 1954 (2) SA 235 (N)

Pillay v Krishna & Anor 1946 AD 946

Willowdene Landowners (Pty) Ltd v St Martin's Trust 1971 (1) SA 302 (T)

St Martin's Trust v Willowdene Landowners' (Pty) Ltd 1970 (3) SA 132 (W)

Pretorius v Greyling 1947 (1) SA 171 (W); [1947] 1 All SA 103 (W)

Ponisammy & Anor v Versailles Estates (Pty) Ltd 1973 (1) SA 372 (A)

Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd 1985 (4) SA 809 (A)

Kangisser & Anor v Rieton (Pty) Ltd 1952 (4) SA 424 (T)

A P de Bourbon SC for the appellant

E W W Morris for the respondent

Judgment

Gubbay CJ: The appeal to this court is from a judgment of the High Court (GIBSON J), which dismissed with costs the appellant's claim for an order for specific performance of a contract of sale entered into with the first respondent, in terms whereof he purchased, for the sum of \$275 000, all the issued share capital in the company Pathelena (Pvt) Ltd ("Pathelena").

The factual background to the dispute between the parties was in large measure common cause and may be set out chronologically in the following way:

One of the assets in the estate of the late SB Patel was an immovable residential property, known as Subdivision C of Lot 48, Block A of Avondale, in the District of Harare. I shall henceforth refer to it as "the property". The heir to the estate was the deceased's wife, Mrinalini Patel, and the executor dative was the deceased's brother, the first respondent. It was arranged by the Patel family that the property was to be transferred from the estate to Mrs Patel and thereafter from her to Pathelena, the shareholders of which were two other companies, Bachu Holdings (Pvt) Ltd and Ferco (Pvt) Ltd (the second and third respondents), the former holding virtually all the issued share capital. The property would then comprise Pathelena's sole asset.

On 23 January 1989 the first respondent wrote to the appellant confirming, *inter alia*, that:

"... the property will be sold to you on share transfer basis. Therefore you shall be purchasing the shares in Pathelena (Pvt) Ltd and our loan account therein for a total of \$275 000,00."

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GUBBAY CJ

No time for payment of the purchase price, or for the transfer of the shares, was fixed by the parties.

Notwithstanding that ownership of the property had not passed to Pathelena, the appellant was given occupation, free of rental, on 1 February 1989, subject to his being responsible for the payment of all service charges as well as the wages of a gardener and a security guard.

On 20 March 1989 registration of the property was effected into the name of Pathelena and in early April 1989 the title deeds thereto were handed to the appellant. This was done to enable him, so it was believed, to raise finance from a building society for the purchase of the issued share capital in Pathelena against the security of a mortgage bond registered against the

property.

During May 1989 the appellant decided to lease the property at a rental of \$3 000 per month with effect from 1 July 1989. The keys to the homestead were handed to the prospective tenant in mid - June 1989 to allow her to carry out certain building improvements she had agreed to make. The latter, however, entertained misgivings as to whether she had the right to lease the property from the appellant, and so approached the first respondent. He was distressed to discover that the appellant was proposing to lease Pathelena's property before he had paid for the issued share capital. Accordingly he recovered the keys, thereby terminating the appellant's possession.

On 2 June 1989 the appellant delivered the deed of transfer to a firm of legal practitioners with instructions to register a mortgage bond against the property in favour of the building society he had negotiated with - the amount to be advanced being \$206 000. He was later informed that it was unlawful to apply for a mortgage bond on the security of a company's property in order to pay for shares in that company.

On 12 June 1989 , and shortly before he had recovered the keys to the homestead, the first respondent addressed a personal note to the appellant, informing him that he was being placed under pressure by Mrs Patel and wished to rid himself of all involvement. He asked that the keys be handed to the bearer of the note and undertook to compensate the appellant for any costs incurred in respect of the property. The note ended:

"I hope you will understand. If you are interested in some other property deal I have something in the offing and (can) give you details."

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GUBBAY CJ

The appellant declined to agree to the cancellation of the sale and on 26 June 1989 instructed his legal practitioners to enforce specific performance of the contract. As he was not then in a position to tender the purchase price, the instruction was not implemented.

In their letter of Friday, 21 July 1989 the legal practitioners acting on behalf of the respondents gave the appellant until 31 July 1989 to pay for the issued share capital in Pathelena. It seems that the appellant only received the letter on Monday 24 July 1989 and immediately handed it to his legal practitioners for reply. The appellant had, therefore, six business days within which to raise the sum of \$275 000.

The appellant protested at the short time limit allowed him. He stated that he was willing to perform within a more reasonable period, but did not indicate what further period he required. In the event, it was only on 4 August 1989 that the appellant tendered the agreed purchase price through his legal practitioners. This was done notwithstanding the written intimation received the previous day that the respondents had cancelled the sale and that the title deeds were to be returned forthwith.

Faced with this impasse, the appellant instituted proceedings on notice of motion against the respondents. In refusing the relief sought, Gibson J made three important determinations: First,

that as a matter of law, the *onus* was upon the appellant to prove that the period of time allowed him to perform his obligations was unreasonable. Second, that, having regard to all the relevant circumstances, the appellant had failed to discharge that *onus*. Third, that the letter of 21 July 1989 served a dual purpose. It placed the appellant in *mora* and, in addition, gave notice of the intention to cancel the contract should there be a failure to perform during the period stipulated.

The correctness of each determination is at the heart of this appeal, and it was to them that the arguments, so persuasively advanced by counsel on behalf of the parties, were directed.

The general applicable rule is that where time for performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or as soon thereafter as is reasonably possible in the circumstances. But the debtor does not fall into *mora ipso facto* if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of *mora*, known as *mora ex persona*, only arises if, after a demand has been made calling upon the debtor to perform by a specified date, he is still in default. The

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GUBBAY CJ

demand, or *interpellatio*, may be made either judicially by means of a summons or extra-judicially by means of a letter of demand or even orally; and to be valid it must allow the debtor a reasonable opportunity to perform by stipulating a period for performance which is not unreasonable. If unreasonable, the demand is ineffective.

Where a debtor has fallen into the *mora ex persona* after demand, the creditor can acquire a right to cancel the contract by serving notice of rescission in which a second reasonable time limit is stipulated, making time of the essence. Both demand and notice of rescission are necessary in order to allow for cancellation for non-performance. The two may be, and commonly are, contained in the same notice. Such notice will then fulfil a double function: It will fix a time for performance after which the debtor will be in *mora*, and create a right in the creditor to rescind the contract on account of that *mora*. See *Nel v Cloete* 1972 (2) SA 150 (A) at 163E; *Flugel v Swart* 1979 (4) SA 493 (FCD) at 502E-H; and generally Joubert *General Principles of the Law of Contract* at pp 202-203; Kerr *The Principles of the Law of Contract* 4 ed at pp 461-462; de Vos *Mora Debitoris and Rescission* (1970) 87 SALJ at pp 310-311.

This brings me to the issue of the burden of proof. Was it on the respondent to show that the period fixed for performance in the *interpellatio* of 21 July 1989 was reasonable, or on the appellant to show that it was unreasonable?

Prior to the decision in the South African Appellate Division in *Ver Elst v Sabena Belgian World Airlines* 1983 (3) SA 637 (A), the view which commanded support was that it is the debtor who carries the burden of proof regarding the unreasonableness of the period allowed for performance. In *Fluxman v Brittain* 1941 AD 273 TINDALL JA, when dealing with this issue, said at 296:

"... the rule was correctly laid down in *Mackay v Naylor* that ordinarily it rests on the debtor to advance the reasons for the granting of the delay. That being so, the defendant cannot rely on non-expiration of a reasonable

time as he did not take this defence in his plea."

The cited case of *Mackay v Naylor* 1917 TPD 533 concerned the lease of a racehorse, the immediate return of which was claimed by the respondent on the ground that, as the lease mentioned no time for termination, he had the right to peremptorily terminate it.

GREGOROWSKI J strongly remarked at 540 *in fine*-541 that:

"If the respondent, the bailee, contends that he ought to have a reasonable

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GUBBAY CJ

notice and that the bailor is acting unreasonably in not giving a proper interval of time for the return of the thing leased, it is for him to set that up as a defence and to prove that the termination is unreasonable and what under the circumstances is a reasonable notice."

See also *Wellington Board of Executors Ltd v Schutex Industries (Pty) Ltd* 1952 (3) SA 170 (C) at 175C-H; *Rae v Rohrs & Anor* 1954 (2) SA 235 (N) at 237C-H; Wessels *The Law of Contract* vol 2 para 2893; Wille *The Principles of South African Law* 7 ed at p 362; de Vos *op cit* at p 311.

But in *Nel v Cloete supra*, at 164F WESSELS JA, while observing that considerations of equity strengthen the contention that the *onus* should rest on the debtor to prove that the time allowed was unreasonably short, was prepared to leave the point open, as it had not been canvassed in argument and its determination was unnecessary to the appeal.

In the *Ver Elst* case *supra* the facts were that a house had been let to the respondent for nine years, one of the conditions being that the appellant would effect certain improvements to the house immediately after occupation had been taken. No time limit was prescribed for the completion of the improvements. The respondent served a demand fixing a time for performance as 26 days after the date of receipt of the notice, which *inter alia* informed the appellant of its intention to resile from the agreement on non-compliance with the demand. TRENGOVE JA (in whose judgment VILJOEN JA and GROSSKOFF AJA concurred) was of the view that the decisions referred to above were irrelevant, as they concerned the fulfilment of contractual obligations whereas the case before him involved the acquisition of an extra-contractual right, namely, the right of cancellation relied on by the respondent. Accordingly, the respondent had to prove that he had acquired that right, and one of the prerequisites for the acquisition thereof was that the appellant had fallen into *mora*. The learned Judge of Appeal stated the principle, as he understood it, at 647 *in fine* (in translation) thus:

". . . where in the present case the respondent relies on a right of cancellation, the burden of proof rests upon him to prove *inter alia* that he made his demand of the appellant *opportuno loco et tempore*."

As the respondent had failed to discharge the *onus* of proving that the prescribed period for compliance had been reasonable, the appellant had not been effectively placed in *mora*, thereby disabling the respondent from resiling from the contract.

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GUBBAY CJ

This decision has attracted some criticism. See Kerr *op cit* at p 472; Farlam and Hathaway *Contract* 3 ed at p 505.

For principally three reasons GIBSON J favoured the "hallowed view" that the debtor bears the *onus*: First, her Ladyship considered as artificial the distinction drawn that the right of cancellation relied upon by the respondent was in the nature of an "extra-contractual right"; it was simply a right to be implied as a term into the contract. Second, she stressed that it is the debtor who knows why he cannot perform in the time fixed by the creditor and, therefore, it is for him to inform the court of the factors and circumstances which prevented his timely performance. Considerations of equity require that this be so. After all, as pointed out by DAVIS AJA in *Pillay v Krishna & Anor* 1946 AD 946 at 954:

"... all rules dealing with the subject of the burden of proof rest 'for their ultimate basis upon broad and undefined reasons of experience and fairness' ..."

Third, where time for performance has not been fixed by the parties, performance by each is due immediately the contract comes into existence, or as soon thereafter as is reasonably possible in the circumstances, and neither is entitled to remain supine. Thus, he who argues for a **further** delay ought to bear the *onus* of establishing the extent of the duration necessary.

There is much to commend the approach of the learned judge. Nonetheless, for the purposes of this appeal, and to the advantage of the appellant, I am prepared to accept that the *onus* rested on the respondents. I do so because in my opinion, for reasons which will soon become apparent, they succeeded in showing that the period of notice given was, in truth, reasonable.

In determining whether a reasonable time was allowed for fulfilment, the court must give attention to:

"... difficulties and delays within the contemplation of the parties at the time of the contract (and also to) difficulties and delays which would have been within the reasonable contemplation of a reasonable man at the time of the contract."

(per CLAASSEN J in *Willowdene Landowners (Pty) Ltd v St Martin's Trust* 1971 (1) SA 302 (T) at 305G, approved of in *Nel v Cloete supra* at 165H-166B). Difficulties and delays other than the above are not to be taken into account. The court should postulate reasonably prompt and appropriate action and due

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diligence and must have regard to the commercial and other interests of both parties to the contract. See *St Martins Trust v Willowdene Landowners' (Pty) Ltd* 1970 (3) SA 132 (W) at 136A-B.

Only one factor arising after the conclusion of the contract is relevant to the assessment of a reasonable time, and that is the time lapse itself between the conclusion of the contract and the making of the demand. In other words, the court must have regard to both the elapsed period and the further period specified in the *mora* notice. This is because, as explained by COLMAN J

in the first *Willowdene* judgment *supra* at 136D:

"The party obliged is not entitled to remain inactive, after the conclusion of the contract, on the assumption that if and when he receives the notice putting him in *mora* he will thereafter still have the benefit of the full period which was reasonable for performance, whatever period that may be."

Put differently, what is a reasonable period of notice depends on what has gone before.

I believe it would have been in the contemplation of the parties at the time of the contract that some delay would be occasioned in transferring the property to Pathelena. This was achieved on 20 March 1989, and the title deeds handed to the appellant early the next month. It necessarily follows that the period which elapsed from 21 March 1989 must be taken into account in determining the reasonableness or otherwise of the period in the *interpellatio*.

What exactly did the appellant do prior to receiving the letter of 21 July 1989? In what way did he busy himself in making arrangements to obtain the necessary finance? No reliance can be placed on the delay resulting from the faulty and inept measures taken by him in that direction. It was of no concern to the respondents what business arrangements the appellant had to make in order to put himself in funds to purchase the share capital. That was his own domestic problem. See *Pretorius v Greyling* 1947 (1) SA 171 (W) at 174. And, having learned in June 1989 that the method he intended to use was illegal, the appellant did nothing about finding alternative sources of funding before receiving the demand.

Moreover, the appellant ought to have been put on his guard that patience was wearing thin: In early June 1989 the first respondent sent a telex to the appellant's legal practitioners, urging them to expedite the registration of the mortgage bond and account to Pathelena for the nett proceeds. A copy of the

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telex was sent to the appellant. A further warning was sounded by the letter of 12 June 1989. The suggestion contained therein that the deal be called off, should have been seen by the appellant as an indication that the first respondent regarded the delay as embarrassing and that time, as far as the latter was concerned, was fast running out. The repossession of the property was yet another warning sign to be heeded.

Against the irrefutable fact that the appellant was never in a position, until 4 August 1989, to tender the purchase price, his claim that he was continually pressing the respondents to complete the transaction, lacks credence. How could he possibly have expected the issued share capital to be registered into his name if he was not ready and able to pay for it? The contrary averment by the first respondent, that on half a dozen occasions over the period April to June 1989 he advised the appellant that he was most upset that the money was not forthcoming and that he received only empty assurances that payment would be made soon, must be accepted as overwhelmingly probable. Transfer of the property having been effected to Pathelena, there was absolutely no cause why the respondents would not be desirous of finalising the transaction.

Finally, it is not without significance that within four days of the time limit having expired the appellant was able to tender the purchase price. If he was in a position to raise \$275 000 in only ten business days during July 1989, one can only assume that he had taken an unreasonably lengthy period to perform his obligations prior to the demand.

The cumulative effect of these features satisfies me that the appellant's inability to comply with the time fixed by the demand was due to his own fault.

This does not, however, dispose of the matter. There remains the issue of whether the letter of 21 July 1989 gave notice of the intention to cancel the contract.

The learned judge expressed the view that the aforesaid letter contained more than an interpellatio. It also gave the appellant notice of the intention to cancel the contract of sale entered into on 23 January 1989 (though not in precise words) in the event of his failure to perform by 31 July 1989. The final paragraph of the letter, which is pertinent, reads:

"In the circumstances we are instructed to advise you that our client requires payment of the purchase price by no later than Monday 31st July 1989, failing which our client requires you to return the Title Deeds on or before

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the 31st July 1989. Should you fail either to pay the purchase price or to return the Title Deeds by the aforesaid date, proceedings will be instituted against you without further notice for delivery of the Deed of Transfer and such costs that may be occasioned thereby."

In order to constitute a notice of rescission the language used must clearly and unequivocally convey an intention to cancel the contract if the stipulated term is not fulfilled. This requirement is so stated in *Ponisammy & Anor v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 385F in these words:

"Where time is not of the essence of the contract, but one of the contracting parties elects to make it so, giving a notice of rescission (a unilateral act), he should at least take care that the notice is clear and unequivocal, so that the other contracting party is aware of the consequences of a failure on his part to perform timeously."

See also *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 830E.

Mr *de Bourbon*, who appeared for the appellant, submitted that the letter in question made no mention of the respondents' intention to cancel if payment was not made by the date fixed. And that there was nothing to show that the appellant had understood it as such. It merely spelt out that such failure would oblige the appellant to return the title deeds to the property. The purported cancellation after 31 July 1989 was, thus, ineffective.

I am unable to agree. The letter must not be divorced from the events which preceded it. The appellant's premature possession of the property had been terminated the previous month but he had retained the title deeds, given to him in order to facilitate the raising of finance to purchase the share capital. The title deeds, therefore, were the only remaining connection the appellant had with the property. Their return would restore the *status quo ante*.

Bearing in mind what had gone before between the parties, I am satisfied that the demand for

the return of the title deeds in the event of non-performance, and the threat to enforce that demand by recourse to legal proceedings, could only reasonably have been understood to convey an intention to cancel. Compare *Kangisser & Anor v Rieton (Pty) Ltd* 1952 (4) SA 424 (T). Indeed, as Mr *Morris* was at pains to stress, it is difficult to envisage for what purpose unrelated to cancellation the return of the title deeds were sought.

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Furthermore, it is significant that the appellant deposed in his founding affidavit that he regarded:

"... the sudden notice to complete within a ten day period as not having been made in good faith, but with an ulterior motive."

This pronouncement appears to me to evince an appreciation that the letter put him on terms - if he did not pay the purchase price as demanded the contract would be immediately cancelled. Consistent with this is the lack of an averment by the appellant that he had been misled by the letter.

In the result, I find myself in complete agreement with the conclusion reached by the court *a quo*, and I would dismiss the appeal with costs.

Korsah JA: I agree.

Ebrahim JA: I agree

Coghlan, Welsh & Guest, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

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S v DU PLESSIS 1991 (2) ZLR 287 (SC)

Court **Supreme Court, Harare**

Gubbay CJ: In Chambers, in terms of s 9A of the Supreme Court of Zimbabwe Act, 1981.

Review of a criminal conviction

13 November 1991

Flynote

Criminal law - Miscellaneous Offences Act [Chapter 68] s 3(1)(n) - public place - meaning - bar of a country club.

Headnote

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The appellant had been convicted in a magistrates court of using obscene or abusive language in a public place. The alleged offence occurred in the bar of the Chipinge Country Club. The appellant contended that such premises were not 'a public place' in terms of the legislation. The Attorney-General did not support the conviction.

Held, the State had failed to prove that the offence occurred in a public place.

Held, a private bar to which only members and their guests are admitted is not a public place.

Cases cited:

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

R v Kane & Ors [1965] 1 All ER 705

R v Morris & Ors (1963) 47 Cr App R 202

Judgment

Gubbay CJ: In this matter the Attorney-General has given notice that he does not support the conviction of the appellant. I am satisfied that this is a proper attitude.

The appellant was charged in a magistrate's court with a contravention of s 3(1)(n) of the Miscellaneous Offences Act [*Chapter 68*], it being alleged that on 8 August 1989 he made use of obscene, abusive, insulting or threatening

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language in a public place, namely the Chipinge Country Club, by saying: "Who brought this thing here, this kaffir?", referring to the complainant.

Such an offence can only be committed in a "public place" as defined in s 2 of the Act. As there was no dispute that the alleged incident occurred in the bar of the Chipinge Country Club premises, being a "building" or "part of a building" as specified in sub-para (b) of the definition, the first issue which fell for determination by the court *a quo* was whether the Club, and in particular its bar, was a place:

"... to which the public or any section of the public has access or are permitted to have access, whether on payment or otherwise and whether or not the right of admission thereto is reserved."

The phrase "any section" has no special significance in the context of this case. It contemplates division on any recognised or recognisable basis, such as a division by race. See *City of Salisbury v Mehta* 1961 R & N 1000 (FSC) at 1014H; 1962 (1) SA 675 (FSC) at 700F.

The trial court held that on the evening in question there were some 30 to 40 people in the bar of the Club and some of them, like the complainant, "could have been invited by their friends who are members"; that "the whole atmosphere was characteristic of a public place, with a considerable number of people drinking and chatting the evening away . . . albeit within

enclosed and private premises".

What the trial court should have addressed its mind to was not the atmosphere in the bar (which was an irrelevant factor), but who had access thereto.

It admits of no doubt, and this was appreciated, that the Chipinge Country Club is a private place. It is a private club, open to members. Yet if on the night of 8 August 1989 the public had access to it or were permitted to have access to it, then for the duration of that limited period of time, it became a public place.

The *onus* was on the State to prove that this was so. It had to establish by reliable evidence that ordinary members of the public were present as of right, in the sense that they had access, although being neither members of the Club, nor the invited guests of members.

Support for this view is to be found in *R v Kane & Ors* [1965] 1 All ER 705. BARRY J, in refusing an application to withdraw the case from the jury, said at 708E-F:

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"I feel that this problem, in the particular case now under review, is one for the jury, and I propose to direct them, in substance, that, if they come to the conclusion that the Stage and Press Club was run in such a way as to be open, albeit after some slight formalities had been complied with, on occasion, to the ordinary general members of the public in Leamington Spa, then they are entitled, if that is their view of the evidence, to find that it was a public place. It might well be that they will arrive at a contrary conclusion if they take the view that this club was being run, and intended to be run, as a private club, but that, on occasion, the odd trespasser might have succeeded in effecting entry. I am quite satisfied, however, that, if the ordinary members of the public were to be allowed to come into this club, then it would be a public place, and I propose so to direct the jury."

Later, in the course of summing-up to the jury, the learned judge remarked at 709C:

"The real question is whether the Stage and Press Club is open to the public, whether on payment or not, or whether, on the other hand, access to it is restricted to a particular class, or even to particular classes, of the public, such, for example, as the members of an ordinary householder's family and his relations and friends, and the plumber or other tradesmen who come to do various repairs about the house. If it is restricted to that sort of class of person then, of course, it is not a public place, it is a private place. Also I feel bound to direct you that it would be a private place and not a public place if access to it was restricted to the members of the club or their guests. If access was restricted to the members of the club or their guests, then the place would not be a public place."

Compare *R v Morris & Ors* [1963] 47 Cr App R 202.

What then was the status of the persons in the bar?

The State failed absolutely to show that **anyone** present at the material time was a non-member or was not the guest of a member. The complainant was a guest of a Mr Sanyanga who, as required by the Club's regulations, had entered his name in the visitor's book. The chairman, Mr Orick, confirmed that it was definitely not the policy of the Club to open its doors to the public at large. Members were only permitted to invite three guests in any one year, and on occasion the sporting committee of the Club would allow a visiting team to utilise the facilities. In this way, access to the Club was restricted to those favoured individuals.

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Accordingly, in the exercise of the power conferred in s 9A of the Supreme Court of Zimbabwe Act, 1981, and with the concurrence of KORSAN JA, I order that the appeal be allowed and the conviction and sentence be set aside.

FAWCETT SECURITY OPERATIONS (PVT) LTD v OMAR ENTERPRISES (PVT) LTD 1991 (2) ZLR 291 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Manyarara JA

Civil appeal

24 October & 18 November 1991

Flynote

Employment - vicarious liability of employer for dishonest acts of employee - test is whether goods have been entrusted to employee.

Delict - negligent breach of term of contract - liability can arise.

Headnote

The appellant appealed against the decision of GREENLAND J (1990 (2) ZLR 108 (HC)) dismissing an application to strike out certain paragraphs of the declaration in the trial action.

The appellant provided a security guard to detect and prevent theft from the respondent's supermarket. The guard chosen for the task was dishonest and participated in or allowed the theft of goods worth \$139 539. The respondent sought to hold the appellant vicariously liable for the dishonest acts of its servant.

Held, unless the goods in question have been entrusted to the custody of the employee, the employer is not vicariously liable for any dishonest acts of an employee, even if the employment provided the opportunity to the employee to act in a dishonest manner.

Held, a claim in delict can arise where it is alleged that a dishonest guard was employed in breach of a duty of care, or where there has been a failure to properly supervise a guard.

Cases cited:

Electra Rubber Products (Pvt) Ltd v Socrat (Pvt) Ltd 1981 ZLR 356 (A); 1981 (4) SA 451 (ZA)

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Nott v ZANU (PF) 1983 (2) ZLR 208 (SC); 1984 (2) SA 115 (ZS)

Morris v C W Martin & Sons Ltd [1966] 1 QB 716; [1965] 2 All ER 725 (CA)

Leesh River Tea Co Ltd & Ors v British India Steam Navigation Co Ltd [1967] 2 QB 250; [1966] 3 All ER 593 (CA)

Rustenburg Platinum Mines Ltd & Ors v SA Airways and Pan American Airways Inc [1979] 1 Lloyd's Rep 19 (CA)

Nel & Anor v Minister of Defence 1978 RLR 455 (G); 1979 (2) SA 246 (R)

Feldman (Pty) Ltd v Mall 1945 AD 733

Mkize v Martens 1914 AD 382

SA Railways & Harbours v Marais 1950 (4) SA 610 (A)

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

Deatons (Pty) Ltd v Flew (1949) 79 CLR 370 (HC of Australia)

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

Canadian Pacific Railway Co v Lockhart [1942] AC 951; [1942] 2 All ER 464 (PC)

SA Railways & Harbours v Albers & Anor 1977 (2) SA 341 (D)

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

Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd 1990 (2) SA 520 (W)

D M Campbell for the appellant

A P de Bourbon SC for the respondent

Judgment

Gubbay CJ: This is an appeal consequent upon the grant of leave, from the High Court dismissing with costs an application brought by the defendant, the present appellant, to strike out as being bad in law, certain paragraphs of the declaration filed by the plaintiff, now the respondent. These are: (i) paragraphs 5 and 6; (ii) paragraph 7; and (iii) paragraph 9. The judgment of the court *a quo* has been reported as *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* 1991 (2) SA 441 (ZH).

At the hearing before this court, though not in his heads of argument, Mr *de Bourbon*, who appeared for the plaintiff, wisely conceded that the objection to paragraph 9 was well taken and withdrew the claim for the repayment of \$5 400 set out therein. It follows that to that extent, at least, this appeal must succeed.

The application to strike out paragraphs 5 and 6, as further particularised, is the substantive and most contentious issue in the appeal. In order to properly appreciate its basis, it is necessary to refer also to the allegations contained in

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the two preceding paragraphs. The scenario which then emerges may be stated thus:

1. The defendant, as its name suggests, undertakes the business of providing both uniformed and plain-clothed security details on hire for reward. During October 1987 it was expressly agreed, orally by the parties, that the defendant was to provide a plain-clothed security guard at the plaintiff's supermarket in Mutare at a fee of \$330 per month. It was an implied term of such agreement that the security guard was to perform his duties in a workmanlike, responsible and honest manner.
2. The plain-clothed security guard so provided by the defendant was one Morris Govere. His responsibilities were to detect and prevent shop-lifting and other thefts occurring at the plaintiff's premises. These responsibilities were either expressly agreed or, alternately, agreed by implication.
3. Between the period October 1987 and December 1988, Govere and other persons to the plaintiff unknown, acting on behalf of Govere, or with his connivance, knowledge or approval, stole goods from the supermarket to the value of \$139 539.
4. At all relevant times in perpetrating or conniving at such thefts, Govere was acting in the course and scope of his employment with the defendant.

The point raised by the defendant is that a person employed in the capacity and with the responsibilities described, cannot in **law** be said to be acting within the course and scope of that employment if he (i) steals goods himself; and/or (ii) engages others to steal goods on his behalf; and/or (iii) connives with others so as to permit them to steal goods.

It is not alleged by the plaintiff that the agreement entered into was one of *depositum* or any form of bailment. It was no more than it is pleaded to be - that the defendant would provide a security guard whose function it was "to detect and prevent shop-lifting and other thefts" of the goods in the supermarket. See *Electra Rubber Products (Pvt) Ltd v Socrat (Pvt) Ltd* 1981 (4) SA 451 (Z AD) at 452E-H.

Obviously, it was envisaged that Govere, dressed inconspicuously as an ordinary shopper or labourer, would prowl up and down the aisles of the supermarket, mingling with the shoppers. He was there to prevent, to the best of his ability, other persons in the supermarket, be they potential customers or

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members of staff, from stealing the merchandise. He was to be constantly vigilant, and if he

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happened to observe anyone secreting goods about his person, or leaving the premises without paying for goods taken, to apprehend him.

There can be no question of the goods displayed on the shelves of the supermarket, or elsewhere on the premises, being placed into the possession or charge of the defendant. They were not entrusted to its care, and through it, to its security guard; but remained under the control and possession of the plaintiff. Customers were permitted to remove merchandise from the shelves, place what it was intended to purchase into a trolley or basket, and move around the supermarket selecting additional goods; in the event of a change of mind, items previously taken from the shelves would be returned thereto.

It was formerly thought that an employer could not be held vicariously liable for a theft committed by his employee on the ground that the act of stealing necessarily took the employee out of the course of his employment. Dishonesty or fraud by the employee for his **own** benefit did not render the employer liable.

This view of the law no longer prevails. It is now recognised and accepted that theft by an employee to whom the goods concerned have been **entrusted** is, in fact, an improper and dishonest mode of performing what he was employed to do, namely, to take care of the goods. In such circumstances, the employee is acting nonetheless in the course of his employment, and so the employer is vicariously liable for the loss of the goods.

This doctrine of vicarious liability of an employer for the intentional wrongdoing of his employee committed in the course of his employment is a part of the law of Zimbabwe. See *Nott v Zimbabwe African National Union (Patriotic Front)* 1983 (2) ZLR 208 (SC) at 210E; 1984 (2) SA 115 (ZS) at 117H.

In advancing their respective contentions counsel referred to *Morris v C W Martin & Sons Ltd* [1965] 2 All ER 725 (CA). In that case the plaintiff's fur coat had been delivered, with her permission, to the defendant company to be cleaned. Morrissey, the defendant's employee, to whom it had been handed for the necessary work to be done, stole it. The Court of Appeal held the defendant liable on the ground that its duty as bailee for reward had been breached by reason of Morrissey's theft. The defendant could not rid itself of responsibility by delegating it to another. Having entrusted to its employee possession of the fur coat, together with the duty to take reasonable care and clean it, the defendant was answerable for the manner in which Morrissey conducted himself. It was appreciated, however, that if the theft of the fur coat had been committed by

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some other employee to whom its possession had not been entrusted, the result would have been different. It would not have been possible to hold that it had been stolen by the employee through whom the defendant had chosen to discharge its duty of care. In the words of SALMON LJ at 740G-H:

"A theft by any servant who is not employed to do anything in relation to the goods bailed is entirely outside the scope of his employment and cannot make the master liable. So in this case, if someone employed by the

defendants in another depot had broken in and stolen the fur, the defendants would not have been liable. Similarly in my view if a clerk employed in the same depot had seized the opportunity of entering the room where the fur was kept and had stolen it, the defendants would not have been liable. The mere fact that the master, by employing a rogue, gives him the opportunity to steal or defraud does not make the master liable for his depredations."

See also DIPLOCK LJ at 738D-E and G

It is clear that the Court of Appeal could have decided the case on the ground that Morrissey had stolen the fur coat in the course of his employment. An essential element of liability on either ground was that the employer had entrusted possession of the fur coat to its employee. The result would have been the same whether the matter had been considered in terms of the employer's own duty as bailee or in terms of the principle of vicarious liability.

Where an employee has committed a theft, the test to be applied is to enquire whether the goods stolen had been **entrusted** to his care by his employer. If they had not, the theft is outside the scope of his employment and the employer is not vicariously liable. The theft is the act of the employee pursuing his own selfish ends - something he has done entirely on his own account. The employer may, of course, be liable on the ground of his negligence in selecting the employee, or because the theft was induced by his own negligence, or because of the negligence of some other employee to whom the charge of the stolen property had been committed. See *Clerk and Lindsell on Torts* 16 ed at para 3-27 p 221; *Winfield and Jolowicz on Tort* 12 ed at p 587; *Salmond and Heuston on the Law of Torts* 19 ed at p 529.

This approach is supported by two decisions of the Court of Appeal which fall on different sides of the line. In *Leesh River Tea Co Ltd & Ors v British India Steam Navigation Co Ltd* [1966] 3 All ER 593 (CA) the plaintiffs consigned chests of tea on the defendant's vessel for shipment from Calcutta to London, Hull and Amsterdam, via Colombo and Port Sudan. The tea was properly and

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carefully loaded and stowed in No. 2 hold. The defendant employed a local firm of stevedores for discharging and loading the cargo at Port Sudan. One or more of the stevedores removed and stole in the course of the discharge or loading of the tea, a small brass plate which was the cover plate of a storm valve. This enabled sea-water to enter the hold and damage the tea. The defendant was sued and one of the issues which had to be considered was whether it was entitled to rely on the immunity conferred by a provision of the Carriage of Goods by Sea Act, 1924. This depended upon whether the stevedores who stole the plate were the agents or servants of the defendant when they committed the theft. It was held that the defendant was entitled to the immunity because the theft was in no way incidental to the discharge and loading of the cargo. As SELLARS LJ stated at 597A-B:

"It is beyond question, I think, that the shipowners could not have escaped liability if the stevedores' men in the performance of the work in hand had damaged or stolen the cargo they had to handle; but the men involved did not damage the cargo which they were handling and did not steal any of it. They took the opportunity to remove a very small part of the ship itself in order to steal it and, in so doing, so damaged the ship that seawater could

enter."

In similar vein SALMON LJ said at 599E-F:

"Moreover if the stevedores handled the cargo dishonestly, for example if they stole it, the shipowners would be liable to its owners for the stevedores' dishonest acts. It seems to me however that the theft in this case had nothing to do with the handling of the cargo. The stevedore's employment merely afforded him the opportunity of stealing the plate. No doubt the shipowners owed the cargo-owners a duty to take care that no one stole any part of the ship if the theft of such part might render the ship unseaworthy and damage the cargo. There was however no breach of that duty. The fact that the thief was a stevedore was quite fortuitous as the theft had nothing to do with the work on which he was engaged. The fact that his employment on board presented him with the opportunity to steal does not, in my judgment, suffice to make the shipowners liable. . ."

In *Rustenburg Platinum Mines Ltd & Ors v South African Airways and Pan American World Airways Inc* [1979] 1 Lloyd's Rep 19 (CA), the facts were these: The plaintiffs were the owners, consignors and consignees of two boxes of platinum which were flown into London's Heathrow Airport from South Africa by the first defendant and were to be flown to the United States of America by the second defendant, Pan Am. The two boxes were stored in Pan

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Am's warehouse over the week-end and were subsequently conveyed to the aircraft. They were handed into the custody of two of Pan Am's loaders who were engaged in loading the hold of the aircraft. One of the loaders who was inside the aircraft placed one of the boxes in a position where it could be seen and easily removed. When everybody's back was turned he handed it down to someone in a security vehicle which was parked alongside the aircraft. The box of platinum was discovered missing only after the aircraft arrived at its destination. It had been stolen by the combined operation of the loader who was entrusted with the actual loading of it into the hold and one or more of the persons in the security vehicle. Pan Am was held to be liable for the loss on the ground that the wilful misconduct of the loader was so bound up with the task entrusted to him by his employer, which was to load the box into the aircraft, as to bring the theft within the scope of his employment. This was explained by LORD DENNING MR at 24 as follows:

"To have wilful misconduct in the scope of the man's employment it has to be pinned on to some person who was entrusted with the task of taking care of the goods. As I ventured to say in *Morris v CW Martin & Sons Ltd* . . .

' . . . when a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty . . . '

To which I may add if that servant is guilty of wilful misconduct in the way he carries out his duty, in so far as he steals the goods himself or combines with others to steal them or allows them to steal the goods, then in those circumstances that servant or agent is guilty of wilful misconduct within the scope of his employment."

EVERLLEIGH LJ, to much the same effect, remarked at 24:

"For my part, I would be content to base the liability of the employer upon the principles of bailment as enunciated by Lord Denning, MR, in *Morris v CW Martin & Sons Ltd*, but also I would base it upon the ordinary rules of master

and servant, that is to say of vicarious liability. This loader was employed to load for safe transit. His job was to load it in a way which would see to its safe transit, but he in fact loaded it in a way which put it in peril. He put it in a position from which it could be readily stolen and that was his intention when he put it there. In my view he was doing wrongly that which he was employed to do."

See also SIR DAVID CAIRNS at 25.

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Accordingly, as I perceive the law, in order to render the employer vicariously liable for the theft of goods by the employee, the goods must in some way or other have been entrusted into the possession or charge of the employee. The culpable employee must be one to whom the custody of the goods was deputed by his employer; not just any employee whose employment simply afforded him the opportunity to steal them. See *Nel & Anor v Minister of Defence* 1978 RLR 455 (G) at 458F-G; 1979 (2) SA 246 (R) at 248F; the *Leesh River Tea* case *supra* at 599F. The theft must have been committed "in the course of doing that class of acts which the (employer) had put the servant in his place to do", *per* DIPLOCK LJ in *Morris v Martin & Sons Ltd supra* at 738F.

Unquestionably Morris Govere falls into the category of the "unfaithful servant" referred to by WATERMEYER CJ in *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 742 in these terms:

"If . . . the harm to the third party is not caused by the servant's abandonment of his master's work but by his activities in his own affairs, unconnected with those of his master, then the master will not be responsible."

This *dictum* echoes the observation of INNES JA made thirty years before in *Mkize v Martens* 1914 AD 382 at 390, cautioning that:

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

See also SOLOMON JA at 384; *South African Railways & Harbours v Marais* 1950 (4) SA 610 (A) at 617C; *South British Insurance Co v du Toit* 1952 SR 239 at 242; 1952 (4) SA 313 (SR) at 316D-E.

A somewhat different test to the issue of whether the employer is vicariously liable for the loss caused to a third party by the intentional wrongdoing for his own benefit by the employee, is suggested by the Australian academic, Professor John Fleming, in his acclaimed work *The Law of Torts* 7 ed at p 356. Relying on a passage in the judgment of DIXON J (as he then was) in *Deatons (Pty) Ltd v Flew* (1949) 79 CLR 370 at 381, he writes:

"In order to attract vicarious liability, the servant's dishonesty must consist of 'acts to which the ostensible performance of his master's work gives

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GUBBAY CJ

occasion or which are committed under cover of the authority the servant is held out as possessing or of the

position in which he is placed as a representative of his master'. It is preeminently in this context that the courts have forsaken the 'course of employment' test and reduced the employer's responsibility by invoking the agency doctrine of actual or ostensible authority, borrowed from the law of contract."

A similarity of thought is to be found in the majority judgment of JANSSEN JA in *Minister of Police v Rabie* 1986 (1) SA 117 (AD) in which he said at 134J-135A that by appointing Van der Westhuizen as a member of the Police Force:

"... and thus clothing him with all the powers involved, the State created a risk of harm to others, viz the risk that Van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution."

Applying this approach, the same may be asserted of a security guard in commercial employment who is "clothed" by his employer with certain ostensible authority. If in the abuse or misuse of that authority he were to cause harm to others, his employer would be liable.

In the present case, on the facts alleged, there was no abuse or misuse of the authority with which the defendant clothed Govere. In conducting his theftuous activities Govere was not purporting to exercise any of the ostensible authority with which it may be said he was clothed. He simply took advantage of the opportunity, which his employment afforded him, to steal. This is not a risk created by the defendant in the sense intended by JANSSEN JA.

The learned judge *a quo*, *supra* at 448D, considered that the thefts alleged, albeit unauthorised, were "so connected with authorised acts that 'they may rightly be regarded as modes - although improper modes - of doing them' *per Canadian Pacific Railway Co v Lockhart* [1942] AC 591 (PC) at 599.

Mr *Campbell*, for the defendant, contended that such a conclusion cannot be supported logically. I agree with him. A guard is authorised to detect and prevent the theft of goods. Instead of doing so, he steals the goods for himself or connives with others to allow them to steal. Such conduct on his part is not so connected with what he is authorised to do as to be a mode of carrying out that function.

1991 (2) ZLR p300

GUBBAY CJ

The true situation, so it seems to me, is that the unauthorised and wrongful acts of Govere fall squarely into the third category mentioned by LEON J in *South African Railways and Harbours v Albers & Anor* 1977 (2) SA 341 (D) at 345C-G as being "an independent act for which the master is not responsible".

Appreciating, perhaps, the cogency of the defendant's argument, Mr *de Bourbon* strove to meet it on another front. He submitted that as a matter of public policy this court should pronounce that the law does not exonerate a security firm from liability where it had been contracted to detect and prevent shop-lifting and other thefts in a supermarket, and the guard it deputed to carry out such a function himself steals the goods, or causes others to steal them, or connives at such thefts. Put differently, in such a situation, policy considerations require that the law impose absolute liability upon the security firm; that such wrongful and dishonest conduct was a risk that social justice and fairness demanded the security firm should bear, unless, of course,

it had been sufficiently far-sighted to exempt itself therefrom under its contract.

Attractive as Mr *de Bourbon's* invitation appears to be, I am not persuaded that there is any warrant to accept it. Where men of business enter into a contract on an equal footing there is no call to enlist the aid of public policy in the event of what is later seen to be a contractual deficiency. *In casu* it was open to the plaintiff to have contracted on the basis that any loss occasioned by the theft of the security guard employed by the defendant would be the responsibility of the latter. It chose not to do so.

For the reasons foregoing, I am of the opinion that the application to strike out paragraphs 5 and 6 of the declaration ought to have been allowed by the learned judge.

Paragraph 7, which is the subject of the second application to strike out, reads:

"Alternatively, and in any event, and by virtue of the oral agreement aforesaid, the defendant owed the plaintiff a duty of care to ensure that the plaintiff did not sustain any loss by theft, but breached such duty of care in that -

- (a) it selected an employee, namely, Morris Govere, who was not honest and trustworthy; and/or
- (b) it failed to supervise the activities of the said Morris Govere adequately, thus enabling him and others to steal goods from the plaintiff's store."

1991 (2) ZLR p301

GUBBAY CJ

In its further particulars the plaintiff disavowed an intention to maintain that **any** theft which occurred during the currency of the agreement would be the responsibility of the defendant, in the sense that it would be obliged to compensate the plaintiff therefor.

The objection taken is twofold: First, the terms of the agreement both express and implied as alleged in paragraph 4 of the declaration do not impose such absolute liability on the defendant; and second, all the words following upon the comma in sub-paragraph (b) are argumentative and superfluous.

Mr *Campbell* was not inclined to urge that breach of a contractual duty in the performance of professional work is not *per se* a wrongful act for the purposes of Aquilian liability. He was aware that such a proposition had not found favour in *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A), and accepted that the plaintiff may have a cause of action, by virtue of the contractual relationship, based on a legal duty of care owed to it by the defendant. Nor did he suggest that the two respects of negligence alleged could not in law give rise to a breach of that duty. As to which, see *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W). Counsel complained that the cause of action had been somewhat inelegantly and inconsistently pleaded - in one breath it is alleged that the contract gave rise to an absolute duty on the defendant's part to ensure that the plaintiff did not sustain any loss by theft; and in another, acknowledges that the defendant as not in the nature of a bailee or insurer.

I have no difficulty in accepting that the cause of action could have been pleaded in a clearer and more precise manner. But viewed as a whole it is apparent that the plaintiff is seeking to

relate its loss of \$139 539, occasioned as aforescribed in the declaration, to the particulars of negligence alleged in paragraph 7, either or both of which constituted a breach of the duty of care.

I also accept that the closing words of sub-paragraph (b) are out of place. What ought to have been alleged in a subsequent paragraph was something to the effect that:

"As a result of the defendant's negligence as particularised above, the said Morris Govere and other persons were able to steal goods from the plaintiff's store to the value of \$139 539."

This again was clearly what was intended, and what, I think, emerges upon a reasonable interpretation of the pleading.

1991 (2) ZLR p302

GUBBAY CJ

The complaint, which in any event is directed to the whole of the paragraph and not solely to the two aspects debated, is technical and, in reality, a matter of semantics. In the circumstances, I am not disposed to interfere with the dismissal of this application by the court *a quo*.

Insofar as the costs incurred in both courts are concerned, it seems to me that the defendant must be held to have achieved substantial success. The objection taken to paragraphs 5 and 6 has now been upheld and that to paragraph 9 conceded. In essence the issues between the parties have been much narrowed.

The order made is:

1. The appeal succeeds to the extent that paragraphs 5, 6 and 9 of the declaration are struck out as being bad in law, but is dismissed with regard to the application to strike out paragraph 7.
2. The costs of the appeal are to be borne by the respondent.
3. The order of the court *a quo* is set aside and substituted therefor is the following:
 - (1) The application to strike out paragraphs 5, 6 and 9 of the declaration is allowed, but is dismissed in respect of paragraph 7.
 - (2) The respondent (the plaintiff) is to pay the costs of this application.

McNally JA: I agree.

Manyarara JA: I agree.

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

Gollop & Blank, respondent's legal practitioners

1991 (2) ZLR p303

DRUMMOND v DE HAAST 1991 (2) ZLR 303 (SC)

Court Supreme Court, Harare

Gubbay CJ, Manyarara JA, Korsah JA

Civil appeal

11 & 21 November 1991

Flynote

Administration of estates - executor - retraction of renunciation of appointment - necessary requirements.

Headnote

In every situation, a person seeking to retract his renunciation as executor under a will must show (1) good and persuasive cause to explain the retraction - that it is not simply a change of heart; (2) that this would be for the good of the estate or of those interested under the will. Among the important considerations are any expressed wishes of the testator and the likely result in costs and in delay on the finalisation of the estate.

The respondent, named as executor in his late father's will, renounced appointment in favour of the appointment of his legal practitioner overlooking the substitutory nomination of the appellant in the event of his failing to take office. The legal practitioner brought the estate to an advanced stage of winding up before the mistake was realised and the appellant obtained the setting aside of his appointment. The respondent thereafter sought an order permitting him to retract his renunciation and to take office as executor.

Held, the renunciation was no change of heart but an attempt to remedy a genuine mistake. There had never been any intention on the part of the respondent to relinquish control of the estate.

Cases cited:

Drummond v The Master & Ors 1990 (2) ZLR 227 (SC); 1991 (2) SA 449 (ZS)

In the Goods of Stiles [1898] P 12

In the Goods of Thacker [1900] P 15

In the Goods of Gill (1873) LR 3 P&D 113

1991 (2) ZLR p304

GUBBAY CJ

In the Estate of Heathcote [1913] P 42

M J Gillespie for the appellant

D A Matyszak for the respondent

Judgment

Gubbay CJ: On 9 July 1988 Raymond Duckworth De Haast died at Harare. He left a last will and testament under which his son, the respondent, was appointed to act as the executor and, in the event of the latter being unable for whatever reason to act, he appointed in his stead his daughter, the appellant.

A month later, on 10 August 1988, the respondent signed a document in which he renounced appointment as executor testamentary and requested the Master of the High Court to appoint his legal practitioner, Mr DW Aitken in his place.

The Master complied. At an edict meeting held on 5 October 1988 Mr Aitken was duly appointed executor dative of the deceased testator's estate. Letters of administration certifying such appointment were issued recording that the respondent had renounced his appointment as executor testamentary.

After a lapse of several months, during which period Mr Aitken proceeded to administer the estate, the appellant called upon the Master to revoke and annul the appointment of the executor dative on the ground that it was contrary to the direction of the testator.

Acknowledging his error, the Master revoked the letters of administration issued to Mr Aitken. He allowed the respondent to withdraw his renunciation and granted him letters of administration certifying that he was the duly appointed executor testamentary and, as such, was authorised to administer the estate.

The appellant protested that the respondent was not entitled by law to retract the renunciation of appointment as executor testamentary, but the Master was unmoved. Ultimately her objection to the procedure adopted was upheld by this court on the ground that the Master had no authority to accept the respondent's retraction, such power being vested solely in the High Court. It was ordered, *inter alia*, that the respondent, be he so advised, was to make application to the High Court for permission to retract his renunciation of appointment as executor testamentary by not later than 14 September 1990, failing which the Master was directed to grant letters of administration to the appellant as executrix testamentary. See *Drummond v The Master & Ors* 1990 (2) ZLR 227 (SC); 1991 (2) SA 449 (ZS).

1991 (2) ZLR p305

GUBBAY CJ

Persisting in his desire to resume appointment as executor testamentary, the respondent made a timeous application to the High Court for permission to retract his renunciation. The relief sought, though opposed by the appellant, was granted by MTAMBANENGWE J. Regrettably the dispute between the parties now comes to this court for the second time.

What are the factors which a court should take into account in considering whether or not to allow an application of this nature?

I would think that where, in consequence of the renunciation, letters of administration had been

validly issued to a person entitled in lower degree, very exceptional circumstances would have to be present. If, for instance, the respondent, appreciating that Mr Aitken could not be appointed executor dative, had, notwithstanding, renounced his own appointment, in consequence of which letters of administration were granted to the appellant as executrix testamentary, the prospect of him obtaining retraction and having the letters of administration set aside would be minimal. The decision *In the Goods of Stiles* [1898] P 12 is illustrative of the need for extraordinary circumstances. Two executors had been jointly appointed under the will of the deceased. The one renounced, the other took probate. Upon the latter absconding, the former was permitted to retract his renunciation and take probate. See also *In the Goods of Thacker* [1900] P 15.

In every situation a person seeking to retract his renunciation as executor must discharge the *onus* of proving that:

1. The desire to retract is not based purely on a change of heart - an appreciation that he had made a mistake in renouncing. Good and persuasive cause must be shown in the sense, perhaps, that the renunciation was the result of his having been misled or misinformed in some way as to its effect; or that subsequent thereto unforeseen circumstances had arisen that made him more suitable than anyone else to assume the appointment. See *In the Goods of Gill* (1873) LR 3 P & D 113 at 115; *In the Estate of Amy Heachcote* [1913] P 42.
2. It is for the benefit of the estate or those interested under the will of the deceased. See *Drummond v The Master & Ors supra* at 453E; Williams on *Executors and Administrators* 14 ed vol 1 at 48; Tristram and Coote's *Probate Practice* 27 ed at 444.

These two criteria may, and often will, overlap. The reason relied upon for the

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GUBBAY CJ

renunciation may have a bearing upon whether it is in the interests of the estate or the beneficiaries to permit of its retraction.

In spite of Mr Gillespie's submissions to the contrary, I am well satisfied that the respondent's desire to retract the renunciation of his appointment was not a change of mind - an "afterthought" which had caused him to adjudge his position in a different way. In my opinion, the respondent was able to advance a genuine and compelling explanation for having decided to renounce. It is plain to me that at no stage did he intend to relinquish the control his deceased father had clothed him with, especially to the appellant, with whom he was much in conflict. As his business commitments required him to travel frequently throughout the Southern African region, he consulted his legal practitioner on how he should deal with the estate. The advice received from Mr Aitken, which was incorrect, led the respondent to renounce his appointment instead of simply authorising Mr Aitken to act on his behalf under a power of attorney.

Material support for the respondent's stance is to be found in the form of renunciation, prepared by Mr Aitken, which expresses the request that the latter be appointed executor dative.

Furthermore, it is accepted by Mr *Aitken* that he was responsible for giving the respondent erroneous advice. This emerges from his supporting affidavit, the relevant paragraph of which reads:

"In giving such advice (namely, that the best course of action was to file a renunciation as executor) neither myself nor my own adviser turned our attention to the fact that upon renunciation the (appellant) would be nominated as executrix in accordance with the will. Had I done so I obviously would not have arranged the edict meeting, or advised upon the course of action taken."

In short, the respondent, with justification, placed the blame for his predicament upon Mr Aitken. That he consistently wished to retain control over the administration of the estate is confirmed by Mr Aitken. Unfortunately their collective minds failed to advert to the substitutory nomination of the appellant under the will.

I have not overlooked that in the previous proceedings Mr Aitken was party to a statement in which he admitted to having drawn the respondent's attention to the fact that "it was not necessary for (him) to sign a form of renunciation in that it was open to (him) to accept appointment as executor testamentary and appoint me under a power of attorney to act as his agent in Zimbabwe to assist with the administration of the estate".

1991 (2) ZLR p307

GUBBAY CJ

It would have been prudent for Mr Aitken to have dealt with this aspect in the affidavit he later deposed to, but I do not consider that any material inconsistency is revealed. Certainly the statement does not lead to the inference that the respondent "flew in the face" of his legal practitioner's advice, as is urged by the appellant. It seems to me that Mr Aitken merely indicated the two options available and then, as explained in the affidavit, advised the respondent that his best course was to renounce. As a layman it is not surprising that the respondent followed that advice.

Mr *Gillespie* conceded, and properly so, that an important factor in the determination of whether the retraction sought is for the benefit of the estate or those interested under the will, is the intention of the deceased testator. It was the respondent who was the testator's first choice to be the executor of his estate.

Where there is an acceptable explanation for the renunciation and no more prejudice will be caused to anyone interested in the estate than if the appointment had been accepted, the court will be far more inclined to restore the *status quo ante* than to defeat the testator's wishes. This is the position *in casu*.

There is also the feature emphasised by the learned judge *a quo*. The winding-up of the estate has reached a fairly advanced stage. An estate account has been filed and advertised as lying for inspection. Considerable costs have been incurred. The appointment of a new executor will thus entail additional and unnecessary costs. In other words, it is for the benefit of the estate to minimise such costs by allowing the respondent to retract.

Finally, it is of relevance that, apart from the respondent who is the heir, the others interested in the estate are legatees who are to receive fixed sums of money. It has not been suggested that

there will be insufficient funds to meet these bequests. Consequently, if the deceased's assets are not brought into the estate the only one to suffer prejudice will be the respondent. He is undoubtedly the person best suited to ensure that this be done.

In the result I would order that the appeal be dismissed with costs.

Manyarara JA: I agree.

Korsah JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

D W Aitken & Co, respondent's legal practitioners

1991 (2) ZLR p308

BOKA ENTERPRISES (PVT) LTD v PINE 1991 (2) ZLR 308 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

24 September & 28 November 1991

Flynote

Negligence - proof of - doctrine of *res ipsa loquitur* - applicability of - what factors give rise to application of doctrine - effect of doctrine on burden of proof.

Headnote

Respondent had been driving behind another vehicle along a road when a vehicle being towed in the opposite direction suddenly overtook the towing vehicle and at the same time strayed into respondent's path and that of the vehicle ahead of her. The towed vehicle collided with both respondent's vehicle and that ahead of her. Respondent sued the driver of the towing vehicle for damage sustained to her vehicle.

Held, that before the invocation of the doctrine *res ipsa loquitur* it must be established that whatever caused the accident was in the **exclusive control** of the defendant.

Held, further, that to apply the doctrine is to do no more than to shift the burden of proof. A *prima facie* case is assumed to have been made out which throws upon defendant the task of proving that he was not negligent.

Held, further, that firstly the proven facts must be examined to find out whether they give rise to the application of the doctrine. Secondly the defence proffered must also be scrutinised to see if it establishes that the defendant was not, in fact, negligent, or that the accident was one which

could have occurred without any negligence on the part of the defendant.

Held, further, that the doctrine could only have been invoked in the circumstances of this case if both the drivers of the towing vehicle and the vehicle in tow had been joined as defendants.

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KORSAH JA

Cases cited:

Arthur v Bezuidenhout & Mieny 1962 (2) SA 566 (A)

Naude NO v Transvaal Boot and Shoe Manufacturing Co 1938 AD 379

Woods v Duncan [1946] AC 401; [1946] 1 All ER 420 (HL)

D P Drury for the appellant

A J Dyke for the respondent

Judgment

Korsah JA: At about 7 pm on 16 April 1987, the respondent was driving in an easterly direction along Mutare Road, behind an army landrover. At the intersection of Mutare Road and Stevens Drive, she observed a truck being towed by another truck travelling in a direction opposite to her. All of a sudden, while the towing truck remained on its proper side of the road, the truck being towed drove past the towing truck on its wrong side of the road and first collided with the army landrover in front of the respondent, and thereafter ran into her Ford Laser, causing extensive damage to her vehicle.

The vehicle in tow, which collided with the respondent's vehicle was an 8-ton Mercedes Benz vehicle owned by Mr Maposi, as was the tow-bar with which it was being towed. The vehicle in tow was being steered, at the time of the accident, by a driver in the employ of Mr Maposi. The towing vehicle, a 10-ton DAF truck, was the property of the appellant and was in the custody, and under the control of Leonard Marozva, a driver employed by the appellant.

The respondent claimed liquidated damages in the sum of \$3 822,72 from the appellant in respect of the loss sustained by her as a result of the accident. In her declaration it was alleged that the second vehicle broke loose from the towing hitch, veered onto the wrong side of the road and collided with her vehicle. This much was common cause. It was also common cause that in towing the broken-down vehicle Leonard Marozva was acting in the course of and within the scope of his employment. But the appellant denied the allegation that the collision was caused through the negligence of Leonard Marozva in that he towed another vehicle when the towing hitch was unsafe.

The respondent testified that at all times relevant to this accident the appellant's vehicle kept to its proper side of the road and did not collide with her vehicle. She did not know what caused the vehicle in tow to veer from behind the towing vehicle and come crashing into her vehicle; nor did she hear, prior to the collision, the squealing of brakes signifying an attempt on the part of

the person steering the vehicle in tow to stop the vehicle.

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KORSAH JA

Patrol Officer Mawonera, who attended the scene of the accident, testified that although he compiled a Traffic Accident Book when he attended the scene, as was the practice, that TAB had been destroyed after the expiration of two years. He could, however, recall that at the scene of the accident he saw an army landrover and the respondent's vehicle parked facing an easterly direction along Mutare Road, and a lorry on the other side of the road facing the opposite direction. The road runs downhill in a westerly direction. About 600 to 700 metres from the scene of the accident in a westerly direction was a solitary vehicle parked on its left hand side of the road.

Investigations revealed to PO Mawonera that the lorry parked at the scene, with the army landrover and the respondent's vehicle, had been towing the solitary vehicle parked some 600 odd metres down the road from the scene of the accident. From his observation the tow-bar which was being used to tow the vehicle got broken into two and that was how the vehicle in tow became separated from the lead vehicle and crashed into the respondent's vehicle. PO Mawonera was unable to shed any light on whether the tow-bar was defective in any way, but suggested that the tow-bar broke because it could not take the weight of the vehicle in tow. He, however, could not recall the thickness or length of the tow-bar, and so his opinion that the tow-bar could not take the weight of the vehicle in tow was a generalisation which does not explain the reason why the tow-bar snapped in two.

The tow-bar may have been, in thickness and length, perfectly adequate for towing a weight equal or greater than that of the vehicle in tow, but may have been defective in a manner not visible to the naked eye. In other words there may have been a latent defect in the tow-bar. No one knows how or why the tow-bar snapped, and the respondent contended that the breaking of the bar was more consistent with its being caused by negligence for which Leonard Marozva was responsible than by other causes, and that the mere breaking of the tow-bar affords reasonable evidence in the absence of any explanation from Leonard Marozva, that the accident arose from the want of care on his part.

In addition to shifting the *onus* of proving that he was not in fact negligent onto Leonard Marozva, evidence was led that Leonard Marozva had, on 13 May 1987, signed an "Admission of Guilt" Form No. 480785 admitting to a contravention of s 61(1)(b) of the Road and Road Traffic (Construction Equipment and Use) Regulations, No. 412 of 1972 charging that he had towed another vehicle which was not under proper control, and had paid a spot fine of \$20 rather than go to court to contest the charge. If the Admission of Guilt fine was adduced in evidence in substantiation of an admission of

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KORSAH JA

liability on the part of Leonard Marozva, then what he was admitting to requires careful scrutiny.

Section 16(1)(b) of GN 412 of 1972 recites that:

"61. (1) No person shall drive on any road any motor vehicle towing another vehicle -

(a) . . .

(b) unless the vehicle being towed is so attached to the towing vehicle as to be under proper control."

If, as was common cause, the veering of the vehicle in tow onto its improper side of the road was as a result of the tow-bar snapping, then the cause of the accident had nothing to do with the vehicle in tow being so insecurely attached to the towing vehicle as not to be under proper control. On the facts, the charge was incompetent and the admission bad and ineffectual as an admission to the liability contemplated by the section. Support for this view also emanates from the evidence that the police explained to Leonard Marozva that they were preferring this charge against him because his tow-bar was not safe (because it snapped).

I turn now to the applicability of the doctrine *res ipsa loquitur* to the facts of this case. The learned trial judge remarked that:

"Where as in this case, a collision occurs on the incorrect side of the road it has been held *res ipsa loquitur*, as the only reasonable inference to draw was that the Mercedes Benz truck found on the incorrect side of the road was due to the failure to exercise proper care. Proof that the Mercedes Benz truck was on the incorrect side of the road is prima facie proof of negligence. *Marais v Caledonian Insurance Co Ltd* 1967 (4) SA 1999 (E)."

While it is true, as stated by Cooper *Motor Law* vol 2 p 99 that the doctrine of *res ipsa loquitur* applies where:

". . . the occurrence . . . (was) . . . of such a kind which ordinarily does not occur unless someone has been negligent, and it must be due to a thing or means within the exclusive control of the Defendant",

to apply the principle is to do no more than shift the burden of proof, which may adequately be met by showing that the defendant was not in fact negligent.

First, the proven facts must first be examined to find out whether they give rise

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KORSAH JA

to the application of the doctrine. Secondly, the defence proffered must also be scrutinised to see if it establishes that the defendant was not in fact negligent, or that the accident was one which could have occurred without any negligence on the part of the defendant.

The chronology of events in the instant case which are uncontroverted is as follows:

At around 5.30 pm on 16 April 1987, upon instructions received, the appellant's driver Marozva took his 10-ton DAF truck to a point some two-and-a-half kilometres west of Ruwa on the main Harare to Mutare Road to tow a broken-down vehicle into Harare. Upon arrival at the point indicated to him, Marozva found an 8-ton Mercedes Benz vehicle on the side of the road which had attached to it a tow-bar. Both the 8-ton Mercedes vehicle and the tow-bar were the property of Mr Maposi.

The said tow-bar was made of iron. It was approximately three to four paces in length and was about four inches in diameter. It was fitted with the necessary coupling mechanisms and satisfied the description demanded by law. Having thus assured himself that the tow-bar was of regulation specification and fit for use, Marozva ensured that the tow-bar had been effectively coupled to his vehicle. He got into his vehicle while the driver of the vehicle in tow also climbed into his, to enable that vehicle to be steered and controlled whilst under tow. Therefore, except for lending propulsion to the vehicle in tow, that vehicle was not completely under the management and control of Marozva.

In a way, the circumstances may be likened to persons pushing a vehicle to start it. Although they give motion to the vehicle they are not in the management and control of it. The main difference being that while the towing vehicle leads the vehicle in tow and may be said to guide to a limited extent the vehicle in tow, those pushing a broken-down vehicle have no guidance, management or control over the vehicle. The limited management and control over the vehicle in tow by the towing vehicle persists while the towing continues. To my mind, unless there are special circumstances, such management and control of the vehicle in tow by the towing vehicle is severed when the vehicle in tow is detached from the towing vehicle, where such severance is not the result of negligence on the part of the driver of the towing vehicle.

To revert to the chronology of events, pursuant to embarking on the journey, but without having ascertained the cause of the break-down of the towed vehicle and, in particular, as to whether such vehicle was equipped with brakes,

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KORSAH JA

Marozva carried out a braking test under tow before departing from Ruwa to Harare.

While approaching the intersection of Stevens Drive in Harare with Mutare Road, Marozva was compelled by a motor vehicle ahead of him to apply his brakes. He first signalled by hand that he was slowing down and then gently applied his brakes. Before slowing down he was travelling at 40 kph. When he applied his brakes the tow-bar linking the two vehicles snapped and the towed vehicle overtook the towing vehicle on its right hand side and collided with the respondent's vehicle. As the vehicle in tow was overtaking the appellant's vehicle Marozva drove to his nearside of the road and stopped about fifteen metres from where the vehicle in tow crashed into the respondent's vehicle. The vehicle in tow, after crashing into the respondent's vehicle, moved to its proper side of the road and stopped some 600 to 700 metres from the scene of the accident.

Do these proven facts give rise to the application of the doctrine of *res ipsa loquitur*?

Before the invocation of the doctrine it must be established that whatever caused the accident was in the exclusive control of the defendant. In the two cases cited by the learned trial judge viz *Arthur v Bezuidenhout and Meiny* 1962 (2) SA 566 (A); and *Naude NO v Transvaal Boot and Shoe Manufacturing Company* 1938 AD 379, to illustrate the application of the doctrine, the motor vehicle in each case was under the exclusive control of the defendant.

In the instant case apart from the towing vehicle lending propulsion to the vehicle in tow, the

vehicle in tow, which collided with the respondent's vehicle, was at all times under the management and control of Mr Maposi's driver. Even if it could be said that, while in tow, the towed vehicle was partially under the control of Marozva, it is evident that it was never under the exclusive control of Marozva even when in tow.

It seems to me that whereas the doctrine may well be invoked by an injured party who sues two drivers the collision of whose vehicles on the road results in injury to him, because each has the exclusive control of his vehicle at the time of the accident, and the occurrence is not one which could happen without negligence on the part of one or the other driver, the doctrine has no application where the injured party elects to sue only one of two drivers whose negligence may have caused the accident, for by doing so the injured party alleges that he is aware that it was the one rather than the other who was negligent. If that be the case then

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KORSAH JA

he must be cognisant of the manner in which the accident was caused. The matter is then, not one that speaks for itself, but one with regard to which the manner in which the defendant was negligent was known and evidence must be adduced to establish that negligence.

It cannot be over-emphasised that the doctrine may be invoked where the thing causing the accident is shown to be under the exclusive control or management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. All that happened in the instant case was that the appellant was towing a vehicle, the tow-bar snapped and the vehicle in tow, being steered by Mr Maposi's driver, moved onto its incorrect side of the road and smashed into the respondent's vehicle. It is not a necessary inference that Marozva's conduct caused the vehicle towed by him to veer to the right and crash into the respondent's vehicle. Especially is this inference incapable of being drawn when the driver of the vehicle in tow, once it became detached from the towing vehicle, must be taken to have assumed exclusive control of the steering mechanism and all other systems of the vehicle in tow before the accident. To put it another way the vehicle in tow was at no time under the exclusive control and management of Marozva.

In my view, *res ipsa loquitur* could only have been invoked in the circumstances of this case if both the drivers of the towing vehicle and the vehicle in tow had been joined as defendants, and not otherwise.

It is not, in my opinion, conclusive to say that the snapping of the tow-bar was the cause of the accident, because nothing may have happened if Mr Maposi's driver had not steered the vehicle in tow so as to overtake the towing vehicle on its right side, rather than stop, resulting in the ensuing accident. Without suing the two drivers jointly, the matter, instead of speaking for itself, becomes even more obscure.

In any case, even if the doctrine were applicable, (which I do not for a moment admit for the reasons above stated), and if I may be permitted to adopt the language of LORD SIMONDS in *Woods v Duncan* [1946] AC 401 at 439:

"... to apply this principle is to do no more than shift the burden of proof. A *prima facie* case is assumed to have

been made out which throws upon him the task of proving that he was not negligent. This does not mean he must prove how and why the accident happened, it is sufficient if he satisfies the court that he personally was not negligent. It may well be that

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KORSAH JA

the court will be more easily satisfied of this fact if a plausible explanation which attributes the accident to some other cause is put forward on his behalf; but this is only a factor in the consideration of the probabilities. The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered; yet if the court is satisfied by his evidence that he was not negligent, the plaintiff's case must fail."

The second issue which falls for resolution is whether the defence proffered established that Marozva (the appellant's driver) was not in fact negligent, or that the accident was one which could have occurred without any negligence on the part of Marozva.

While it may be inferred that the braking of the towing vehicle caused tension on the tow-bar which snapped under pressure, the inquiry concerning negligence, as Mr *Drury* rightly submitted, must go further, having regard to the defence put forward by Marozva. He examined the tow-bar by sight and found it to be in order and of regulation standard; he checked the couplings and, before leaving Ruwa, carried out a braking test which he found to be in order. In the circumstances the conduct of Marozva prior to the accident was reasonable and adequate and did not in any way constitute negligence or a cause of conduct which fell below that of a reasonably prudent driver.

If the tow-bar had a latent defect which was not discoverable by ordinary skill and care, and Marozva did visually examine the tow bar and found no discernible flaws, then Marozva had done all that was humanly possible to ensure that he carried out his duties safely. It was not for Marozva to establish that the tow-bar had a latent defect in order to be absolved of liability. It is sufficient for him to put forward a plausible explanation which attributes the accident to some cause other than negligence on his part. The learned trial judge thus fell into error when he held that the *onus* was on the appellant to establish that the tow-bar had a latent defect which was not discoverable by ordinary skill and care.

It would appear that another ground on which the learned trial judge found the appellant to be negligent was his failure to ascertain whether or not the vehicle in tow had serviceable brakes. But, as Mr *Drury* again rightly submitted, that issue was neither pleaded nor relied upon and no evidence was led to establish the condition of the braking system on the vehicle in tow. No inference that its brakes were defective can be drawn from the fact that the vehicle in tow came to a halt 600 to 700 metres from the point of impact with the respondent's vehicle. It may well be that the driver of the vehicle in tow

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KORSAH JA

was in a state of shock after crashing into two vehicles and failed to apply his brakes.

The learned trial judge misdirected himself by placing reliance on particulars which were neither

pleaded nor relied upon to found negligence, especially as there was no evidence regarding the condition of the braking system on the vehicle in tow. In any event to tow a vehicle without brakes is not an offence under the Regulations. What is clear from the evidence is that the appellant relied on his vehicle and its brakes during the towing process, and there was no evidence in that regard that the brakes on the appellant's vehicle were unsuitable or inadequate. Indeed the two vehicles had travelled a not inconsiderable distance from Ruwa to Harare by this method without anything untoward happening, and there was no evidence to establish that such conduct was negligent or unlawful.

It seems to me that the appellant gave an account of the accident which indicated that it was not negligent. The appellant is not required to prove exactly how the accident occurred. It is sufficient for it to give an explanation which is consistent with no negligence on its part. And this it did.

In the result the appeal is allowed with costs. The judgment in the court below is set aside and in its place is substituted the following:

"The plaintiff's claim is dismissed with costs."

McNally JA: I agree

Ebrahim JA: I agree

Gollop & Blank, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

1991 (2) ZLR p317

REITH v ANTAAO 1991 (2) ZLR 317 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Ebrahim JA

Civil appeal

8 November & 5 December 1991

Flynote

Husband and wife - adultery - damages - measure and quantum.

Headnote

The respondent sued the appellant for damages of \$10 000 for enticement and adultery. The trial court found that the respondent's wife had deserted him and thereafter commenced an association with the appellant. The trial court found that no enticement had been proved. As to the issue of when adultery commenced, the trial court found on the probabilities that adultery had occurred before the issue of the summons, and awarded \$10 000 as damages for adultery.

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The appellant appealed.

Held, the award was too high, in particular as the adultery was not the cause of the break-up of the marriage.

Cases cited:

Smit v Arthur 1976 (3) SA 378 (A)

Cottham v Cottham GS-5-76 (not reported)

Hickey v Hickey & Anor GS-28-79 (not reported)

Meakin v du Plessis HH-384-83 (not reported)

Shonge v Shonge & Anor HH-414-86 (not reported)

Dzemwa v Makarati HH-85-87 (not reported)

Sidubi v Middlemiss HB-130-87 (not reported)

Gumunya v Munyanyi HB-130-89 (not reported)

Kasirowore v Muzenda HH-127-90 (not reported)

Mtungwazi v Sibanda HB-67-90 (not reported)

Ncube v Mguni HB-77-90 (not reported)

1991 (2) ZLR p318

McNALLY JA

A P de Bourbon SC for the appellant

S B A Longhurst for the respondent

Judgment

McNally JA: In the High Court Mr Antao was awarded the sum of \$10 000 against Mr Reith by way of damages for adultery. The adultery was admitted. The factual issue was the date of the adultery. The plaintiff, Mr Antao, claimed that Mr Reith had enticed his wife to leave him and that they had committed adultery before she had left him. The damages claimed were therefore based on enticement as well as adultery. The declaration makes that very clear. The defence was that the relationship had developed only after she had left Mr Antao and after the marriage had irretrievably broken down. The claim, I should add was for \$10 000, the sum that was in the end awarded.

The learned judge found on the evidence that there was no enticement. He found that she had left her husband and gone to stay with Mr Reith's brother and his wife. He found that Mr Reith had nothing to do with that move. It was only after the move that a relationship developed. Four months after the move she left the brother's house and moved into Mr Reith's house. She and

Mr Reith both denied that they lived together at that stage. She had a separate apartment in his house. Their sexual relationship developed some months later.

The learned judge did not believe that. He found on a balance of probabilities that the sexual relationship began when she was still at the brother's house. He found that this relationship made any question of reconciliation impossible. He, therefore, granted the divorce to Mr Antao (both had claimed a divorce) and awarded damages as aforesaid.

The finding that there was no enticement cannot seriously be challenged on the evidence. But it seems to me, with respect, that His Lordship did not give sufficient weight to that finding in making his award for damages.

Argument was addressed to us about the sexual mores of the community and whether or not the action for adultery is outdated in today's society. I do not propose to make a definitive ruling on the subject, save to say that the action has certainly not been abrogated by disuse. I am not qualified to say whether adultery is committed more frequently today than it was ten or twenty or fifty years ago. One can say that society is more tolerant of, and less shocked by adultery than it was fifty years ago. But whether that level of tolerance is greater than it was say in the 60s and 70s is a matter of opinion. I note Boberg's remark (*The Law of Persons and The Family* at p 184, note 15) that "contemporary awards tend to be relatively small".

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McNALLY JA

What is to my mind absolutely clear is that the courts have always in the last thirty years drawn a very sharp distinction between adultery which breaks up a happy and stable marriage on the one hand, and adultery which ensues after an unhappy and unstable marriage has broken down in all but name, on the other.

All the evidence in this case indicates that the adultery in this case falls into the latter category. Mrs Antao (as she then was) was married on 21 March 1981. She left her husband and started divorce proceedings on 25 February 1982. There was a reconciliation. She instituted proceedings again in 1984. There was another reconciliation. The daughter Sara was born in October 1985. She left him again in April 1986. Clearly therefore the marriage was highly unstable and deeply unhappy. I know that Mr Antao denies that, but the facts are against him.

It is true, as the learned judge said, that it was the relationship with Mr Reith which then made a further reconciliation impossible. But, as Mr *de Bourbon* so tellingly submitted, that relationship did not end the marriage relationship. It simply put an end to the possibility that it might re-start. And one must point out that that possibility was increasingly remote. Each break-up made reconciliation more unlikely. One cannot divide human relationships into separate and watertight compartments. The fact is, on the evidence, that the marriage had all but broken down when Mr Reith came upon the scene.

Some point was made of the facts that the summons claiming, *inter alia*, damages for adultery, was issued on 6 January 1987. If adultery was committed only after that date, no damages were payable.

The learned judge found that adultery began in the period May 1986 to September 1986. I see no reason on the evidence to quarrel with that finding. But even if it only occurred when she moved in to Mr Reith's house in September 1986 I am satisfied that it began before the issue of summons. (Compare the approach of the court in *Smit v Arthur* 1976 (3) SA (A) at 384-6.)

Damages are therefore payable.

As to *quantum*, a number of cases were cited. *Cottham v Cottham & Anor* GB-5-76; *Hickey v Hickey & Anor* GS-28-79; *Meakin v du Plessis* HH-384-83; *Shonge v Shonge & Anor* HH-414-86; *Dzemwa v Makarati* HH-85-87; *Sidubi v Middlemiss* HB-130-87; *Gumunya v Mungani* HB-130-89; *Kasirowore v Muzenda* HH-127-90; *Mtungwazi v Sibanda* HB-67-90; *Ncube v Mguni* HB-77-90. It was argued whether the value of chastity is

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McNALLY JA

depreciating faster or slower than the value of money. I am not prepared to say that an award of \$10 000 could never be made in today's circumstances. But I am satisfied that the learned trial judge misdirected himself in awarding the full amount claimed when the major element on which the claim was based, namely, enticement, was specifically dismissed, and loss of *consortium* on the evidence was a negligible factor.

In my view no more than \$700 should have been awarded.

Accordingly the appeal is allowed with costs and the order of the High Court is amended by the substitution of the figure of \$700 for the figure of \$10 000.

Manyarara JA: I agree

Ebrahim JA: I agree

Winterton, Holmes & Hill, appellant's legal practitioners

Ben Baron & Partners, respondent's legal practitioners

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ATTORNEY-GENERAL v MZIZI 1991 (2) ZLR 321 (SC)

Court Supreme Court, Harare

Gubbay CJ, McNally JA & Manyarara JA

Criminal appeal

18 November & 5 December 1991

Flynote

Appeal - against discharge of accused at close of State case - leave of judge of Supreme Court required.

Criminal procedure - application for discharge of accused at close of State case - test applicable - how credibility of prosecution witnesses to be treated - competent verdicts - not competent to acquit on main charge and proceed on lesser charge revealed by evidence - proper procedure in such cases is to remit the matter for continuation of trial.

Criminal Procedure and Evidence Act [Chapter 59] - s 188 (3) - application for discharge at close of State case - section not operative where there is evidence upon which accused might be convicted of lesser offence - amendment to subs (3a) - effect is to allow appeals against decision granting discharge at close of State case - subs (3b)(b) allows remittal for continuation of trial or for a trial de novo.

Evidence - credibility of prosecution witnesses - how to be measured in application for discharge - test applicable.

Legislation - Criminal Procedure and Evidence Act [Chapter 59] s 188(2b)(b)(i); s 188 (3); 188 (3a); s 199.

Headnote

Where the trial magistrate had acquitted the accused consequent upon an application for discharge at the close of the State case, appellant had appealed under the amendment to s 188(3a) of the Criminal Procedure and Evidence Act [Chapter 59]. The court found that as there was evidence of a lesser offence upon which the accused might have been convicted, the

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McNALLY JA

decision to acquit had not been competent and remitted the matter for continuation of the trial in terms of s 188 (3b)(b)(i).

Decisions made under the unamended section had been rendered irrelevant by the amendment.

Cases cited:

R v Herholdt & Ors (3) 1956 (2) SA 722 (W)

S v Mpetha & Ors 1983 (4) SA 2162 (C)

R v Dzingayi & Ors 1965 RLR 171 (G)

Attorney-General v Bvuma & Anor 1987 (2) ZLR 96 (SC)

J Zindi for the appellant

D P Carter for the respondent

Judgment

McNally JA: The appellant appeals, with the leave of this court granted in terms of subs (3a) of s 188 of the Criminal Procedure and Evidence Act [Chapter 59], against the decision of the Regional Magistrate for the Western Division, Bulawayo, to discharge the respondent at the

close of the State case in terms of s 188(3).

The charge was one of assault with intent to rape and rape. The magistrate found that the complainant was unreliable and deliberately untruthful, and that her aunt, who gave corroborating evidence, was, "to say the least, a pathetic and shameless liar".

The defence had been a defence of consent. It was common cause that the parties had previously been in love and had had a sexual relationship. The State case was that the complainant had terminated that relationship in August 1990 and had then been assaulted and raped in November 1990.

Subsection (3) of s 188 reads as follows:

"If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it may return a verdict of not guilty."

The new subs (3a), introduced by Act 24 of 1989, provides:

"If the Attorney-General is dissatisfied with a decision in terms of subsection (3) he may, with the leave of a Judge of the Supreme Court, appeal against such decision to the Supreme Court."

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McNALLY JA

In terms of the proviso to that subsection legal aid was granted to the respondent, and the court is grateful to Mr *Carter* for his assistance.

The test that is applied is whether the evidence presented by the prosecution "is such that a reasonable man, acting carefully, might properly convict". (*Per* BEKKER J in *R v Herholdt & Ors* (3) 1956 (2) SA 722 (W).)

This is a question of law. Credibility is obviously a relevant consideration, but the credibility of the prosecution witnesses must be measured against the same yardstick. The court must be satisfied that no reasonable man, acting carefully, might properly convict on such evidence. Compare *S v Mpetha & Ors* 1983 (4) SA 262 (C) at 265 E-F; and LORD PARKER'S Practice Note reported in [1962] 1 All ER 448.

It is unnecessary for us to decide whether, on the facts, the magistrate erred in his assessment of the credibility of the prosecution witnesses. And since we propose to remit the matter on another ground it may be undesirable that we should comment on this aspect.

The respondent frankly admitted that he assaulted the complainant. A conviction for assault is competent on a charge of rape or of assault with intent to commit rape - see s 199 of the Criminal Procedure and Evidence Act. Indeed the magistrate conceded that he had overlooked this point.

Mr *Carter* submitted that we should not follow *R v Dzingayi & Ors* 1965 RLR 171, which is clear authority for the proposition that, where there is evidence upon which the accused might be convicted of a lesser offence, the section is not operative. It is not competent for the court to

acquit the accused on the main charge and direct that the trial proceed on the lesser charge. It is all or nothing.

Mr *Carter* referred us to the case of *Attorney-General v Bvuma* 1987 (2) ZLR 96. That case, however, was based on a different section of a different Act. Insofar as the judgment refers to s 188 of Chapter 59, it refers to the unamended section, and is no longer relevant. Indeed it seems likely that the section was amended because of the decision in *Bvuma's* case *supra*. Subsection (3b) now specifically provides for remittal of the case for continuation of the trial.

I can see no reason for departing from the decision in *Dzingayi supra*. It has stood unchallenged in our law reports for 26 years. Moreover, it gives a meaning to the clear words of the section "or any other offence of which he might be convicted thereon". The section therefore permits a discharge at the

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McNALLY JA

end of the State case when, and only when, there is no evidence on which a reasonable man, acting carefully, might properly convict either on the main charge or on any alternative or competent charge.

In this case the conditions for a discharge were not fulfilled. There was evidence upon which a court might have convicted the accused of a lesser offence and such conviction would have been a competent verdict. The decision to acquit at that stage was therefore as a matter of law incompetent.

In the circumstances the appeal succeeds. I see no reason to follow any course other than that provided for in subs (3b)(b)(i). I set aside the magistrate's verdict and remit the case for continuation of the trial. I make it clear that the magistrate is entirely free, within the limits of judicial discretion, and at the completion of all the evidence, to acquit or convict the respondent of the main offence charged or to enter a verdict of guilty or not guilty in relation to any of the lesser offences specified in s 199 of the Criminal Procedure and Evidence Act [*Chapter 59*]. In short, he should continue with the trial as if the question of discharge had never arisen.

Gubbay CJ: I agree.

Manyarara JA: I agree.

Pro Deo

1991 (2) ZLR p325

S v ADOLFO 1991 (2) ZLR 325 (HC)

Court High Court, Harare

Smith J

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Criminal trial

5, 6 & 12 December 1991

Flynote

Evidence - tape recordings - one side of conversation only audible - evidential value may be weakened but still admissible.

Criminal procedure (sentence) - evidence relating to mitigation - rules of admissibility relaxed - defective tape recording - intended to be used by the State - only fair that accused should be allowed to make use of it.

Criminal law - bribery - very serious offence - offence aggravated if bribe is offered to a magistrate - sentence must however depend on the circumstances - accused not initiator of bribe - gravity of offence reduced.

Headnote

The fact that only one side of a tape-recorded conversation is capable of being reproduced may weaken the evidential value of the tape or transcript because it is not possible to get a complete picture of the full conversation but the cogency and weight to be attached to the transcript must be decided by the court. The tape recording itself must be admissible.

The decision whether to admit such a defective tape recording was reinforced by the fact that it related solely to mitigation and when a court considers submissions in mitigation the rules of admissibility of evidence are relaxed. The fact that the recording machine was set up by the State with the intention of obtaining a tape recording of the conversation between the accused and the other party to the conversation, for the purpose of prosecuting the accused, was also relevant.

The offence of bribery is very serious and where a bribe is offered to a

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SMITH J

magistrate, the offence is aggravated. The sentence to be imposed, however, must depend on the circumstances and where an accused person was not the initiator of the bribe, the gravity of the offence is reduced.

Cases cited:

S v Ramgobin & Ors 1986 (4) SA 117 (N)

S v Baleka & Ors 1986 (1) (4) SA 192 (T)

S v Magqabudi & Anor 1983 (4) SA 54 (TSC)

S v Paweni & Anor 1985 (2) ZLR 133 (SC)

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

S v van der Westhuizen 1974 (4) SA 61 (C)

S v Govere & Ors S-125-85 (not reported)

S v Kuntz S-180-82 (not reported)

J Shava for the State

J B Colegrave for the accused

Judgment

Smith J: The accused pleaded guilty to a charge of bribery. He offered \$5000 to a regional magistrate as an inducement to the magistrate to sentence a Mr Krebs, whom he had convicted of contravening a provision of the Gold Trade Act [*Chapter 164*], to a fine and not to a term of imprisonment. The accused was convicted in accordance with his plea. The circumstances in which the bribe was offered are important in order to appreciate the moral blameworthiness of the accused. There are certain facts which are not in dispute between the State and the accused. They are as follows. The accused comes from a large family, he has seven sisters and five brothers. It is a close-knit family, all are staunch members of the Roman Catholic faith and are regular church-goers. They are highly respected in the community in which they live. The accused is 31 years old and is a teacher at a primary school in Bindura. He is dedicated to his profession, being prepared to teach in rural areas. He established a football club in Sunningdale, the suburb in which his family lived, to give youths some activity to keep them out of mischief, and was associated with the club for five years. Krebs married the accused's sister last year. He was convicted on Friday 8 March. On Sunday 10 March the accused came to Harare from Bindura, where he was staying. Members of his family were discussing Krebs' conviction. Krebs was very concerned that if he were sentenced to imprisonment he would be deported. During the family discussions the accused mentioned through a mutual friend that he had met the magistrate who had convicted Krebs and regarded him as a friend. Krebs then asked the accused to talk to the magistrate and ask him to be lenient with Krebs and sentence him to a fine rather than to imprisonment.

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SMITH J

The accused was reluctant to do so but eventually Krebs persuaded him to talk to the magistrate. The accused then drove to the house in Sunningdale where the magistrate used to live and spoke to the magistrate's sister who gave the accused her brother's telephone number. The accused returned to his sister's house and spoke to the magistrate on the telephone. The accused telephoned the magistrate again the next day, Monday 11 March, at about 7 am and asked if he could visit the magistrate and talk to him. The magistrate agreed that the accused could visit him at his office in the Harare Magistrate's Court at 11 am. The visit took place, lasting about half an hour. The accused returned to the magistrate's office in the afternoon and asked him if \$5000 was sufficient. The magistrate agreed that it was. The accused said that he would be in Harare on the afternoon of Thursday 14 March and could hand the money over then. On the Thursday the accused came into Harare at lunch time and went to his sister's house where he saw Krebs. At about 3 pm they drove into town and the accused went to the magistrate's office and told the magistrate that he had money but not on him because he was

afraid that he would be searched when he entered the building and if a large amount of money was found on him suspicions would be aroused. He asked the magistrate if he would go outside with him and then the money could be handed over. The magistrate refused so the accused went out to his car, collected the money from Krebs and went back to the magistrate's office. It was while he was counting the money, or just about to do so, that the police officer entered the office and arrested the accused. The accused then apologised to the magistrate, saying "I'm sorry about this".

The disputes between the State and the accused centre around what was said by the accused and the magistrate during their telephone conversations and meetings. With regard to the first telephone conversation on the Sunday afternoon, the accused said that he had asked the magistrate if he could do him a favour and be lenient with Krebs and the magistrate had said he would look into it. Then the conversation ended. However the magistrate said that he had told the accused that if he wanted to speak about Krebs' case he should leave things alone and not get involved. When the accused insisted that he wanted to meet him, he had put the phone down. The accused denied that the magistrate had advised him not to get involved. He said that if the magistrate had said that, he would not have made any further attempt to contact him. In fact he would not have contacted the magistrate again, because he felt he had done enough, had it not been for Krebs. With regard to the second telephone conversation on the Monday morning, the accused said that he asked the magistrate if he could see him and the magistrate agreed. He did not insist, as the magistrate claimed. In fact, if the magistrate had refused to see him he

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SMITH J

would have taken the matter no further.

With regard to the conversation in the magistrate's office on the Monday morning, the accused said that his intention was to ask the magistrate if he could do him a favour and be lenient with Krebs. He had no intention of offering the magistrate a bribe. He himself had no money to do so and he did not know whether Krebs had because they had not discussed any such thing. The accused said that it was only during the course of conversation that he realised that the magistrate was actually soliciting for a reward in return for his favour. As he had not discussed the matter with Krebs, he could not pursue that aspect and so he had had to return to Krebs to see whether Krebs was prepared to offer any money, and if so, how much. The magistrate, on the other hand, said that fairly soon after the accused entered his office the accused made a vague offer that "something would be done for him" and he spent the rest of the interview trying to get some clarity as to exactly what was being offered to him.

The magistrate when he went to his office on the Monday morning after agreeing to meet the accused at 11 am, had discussed the matter with his colleagues and the then Chief Magistrate and with some police officers. A tape recorder was fitted up so that the conversation between him and the accused could be recorded. Unfortunately the machine provided was not powerful enough to pick up the accused's words sufficiently clearly so that they could be transcribed. Accordingly the transcription of the tapes gives only what the magistrate said. Mr *Colegrave* applied to have the transcript admitted in evidence. Miss *Shava* objected on the grounds that it

did not give a true picture of what had taken place as it did not show what the accused had said. She relied on *S v Ramgobin & Ors* 1986 (4) SA 117 (N) and *S v Baleka & Ors* (1) 1986 (4) SA 192 (T). In the former case MILNE JP at 135C-D said:

"In the result, for these recordings to be admissible, it must be proved that the exhibits sought to be put in (a) are the original records and (b) that, on the evidence as a whole, there exists no reasonable possibility of 'some interference'."

In this case the exhibits are the original recordings and there is no possibility of some interference. In *Baleka's* case *supra* VAN DIJKHORST J at 145C said that South African and English courts have admitted evidence of tape recordings even where the recordings were imperfect, parts were inaudible and the whole was not decipherable. At 195H-I he said:

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SMITH J

"When a tape has been tampered with in the sense that certain words have been erased or certain portions inserted, the remainder of the tape is still original. The interference may have the result of diminishing or destroying its evidential value, but that does not mean that it is inadmissible."

It seems to me that the same principle would apply in this case. The tape recorder was unable to pick up clearly what the accused said but virtually everything the magistrate said was clearly audible. The fact that only one side of the conversation is capable of being reproduced may weaken the evidential value of the tape or transcript because it is not possible to get a complete picture of the full conversation but the cogency and weight to be attached to the transcript must be decided by the court. The tape recording itself must be admissible. My decision to admit the transcript is reinforced by two further considerations. Firstly, the defence wishes to produce the transcript for the purposes of submissions in relation to mitigation. The accused has already been convicted. When a court considers submissions in mitigation the rules of admissibility of evidence are relaxed. Hearsay evidence may be allowed - see for example *S v Magqabudi & Anor* 1983 (4) SA 54 (TSC). Secondly, the recording machine was set up by the State with the intention of obtaining a tape recording of the conversation between the accused and the magistrate for the purpose of prosecuting the accused. The tape has been in the possession of the State all the time and it is the defence counsel who wishes the tape to be produced in evidence. It seems to me that the State should not be able to prevent the production of the tape recording in the circumstances.

Mr *Colegrave* has wisely conceded that bribery is a very serious offence and that where the bribe is offered to a judicial officer the offence is aggravated. In *S v Paweni & Anor* 1985 (2) ZLR 133 (SC) at 140G BECK JA said:

"Bribery of public officials is a most serious evil in any society, and is particularly to be guarded against in a developing country."

He referred with approval to the view expressed by HOLMES JA in *S v Narker & Anor* 1975 (1) SA 583 (A) at 586A that bribery "is a corrupt and ugly offence striking cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration. In general, courts view it with abhorrence". In *S v van der Westhuizen* 1974 (4) SA 61 (C) at 65G BAKER J

said:

"In many cases of bribery of officials in the past even first offenders have been sent to gaol for their offence, without the option of a fine."

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SMITH J

The sentence to be imposed in a case of bribery depends, of course, on the circumstances of the case. In some cases, it is the official who accepts the bribe whose conduct is the more blameworthy whereas in others it is the conduct of the person offering the bribe. That is clearly illustrated in *S v Govere & Ors* S-125-85 (not reported). The four appellants in that case were officials who had been bribed by Paweni, the appellant in *Paweni's* case *supra*. At p 4 of the cyclostyled judgment (S-74-85) BECK JA said:

"I consider that Paweni's bribery of the appellants is very much more serious and morally objectionable than the behaviour of any one of the appellants in accepting the corrupt offers made by Paweni."

In *S v Kuntz* S-180-82 (not reported) the appellant had been convicted of bribery and sentenced to 12 months' imprisonment. He had offered a bribe of R1 000 to be paid in South Africa to a captain in the Zimbabwe National Army to induce the latter to persuade the Army to purchase fire engines from his company. The Supreme Court considered that the magistrate's finding that the Army captain did not solicit the bribe could not be supported and that there was the very real possibility, if not the probability, that it was the Army captain who prompted the appellant into making the offer that was made. BECK JA at p 5-6 of the cyclostyled judgment said:

"The likelihood that De Villiers solicited the bribe that the appellant, as the magistrate correctly found, seriously and deliberately offered him is no defence to the charge of bribery, which offence is complete when the corrupt consideration is intentionally offered, or agreed to. It does however have a material bearing on the matter of sentence.

. . .

I think it is obvious that, where corruption already exists in the breast of a public official, and is used by him to exert pressure on others to pander to it so as to obtain the advantage of that official's favour (or perhaps to avoid the disadvantage of his unfair disfavour) the moral culpability of the person who succumbs to such an overture is significantly less than that of one who on his own initiative seeks to corrupt a yet uncorrupted official."

In the present case there is of course no suggestion that corruption already existed in the breast of the magistrate. He was clearly incensed at the suggestion that he would be influenced by any consideration or bribe.

The magistrate, although he could not remember the actual words he used, was certain that when the accused telephoned him on the Sunday afternoon

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he had told him not to get involved. The accused disputed this. From the evidence given about

the accused's nature and from observing him in court I am sure that if the magistrate had been blunt and told the accused that he was skating on thin ice and should not get involved, the accused would not have attempted to make further contact. There is no reason not to believe the accused when he says that Krebs pressurized him to make further contact and attempt to see the magistrate. The magistrate himself agreed that the accused was acting under pressure from another, obviously Krebs. When the accused telephoned the magistrate again on the Monday morning the magistrate told him that he could see him at 11 am. If therefore the accused had not gained the impression from the telephone conversation on the Sunday evening that the magistrate was not interested, and indeed was hostile to any suggestion of interference, the magistrate admits that the accused would not have gained such an impression from the telephone conversation on the Monday morning. Quite the contrary in fact. The fact that the magistrate agreed to see him at 11 am would have led the accused to believe that he could persuade the magistrate to act leniently. At least the magistrate was prepared to see him and listen to him. The magistrate said that the accused had been insistent that he wanted to see the magistrate and that was why he, the magistrate, agreed to the meeting. The accused denied that he had been insistent. Again, having regard to the accused's manner in court, it is difficult to believe that he would have persisted had it been made clear that he was not welcome. It could well be that the magistrate was annoyed at the second telephone call and that in his annoyance he read more into the accused's call than the accused intended. With regard to the meeting at 11 am on the Monday, the said that the accused had said that something would be done for him, that is some consideration would be given to him. The accused, on the other hand, said that he had not said so and in fact had not even considered offering any consideration. The magistrate's impression of what was said to him was obviously coloured by the fact that he believed that the accused was coming to offer him a bribe. Had he not thought that, he would not have had the prior discussions with his colleagues and the police and set up the recording machine. I feel sure that if the accused had intended, when he went to the meeting, to offer a bribe he would have made a specific offer before he left. The magistrate made it clear that he would be risking a lot, putting himself on the line, as he expressed it, and wanted to know how far they were prepared to go. Even with such encouragement and enticing from the magistrate the accused could not make a definite offer. He had to consult Krebs. It seems to me that the moral blameworthiness of the accused in this case must be equated with that of the appellant in *Kuntz's case supra* although in that case the court found that the Army captain had probably solicited the

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SMITH J

bribe whereas in this case the magistrate was enticing the accused in order to trap him into making a specific offer. In *Kuntz's case supra* at p 6 of the cyclostyled judgment, BECK JA said:

"It is no easy matter to decide on an appropriate sentence in this case. Corruption of the kind under consideration is so serious that I do not think that a fine, even though it must be a substantial fine, would by itself reflect the inherent gravity of the offence. Bearing in mind, however, the very important consideration that the appellant was probably not the initiator of the bribe, and having regard to the seriously damaging consequences that his offence has brought upon him, I am of the view that a sentence of imprisonment, in addition to an appropriate fine, may justly be suspended."

Similar considerations, I feel, apply in this case. The aggravating feature is that the official to whom the bribe was offered was a regional magistrate. On the other hand, the accused himself had nothing to gain from the transaction. He was not the initiator of the bribe, Krebs was. He was not trying to further his own interests or that of his employer. He was trying to help Krebs and Krebs' wife, his sister. He was subjected to a lot of pressure from Krebs. He has been suspended from his employment for nine months and may well be discharged. He will have to leave the profession for which he is trained and which he loves.

The accused is sentenced to a fine of \$2000 or, in default of payment, six months' imprisonment and to six months' imprisonment suspended for five years on condition that he is not convicted of having committed, during that period, any offence involving bribery or a contravention of the Prevention of Corruption Act, 1985, for which he is sentenced to imprisonment without the option of a fine.

The \$5 000 offered as a bribe is forfeited to the State.

Stumbles & Rowe, accused's legal practitioners

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CLAN TRANSPORT CO (PVT) LTD v MHISHI 1991 (2) ZLR 333 (SC)

Court Supreme Court, Harare

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

31 October & 12 December 1991

Flynote

Contract - common carrier - definition of - status not affected by restriction on liability - carriage of goods by land - "owner's risk" clause in contract for - may not place upon consignor onus of proving how goods lost or damages.

Headnote

Anyone who undertakes to carry the goods of all persons indifferently, for hire, is a common carrier whether or not he restricts his liability for the goods transported.

The common law rule which places upon a carrier of goods by land the *onus* of proving the basis for release from liability for loss of, or damage to, goods in his custody is a rule of evidence and may not be altered by contract. Accordingly, while an "owner's risk" clause in a contract for the carriage of goods by land may limit the liability of the carrier, it may not place a consignor whose goods are lost or damaged in transit the *onus* of proving how such loss or damage occurred.

Cases cited:

Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe 1988 (1) ZLR 304 (SC); 1990 (1) SA 582 (ZS)

Burger v Central South African Railways 1903 TS 571

Pohoomull Bros v Rhodesian Railways 1921 SR 88

Canada Steamship Lines Ltd v Regem [1952] AC 192; [1952] 1 All ER 305 (PC)

Transport and Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd 1991 (1) ZLR 190 (SC); 1991 (4) SA 150 (ZS)

1991 (2) ZLR p334

KORSAH JA

Bickle v Ministers of Law and Order 1980 ZLR 36 (G); 1980 (2) SA 764 (R)

A J Dyke for the appellant

Mrs B Mtetwa for the respondent.

Judgment

Korsah JA: On 11 January 1988 the respondent entered into an agreement with the appellant, a limited liability company, incorporated in accordance with the laws of Zimbabwe and carrying on business as transporters, to convey certain building materials, hereinafter referred to as "the materials", from Gweru to No. 3 Stonechat Lane at Borrowdale in Harare.

The materials were in an undamaged state when they were handed over to the appellant at Gweru, but were delivered at the specified address in Harare in a damaged condition and as a result were unfit for use. The respondent alleged that such damage was occasioned to the materials through the negligence of the appellant and claimed and was awarded damages of \$1 331,73 for the loss of the materials.

Two other subsidiary claims for damages by the respondent against the appellant in respect of other matters were decided in favour of the respondent, but as they are not the subject of appeal they need not detain us. The appeal is in respect of only those materials consigned to the appellant for carriage from Gweru to Harare.

The first issue which calls for attention is that the appellant's consignment notes all have printed on them in extremely small writing that:

"The company is not a COMMON CARRIER and does not accept the liabilities of a COMMON CARRIER."

The explanation proffered for this assertion was that a common carrier is one who carries everything and has few, if any, conditions of carriage, but although the appellant carries everything, it will only carry certain things at owner's risk.

This is a lame excuse for saying that the appellant is not a common carrier. The question whether a person is a common carrier or not is one of fact. A man may be a common carrier

without so styling himself. Anyone who undertakes to carry the goods of all persons indifferently, for hire, is a common carrier. It is of no consequence that that carrier restricts his liability for the goods transported; that does not make him any the less a common carrier. *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe* 1988 (1) ZLR 304 (SC).

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KORSAH JA

Clause 8 of the appellant's "Conditions of Carriage" recites that:

"8. (i) The loading, unloading and transportation by the Carriers of the classes of merchandise described hereunder shall be undertaken **only at owner's risk**; save where the Carriers, or any of them, specifically declare otherwise in respect of any particular class or classes of merchandise -

- (a) ...
- (b) goods which are not packed or merchandise contained or wrapped in paper or similar material or goods which, in the opinion of the Carriers, are not securely packed or are not sufficiently protected to ensure safe delivery or which appear to be damaged or defective."

It was common cause that the respondent's materials were delivered in an unpacked state. The appellant contended that the materials fell within the description of goods contemplated by s 8(i)(b) of the "Conditions of Carriage" and were, therefore, conveyed at "owner's risk". The respondent, on the other hand, maintained that whenever he had been obliged to employ the services of the appellant in conveying goods from one place to another, and the appellant intended to carry the goods at owner's risk, the appellant had signified its intention so to do by stamping "OWNER'S RISK" on the consignment note, and thus brought to the attention of the consignor that the goods were being so carried. On this occasion, as the appellant omitted to stamp "OWNER'S RISK" on the consignment note for the materials, so the respondent argued, the materials were not being carried at owner's risk.

The reason for this dispute as to whether or not the materials were carried at owner's risk is that in the definitions section of the "Conditions of Carriage":

"'Owner's risk' means that the transportation of the goods is undertaken by the Carriers on the special condition that the Carrier shall not be liable for damage, shortage, or delay except upon proof by the consignor that such damage, shortage or delay arose as a direct consequence of the wilful misconduct or gross negligence of the Carrier's servants, agents or sub-contractors."

It was common cause that the respondent signed the appellant's consignment note, requesting the appellant to "receive and transport subject to your conditions of carriage". The respondent admitted that at the time of signature he was aware that the note referred to conditions of carriage. The respondent must, therefore, have known that he was putting his signature to a contractual

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KORSAH JA

document binding himself in terms of the conditions referred thereto, and those conditions formed an integral part of the document he signed, whether or not he took the trouble to

ascertain the exact nature of the terms and conditions he was assenting to. *Burger v Central South African Railways* 1903 TS 571. Consequently, the respondent was bound by Clause 8(i)(b) of the Conditions of Carriage.

In *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe, supra*, it was held that the Praetor's Edict *de nautis, cauponibus et stabulariis* applied equally to common carriers by land. DUMBUTSHENA CJ expressed himself at p 315D and F of the report thus:

"I cannot see any good reason why the strict liability imposed by the Edict on public carriers by water should not be extended to public carriers by land. The principle is the same: the carrier is liable for loss of the goods (or injury to the goods) because he does not deliver them in an undamaged condition or at all."

A salutary effect of the strict liability for damages to, or loss of, the goods which the Edict imposes on common carriers is that it places the onus on the carrier to prove that:

"the loss was due to *vis major* or to *damnum fatale*, to inherent vice in the goods or to the negligence of the owner of the goods."

(See *Pohoomull Brothers v Rhodesia Railways* 1921 SR 88.)

There is no *onus* on the consignor of goods who brings an action for damages against the carrier to prove how the goods were damaged, lost or destroyed. After all, he would not be present during the course of the journey and it would be placing an intolerable burden on him to require of him proof of what he cannot possibly know. All he can do is to establish that he handed over the goods in an undamaged condition and that they were damaged when he received them back.

Generally speaking, carriers by land may exempt themselves from the strict liability imposed by the common law or limit such liability. See *Cotton Marketing Board of Zimbabwe* case *supra* at 315H-316A. And if the exemption or exclusionary clause contains language which expressly exempts the person in whose favour it is made from the consequences of negligence of his own servants, effect must be given to the provision. See *Canada Steamship Lines*

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KORSAH JA

Ltd v Regem [1952] AC 192 at 208, [1952] 1 All ER 305 (PC) at 310A (quoted with approval in *Transport and Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd* 1991 (1) ZLR 190 (SC); 1991 (4) SA 150 (ZS).

As the definition of "owner's risk" specifically exempts the appellant from certain types of negligence, effect must be given to that exemption or exclusionary clause, but only after ascertaining its meaning, like any other clause in a contract, having regard to the nature and purpose of the contract, and the context within which the words were used.

To begin with, to the extent that the exclusionary clause attempts to shift the *onus* of proving negligence onto the consignee it is bad in law. The rules of evidence are based on considerations of fairness and experience. It is the court that determines the party upon whom the burden of proof lies. The parties cannot by their contract deprive the court of this

responsibility. They may contract out of liability for negligence, but not out the rules of evidence by which negligence may be established.

The burden of proof, in the sense of the risk of non-persuasion, may be taken from the pleader desiring action and placed upon the opponent. Common sense and experience have dictated that the burden of proving a fact is on the party who is presumed to be possessed of the peculiar means of knowledge enabling him to prove its falsity, if it is false. In the instant case, the damage to the materials occurred when they were in the possession of the appellant. The respondent was not present when such damage was occasioned. The appellant, and the appellant alone, is the party who presumably has peculiar means of knowledge enabling it to prove whether the damage occurred as a direct consequence of the wilful misconduct or gross negligence of its servant, agents or sub-contractors.

The owner's risk clause in this case appears to exempt the appellant from all damage except such as was caused by it as a direct consequence of "the wilful misconduct or gross negligence". As BEADLE AJ (as he then was) rightly pointed out in *Bickle v Ministers of Law and Order* 1980 ZLR 36 (G) at 40H; 1980 (2) SA 764 (R) at 770B-C, the words "gross negligence" "must be construed in the context in which they are used because the words may have different meanings in different contexts". Used in juxtaposition to "wilful misconduct", "gross negligence" must be construed as something other than wilful. As the learned judge said: "They must mean precisely what they say, ordinary negligence of an aggravated form which falls short of wilfulness". This was the extent to which the appellant bound itself for the negligence of its servants, agents and sub-contractors.

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KORSAH JA

As already stated, the cause of the damage to the materials was something which was peculiarly within the knowledge of the appellant. The *onus* was thus on the appellant to establish that such damage as was occasioned to the materials, while they were in its custody, occurred without wilful misconduct or gross negligence on its part. However, because the appellant thought the respondent bore the burden of proving its negligence, the appellant made no attempt to discharge this burden. It cannot be over-emphasised that the apportionment of the risk of non-persuasion is a duty bestowed upon a court by both common sense and law, and that duty the parties cannot, by their contract, take away from the court.

In the result, the appeal is dismissed with costs.

Gubbay CJ: I agree

Ebrahim JA: I agree

Coghlan, Welsh & Guest, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

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IN RE MLAMBO 1991 (2) ZLR 339 (SC)

Court Supreme Court, Harare

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

Referral pursuant to the Constitution

26 November & 12 December 1991

Flynote

Constitutional law - right to a fair hearing within a reasonable time - purpose underlying Constitutional guarantee - interpretation of s 18(2) of the Constitution - factors to be considered - onus - assessment of reasonableness - remedy - costs follow the event.

Criminal procedure - calculation of reasonable period - runs from moment accused is charged - State cannot resort to expedient of withdrawing charge before plea to defeat Constitutional guarantee.

Headnote

Applicant was arrested on 3 October 1986 on allegations of theft. After two weeks in custody he was admitted to bail. On 15 January 1987 he was formally charged with theft. Thereafter he was remanded on no fewer than twelve occasions until 28 August 1987 when the charges were withdrawn before plea. Three years later he was summoned to appear on the same charges. He applied in terms of s 24(2) of the Constitution for a referral to the Supreme Court on the grounds that there had been an infringement of his constitutional rights to a fair hearing within a reasonable period. The matter having been so referred:

Held, that if an accused person complains that there has been an infringement of his right to a fair hearing within a reasonable time, he may properly raise the issue with the lower court before reference to the Supreme Court.

Held, further, that the object of s 18(2) of the Constitution is the protection of the individual interest in fundamental justice.

Held, further, that the withdrawal of charges before plea does not interrupt the time-frame which commences to run from the time of arrest or first remand

1991 (2) ZLR p340

Held, further, that the factors to be considered in determination of whether the accused has been afforded a fair hearing within a reasonable time include the reason for the delay, the assertion of his rights by the accused person, prejudice arising from the delay and the conduct of the prosecutor and of the accused person in regard to the delay.

Held, further, that where the entire delay is attributable to the actions of the State then, unless there is some strong basis to counter this factor, it will not be possible to tolerate such delay.

Held, further, that in an application of this nature it is permissible to order that the costs incurred

should follow the event.

Application accordingly granted with the Attorney-General ordered to pay the costs of the application.

Cases cited:

S v Marutsi 1990 (2) ZLR 370 (SC)

Mandirwhe v Minister of State 1986 (1) ZLR 1 (AD); 1981 (1) SA 759 (ZAD)

Bickle & Ors v Minister of Home Affairs 1983 (2) ZLR 400 (SC)

Zinyemba v Minister of the Public Service & Anor 1989 (3) ZLR 351 (SC)

United States v MacDonald 456 US 1 (1982)

United States v Loud Hawk 474 US 302 (1986)

R v Askov (1991) 49 CRR 1 (SC Canada)

Barker v Wingo 407 US 514 (1972)

Eckle v Germany (Federal Republic) (1983) 5 EHRR 1

Foti v Italy (1983) 5 EHRR 313

United States v Marion 404 US 307 (1971)

R v Carter (1986) 21 CRR 170 (SC Canada)

Klopper v North Carolina 386 US 213 (1967)

Perreault v R (1985) 19 CRR 101 (Ontario District Court)

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

United States v Van Neumann 474 US 243 (1986)

Bell v Director of Public Prosecutions of Jamaica & Anor [1985] 2 All ER 585 (PC)

Jago v District Court of New South Wales & Ors (1989-90) 168 CLR 23

König v Federal Republic of Germany (1980) 21 EHRR 170

Mills v R (1986) 21 CRR 76 (SC Canada)

Rahey v R (1988) 33 CRR 275 (SC Canada)

R v Conway (1989) 40 CRR 1 (SC Canada)

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

GUBBAY CJ

D P Carter for the applicant

J Ndlovu for the Attorney-General

Judgment

Gubbay CJ: In this matter the question which falls to be determined was referred to this court by the presiding magistrate in terms of s 24(2) of the Constitution of Zimbabwe, at the request of counsel for the applicant. It raises, first, the scope and character of the right, under s 18(2) of the Declaration of Rights contained in the Constitution, of a person charged with a criminal offence, to be afforded a fair hearing within a reasonable time; and, second, the nature of the remedy to be provided for an infringement of that right.

Section 18(2) reads in full:

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

What approach should be taken to the interpretation of the provision? In my view considerable assistance may be derived from reference to jurisdictions interpreting the "right to a speedy and public trial" entrenched by the Sixth Amendment to the Constitution of the United States, and "the right to be tried within a reasonable time" guaranteed by s 11(b) of the Canadian Charter of Rights and Freedoms and by Article 6 para 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

THE FACTUAL BACKGROUND

The applicant was employed by the Municipality of Harare as a stores officer. On 3 October 1986 he was arrested by the police, without warrant under s 29 of the Criminal Procedure and Evidence Act [*Chapter 59*], and informed that there were reasonable grounds to suspect him of having stolen goods from the Municipal stores between April 1984 and July 1986. Inevitably, information had been laid to that effect. He was held in custody for two weeks before being admitted to bail on condition that he deposit an amount of \$1 000 and report his presence to the police twice per week.

On 15 January 1987 the applicant was formally charged by the police with having stolen the goods and was invited to make a warned and cautioned statement in answer thereto. In his written response he denied the allegations.

During the period between the date of his arrest and 23 August 1987, the applicant was brought before a magistrate for remand on charges of theft by

GUBBAY CJ

conversion, on no fewer than twelve occasions. He was then unrepresented. On the latter date a legal practitioner was engaged to appear on the applicant's behalf. He complained to the magistrate at the lengthy delay in bringing the applicant to trial and made strong representations that a date for the trial be fixed. Thereupon the prosecutor promptly withdrew the charges, to which the applicant had not, at that stage, pleaded. It was made clear to the applicant that by adopting that procedure the Attorney-General had not lost the right to prosecute him at any later time, upon the same charges. His bail deposit was refunded and the obligation to report fell away.

On 28 August 1990 the applicant was served with a summons directing him to appear in the magistrate's court to answer thirteen counts of fraud, in respect of property owned by the Municipality of Harare, alleged to have been committed by him from 12 April 1984 to 11 July 1986. Although the offences were now described as "fraud", they related to the exact items of property which had been the subject of the theft by conversion charges. For all practical purposes the charges were no different from those withdrawn three years earlier. Prior to service of this summons, the applicant had received no intimation from either the police, or the Office of the Attorney-General, that the charges were to be resurrected. The summons set the trial down for 5 to 7 November 1990.

A different legal practitioner was instructed to defend the applicant. He wrote on several occasions to the clerk of the criminal court requesting the provision of copies of the documents which the State intended to produce at the trial. These were not forthcoming. In the event, on 5 November 1990 this legal practitioner sought a postponement of the trial. It appears that the prosecutor then mandated to conduct the trial had not been furnished with these letters. He agreed to a postponement and undertook to make the documents available to the defence. The applicant was remanded out of custody to 2 April 1991, which was the earliest available date at which the trial could commence.

On 2 April 1991 counsel appeared for the applicant. The presiding magistrate was asked to exercise his inherent jurisdiction to stay the prosecution on the ground that the applicant's rights under s 18(2) of the Constitution had been infringed by the delay in bringing the case to trial. In the alternative, counsel drew the magistrate's attention to s 24(2) of the Constitution, and submitted that recourse could be had thereto as the question he raised was neither frivolous nor vexatious. No explanation for the delay was proffered by the prosecutor who, though declining to admit any responsibility on the part of the State, adopted the stance that a magistrates court has no jurisdiction to stay proceedings upon the constitutional violation contended for.

1991 (2) ZLR p343

GUBBAY CJ

The presiding magistrate, it would seem, was singularly unimpressed with the submissions advanced on the applicant's behalf. He refused to refer the question to this court and ruled that the trial was to commence. In his opinion the alleged constitutional infringement could only be raised after the applicant had pleaded to the charges and not before his pleas had been taken.

Put differently, that the critical stage of being "charged with a criminal offence" is only reached once the formal charge is put and a plea recorded. That is a construction of s 18(2) which I cannot share.

The following morning the applicant was brought to trial before another magistrate. The thirteen counts of fraud were read and he pleaded not guilty to each of them. His counsel again sought a stay of the prosecution. In the alternative, he requested a referral of the question under s 24(2). The applicant was called to testify and was cross-examined with little effect. The prosecutor advanced the same contention as she had on the previous day and adduced no evidence in justification of the long delay in bringing the applicant to trial. The magistrate, however, wisely acceded to the request for a referral.

THE APPLICATION

In *S v Marutsi* 1990 (2) ZLR 370 (SC) it was held that if an accused complains that there has been an infringement of his right to a fair hearing within a reasonable time, he must raise the issue with the lower court before reference may be made to the Supreme Court. This is what the applicant did. Of course, it is also permissible for the presiding judicial officer to refer such a question *mero motu*, provided the answer is material to the decision he is being called upon to make. But if the request is made, the only basis for refusing it is where, in the opinion of the judicial officer, the question raised is "merely frivolous or vexatious".

I am satisfied that the present application is properly before this court. The difficulties adverted to in *Mandirwe v Minister of State* 1986 (1) ZLR 1 (SC) at 8E-F; 1981 (1) SA 759 (ZAD) at 764H, *Bickle & Ors v Minister of Home Affairs* 1983 (2) ZLR 400 (SC) at 432D-F, 1984 (2) SA 439 (ZS) at 441G-H, and *Zinyemba v Minister of the Public Service & Anor* 1989 (3) ZLR 351 (SC) are not attendant upon it.

THE PURPOSE UNDERLYING THIS CONSTITUTIONAL GUARANTEE

In the opinion of the Supreme Court of the United States, the speedy trial guarantee in the Sixth Amendment to the Constitution is "designed to minimise the possibility of lengthy incarceration prior to trial, to reduce the lesser, but

1991 (2) ZLR p344

GUBBAY CJ

nonetheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges". See *United States v MacDonald* 456 US 1 (1982) at 8, adopted in *United States v Loud Hawk* 474 US 302 (1986) at 311.

These words aptly describe the main purpose of the right to be afforded a fair hearing within a reasonable time under s 18(2) of the Constitution of Zimbabwe, namely, to minimise the adverse effect on the person charged flowing from the pending disposition of a still to be determined criminal charge. The right, therefore, recognises that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma and pressures detrimental to the mental and physical health of the individual. It is a truism that

the time awaiting trial must be agonising for accused persons and their immediate family. I believe that there can be no greater frustration for an innocent charged with an offence than to be denied the opportunity of demonstrating his lack of guilt for an unconscionable time as a result of delay in bringing him to trial.

The right recognises, also, that an unreasonable delay may well impair the ability of the individual to present a full and fair defence to the charge.

Trials held within a reasonable time have an intrinsic value. If innocent, the accused should be acquitted with a minimum disruption to his social and family relationships. If guilty he should be convicted and an appropriate sentence imposed without unreasonable delay. His interest is best served by having the charge disposed of within a reasonable time so that he may get on with his life. A trial at some distant date in the future, when his circumstances may have drastically altered, may work an additional hardship upon him and adversely affect his prospects of rehabilitation.

Although s 18(2) is concerned with ensuring respect for the rights of the individual, its enforcement, which may from time to time admittedly allow the guilty to go unpunished, nevertheless benefits society as well. There is a collective interest in making certain that those who commit crimes are brought to trial quickly and dealt with fairly and justly. Speedy trials strengthen this aspect of the community interest. Important practical advantages flow from an expeditious resolution of the charges, the nature of which can be stated no more eloquently than in the words of CORY J in *R v Askov* (1991) 49 CRR 1 (Supreme Court of Canada) at 20:

1991 (2) ZLR p345

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"There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employers; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost. Witnesses too are concerned that their evidence be taken as quickly as possible. Testifying is often thought to be an ordeal. It is something that weighs on the minds of witnesses and is a source of worry and frustration for them until they have given their testimony.

It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal trials take place within a reasonable time. From a wider point of view, it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law."

See also *Barker v Wingo* 407 US 514 (1972) at 519-520.

This societal interest, albeit of great importance, is not the object of s 18(2); it is a consequence of it. The prime aim is the protection of the individual interest in fundamental justice.

THE INTERPRETATION OF SECTION 18(2)

The concept of reasonableness is one which defies exact definition. Under s 18(2), however, as this requirement is related to the passage of time, there is the advantage of being able to refer to precise events and stages in the proceedings.

It is apparent that a reasonable time is necessary for the State to be in a position to get the case to trial. A varying extent of time will be needed to prepare the

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docket, depending on the complexity or otherwise of the proposed charge or charges; to record the statements of witnesses; and to arrange for their attendance. In addition, there are the usual systemic delays, such as a congested court calendar, the availability of court facilities, judicial officers and prosecutors, and the considerate accommodation of the schedules of witnesses. The list is not exhaustive. The system is not perfect and resources are limited, and one has to accept as normal and inevitable a period of delay in respect of these matters. But this is not to accept that the State can justify abnormal periods of systemic delay on such grounds. The fact that it may have been the practice to tolerate such delays in the past does not now immunise them from scrutiny under s 18(2).

The distinction between what is a reasonable period and what is not cannot be drawn too sharply. Undoubtedly it will be difficult in some cases to decide whether the lapse of time in affording an accused a fair hearing of his case has passed the reasonable mark or not. It is a question of degree. All the circumstances have to be considered in making what is essentially a value judgment. However, I believe that the experience of judicial officers enables them to determine on which side of the line the position of a particular accused falls.

The time frame to be considered starts to run from the moment a person is charged. The key word is "charged". What does it mean in the context of s 18(2)? Does the provision envisage only the situation where the accused is called upon in court to plead to a formal charge? To my mind, such a restrictive construction has the effect of rendering the protection almost nugatory. It squares more with an arraignment. And, of course, it would be susceptible to untold abuse, permitting the State to delay inordinately before bringing a person before the trial court, happy in the knowledge that by so doing there had been no violation of a constitutional right.

I have no hesitation in holding that the time frame is designed to relate far more to the period prior to the commencement of the hearing or trial than to whatever period may elapse after the accused has tendered a plea. This meaning is wholly consonant with the rationale of s 18(2) - that the charge from which the reasonable time enquiry begins, must correspond with the start of the impairment of the individual's interests in the liberty and security of his person. The concept of "security" is not restricted to physical integrity, but includes stigmatization, loss of privacy, anxiety, disruption of family, social life and work.

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I may say that this view accords with the interpretation given to the materially similar wording of Article 6 para 1 of the European Convention by the European Court of Human Rights. In *Eckle v Germany (Federal Republic)* (1983) 5 EHRR 1, it was said at 31:

"In criminal matters, the 'reasonable time' referred to in Article 6 (1) begins to run as soon as a person is 'charged'; this may occur at a date prior to the case coming before the trial court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened. 'Charge', for the purposes of Article 6 (1), may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the (suspect) has been substantially affected'."

And in *Foti v Italy* (1983) 5 EHRR 313 at 326 the European Court was at pains to emphasise that:

"Whilst 'charge', for the purposes of Article 6 (1), may in general be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect."

Arrests are not, and certainly ought not to be, investigatory procedures. Rather they are vehicles to court and fall within the same category as the issuance and service of a summons citing the crime the accused is alleged to have perpetrated. For a warrant for the arrest of a person will only be granted on the laying of information that there are reasonable grounds to suspect him of having committed an offence. And whenever an arrest is made without a warrant, it is obligatory that the police officer effecting it, inform the person forthwith of the cause thereof. (See s 36(4) of the Criminal Procedure and Evidence Act.) It was just such a situation that inspired JUSTICE WHITE in *United States v Marion* 404 US 307 (1971) to observe at 320:

"To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety

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in him, his family and his friends . . . So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment."

In the present matter, even if the arrest of the applicant without a warrant on 3 October 1986 is not to be taken as an official notification by a competent authority of an allegation that he had committed a crime (a proposition with which, obviously, I do not agree), it admits of no doubt that compliance by the police with s 36(1) of the Criminal Procedure and Evidence Act started the clock ticking against the State. That provision enacts that any person arrested without warrant may be detained for a period not exceeding forty-eight hours "unless he is brought before a judge or magistrate **upon a charge of any offence** (my emphasis)", and his further detention is ordered or a warrant for his further detention is obtained.

Can the State stop the clock by resorting to the expedient of withdrawing the charge before plea, as it is permitted to do under s 297(3) of the Criminal Procedure and Evidence Act, only to reinstate the same charge, or a charge based on the identical information, when in a position to commence with the trial?

In my opinion, the type of withdrawal envisaged in s 18(2) of the Constitution is an irrevocable one - a withdrawal after plea by the Attorney-General in terms of s 13 of the Criminal Procedure and Evidence Act, thereby entitling the accused to a verdict of acquittal in respect of that charge. In other words, the withdrawal must be one in which no hearing of the charge can ever arise. To adopt any other construction would be to emasculate the protection the Constitution intends to afford.

The point did not escape the attention of LAMER J (as he then was) in *R v Carter* (1986) 21 CRR 170 (Supreme Court of Canada) where at 173 he said:

"As I indicated in *Mills v The Queen* . . . the time frame to be considered in computing trial within a reasonable time generally runs only from the moment a person is charged. In passing, I might add that I say 'generally' because there might be exceptional circumstances under which the time might run prior to the actual charge on which the accused will be tried. As an example, if the Crown withdraws the charge to substitute a different one but for the same transaction, the computation of time might well commence as of the first charge."

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The Supreme Court of the United States in *Klopfert v North Carolina* 386 US 213 (1967) reviewed a provision similar to that of withdrawal before plea. The criminal procedure of North Carolina allowed a prosecuting attorney to take a *nolle prosequi* if he did not wish to proceed further with a prosecution, thereby declaring that he would not **at that time** prosecute the case further. But it was permissible to restore the case to the trial docket when ordered by a judge upon the prosecuting attorney's application. *Klopfert* was indicted in February 1964 for criminal trespass. The prosecuting attorney moved for, and was granted, a *nolle prosequi* in August 1965, eighteen months later. *Klopfert* contended that the entry of the *nolle prosequi*, which merely suspended the prosecution, deprived him of his right to a speedy trial, and that it did not relieve him of the limitations placed upon his liberty and security. The Supreme Court of North Carolina ruled against him. In allowing the appeal WARREN CJ remarked at 222

"By indefinitely prolonging this oppression, as well as the anxiety and concern accompanying public accusation, the criminal procedure condoned in this case by the (court below) denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment."

The case, of course, involved an indeterminate delay in the resumption of the trial against *Klopfert*. Nonetheless, it is implicit in the approach of the learned CHIEF JUSTICE that the period between the entry of the *nolle prosequi* and its lifting is to be taken in conjunction with the delay preceding it in order to assess whether the right to a speedy trial had been violated. See also *Perreault v R* (1985) 19 CRR 101 at 104 (Ontario District Court).

It necessarily follows, in my view, that the withdrawal of the charges against the applicant on 23 August 1987 did not interrupt the time frame, which commenced to run either upon the applicant's arrest on 3 October 1986 or with his first remand by the magistrate a few days later;

and that the date of service of the summons is not to be taken as the critical moment when the clock started to tick against the State. In sum, the correct approach in this matter is to evaluate the reasonableness of the overall lapse of time.

THE FACTORS TO BE CONSIDERED IN A DETERMINATION OF WHETHER AN ACCUSED PERSON HAS BEEN AFFORDED A FAIR HEARING WITHIN A REASONABLE TIME

In *Fikilini v Attorney-General* 1990 (1) ZLR 105 (SC) at 112G this court approved of the factors identified by JUSTICE POWELL in his landmark judgment

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in *Barker v Wingo supra* as amongst those to be taken into account in assessing whether an accused has been deprived of his constitutional right to a speedy trial. He stated them at 530-532, as follows:

"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the 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.

We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court was identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to 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

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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."

See also *United States v Van Neumann* 474 US 242 (1986) at 247.

These factors received the imprimatur of the Privy Council in *Bell v Director of Public Prosecutions of Jamaica and Another* [1985] 2 AU ER 585 (PC). In delivering the judgment of the Board, LORD TEMPLEMAN said at 591j:

"Their Lordships acknowledge the relevance and importance of the four factors lucidly expanded and comprehensively discussed in *Barker v Wingo*. Their Lordships also acknowledge the desirability of applying the same or similar criteria to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case."

See also the decision of the High Court of Australia in *Jago v The District Court of New South Wales and Others* (1989-90) 168 CLR 23 at 33 and 60.

A not dissimilar approach was enunciated by the European Court of Human Rights in *König v Federal Republic of Germany* (1980) 2 EHRR 170 at 197, in these terms:

"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 administrative and judicial authorities."

Recent decisions of the Supreme Court of Canada in *Mills v R* (1986) 21 CRR 76, *Rahey v R* (1988) 33 CRR 275, *R v Conway* (1989) 40 CRR 1, and *R v Askov supra* exhibit dissension as to whether prejudice to the accused is a relevant factor for the purpose of determining if his constitutional safeguard under s 11 (b) of the Charter was infringed. In the opinion of LAMER J (as he then was) in *R v Conway supra* at 29:

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"... whether the accused's ability to mount a full and fair defence is or is not impaired is not relevant to a determination of whether there has elapsed an unreasonable period of time, as that goes to the fairness of the trial and is more properly related to the right to a fair trial (specifically provided for under s 11(d))."

The majority view, on the other hand, is well expressed by WILSON J in *Rahey v R supra* at 297, in these words:

"... I believe that in assessing whether or not the delay in disposing of charges against an accused was reasonable or not, prejudice to the accused resulting from the delay is very relevant. I cannot accept a water-tight compartment' approach to Charter rights. I believe that the same factors which are relevant to an alleged violation of one right may also be relevant and entitled to consideration in relation to an alleged violation of another. To say otherwise may well be to deny an accused the full measure of protection which the right he asserts was intended to provide."

See also HER LADYSHIP'S comments in *Mills v R supra* at 169.

With all deference, it is this approach that I prefer. But it is unnecessary to make a choice, because the right which is protected under s 18(2) is the right to a **fair** hearing within a reasonable time, and not simply the right to be tried within a reasonable time. Consequently, prejudice to the accused's ability to "mount a full and fair defence" resulting from the delay in

affording him a hearing is a most relevant factor.

What is emphasised in determining the cut-off point after which a delay becomes unreasonable is a "balancing test, in which the conduct of both the prosecutor and the defendant are weighed" (*per* POWELL J in *Barker v Wingo supra* at 530). The variety of factors to be considered may pull in opposite directions. In the absence of acquiescence, express or implied, a certain degree of prejudice resulting from a long delay may be inferred, if not rebutted by the State. Actual prejudice, such as impairment of the right to a fair hearing due to the death or disappearance of witnesses, may further militate in favour of the accused. Against this must be weighed factors related to the cause of the delay. Was the responsibility that of the State? If so, was the delay attributable to malice, negligence, mere inadvertence, or the inherently complex nature of the offence? Were there unavoidable factors, such as the death or unexpected ailment of an essential witness? Were there justifiable systemic delays?

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THE ONUS

It is for the person charged to persuade the court that the delay complained of exceeds what is reasonable. See *Fikilini v Attorney-General supra* at 117D-E. The degree of persuasion required of him is to show that the delay is *prima facie* unreasonable, or, in the words of POWELL J in *Barker v Wingo supra* at 530, "presumptively prejudicial". It is that which triggers the enquiry into the other factors that go into the balance. It is the threshold at which the court may look to the State for an explanation.

It is, of course, neither possible nor desirable to identify precisely the length of delay which will trigger the enquiry. Each case is to be viewed in the light of its own particular circumstances in order to determine whether the delay is *prima facie* unreasonable.

ASSESSMENT OF REASONABLENESS

By way of preliminary comment, I find that the State's conduct is indicative of a sustained unconcern to proceed as quickly as possible against the applicant.

The overall length of the delay is four years and seven months. Even though fraud is a serious offence and the charges levelled against the applicant are many, involving a total amount of \$4 252, the delay occasioned in bringing him to on 2 April 1991, is certainly adequate to trigger an enquiry. It is "presumptively prejudicial".

What is the explanation for the delay? None was proffered by the State, and a bald denial of responsibility does not suffice. It is not claimed that any of the twelve remands were sought by the applicant. True, he did not expressly oppose them, but his ultimate engagement of a legal practitioner to appear for him evinces his dissatisfaction with the on-going situation. On 23 August 1987 that legal practitioner protested so adamantly at the State's failure to bring the applicant to trial that the prosecutor, rather than be put on terms by the court to fix a date of hearing, withdrew the charges. Three years later they were reinstated. Yet again there is no explanation for this lapse of time. On receipt of the summons to appear in court on 5 November

1990, the applicant instructed another legal practitioner to defend him. Documents which were requested were not provided so that the trial had to be postponed to the earliest available date, six months hence. Not even that additional delay is attributable to the applicant. In sum, there can be no question of the applicant in any way contributing to the regrettable situation in which the hearing of his case was delayed to 2 April 1991.

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That the entire delay was attributable to the actions of the State weighs heavily in favour of the applicant. Unless, therefore, there is some strong basis to counter this factor, which becomes clear from an examination of other factors, it will not prove possible to tolerate it.

Next to be set in the scale is the frequency and force of the objection to the delay. On 23 August 1987 and on 2 and 3 April 1991, objections were raised on the applicant's behalf. No objection was taken on 5 November 1990, but the omission to do so, in the context of what occurred both before and after that occasion, cannot be viewed as a waiver of the applicant's constitutional guarantee. In any event, I think it doubtful that the applicant's erstwhile legal practitioner directed his mind to the constitutional protection available to his client, understood its nature and deliberately waived the right provided by it. If the trial had proceeded on 5 November 1990, without any complaint that s 18(2) had been infringed, the position would have been different. See *R v Ruzario* 1990 (1) ZLR 359 (SC) at 367E-G.

With regard to the fourth factor, the evidence elicited from the applicant was that the delay had caused him actual prejudice. Three of the witnesses, formerly senior employees of the Municipality of Harare, who would have been called in his defence have emigrated and their whereabouts are now unknown. With the passage of the years from the date of the withdrawal, the applicant came to believe that he would not be prosecuted, and so did not deem it necessary to keep in contact with these persons.

Moreover, a very long delay such as this, inherently gives rise to a strong presumption of prejudice to an accused. Where the State can demonstrate that there was no prejudice flowing from the delay, then such proof may serve to excuse it.

Balancing all the factors leads me irresistibly to the conclusion that the effect of this extraordinarily lengthy delay is such as to deny the applicant the right to a fair hearing of his case. Justice so delayed is an affront to the individual, to the community and to the very administration of justice.

I am deeply aware of the consequence of so holding. The charges against the appellant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission of serious crimes. Yet, that trial can only be undertaken if the guarantee under s 18(2) of the Constitution has not been infringed. In this case it has been grievously infringed and the unfortunate result is that a hearing

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cannot be allowed to take place. To find otherwise would render meaningless a right enshrined in the Constitution as the supreme law of the land.

REMEDY

Section 24(4) of the Constitution empowers the Supreme Court to:

" . . . make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights."

It is difficult to imagine language which would give this court a wider and less fettered discretion. But relative to s 18(2) where, upon balancing the various factors, it is decided that an accused's right to a fair hearing within a reasonable time has been contravened, a stay of proceedings must be the minimum remedy. For to direct, for instance, that the trial proceed forthwith would be to contradict the accepted claim that the inordinate delay had denied him the very right that is safeguarded under s 18(2). It would amount to participating in a further violation of the provision.

A permanent stay of the proceedings is the relief sought by the applicant and it is the relief I am disposed to grant. It seems to me that, notwithstanding the applicant's plea of not guilty, an order that the charge be dismissed would be tantamount to a pronouncement of innocence. That I am not prepared to do. After all, the applicant has elected to put a definitive but premature end to the prosecution instead of a final determination of the issue of innocence or guilt.

COSTS

It is permissible in an application of this nature to order that the costs incurred should follow the event. See *Bull v Attorney-General of Zimbabwe* 1987 (1) ZLR 36 (SC); [1988] LRC (Constit) 324. I see no reason to deprive the applicant of his costs.

ORDER

Accordingly, I would order as follows:

1. The proceedings in the Magistrates' Court, Harare, in the case of *The State v Shadreck Siyapi Mlambo*, Case No. 15538/90, be and are hereby permanently stayed.
2. The Attorney-General is to pay the costs of this application.

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McNally JA: I agree.

Manyarara JA: I agree.

Korsah JA: I agree.

Ebrahim JA: I agree.

Muvingi & Machaya, applicant's legal practitioners

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COMMISSIONER OF TAXES v D 1991 (2) ZLR 357 (SC)

Court **Supreme Court, Harare**

Manyarara JA, Korsah JA & Ebrahim JA

Tax appeal

15 October 1991 & 16 January 1992

Flynote

Taxation - Capital Gains Tax Act 1981 - whether interest on a building society loan is a deductible expense for the purposes of s 11 (2)(a) of that Act.

Headnote

The Commissioner disallowed a claim by a taxpayer to deduct the cost of a mortgage loan against the sum realised on the sale of the immovable property for the purpose of assessing any capital gain. The Income Tax Special Court upheld the right of the taxpayer to claim such a deduction, and the Commissioner appealed.

Held, the interest paid on the loan from a building society used to purchase immovable property or construct a house is a deductible expense in terms of s 11(2)(a) of the Capital Gains Tax Act 1981.

Cases cited:

Financier v Commissioner of Taxes 1950 SR 69; 17 SATC 34 (SR)

Secretary for Inland Revenue v Eaton Hall (Pty) Ltd 1975 (4) SA 953; 37 SATC 343 (A)

Ex parte Minister of Justice: In re Rex v Bolon 1941 AD 345

Kantor v MacIntyre NO & Anor 1958 (1) SA 45 (FSC)

M J Gillespie for the appellant

E W W Morris for the respondent

Judgment

Manyarara JA: The issue in this case is whether interest paid on a building society loan is deductible in arriving at the amount of capital gain

MANYARARA JA

for the purposes of the Capital Gains Act 1981. The appellant disallowed the amount and the respondent objected to the assessment. His objection was disallowed. He appealed to the Income Tax Special Appeals Court which allowed his appeal. The learned President, (SMITH J) ordered the assessment to be amended accordingly. The appellant appeals to this court for an order setting aside the Special Court's judgment and confirming his assessment.

The facts are not disputed and I shall quote the learned President's summary thereof. In so doing, I shall refer to the appellant as "the Commissioner" and to the respondent as "the taxpayer", to which terms I shall adhere in the rest of this judgment. The summary is as follows:

"The taxpayer bought a house in 1981 for \$45 000. In the agreement of sale there was a provision to the effect that the sale was subject to the condition that the purchaser obtained a loan on the usual terms and conditions from a building society or other financial institution in the sum of \$33 750. A loan was obtained from a building society and the sale was effected. In 1988 the taxpayer sold the house for \$150 000, after having built on a new bedroom in 1985. The Commissioner assessed the capital gain of the taxpayer for the year ended 31 March 1988. In determining such capital gain he disallowed amounts totalling \$33 196 (hereinafter referred to as 'the disputed amount') of which \$27 720 was in respect of interest paid by the appellant during the period 15 November 1981 to 15 May 1988 on the loan he had obtained to buy the house and \$5 476 was in respect of the related 5% allowance. The taxpayer objected to the disallowance of the disputed amount. The objection was disallowed and the taxpayer noted an appeal to this Court."

As I have said, the learned President allowed the appeal in the terms already mentioned.

Mr *Gillespie*, for the Commissioner, submits that the relevant provision, s 11(2)(a) of the Capital Gains Act, "is cast in a manner (which is) somewhat ambiguous" but "there is much which is plain". The contention is that the unexpressed legislative intent indicates that the disputed amount is not deductible in both the extended and more limited context of the enactment.

Section 11 of the Act provides as follows:

"11. (1) For the purposes of determining the capital gain of any person there shall be deducted from the capital amount of such person the amounts

MANYARARA JA

allowed to be deducted in terms of this section:

...

(2) The deductions which shall be allowed for the purposes of subsection (1) shall be -

- (a) expenditure to the extent to which it is incurred on the acquisition or construction of such specified assets as are sold during the year of assessment other than expenditure in respect of which a deduction is allowable in the determination of the seller's taxable income as defined in subsection (1) of section 8 of the Taxes Act.

...

- (b) expenditure to the extent to which it is incurred on additions, alterations or improvements to specified assets referred to in paragraph (a) other than expenditure in respect of which a deduction is allowable in the determination of the seller's taxable income as defined in subsection (1) of section 8 of the Taxes Act."

Briefly, s 8(1) of the Taxes Act (the Income Tax Act [*Chapter 181*]) defines "gross income" as the total amount received by the taxpayer in any year of assessment excluding any amount which is proved by the taxpayer to be of a capital nature.

It will be evident that s 11(2)(a) as presently worded prohibits the deduction twice of any expenditure in arriving at the amount of capital gain. This is made plain by the language of the provision. What is not made so plain as Mr *Gillespie* correctly submits is whether an expense which is allowed as part of "financing" the acquisition of the specified asset (bond interest) is an expense which is incurred on the acquisition of the asset. The Commissioner held that it was not and the learned President held that it was. In this appeal, Mr *Gillespie* submits that the question could have been put beyond doubt by inserting, after "specified asset," the expression "or in respect of the financing of such acquisition or construction", to include bond interest; or the expression "which expenditure shall not include expenditure in respect of the financing of such acquisition or construction" to exclude bond interest. The logic of the suggestion is evident. However, we are here dealing with the unexpressed legislative intent of the enactment.

Mr *Gillespie* argues in favour of the second formulation excluding bond interest as "the extended context of the enactment" which he suggests shows the treatment of the whole question of interest expenditure in relation to tax on principles which he summarized as follows:

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1. That in terms of s 15(2)(a) of the Income Tax Act interest will be deductible from income as a general deduction if it is incurred for the purpose of trading or producing income and is not of a capital nature. *Financier v Commissioner of Taxes* 1950 SR 69; 17 SATC 34.
2. That if it is capital expenditure it could only be deducted from income under one of the special deductions in respect of capital expenditure. In this regard, the court is urged to follow the general approach adopted in *Secretary for Inland Revenue v Eaton Hall (Pty) Ltd* 37 SATC 343 at 347-8, 1975 (4) SA 953 at 956-7.
3. That expenditure on interest of a capital nature is generally not deductible from gross income although certain capital expenditure is deductible.

I have no quarrel with these principles. I also agree that they are recognized in the Capital Gains Act. Section 11(2)(a) provides that capital expenditure already deducted from gross income for the purpose of the Income Tax Act may not be again deducted for the purpose of arriving at the amount of capital gain. It is also true that in terms of s 11 (2)(c)(ii) capital expenditure in respect of which a deduction has been allowed may be the subject of a further annual allowance.

Put another way, the wording of s 11(2)(a) of the Capital Gains Act does not differ in effect from

s 15(2)(a) of the Income Tax Act which provides as follows:

"(2) The deductions allowed shall be:

- (a) expenditure and losses to the extent to which they are incurred for the purpose of trade or in the production of the income except to the extent to which they are expenses and losses of a capital nature."

The similarity of the two provisions is apparent. Section 15(2)(a) excludes "expenses or losses of a capital nature". What remains is "expenses or losses to the extent to which they are incurred for the purpose of trade or in producing the income", whose meaning is unambiguous. Therefore I agree with Mr *Morris* for the taxpayer that the unexpressed legislative intent must be that the words "expenditure to the extent to which it is incurred on the acquisition or construction of the specified asset other than . . .", appearing in the disputed provision should not be construed differently from the similar expression appearing in s 15(2)(a) of the Income Tax Act. It may be safely assumed that if the legislature intended otherwise it would have used different language. therefore

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Therefore, my respectful view is that the *Eaton Hall* approach is of general guidance only in construing s 11(2)(a) as presently worded. The relevant passage at 1975 (4) SA 965F-957B is to the following effect:

"Firstly, it is obvious from the context that 'the cost of any building' means the cost of erecting that building. Secondly, in the absence of any definition in the Act of such cost one must look at its ordinary meaning. The *Oxford English Dictionary* defines 'cost' as meaning: 'That which must be given or surrendered in order to acquire, produce, accomplish, or maintain something; the price paid for a thing.' Hence 'the cost to the taxpayer of the building' ordinarily means the price or consideration given or paid by him for the erection of the building. It does not, therefore, include expenses incurred by the taxpayer in connection with the erection of the building unless, of course, they are part of the price or consideration paid for the erection. Thirdly, as counsel for the Secretary rightly pointed out, the use of the preposition 'of' instead of a phrase with a wider connotation, like 'in respect of', between 'cost' and 'any building', indicates that the connection between them must be direct and close, in other words, the expression comprehends the cost of erecting the building and nothing more. Fourthly, as counsel for the Secretary again rightly contended, that limited connotation is also manifested by the use of the physical, identifiable, concrete object of 'any building' or 'improvements' instead of the abstract, gerundive concept of 'building' or 'improving' a structure. Thus, 'the cost of building or improving' something is not as well delineated as 'the cost of any building or improvements'. The former might well cover certain expenses incurred incidentally in building or improving a structure, whereas under the latter the cost is delimited by the very physical nature of the building or improvements.

All those considerations point in one direction, namely, that the ordinary, grammatical meaning of the words 'the cost to the taxpayer of any building' in those provisions is that such cost is limited to the price or consideration given or paid by the taxpayer for the erection of the building. Hence there is no need to invoke the aid of any of the other canons of construction or the authorities canvassed in the arguments of counsel for the parties to ascertain its true meaning."

I agree with the learned President that in the context of the Capital Gains Act s 11(2)(a), the words "expenditure to the extent to which it is incurred on the acquisition or construction of the specified asset" must be given their ordinary grammatical meaning as appears from the

following passage of his judgment:

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"It seems to me, however, that even as presently worded s 11 (2)(a) would include the interest paid by the appellant. The Commissioner accepted that the bond costs and the valuation fee paid by the taxpayer constituted expenditure incurred on the acquisition of the house. Additionally, when the taxpayer built on a new bedroom in 1985 the Commissioner accepted that the bond costs, valuation fee, architect's fees and even the fee for planning approval constituted expenditure incurred on the additions, alterations or improvements to the house for the purposes of s 11(2)(b) of the Act. If costs of registering a mortgage bond and valuation fees which are paid to a building society are legitimately regarded as expenditure incurred on the acquisition of the property, I fail to see why interest costs should not also be regarded as such expenditure. The taxpayer's agreement to buy the house was conditional upon his obtaining a loan from a building society or other financial institution. Had he not obtained a loan he would not have bought the house. He would not have obtained the loan had he not agreed to pay interest thereon. Therefore it seems to me that the interest payments were expenditure incurred on the acquisition of the house."

I agree with the finding. The test to be applied is the purpose for which the money was borrowed. *Financier v Commissioner of Taxes supra* at 36. I would, therefore, reject Mr Gillespie's argument as unsound.

The second argument is that the formulation of s 11(2)(a) is based on previous judicial interpretation of a statute *in pari materia* in the *Eaton Hall* case *supra* and from this may be deducted that the legislature intended the provision to be interpreted "narrowly" so as to exclude bond interest. In particular, so the argument continued, the use of the proposition "on", instead of the more extended "in respect of" or "in connection with", shows the validity of the narrower construction. In Mr Gillespie's opinion s 11(2)(a)(i) and (ii) deliberately equates expenditure "on the acquisition" of an asset with the value of an asset or the return to the person disposing of the asset "in such a way as to preclude from consideration certain payments that may be made and would otherwise be incidental to the acquisition".

Reference is also made to s 11(5) which provides as follows:

"(5) Where the owner of immovable property has, as the lessor of such property, been charged to income tax in terms of paragraph (c) of the definition of 'gross income' in subsection (1) of section 8 of the Taxes Act, he shall be deemed to have incurred expenditure in terms of paragraph (a) or (b) of subsection (2) in relation to such immovable property equal to the

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amount so included in his taxable income at the time of such inclusion."

I believe that the various aspects of the learned President's judgment to which I have referred deal adequately with the argument and it is unnecessary to repeat them at this stage. The same goes for the further suggestion that the Commissioner's application of the disputed provision in the more limited context of the Act "is more in harmony with the intent of the legislature". As I have said, the learned President found the other way and I agree with his reasons for doing so.

However, Mr *Gillespie* persists in his argument by submitting that the legislature's refusal to use any formulation showing a clear departure from the ratio of an earlier case, namely, *Ex parte Minister of Justice: In Re Rex v Bolon* 1941 AD 345, ought to be taken as indicating an intention that the *Eaton Hall* approach should be followed.

I have already referred to the *Eaton Hall* case. The passage from *In Re Rex Bolon supra* cited by Mr *Gillespie* appears at 359-60 and reads as follows:

"Before answering specifically the questions submitted it is necessary to deal with a further argument of the Attorney-General based on a principle enunciated in various English cases, such as *Webb v Outrim* (1907 AC at p 89) and *Mersey Docks v Cameron* (11 HLC 443, *per* BLACKBURN J at p 480) that

'when a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in framing a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them'.

In *Barras v Aberdeen Steam Trawling & Fishing Co* (1933 AC 402) LORD MACMILLAN stated that that rule of interpretation afforded only a valuable presumption as to the meaning of the language employed in a statute. Before it can be applied one of the requisites is that the judicial interpretation must be well settled and well recognised. It is argued here that as Act 44 of 1937 was passed after the decision of the Appellate Division in *Rex v Jacobson & Levy* the burden of proof placed on the employer by sec. 33 (8) was intended to be a burden of proving the fact beyond reasonable doubt. But in view of the difficulty of determining the correct interpretation of *Rex v Jacobson & Levy*, as above explained, I am not prepared to hold that the judgments in that case or the references to that decision in various Provincial Courts between 1931 and 1937 are sufficient to give rise to the

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presumption mentioned in the said rule of interpretation."

TINDALL JA held that the disputed expression in that case should be interpreted "using (it) in its usual and correct sense".

I find no substance in Mr *Gillespie's* argument. In my view, the argument is yet another attempt to have read into the disputed provision words which the legislature, in its wisdom, has chosen not to use. Reference should be made to the learned President's judgment which shows that the basis on which the Commissioner purported to exclude bond interest is illogical. The point need not be laboured.

The next argument concentrates on subsection (6) of s 11 relating to deeds of sale. The subsection was inserted by the Finance Act 1988 and it provides that where a person transfers his rights under a deed of sale he shall be deemed to have acquired the specified asset from the person with whom he entered into the deed of sale for an amount equal to the amount payable by him under the deed of sale.

The Finance (No. 2) Act 1988 added the words "excluding any interest payable on the outstanding purchase price".

Both Acts were made effective for the year of assessment following that in which the taxpayer sold the house.

In this regard, the caution expressed in *In Re Rex v Bolon supra* is echoed in *Kantor v MacIntyre NO & Anor* 1958 (1) SA 45 (FSC) by TREDGOLD CJ who dealt with the two forms which the interpretation of legislation may take at 48C-E as follows:

"The first is an 'Act of explanation' which is an enactment that in express terms sets out to explain the earlier Statute. Such Acts are now seldom used and it is fortunate that this is so. They create great practical difficulty in the application of the original Act to events that occur before the later Act is passed.

In the second place it may happen that a later Act, by assuming that an earlier cognate piece of legislation has a particular meaning, throws light on what Parliament originally intended. The use in this manner of later legislation to clear up ambiguity or obscurity in earlier legislation has the approval of the House of Lords. *Ormond Investment Company v Betts*,

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1928 AC 143 at p 156. But it is a method of construction which must, in my option, be applied with very great caution. If a Statute is capable of two meanings and one is more probable than the other, then the more probable meaning would presumably be adopted by the Courts in any event. If a later Statute is involved to support the less probable meaning, it comes dangerously near to making the later Statute retroactive and might have serious effects upon people who, before it was passed, had, in good faith, acted upon the alternative construction."

As the learned President succinctly put it, "It would be anomalous if the meaning of the law as in force at the time when the capital gain of (the taxpayer) was assessed was to be determined by an amendment which was enacted later and became effective only in the following year". See s 11(2)(a). The argument to the contrary advanced by Mr *Gillespie* must be rejected.

A further point raised by Mr *Gillespie* in pursuance of his argument is that the provision of an annual allowance by the Finance Act 1982 "is not logically justified when applied to 'finance charges in connection with the acquisition or construction of the specified asset'". Mr *Gillespie* contrasts the taxpayer's case with the position of a purchaser under a deed of safe and suggests that the result is "the sort of absurdity which one should avoid and can be avoided" by interpreting s 11(2)(a) in the manner which the Commissioner interpreted the provision.

The point did not escape the learned President's attention as appears from the following passage of his judgment:

"I accept that this interpretation means that the taxpayer who borrows money to finance the acquisition of a specified asset would get a larger deduction than the taxpayer who uses his own money. But I do not see why that should be contrary to the intention of the legislature. After all, the taxpayer who borrows money to finance the acquisition of a specified asset has incurred greater expenditure thereon than the taxpayer who has not had to borrow money. In equity, therefore, the taxpayer who has incurred interest charges should be permitted to deduct such expenditure before his capital gain is calculated. I can see no reason why such expenditure should be excluded. It is expenditure directly related to the acquisition of the property concerned."

And:

"This finding of the court would mean that there is an inconsistency between contracts of sale and transfer of rights under a deed of sale referred to in subs

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(6) of s 11 of the Act. To remove the inconsistency, I would recommend that consideration be given to repealing the amendment to that subsection that was made by Act No. 16 of 1988."

I associate myself fully with those remarks.

It was submitted finally that the contra *fiscum* rule of interpretation can only be resorted to if one finds oneself in doubt after examining the disputed provision in both the extended and narrow contexts of the Act. I agree but in the light of the conclusion I have reached the application of the rule, which would be decisive, does not arise.

The appeal is dismissed with costs.

Korsah JA: I agree

Ebrahim JA: I agree

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

Atherstone & Cook, respondent's legal practitioners

Endnotes

1 (Popup - Popup)

The recitation of facts at the beginning of the judgment has been abbreviated. For the full facts of the matter, see the cyclostyled judgment S-164-91

2 (Popup - Popup)

The remainder of the judgment is not relevant to the report. On the merits the appeal had no prospects, and was dismissed.

3 (Popup - Popup)

Portions of the judgement have been omitted. Only the aspects relevant to liability and the assessment of the quantum of damages have been reported. See also *Reith v Antao* at p 317 *infra*