HENDRIE NO v THE ASSISTANT MASTER 1992 (1) ZLR 1 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Georges JA & Beck JA

Civil appeal

3 & 23 December 1982

NOTE:

This judgment, which overruled the judgment of Gubbay J (as he then was), reported in 1982 (2) ZLR at p 102, was inadvertently omitted from the 1982 Reports.

Flynote

Revenue and public finance - estate duty - Estate Duty Act [Chapter 178] - s 5 (h) (i) - exemption from duty for bequest to be used for charitable, educational or ecclesiastical purposes within Zimbabwe - whether exemption only applies where money from bequest to be expended solely within Zimbabwe

Headnote

In his will the deceased left assets to enable a trust to be established. The purpose of the trust was to give financial assistance to persons ordinarily resident in Zimbabwe to enable persons with certain qualifications to pursue post-graduate and and research programmes. It was not stated in the trust that the post-graduate training or research programmes were only to be done in Zimbabwe and thus it seemed to be envisaged that some training and research might be done outside Zimbabwe and where this was the case the money from the fund would be expended externally.

For the bequest setting up the trust to be exempt from estate duty in terms of s 5 *(h)* (i) of the Estate Duty Act, it had to have accrued to the trust -

> "... under conditions requiring such amount or value to be devoted wholly to charitable, educational or ecclesiastical purposes of a public nature within Zimbabwe."

It was argued that this provision required that exemption from duty only applied to estate assets placed in an educational trust which were to be expended

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in Zimbabwe. This contention was rejected. It was held that the provision only required that there be an educational purpose of benefit to Zimbabwe. Where Zimbabwean residents were being funded to study abroad, there would still be an educational purpose of benefit to Zimbabwe.

The assets placed in this trust were therefore exempt from estate duty in terms of s 5(h)(i).

The court provided these examples of situations where the funds would be exempt from duty under s 5(h)(i) even though they are expended abroad:

- where, in order to advance art in Zimbabwe, an institution purchases from a museum abroad a collection of carved stone birds taken from Great Zimbabwe;
- where scientific equipment, unavailable locally, is purchased for educational purposes ;
- where distinguished specialists from abroad are brought to give lectures in Zimbabwe and these specialists are paid for their services in their home countries.

Cases cited:

Hall v Derby Sanitary Authority [1885] 16 QBD 163

Provincial Secretary-Treasurer of New Brunswick v Robinson & Anor (1919) 49 DLR 361

Kerry v A-G (1883) 11 LR Ir 253

A-G v Delaney (1815) IR 10 CL 104

C W Jordaan for the appellant

S Muchechetere for the respondent

Judgment

Fieldsend CJ: Doctor John Wakeford died on 9 March 1981. He left a will dated 30 October 1980. After providing for a number of legacies he left the residue of his estate in Zimbabwe, as well as assets outside Zimbabwe that were registered in the name of nominees in this country, in trust to the John Wakeford Scholarship Trust. The expressed purpose of this Trust is to provide assistance in "the form of scholarships, bursaries, grants, loans or other aid to enable persons who have already obtained university degrees or other post-school technical, scientific or occupational training of any kind, to engage in post-graduate studies, research or other useful similar pursuits not necessarily at a university."

Awards of assistance are to be made by a committee. The initial members of the committee were named in the will, which provided that every subsequent member should be ordinarily resident in Zimbabwe .

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Those eligible for awards were defined in Clause 3(1) as follows:

> "Only persons who have been ordinarily resident in Zimbabwe for at least three years immediately preceding their applications to the Committee shall be eligible to receive assistance. In cases where candidates are, in the opinion of the Committee, of equal merit, preference is to be given to those who are ordinarily resident in the area that is at present known as Matabeleland. A person shall be deemed to be ordinarily resident at the place where his home is situate, notwithstanding that he may be attending a school, university or other educational institution elsewhere either within or outside Zimbabwe."

Clause 1 (4) provides that once the Committee has made an award the Trust shall "disburse the amount of each award, in such manner as it may deem appropriate, either to the beneficiary or to the educational institution concerned".

It will be seen that there is no provision in the Trust Deed that the training of those to whom awards are made must necessarily be obtained in Zimbabwe.

For estate duty purposes the question has arisen whether the amount which accrues to the Trust attracts estate duty under the Estate Duty Act [*Chapter 178*]. If the amount accrues to the Trust:

> "... under conditions requiring such amount or value to be devoted wholly to charitable, educational or ecclesiastical purposes of a public nature within Zimbabwe; "

then it will not attract duty.

I deal first with what is common cause. It is accepted that the trust fund is to be devoted wholly to educational purposes. There can be no question about this. It is also accepted that the educational purposes are of a public nature. This concession too is clearly right. The assistance is available to any person with the necessary residential qualifications who has already obtained post-school training of any kind. This is a sufficiently wide class to characterize the purposes as purposes of a public nature. See for example *Hall v Derby Sanitary Authority* [1885] 16 QBD 163 which decided that an orphanage for the children of deceased railway employees was a public charity.

It was at one stage faintly argued by Mr *Muchechetere* for the Assistant Master that the educational purpose was not a purpose within Zimbabwe. He based this

argument on the contention that clause 3 (1) required only that awards had to be made to persons who had been ordinarily resident for at least three years prior to their applications, and not that they had to be resident at the time of application or award. He did not persist in this argument and rightly so in my view. Whilst the first sentence of clause 3 (1) may just be said to be ambiguous, the second sentence referring to preference being given to those "who are ordinarily resident in Matabeleland" removes any ambiguity. Awards are clearly to be made to those who are and have been for at least three years prior to application ordinarily resident in

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Zimbabwe.

Mr *Muchechetere's* main argument was that s 5 (h) (i) requires that the trust money must be spent within Zimbabwe. This is perhaps another way of putting the ratio *decidendi* of the learned judge below when he said:

> "It seems to me that section 5 (h) (i) of the Estate Duty Act is concerned that the educational purpose, and therefore the **institution or body fulfilling** that purpose, **should be within Zimbabwe** and not with the question as to the residence of the recipient of financial assistance which enables him to obtain the education."

With respect to the learned trial judge, to deal with his reasoning first, he has confused educational "purpose" with the means by which that educational purpose is fulfilled. An educational purpose within Zimbabwe can as a matter of principle be fulfilled by giving a Zimbabwe resident education outside the country. And an educational purpose within Zimbabwe is not necessarily served by establishing scholarships for persons with no connection with this country to pursue their studies here. The real issue in this appeal is whether the section requires the education to be given in Zimbabwe. This depends on the precise wording of the section and cannot be decided as a matter of impression, especially as an educational purpose within Zimbabwe can be served by educating a Zimbabwe resident abroad.

Mr *Muchechetere* contended that the words "within Zimbabwe" in s 5 (h) (i) qualified both "educational purposes of a public nature" and the verb "devoted". It was necessary, he said, that the money had to be spent wholly within Zimbabwe.

In the first place, there are grammatical and constructional difficulties in this interpretation of s 5 (h) (i). The words "within Zimbabwe" are as far away as they could be from the verb "devoted". They very much more naturally qualify the phrase "educational purposes of a public nature". If it had been intended that

the money had to be spent within Zimbabwe it is unlikely that this would have been achieved by using a verb such as "devoted". That verb is entirely appropriate if it applies to the purposes. It is not appropriate if it is intended to define the place where the money is to be spent.

Secondly, and more importantly, the underlying purpose of the legislation is against the construction contended for by Mr Muchechetere . It is not special pleading to say that one of the objects of exempting funds from estate duty is to allow the fullest use to be made of them for charitable and educational purposes for the benefit of the country. Such benefit can flow regardless of where the money is spent.

I take as an illustration a situation which can arise under s 5(h)(ii). That exempts from duty any amount accruing to:

> "Any public institution within Zimbabwe for the advancement of science or art, or of a charitable, educational or ecclesiastical nature, if such public institution devotes such amount or value to purposes of such a nature within Zimbabwe."

If the institution devoted the sum to the purchase from a museum abroad of a collection of

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carved stone birds taken from Great Zimbabwe, it surely must have devoted the sum to the advancement of art within Zimbabwe. Similarly, if it devoted the sum to the purchase from abroad of advanced scientific teaching equipment not available here, it surely must have devoted the sum to an educational purpose within Zimbabwe.

If I am right in my interpretation of s 5 (h) (ii), then that leads very strongly to a similar construction of s 5 (h) (i). Such a construction would be consistent with the ostensible object of the legislation of fulfilling educational purposes within Zimbabwe. Another example serves to strengthen this conclusion. A trust is established to pay for distinguished academics to give a series of specialist lectures in Zimbabwe, the money to be paid to them in their home countries both for travel and as remuneration. The purpose is an educational purpose within Zimbabwe, despite payment being made abroad.

On the wording of s 5 (h) (i) I am clear that it is not necessary for the money to be spent within Zimbabwe nor for the education to be provided within Zimbabwe in order to satisfy the requirements of the section.

Certain somewhat peripheral authorities were referred to, but they do not lead

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me to a different conclusion. The first - *Provincial Secretary-Treasurer of New Brunswick v Robinson & Anor* (1919) 49 DLR 361 - concerned a trust for the founding of such charitable, religious, educational or sanitary institutions as the trustees might see fit and deem desirable. There was no geographical limit whatsoever on the location of the institutions. Unsurprisingly it was held that this trust was not for a purpose to be carried out in New Brunswick as required by the applicable Succession Duty Act. One Irish case - *Kerry* v *A-G* (1883) 11 LR Ir 253 - there relied upon dealt with a bequest to the poor, without qualification or limitation. This was held not to satisfy a requirement exempting from duty any legacy "for the education or maintenance of poor children in Ireland". That result was inevitable. The other case - *A-G* v *Delaney* (1815) IR 10 CL 104 - dealt with a bequest to a Roman Catholic Bishop and the President of a Roman Catholic College in Ireland for the education of clergymen for a foreign mission is a little more closely in point.

The section there exempted from duty:

> " '... any legacy given for the education or maintenance of poor children in Ireland or to be applied in support of any charitable institution in Ireland or for any purpose merely charitable.'"

The quoted extracts from the judgment:

> "To bring the case within the statute the legacy must be given for a charitable purpose in Ireland. There must be a clear intention manifested upon the face of the will that the purpose should be effectuated here, and there must be an obligation upon the trustees to apply the money in Ireland. It is not sufficient that an application of the money in Ireland would satisfy the bequest."

and

> "I base my judgment on this - that, upon a true construction of the will, there is no obligation on the trustees to

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> expend the money in Ireland, and that the bequest is not a bequest 'merely charitable' in Ireland."

seem to show that the claim for exemption had to fail on two grounds: first, the purpose was to train clergymen for a foreign mission and, secondly, there was no obligation to spend the money in Ireland. But even the finding that the money had to be applied in Ireland is not particularly strong persuasive authority in favour of Mr *Muchechetere 's* contention, because the wording of the section was so different from that which we have to consider.

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Next, reliance is placed on the following passage in Meyerowitz *The Law and Practice of the Administration of Estates* 5 ed para 28.10 :

> "...if a bequest were left to A to be devoted by him to charitable purposes, the beneficiaries to be selected by him in his discretion, the provisions of the section (4(h)(i)) would not be met, since it would not appear from the terms of the bequest that the charities must be of a public nature or that they must be within the Republic. On the other hand, a bequest for the purpose of educating deserving students at a named public school or university within the Republic would contain in itself the required limitations. Would be testators and donors would be well advised, if that is their object, to provide specifically that their charitable, educational or ecclesiastical bequests should conform to the provisions of the section, and where the selection of the objects of their generosity is to be left to the discretion of a person, his discretion should be limited to the choice of purposes of a public nature within the Republic."

This passage does not deal with the question we are considering. In the example posed there is no limitation placed on the beneficiaries to be selected. In the case we are considering they have to be Zimbabwe residents. In addition, the learned author appears to state that "the charities" and not the charitable purpose must be within the Republic. Certainly he is not considering the case where the beneficiaries are required to be resident within the Republic but may receive their benefit outside.

Finally, it is prayed in aid of the Assistant Master the fact that s 4(h)(ii) of the South African Act - the equivalent of our s 5(h)(ii) - is not limited as ours is by the words "within the Republic". I have already dealt with what I consider to be the proper interpretation to be placed on our s 5(h)(ii). I think it very dangerous to draw inferences from the differences in parallel legislation in another country, and in the present instance I do not think that the difference in wording is of any significance in the interpretation. All it means is that in South Africa there is exemption for a public institution within the Republic even if the bequest is used for the advancement of science, art, etc outside the Republic.

In the event I am satisfied that the bequest to the John Wakeford Scholarship Fund is exempted from Estate duty by s 4(h)(i) of the Estate Duty Act.

The appeal is allowed with costs, and there will be an order setting aside the Estate Duty Assessment No. B/82.

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Georges JA: I agree.

Beck JA: I agree.

Calderwood, Bryce Hendrie & Partners, appellant's legal representatives

State Attorney, respondent's legal representatives

MUSARA v ZIMBABWE NATIONAL TRADITIONAL HEALERS ASSOCIATION (ZINATHA) 1992 (1) ZLR 9 (HC)

Court **High Court, Harare**

Robinson J

Civil petition

6 September 1991

Flynote

Civil procedure - declaratory order - decision to suspend petitioner void - court exercising discretion to declare decision void despite fact that remedy of review had been available but time limit for bringing matter on review had expired

Headnote

The Board of Management of Zinatha or Professor Chavunduka had purported to suspend the petitioner from his office in Zinatha. The court declared this purported suspension to be null and void. If the decision to suspend had been taken by the Board of Management, the decision was void as this Board had no legal standing under the Zinatha Constitution and thus this Board had no authority to suspend an office holder. If the decision had been taken by Professor Chavunduka, the decision was again void because, at the date of the purported suspension, the petitioner held no office in Zinatha and the respondent's Constitution only empowered the respondent's President to "suspend from office" any person who acted or spoke contrary to the policy of Zinatha.

The court granted the declaratory order sought by the petitioner despite the fact that he could have proceeded by way of review had the time limit for bringing a review not expired.

The court ruled that where a decision was void, any interested party should be at liberty to approach the court at any time for an order declaring the decision to be void. The court had a fundamental duty to see that justice was done and only in exceptional circumstances would it refuse to make a declaration that a void act was null and void.

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ROBINSON J

Cases cited:

Morrison v Morrison 1972 (3) SA 185 (C)

S v Prinsloo 1970 (3) SA 550 (O)

Deputy Min of Tribal Authorities & Anor v Kekana 1983 (3) SA 492 (B)

Govender v Workmen's Compensation Comr 1950 (3) SA 22 (T)

Bayat & Ors v Hansa & Anor 1955 (3) SA 547 (N)

S Hwacha for the petitioner

P C Paul for the respondent

Judgment

Robinson J: In this matter I delivered an *ex tempore* judgment on 6 September 1991 and said that I would record the full reasons for the order made by me, which was as follows -

> "1. That the petitioner's purported suspension by the respondent's President on 28 May, 1991 be and is hereby declared to be null and void *ab initio*.
>
> 2 . That the respondent pay one-half of the petitioner's costs .
>
> 3. That in the event of the respondent's noting an appeal against this order, then notwithstanding the noting of such an appeal, this order shall remain of full force and effect unless and until it is set aside on appeal. "

On 16 August 1991 on the basis of an *ex parte* petition presented to him in Chambers as a matter of urgency, SMITH J granted an order in the following terms -

> "That a rule *nisi do* issue returnable to this Honourable Court sitting at Harare on the 28th day of August, 1991 calling upon the respondent to show cause, if any, why: -
>
> (a) the petitioner's suspension from Zinatha on the 28th May, 1991 should not be declared null and void;
>
> (b) the petitioner should not be allowed to stand for election to positions within Zinatha ;
>
> (c) the respondent should not be ordered to pay the costs of this petition.
>
> That a copy of the petition and this order be served on the respondent."

On 28 August 1991 an order was made by CHEDA J, in accordance with the consent of the parties, that the matter be postponed to 4 September 1991 and that the rule nisi be extended accordingly .

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Consequent upon my agreeing to hear this matter during the court vacation on 6 September 1991, I made an order, in accordance with the consent of the parties, setting down this matter for hearing on Friday, 6 September, 1991 at 11.30 am and extending the rule *nisi* to that date.

At the hearing it was not necessary for me to have regard to the allegations raised by the petitioner against the respondent's President, Professor Gordon Lloyd Chavunduka, or by the latter against the former since it was possible for me to determine the matter on the basis of facts which were common cause between the parties, namely:

(a) that the petitioner is a traditional medical practitioner duly registered in terms of the Traditional Medical Practitioners Act, 1981 and a fully paid-up member of respondent;

(b) that the petitioner received a letter dated 28 May, 1991 addressed to him by the respondent's President on the respondent's letterhead reading as follows-

"Dear Mr Musara

I am writing to inform you that you have been suspended from your position in ZINATHA with immediate effect. You will not be allowed to visit any ZINATHA office in any way.

The suspension is for three years. The Board of Management made this dicision (*sic*) because you took Gutu Research material without authority and kept it for several weeks and thus preventing Dr Nangate from producing the required report on time. The board took a very serious view of this kind of behaviour.

Yours sincerely

Professor GL Chavunduka,

PRESIDENT"

(c) that in informing the petitioner of his suspension, the respondent's President purported to act under clause 5(i) of respondent's Constitution, the relevant part of which provides that the President "shall ensure adherence to the Association's policies by all officials and members and is empowered hereby to discipline and suspend from office any person who acts or speaks contrary to the policy of the Association";

(d) that there is no provision for a Board of Management under the respondent's Constitution;

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(e) that the petitioner's contract of employment with the respondent as a National Co-ordinator for the respondent's AIDS programme expired on 31 March 1991;

(f) that at the date of his purported suspension, the petitioner held no office with the

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respondent under its Constitution or any other position, being merely a fully paid-up member of the respondent .

In the light of these facts, I found that the decision purporting to suspend the petitioner was clearly null and void *ab initio* on two grounds.

Firstly, the decision was made by a body, namely, the so-called Board of Management created by the respondent's President, which had no legal standing under the respondent's Constitution and, therefore, no authority whatsoever to make a decision suspending the petitioner, which the respondent's President said in his said letter to the petitioner dated 28 May, 1991 quoted in paragraph (b) *supra*, the Board of Management had done. In view of the explicit contents of that letter, I fail to see how the respondent's President can seek to say, as he does in paragraph 5 of the respondent's opposing affidavit, that initially the decision to suspend the petitioner was his own decision made by him after consultation with his own Board of Management. If that had been so, then why did not the respondent's President say that in his said letter informing the petitioner of the decision to suspend the petitioner? Indeed, it is significant that the respondent's President makes no attempt to deal with the terms in which his said letter was couched - this certainly seems to be a case of the respondent's President being hoist by his own petard or, perhaps more pointedly put, trapped by the words of his own letter.

Secondly, and in any event, even if the decision to suspend had been made by the respondent's President acting purportedly under clause 5(i) of the respondent's Constitution, clause 5(i) only empowers the respondent's President to "suspend from office" any person who acts or speaks contrary to the policy of the Association. This obviously presupposes that the person concerned holds an office from which the respondent's President may suspend him. Accordingly, leaving aside the question of whether it can be said, as contended by Mr *Paul,* that the petitioner had acted "contrary to the policy of the Association" by withholding the research materials in question from the respondent, because the petitioner held no office in the respondent, it is evident that the respondent's President acted in excess of his power in purporting to suspend the petitioner under clause 5(i) of the respondent's Constitution.

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It being trite law, for which I see no need to cite any authority, that something done by an official in excess of the power conferred upon him is null and void *ab initio*, it follows that, in the present case, the petitioner's suspension is null and void.

That being the case, it is arguable that any interested person should be at liberty and entitled, at any time, to approach this court for an order declaring the act in question to be null and void. In this connection, I would refer to the case of *Morrison v Morrison* 1972 (3) SA 185 (C), which concerned the granting of a declaratory order, at the instance of the guilty party, that a purported marriage was void on the ground that it was bigamous. In that case, at p186G, VOS AJ said that where a party seeks to obtain clarity about his own status and that of his purported wife, the court should be slow to turn him away. By the same reasoning, this court should be slow to turn the petitioner away where he seeks a declaratory order about his status in the respondent, so that it is known whether he can stand as a candidate for election within that

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organisation, especially where, *ex facie* the papers before this court, it is clear that the petitioner's suspension was invalid and, therefore, null and void *ab initio.*

In *S v Prinsloo* 1970 (3) SA 550 (O) at 553F-G, the court stated (I give the English translation):

> "Invalid proceedings are inevitably null and void ab initio and a court of appeal should not hesitate to intervene *mero motu* and to set such proceedings aside. It would in fact be inexcusable to ignore the proven fact of invalidity merely because it has not been raised in the notice, since by doing so the court would ensure that justice is not duly done and would therefore be ignoring its fundamental duty."

Although, admittedly, *Prinsloo's* case is a criminal case, I consider that the same approach should be adopted by the court in a civil case where, on the papers before it - the more so where those papers seek a declaratory order - an act of glaring invalidity is, as in this matter, staring the court straight in the face. For the court to refuse, save in exceptional circumstances justifying such refusal, to declare the act in question null and void *ab initio* on some technical ground would, I agree, be to ignore the court's fundamental duty to see that justice is done which, after all, is the duty which the layman expects the courts to discharge.

If I am justified in taking this approach, then this matter is easily and immediately resolved since there appears to be no good reason why the court

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should not grant the declaratory order sought by the petitioner, namely, that his purported suspension on 28 May 1991 was invalid and, therefore, is null and void

However, lest I be wrong in this approach, I proceed to consider whether I should not exercise my discretion in favour of the petitioner and should therefore refuse him the declaratory relief which he seeks under s 14 of the High Court of Zimbabwe Act, 1981.

At the outset I would observe that the bulk of the petitioner's petition raises matters, such as malice, gross irrationality, the application of the *audi alteram partem* principle and bias, which relate to the subject of review and which would only render the act in question voidable and not void. Consequently, those issues are not properly before this court in the present application which seeks a declaratory order specifically and exclusively on the ground that the petitioner's purported suspension is null and void. Fortunately for the petitioner, there is just sufficient information on the papers to enable the court to consider the petition as one seeking a declaratory order in regard to the petitioner's suspension - had there not been such information so that the petition amounted to a review *simpliciter* (see *Deputy Minister of Tribal Authorities & Anor v Kekana* 1983 (3) SA 492 (b)), then I would have dismissed the petition on the ground that it was out of time as a review matter and that no cause had been shown on the papers for the court, in terms of R 259 of the Rules of Court, to extend the prescribed eight week period within which a review is to be instituted.

Mr *Paul* submitted that I should not exercise my discretion in favour of the petitioner on two grounds.

Firstly, he said that the petitioner has not been frank with the court in advancing two different

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reasons for withholding from the respondent the research materials demanded by the respondent. However, Mr *Hwacha* frankly admitted from the Bar that the reason given in the letter which he addressed to the respondent's legal practitioners on 5 July 1991, namely, that the petitioner would continue to hold on to the research materials on the basis of a lien, was a gloss or interpretation which he, Mr *Hwacha*, had put forward to justify the petitioner's retention of the research papers. In the light of this admission, the allegation that the petitioner had not been frank with the court could not be sustained.

The second ground relied upon by Mr *Paul* was based on the case authority to which I drew Mr *Hwacha's* attention, namely *Govender v Workmen's Compensation Commissioner* 1950 (3) SA 22 (T). In that case BLACKWELL J

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said that if the Legislature provides a speedy and effective method of testing a question such as that which was in issue in the case before him and the applicant, having elected not to adopt that remedy and then being out of time, comes to court for a declaratory order, he should not expect to receive any sympathy from the court. As a result, the learned judge refused to exercise his discretion in favour of the applicant. Mr *Paul* therefore argued that since it had been open to the petitioner to bring this matter on review under O 33 of the Rules of Court speedily and more effectively, the court should not have any sympathy when the petitioner is out of time and asks this court to hear the matter urgently in the court vacation where the delay is of the petitioner's own making.

Although in *Govender's* case the court left open the question whether, when the Workmen's Compensation Commissioner has made an order in excess of his power or has given an order in excess of his jurisdiction, the court has the power to interfere, that case is obviously distinguishable from the present case on the basis that in *Govender's* case the court was not dealing with an act which was null and void.

More pertinently, I would draw attention to the following passage in the judgment of CANEY J in *Bayat & Ors v Hansa & Anor* 1955 (3) SA 547 (N) at 552C-D:

> "Consequently the situation, as I see it, is that, if the second respondent did decide the question of contractual rights adversely to the applicants, it remained open to them either to review the decision of the second respondent, notwithstanding that they had taken part in a contest before the second respondent on the very question, or, ignoring the second respondent's decision on that question and treating it as a nullity as being beyond the powers of the second respondent, to bring proceedings for a declaration of rights or otherwise to enforce the claim which they maintain they have against the first respondent."

There would have been much substance in Mr *Paul's* second ground had the act in question been a voidable, as opposed to a void act subject to review and I have no hesitation in saying that where, in such a case, it is clear that an applicant has unjustifiably sat on his rights and has then decided, when he is out of time in approaching the court by way of review, to approach the court for declaratory relief, I would have little compunction in refusing to exercise my discretion in the applicant's favour.

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In any event, it is important to note that the petitioner did not sit on his rights but

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consulted his legal practitioners within the eight week review period, as will appear from the letter which the petitioner's legal practitioners addressed to the respondent's legal practitioners on 5 July 1991, being annexure F to the respondent's opposing affidavit, in which the petitioner's legal practitioners made it clear that the petitioner was challenging his suspension. Although it does not emerge from the papers what happened thereafter, the fact is that fairly shortly after the expiry of the review period, the petitioner approached this court as a matter of urgency for a declaratory order in respect of his suspension.

In the light of this and also in the face of the glaringly unlawful and void suspension of the petitioner by the respondent's President, seeking to block the petitioner from standing as a candidate in the respondent's elections, I was prepared to exercise my discretion in the petitioner's favour by declaring that his purported suspension on 28 May 1991 was null and void. I made an order accordingly, from which it followed that the petitioner could not be barred, on account of his suspension, from standing as a candidate in the respondent's immediately imminent elections.

On the question of costs, since I believed that the petitioner had raised in his petition much that was irrelevant to the declaratory relief sought, I decided to award the petitioner only one-half of his costs and I made an order accordingly.

Since Mr *Paul* had no objection to my so doing, I ordered that in the event of the respondent's noting an appeal against the order made by me, then notwithstanding the noting of such an appeal, the order was to remain of full force and effect unless and until it was set aside on appeal.

Kantor & Immerman, petitioner's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

CITY OF MUTARE v MLAMBO 1992 (1) ZLR 17 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Gubbay CJ, Manyarara JA & Ebrahim JA

Civil appeal

3 & 19 December 1991

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Flynote

Administrative law - failure by person empowered to order suspension of employee to apply his mind to matter - acting under direction of body not empowered to order suspension - refusal of tribunal to allow employee to be legally represented at inquiry into alleged misconduct during employment - whether breach of natural justice

Headnote

The respondent had been found guilty of misconduct by a sub-committee of the City Council. He had asked to be legally represented at this inquiry but the committee had refused to allow this. Subsequently the respondent was suspended from duty. The suspension was communicated by the Town Clerk acting under the directions of the City Council.

Held, that in terms of s 90(10) of the Urban Councils Act [*Chapter 214*] the Town Clerk but not the Council was vested with the power to suspend an employee. By acting on the instructions of the Council the Town Clerk had failed to apply his mind to the matter and to make the decision which he and not the Council was empowered to make. Therefore the respondent had not been lawfully suspended and, as he had not been lawfully suspended, the Council was not entitled to cause an inquiry to be held.

Held, further, that the conclusion on the matter of suspension made it unnecessary to decide whether the refusal to allow legal representation at the inquiry constituted a breach of natural justice. This question was left open. The court did, however, say *obiter* that such factors, perhaps combining together, as inarticulacy, a lack of familiarity with the setting and procedures, a failure to grasp the critical matters in issue and to distinguish the relevant from the irrelevant, and intelligence inadequately to appreciate the issues

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GUBBAY CJ

of law or complex fact would make legal representation before a disciplinary tribunal an essential of natural justice.

Case cited:

Chigowa v Municipality of Marondera 1990 (2) ZLR 121 (H)

J Sayce for the appellant

*E Chatikobo f*or the respondent

Judgment

Gubbay CJ: This is an appeal against the decision of the High Court (Reynolds J) ordering the appellant ("the Council") to reinstate the respondent to the post of Liquor Sales Manager and to pay the costs of the proceedings instituted by him.

On 14 March 1990 the respondent received a letter addressed to him by the Town Clerk to the Council. It read, in relevant part, as follows:

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> "... I would advise that on the recommendation of the Commission, the Council has resolved that you be suspended from duty without pay forthwith.
>
> The basis for your suspension is that, after weighing the evidence in the audit report against your written and verbal submissions ... the Council felt that there was a *prima facie* case of misconduct, gross mismanagement , dishonesty and abuse of authority in the manner in which you were performing your duties ..."

The Commission referred to in the letter was a sub-committee appointed by the Council.

Two days earlier the respondent had appeared before this sub-committee (comprising four municipal councillors and three senior officials) tasked by the Council to conduct an enquiry into allegations levelled against him of irregular management practices in the Liquor Sales Department. At the inception of the hearing he requested permission to engage a legal practitioner to represent him. His request was refused, for the stated reason that the enquiry was solely concerned with administrative procedures, and not with the "criminal aspect" of the various investigations that were in progress. In the event, the enquiry proceeded with the respondent being unrepresented, and terminated with the sub-committee recommending to the Council that he be discharged from service with effect from the date of suspension.

GUBBAY CJ

On 4 May 1990 the respondent was informed by the Town Clerk that, having considered the sub-committee's recommendation, the Council had resolved, subject to the approval of the Minister of Local Government, Rural and Urban Development, to discharge him from its employment. The requisite approval was given on 1 August 1990.

The learned Judge *a quo* upheld the contention raised before him, that the denial of legal representation constituted so gross an infringement of the respondent's fundamental right to be afforded a fair hearing as to warrant judicial intervention without more ado. It has been argued before this Court that he was wrong in that regard.

It is as well, however, to turn immediately to the second ground upon which the judgment is supported by the respondent and challenged by the appellant.

Section 90(10) of the Urban Councils Act [*Chapter 214*] provides that:

> "If it appears to a senior official that any employee of the council who is not a senior official has been guilty of such conduct that it is desirable that that employee should not be permitted to carry on his work, he -
>
> (a) may suspend the employee from office and require him forthwith to leave his place of work; and
>
> (b) shall cause the suspension to be reported to the council at the first opportunity."

Since the respondent was an ordinary employee the power to suspend him vested solely, therefore, in a "senior official".

To my mind, the content of the letter of suspension, although under the hand of the Town Clerk, who is a "senior official" as defined in s 90(1) of the Act, makes it clear that the Town Clerk was

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merely communicating to the respondent a resolution of the Council acting on the recommendation of the sub-committee. What was being conveyed was the decision of the Council and not that of the Town Clerk. Nowhere in the letter did the Town Clerk express his own personal view or what *he* had decided to do. There is just no indication that he applied his mind to the matter, or exercised his discretion. It was the Council to which it appeared that the respondent had been guilty of misconduct.

In his opposing affidavit the Town Clerk fairly stated that: -

> "... Council and the Committee of Enquiry had recommended his suspension.

> As the Council had directed the applicant be suspended I complied with that directive."

He went on, nevertheless, to aver that, though not mentioned in the letter, he was satisfied at the time that it was desirable that the respondent be placed under suspension. This claim, which is suggestive of an *ex post facto* exercise or a discretion, is not acceptable. What is to be looked to is the letter and the letter alone. It reflects an assumption of power by the Council which it did not possess and an omission by the Town Clerk, or any other senior official, to act upon his own initiative. See *Chigowa v Municipality of Marondera* 1990 (2) ZLR 121 (H) at 127A-C.

Nor am I impressed by the submission that, as the council has the power under s 90(13) of the Act, after considering the results of the enquiry, to lift the suspension of the employee, it has inherent power to order a suspension under s 90(10). I think that proposition is a *non sequitur*. A power to lift the suspension does not imply a power to impose it. It is lifted in consequence of the enquiry, just as the employee may be discharged as a result of it. The law-maker had sound reason not to vest the power to suspend in the council for to do so would, to some extent at least, place the council in the position of having to justify its prior view, albeit *prima facie*, that the employee had been guilty of an act of misconduct serious enough to warrant him being prohibited from carrying on his work.

It is true, as Mr *Sayce* for the appellant pointed out, that there is nothing to prevent the council from discharging an employee under s 90(7)(b) of the Act, without his previously having been suspended under s 90 (10), on any ground that would in law justify discharge without notice. But the existence of that power does not seem to me to evince an intention on the part of the law-maker to bestow the right to suspend as well. Two different procedures are envisaged: In the first, the allegation of misconduct is not considered to warrant the holding of an enquiry into its proof. In the second, the allegation of misconduct is sufficiently open to uncertainty as to require the holding of such an enquiry.

It inevitably follows, in my judgment, that as the respondent was not lawfully suspended under s 90 (10) of the Act, the Council was not empowered to cause an enquiry to be conducted by the sub-committee under s 90(13)(a). The disregard of the express provisions of the Act tainted the subsequent discharge of the respondent with procedural impropriety.

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Whether on the facts the resolution to discharge the respondent was right and

GUBBAY CJ

fair is entirely beside the point and does not fall to be determined.

This conclusion makes it unnecessary to decide whether, in the particular circumstances of this case, natural justice required that the respondent be represented by a legal practitioner even if he had no absolute right thereto. I prefer to leave that question open. I shall go no further than to say that such factors, perhaps combining together, as inarticulacy, a lack of familiarity with the setting and procedures, a failure to grasp the critical matters in issue and to distinguish the relevant from the irrelevant, and intelligence inadequately to appreciate the issues of law or complex fact, would, I believe, make legal representation before a disciplinary tribunal or board an essential to natural justice.

Albeit for reasons different from those entertained by the court *a quo*, I would dismiss this appeal with costs.

Manyarara JA: I agree.

Ebrahim JA: I agree.

Gargan Brothers & Chadder, appellant's legal practitioners

Chinamasa, Mudimu & Chinogwenya, respondent's legal practitioners

S v WHITE 1992 (1) ZLR 23 (HC)

Court **High Court, Harare**

Smith J & Hwacha AJ

Criminal review

8 January 1992

Flynote

Review - duty of magistrates in relation to submission of cases for review

Headnote

It is imperative that records are submitted for scrutiny or review within one week as required by law. Magistrates who are dilatory and fail to comply with this requirement are failing in their duty.

By the time the record reached the High Court the accused had already served a prison

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sentence imposed by the magistrate. The accused was a 20-year-old first offender and the High Court decided that he should have been fined and not imprisoned. The delay in submission of the case for review had therefore led to the accused serving a prison term when he should have not have gone to prison at all.

Judgment

Smith J: The accused, a 20-year-old first offender, pleaded guilty on 11 October 1991 to a charge of theft by conversion of $297 and was duly convicted . On 28 October he was sentenced to 6 months' imprisonment, of which 4 months were suspended. The regional magistrate who scrutinized the record considered that a fine, coupled with a wholly suspended prison sentence, would have been the proper punishment. I agree with him. The sentence imposed was excessive. The record was received at the regional magistrate's office on 2 December, he wrote his letter on 9 December and it was received at the High Court on 3 December. When I made inquiries I found that the accused had already served his 2 months' imprisonment and been released. The trial magistrate, Mr Mafusire, certified the record on 13 November, which was more than 2 weeks after the accused was sentenced, even though the law requires that the proceedings must be sent on review within one week. There was then another two-week delay before the record arrived at the office of the regional magistrate.

SMITH J

It is imperative that records are submitted for scrutiny or review within one week as required by law. Magistrates who are dilatory and fail to comply with this requirement are failing in their duty. In the present case it has resulted in the accused, a 20-year-old, serving a two-month sentence of imprisonment instead of having an option to pay a fine.

The conviction is confirmed but the sentence is set aside and the following is substituted:

Accused is sentenced to a fine of $300 or, in default of payment, 2 months' imprisonment and, in addition, to 4 months' imprisonment wholly suspended for 5 years on condition that within that period the accused does not commit any offence of which theft is an element for which he is sentenced to imprisonment without the option of a fine.

As the accused has already served the period of imprisonment he shall not be required to pay the fine.

Hwacha AJ: agrees.

S v CHIRAI 1992 (1) ZLR 24 (HC)

Court **High Court, Harare**

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Smith J

Criminal review

15 January 1992

Flynote

Criminal procedure (sentence) - multiple counts - globular sentence - counts should not be taken as one for sentence where they are dissimilar - imposition of imprisonment as alternative to fine

Headnote

A magistrate had taken two counts as one for sentence. The offences were attempted fraud and a charge of corruption.

The review court ruled that separate sentences should have been imposed on each count as the offences were entirely dissimilar .

The review court also ruled that the term of imprisonment imposed as an alternative penalty was excessive. It gave a rule-of-thumb guide.

Cases cited:

S v Chawasarira 1991 (1) ZLR 66 (H)

S v Tsatsinyana 1986 (2) SA 504 (T)

S v Ncobo; *S v Zwelibhangile*; *S v Dlamini* 1988 (3) SA 954 (N)

S v Juta 1988 (4) SA 926 (TS)

Judgment

Smith J: The accused pleaded guilty to a charge of attempted fraud and to a charge of contravening s 3(1)(b) of the Prevention of Corruption Act, 1985, and was duly convicted on both counts. The magistrate then took both counts as one for the purpose of sentence and sentenced the accused to a fine of $600 or, in default of payment, 6 months' imprisonment. In *S v Chawasarira* 1991 (1) ZLR 66 (H) this court pointed out the undesirability of treating offences which are different and independent as one and imposing a globular sentence. There are many reasons why each separate offence should be treated separately with a

separate sentence being imposed for each. In this case the two offences of which the accused has been convicted are entirely dissimilar. In my opinion the magistrate acted improperly in treating both offences as one for the purposes of sentence.

Furthermore, I consider that the alternative period of imprisonment is much too severe. In *S v Tsatsinyana* 1986 (2) SA 504 (T) VAN DIJKHORST J considered the question of imposing a

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prison sentence as an alternative to payment of a fine. The judgment is in Afrikaans but I have obtained a translation from a duly qualified person of what the learned judge said at p 508-9 which reads as follows:

> "The alternative of imprisonment has a twofold goal. First, it serves as a sanction to ensure payment of the fine. Second, it serves as punishment for the offence in the event of non-payment of the fine. To attain the first goal the term must be such as to enforce payment. For the second goal the period of the imprisonment must pass the test that would be applied if imprisonment was the only punishment being imposed. Here, the nature of the offence, the personal circumstances of the offender and the interests of the community will merit consideration. It follows from the above that in respect of the same act two offenders can be sentenced to different fines with the same alternative imprisonment."

This statement was quoted with approval by Howard DJP in *S v Ncobo*; *S v Zwelibhangile*; *S v Dlamini* 1988 (3) SA 954 (N).

The matter was also considered in *S v Juta* 1988 (4) SA 926 (TS). van Reenen CJ stated the well-known precept that sentence is pre-eminently a matter for the trial court and that it is, within the limits of statutory provisions, in the discretion of the presiding officer, but that is not an ordinary discretion but a judicial discretion. When deciding on sentence, the court should first consider whether the case is one which calls for a prison sentence or not. If it decides that a fine is appropriate it must determine the magnitude of the fine, having regard to the usual factors. At p 927-8 he continued:

> "Having decided on the amount of the fine, the court has to consider what should happen if it appears that the accused is unable or unwilling to pay the fine. The court has two options: firstly, he can abide by the fine, in which case the fine can be recovered, if needs be, by civil execution against the accused, or, and this is the usual course, he can decide to impose a prison sentence which is to be enforced if the fine is not paid.

SMITH J

> But, and this is where magistrates often go wrong, in the deciding on the term of imprisonment, the court is now not concerned with a punishment for the crime. Decision on that punishment has already been made. What the court must decide is what sanction is to be applied should the punishment which has been determined fails.
>
> When deciding upon the amount of the fine, the court has regard to the financial circumstances of the accused and whether the impact of the fine in these circumstances would be an adequate censure for the accused's misdemeanour.
>
> The same considerations also apply when considering the alternate prison sentence. In addition, regard should be had to the special impact which a prison sentence would probably have upon the accused, having regard to his personal circumstances, employment, social status and so on.
>
> Obviously, the whole matter is beset with great difficulty. Conflicting considerations abound, such as the effect upon the accused, his family and dependants, the requirements of the law, the interests of society and so on Care should also be taken not to stress too much the peculiar circumstances of the individual accused. It would appear to be safer to regard him as an average representative of a class and consider the various factors in that light."

He concluded by giving a rule-of-thumb guide which, he said, would have to be revised if the value of the rand changed markedly.

I agree with the remarks of the learned Chief Justice that the matter is "beset with great

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difficulty". He did not, however, mention that one of the primary considerations that should be borne in mind by the court is whether the period of imprisonment is an appropriate sentence for the offence that was committed . In the present case it seems to me, as I said earlier, that imprisonment for a period of 6 months as an alternative to the fine of $600 is excessive and induces a sense of shock. If the magistrate was satisfied that a fine was appropriate and that the magnitude of the fine was $600, then the alternative period of imprisonment should have been fixed at two or three months - certainly not more than three months .

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

Count No 1: Accused is sentenced to a fine of $100 or, in default of payment, 14 days' imprisonment

SMITH J

Count No 2: Accused is sentenced to a fine of $300 or, in default of payment, 6 weeks' imprisonment.

Robinson J: agrees

MURPHY v DIRECTOR OF CUSTOMS AND EXCISE 1992 (1) ZLR 28 (HC)

Court **High Court, Harare**

Smith J

Civil action

28 & 29 October 1991 & 22 January 1992

Flynote

Prescription - whether claim to recover forfeited goods had prescribed

Revenue and public finance - Customs and Excise Act [Chapter 177]- forfeiture of goods - whether claim to recover goods prescribed

Headnote

In terms of s 176(9) of the Customs and Excise Act [*Chapter 177*] a person wishing to recover goods which have been seized by Customs must institute proceedings to recover his goods within three months of the seizure. As the plaintiff had failed to bring his proceedings within the time period specified, his claim was prescribed.

Even if there were a separate cause of action arising out of an order of forfeiture of goods, as opposed to seizure of goods, the plaintiff must fail in his action because he had failed to comply

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with the mandatory provisions contained in s 178(1) and (2) that the claimant must give at least one month's written notice, which notice must clearly and explicitly set out the cause of action. The court declined to decide, however, whether there was in fact a separate cause of action based upon forfeiture. It did, however, strongly recommend that consideration be given to amending the Customs and Excise Act [*Chapter 177*] so as to make it clear that an order for forfeiture of goods gives rise to a separate cause of action and to provide for notice of forfeiture to be given just as notice of seizure is given.

Cases cited:

Patel v Contr of C & E 1982 (2) ZLR 82 (H)

Evins v Shield Ins Co Ltd 1980 (2) SA 814 (A)

Abrahamse & Sons v SA R & H 1933 CPD 626

SMITH J

Contr of Customs v Guiffre 1971 (2) SA 81 (R)

Admin, Tvl v Husband 1959 (1) SA 392 (A)

M J Gillespie for the plaintiff

D P Carter for the defendant

Judgment

Smith J: This is an action for the return of 17 cases of whisky which were forfeited to the State or payment of the value thereof. The plaintiff is the proprietor of a bottle store. On 18 September 1984 officials of the Department of Customs and Excise (hereinafter referred to as "the Department") visited his bottle store and seized 7 cases of imported whisky. On 14 November his bottle store was again visited by customs officers and a further 17 cases of imported whisky were seized. The whisky was seized because of the plaintiff's inability to account for the manner of the importation of the goods, the customs clearance thereof or the purchase of the goods in Zimbabwe. The plaintiff wrote a letter dated 15 October 1984 to the defendant about the seizure of the 7 cases on 18 September, asking to be told "what is going on" and saying that failure to do so would leave him "no alternative but to take you to court ". Thereafter the plaintiff was charged with offences under the Customs and Excise Act [*Chapter 177*] (hereinafter referred to as "Chapter 177") but the charges were withdrawn on or about 10 February 1986. On 11 July the plaintiff was told, verbally, by an official in the Department that following the dropping of the criminal charges the cases of whisky had been confiscated. This resulted in a letter dated 16 July 1986 from the plaintiff's legal practitioner to the defendant asking for confirmation in writing that the cases of whisky had been confiscated and giving notification in terms of s 178 of Chapter 177 that they intended to institute proceedings to reclaim the whisky on the grounds that the confiscation was wrongful. They said that it was their view that the date of confiscation must be taken as the date on which the plaintiff was verbally advised of the confiscation. The defendant replied by letter dated 1 August 1986 in which the following points were made. No

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documents were available to prove that the plaintiff had properly cleared the whisky through the Department for consumption and therefore they were declared forfeit. In terms of s 178(4), as read with s 176(9), of Chapter 177 any proceedings for the recovery of goods seized under Chapter 177 must be instituted within three months of the date of service of the notice of seizure. The relevant dates in this case were 18 September 1984 and 14 November 1984 and accordingly the deadlines for any lawsuits were 18 December 1984 and 14 February 1985 respectively. Therefore the notice of action was time-barred and so rejected. This letter was received by the legal practitioners on 6 August 1986. They replied by letter dated 7 August, saying that they were aware of the relevant provisions of Chapter 177 but that did not alter their position as set out in their

letter dated 16 July. They asked what documents were required to prove that the whisky was properly cleared. The whisky had been acquired by the plaintiff on sale from various liquor outlets as per invoices that had been supplied to the public prosecutor. The duty of clearing the whisk lay not on the plaintiff but on the retail outlets from whom he purchased the whisky. The defendant did not respond to this letter and so the plaintiff instituted this action on 5 November 1986 claiming the return of the whisky or payment of $7200, being the value thereof.

At the commencement of the hearing Mr *Gillespie* applied for leave to amend the plaintiff's declaration in two respects. Firstly, where the declaration averred that the forfeiture had been ordered in the period 10 February to 1 August 1986 , to change the latter date to 6 August. Secondly, to alter the payment claimed from $7200 to $24 480, to reflect the increase in value of the whisky. Mr *Carter* replied that the respondent was prepared to agree to a figure of $17 280 which would value the whisky at $60 a bottle, but not $24 480 which valued the whisky at $80 a bottle. Mr *Carter* also applied for leave to amend the defendant's plea in opposition. The defendant, in its plea, denied that proof of the purchase of the whisky had been furnished and claimed that because the plaintiff had not given notice in terms of s 178 of Chapter 177, his cause of action was prescribed and unenforceable. The amendment sought was to claim, alternatively, that the plaintiff was barred in terms of s 178(4) as read with s 176(9) of Chapter 177 from continuing the action since he failed to bring his action within three months after the cause thereof arose. Both applications were granted .

The plaintiff gave evidence to support his application. After narrating the events set out above he went on to deal with the acquisition of the whisky. He said that he had bought the whisky for his own consumption and for sale to selected clients who were major customers. He produced invoices to prove purchases of whisky from three local wholesale outlets. He also produced three other documents referring to the sale of whisky to him. One was a cash book voucher from a firm which sells electrical equipment that reflected the sale to the plaintiff of ten cases of whisky. He said that the firm had bought the whisky at a customs rummage sale. Another was a hand written statement by his mother to the effect that she had sold him 34 bottles of whisky. It was not dated and did not state the date or dates of the sale or sales. He said that she lived in Durban and whenever she visited him she used to bring whisky and wine for him. She had sent the note about selling him 34 bottles of whisky at his request. he third was a note written on the

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back of an invitation to join a club of selected members of the plaintiff's bottle store by a Mr Mensah stating that in October 1984 he had sold the plaintiff two cases of whisky. In cross-examination the plaintiff agreed that the

SMITH J

documentary evidence of purchases of whisky related to purchases in the period August 1983 to January 1984 and explained that he had kept whisky back for Christmas. After the whisky had been seized he wrote to Mr Mensah and to his mother and they had sent the notes referred to above about selling him whisky. His mother had brought the whisky to him over a period of six to ten months. He did not keep stock cards showing the purchase of liquor for his bottle store. The plaintiff also called Mr Gledhill, the sales manager of a firm that had sold him whisky. He said that the demand for Scotch whisky was high and it had been in short supply since 1983. The present landed costs of a 750 ml bottle of Scotch whisky was $60 and he had seen bottles on the shelves of local stores being offered for sale at a price ranging from $70 to $75 a bottle. He was not surprised to hear that at some places it was sold for $85 a bottle.

There were two witnesses for the defence, Mr Nkomo, who had been one of the officials who had seized the whisky on 18 September 1984, and Mr Bosha, who had seized the whisky on 14 November 1984. Mr Nkomo said that when they asked the plaintiff about the 7 cases of whisky he said that he had bought them from a local firm and produced some invoices. The officials did not accept that the invoices related to the cases in question because the invoices were dated 1983 and a Christmas period had intervened and furthermore there was no indication on the cases that the whisky had come from the firm which had issued the invoices and neither did the cases have the firm's stamp. In his experience most consignments of liquor from the firm concerned were packed in that firm's boxes and were stamped with its stamp. All the bottles were in their original cases. Mr Bosha said that in the case of the whisky seized on 14 November, some bottles were in their original cases and some bottles were loose. The manufacturer's label had been removed from some of the cases. The officials were not satisfied that the whisky had been lawfully imported because the plaintiff had not been able to produce any customs clearance papers. He had said that he had obtained the whisky from a number of people over a period of time and did not have any customs clearance papers. In cross examination he said that he would not be surprised to find that the labels on cases of whisky sold at a customs rummage sale had been defaced.

The relevant provisions of Chapter 177 are as follows. Section 176 deals with the procedure as to seizure and forfeiture. Subsections (1) to (8) deal with the seizure of goods and then subs (9) and (10) provide as follows:

> "(9) Subject to the provisions of section *one hundred and seventy-eight*, the person from whom the articles have been seized or the owner thereof may institute proceedings, for -

SMITH J

(a) the recovery of any articles which have not been released from seizure by the

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Director in terms of paragraph (a) of subsection (6); or

(b) ...

within three months of the notice being given or published in terms of subsection (8).

(10)If proceedings are not instituted in terms of subsection (9), any articles declared to be forfeited shall without compensation vest in the President and may, by direction of the Director, be sold or destroyed or appropriated to the State."

Section 178, which provides for notice of any action to be given to an officer , reads as follows:

"(1) No writ or summons shall be issued against nor a copy of any process served upon the Director or any officer for anything done by him under this Act or any other law relating to customs or excise until one month after notice in writing has been delivered to him...

(2) In the notice shall be clearly and explicitly contained the cause of the action, ...

(3) No evidence shall be adduced at the trial of the action by the plaintiff except as to causes thereof stated in the notice, and judgment shall not be given for the plaintiff unless he proves that the notice was given. In default of proof of notice by the plaintiff, the defendant shall be entitled in such action to judgment in his favour and costs.

(4) Every such action shall, subject to the provisions of subsection (9) of section *one hundred and seventy-six*, be brought within three months after the cause thereof arose, ..."

(The three-month period specified in s 176(9) and s 178(4) has been extended to eight months and the one-month period specified in s 178(1) has been extended to 60 days - see s 7 of Act No. 3 of 1990 - but those amendments do not apply to this case - see s 9 of Act No. 3 of 1990.)

In *Patel v Contr of C & E* 1982 (2) ZLR 82 (H) the court dealt with a special plea of prescription in an action brought by a person from whom goods had been seized in terms of Chapter 177. As is succinctly stated in the headnote to that case, GUBBAY J, as he then was, held that the plaintiff's cause of action arose when the goods were seized. Forfeiture was a different procedure; at the moment of forfeiture ownership of the goods vested in the President and the period of prescription allowed to an affected person could not be reconciled with

such immediate vesting. An analysis of the relevant provisions of Chapter 177 showed that a clear distinction was made between seizure and a declaration of forfeiture.

Mr *Gillespie* argued that that case was wrongly decided. He gave an example of one anomaly that could result if that case were followed. If the plaintiff had been prosecuted for an offence in terms of Chapter 177 and had proved that he had acquired the whisky after importation for its true value and was unaware at the time of the acquisition that it had been smuggled into the country the court could not declare the whisky to be forfeited because s 190(3)(b) specifically so provides. However the Director could thereafter declare the whisky to be forfeited and his decision would not be open to challenge. Mr *Gillespie* also criticised the conclusion in *Patel's*

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case, *supra*, at p 86 that the cause of action arises with the first material fact which has to be proved to entitle the aggrieved party to succeed. He referred to *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) where at p 838 Corbett JA quoted with approval from *Abrahamse & Sons v SA Railways & Harbours* 1933 CPD 626 where WATERMEYER J said at p 637:

> "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 fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. 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."

In *Evins'* case the learned judge then proceeded to demonstrate how two causes of action could flow from an accident where a person was seriously injured and then died some time later. Proof of bodily injury would be basic to a claim for damages for bodily injury, whereas proof of the death of the breadwinner would be basic to a claim for loss of support. In the first case the cause of action would arise on the date of the injury, whereas in the second it would arise on the date of the death of the injured person, not on the date of the injury. With all due respect, it appears to me that a cause of action would "arise" or "accrue" on the occurrence of the last of the facts which are material to be proved to entitle a plaintiff to succeed in his claim, and not the first.

In this case it is not necessary for me to decide whether or not the plaintiff has a separate cause of action in respect of the forfeiture of his whisky, because of his failure to comply with the requirements of s 178 of Chapter 177. In terms

SMITH J

of subs (1) and (2) thereof the plaintiff was required to give at least one month's notice in writing of his intention to issue summons or process and that notice must contain, clearly and explicitly, the cause of the action. The only notice given by the plaintiff was his letter dated 15 October 1984 in which he referred to the seizure of the 7 cases of whisky on 18 September, asked what was going on and said that failure to let him know would leave him no alternative but to take the respondent to court. Could it be said that the plaintiff's cause of action is clearly and explicitly contained in that letter? In determining this question, I will follow the lead of Beck J (as he then was) in *Contr of Customs v Guiffre* 1971 (2) SA 81 (R) and bear in mind that the approach to be adopted should be that which was described by Malan JA, dealing with a similarly worded provision, in *Administrator, Transvaal v Husband* 1959 (1) SA 392 (A) at p 394 C-D in the following terms :

> "The approach to the interpretation of the sub-section ought, consequently, not to be technical and a notice should be held not to be a compliance with the sub-section only if it fails to set out a cause of action or if it is so wanting in particularity that it is deficient in essentials and, as a consequence, hampers the Administration in a proper investigation of the complaint. While it may be desirable to have a more or less full statement of the facts relied upon, a bald statement of the essentials, in my opinion, suffices provided, however, that there has been substantial compliance with the requirements of the sub-section."

Adopting the above approach, it could be construed that the plaintiff was alleging that he had lawfully purchased the whisky and that the seizure was therefore unlawful. However, that letter

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referred only to the whisky that was seized on 18 September. No letter was written about the whisky that was seized on 14 November. Since, in terms of subs (3) of s 178, no evidence may be adduced at the trial of an action except as to causes thereof stated in the notice it must follow that no evidence may be adduced as to the whisky that was seized on 14 November. Furthermore, judgment shall not be given in respect thereof for the plaintiff unless he proves that the notice was given.

With regard to the whisky that was seized on 18 September, the notice given in terms of s 178 gave, as the cause of action, the unlawful seizure of the whisky. In terms of subs (9) of s 176 of Chapter 177, the plaintiff could institute proceedings for the recovery of the whisky within three months of the notice of seizure that was given to him. He failed to do so and therefore it must follow that his cause of action based on unlawful seizure has prescribed.

SMITH J

Mr *Gillespie* submitted that despite the decision in *Patel's* case *, supra*, the plaintiff has a separate cause of action in relation to the forfeiture, as opposed to the seizure, of the whisky. To my mind, justice and equity demand that his submission be supported. In a case like this it could well be that the seizure of the goods was justified, in that the owner could not prove the lawful importation of the goods. However, once he had proved lawful acquisition and proper clearance of the goods, then he should be able to bring an action for the recovery of the goods. It seems to me that it would be quite wrong to hold that because he had not brought an action for the recovery of the goods within the three-month period he could not challenge a decision to order the forfeiture, which was taken some two years later. If the Legislature intended to deprive an aggrieved person of his right to challenge an order of forfeiture it should do so clearly and unambiguously.

In this case, even if it were to be assumed, without deciding the point, that the plaintiff had a separate cause of action flowing from the forfeiture of the goods, he is debarred from bringing this action because he has failed to comply with the requirements of s 178 of Chapter 177. In the letter from his legal practitioners dated 16 July it was specifically stated that notice was being given in terms of s 178(2) of Chapter 177 that the cause of action was the wrongful confiscation of the whisky and that it was their view that "the date of confiscation must be taken as the date on which our client was verbally advised by your Mr Noble of the said confiscation". That date was, according to the letter, 11 July. I presume that the point the legal practitioners were making was that the forfeiture, which was when the cause of action arose, must be regarded as having occurred when the plaintiff was advised by Mr *Noble* that the whisky had been confiscated and not when the actual decision to confiscate was taken, which may have been a few days earlier. If one assumes that 11 July was the date of forfeiture and therefore when the cause of action arose, then in terms of subs (4) of s 178 the action, of which notice was duly given, had to be brought within three months. It was brought on 5 November which was some three weeks after the end of the three-month period. Mr *Gillespie* tried valiantly to persuade me that the forfeiture must be regarded as having taken place on 6 August, which was the date the plaintiff's legal practitioners received the letter dated 1 August 1986 from the respondent advising that the whisky had been declared forfeit. I was not convinced. There is

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nothing in Chapter 177 which requires that a declaration of forfeiture must be in writing. After the decision to declare the goods forfeit was made, the plaintiff was advised thereof. I can see no justification for holding that the verbal notice was inadequate and of no force or effect. It did have the effect of giving notice to the plaintiff that his whisky had been forfeited to the State.

SMITH J

For the reasons set out by Gubbay J in *Patel's* case, *supra*, the relevant provisions of Chapter 177 could be construed as providing that a person whose goods have been declared forfeited has no separate cause of action. He must institute proceedings within the prescribed period after the seizure of the goods it used to be three months but is now eight months. As this case has shown, if criminal proceedings are contemplated it could take some years before the accused is actually brought to trial or the charges are withdrawn. I would strongly recommend that consideration be given to amending Chapter 177 so as to make it clear that an order of forfeiture gives rise to a separate cause of action and to provide for notice of forfeiture to be given just as notice of seizure is given. It could well be that in some cases the one notice could cover both seizure and forfeiture. Provision could also be made for preventing an aggrieved person having two bites at the cherry as pointed out in *Patel's* case, *supra*.

With regard to costs, Mr *Gillespie* submitted that the plaintiff should be awarded his costs up to the commencement of the trial because it was only at that stage that the defendant amended its plea so as to claim that the plaintiff was barred in terms of s 178(4) as read with s 176(a) of Chapter 177 from continuing the action. I do not accept his submissions. Even if I were inclined to accept them, s 178(4) of Chapter 177 provides that if judgment is given against the plaintiff the defendant shall receive as costs full indemnity for all expenses incurred by him.

The application is dismissed with costs as required by subs (4) of s 178 of Chapter 177.

Winterton Holmes & Hill, plaintiff's legal practitioners

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

ZIMBABWE AMALGAMATED RAILWAYMEN'S UNION v NATIONAL RAILWAYS OF ZIMBABWE 1992 (1) ZLR 37 (HC)

Court **High Court, Bulawayo**

Blackie J

Civil petition

22 & 24 January 1992

Flynote

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Employment - Labour Relations Act 1985 - order to terminate strike and return to work - dismissal of workers

Headnote

When an order is issued by a labour relations officer in terms of the Labour Relations Act requiring striking workers to terminate a strike and return to work before a specified time and date, in terms of s 21(2) of the Labour Relations (General) Regulations 1985 the order must be served on the parties by hand or by post. As important rights pertaining to employment and the control of industrial action are involved, there should be strict compliance with the prescribed manner of service of orders requiring the ending of the industrial action.

As the striking workers had only been served with the order in the prescribed manner after the time specified for ending the strike had already passed and as the striking workers were thus not given the chance to exercise the option of returning to work before the deadline had expired, the order was illegal and the sacking of the workers based on this order was invalid.

D M Campbell for the petitioner

H I Bisset for the respondent

Judgment

Blackie J: The petitioner is the trade union certified in terms of the Labour Relations Act, No. 16 of 1985 (the Act), to represent the interests of employees, other than managerial employees, in the service of the respondent.

1992 (1) ZLR p38

BLACKIE J

On 14 January 1992, some of the employees of the respondent went on strike in protest against a decision by the respondent to award a special skills allowance to certain other employees of the respondent.

As a result of this strike, an order was issued against petitioner in terms of s 122 of the Act to show cause why a disposal order in terms of s 123 of the Act should not be made in relation to the strike. The show cause order was issued under the signature of a senior labour relations officer. Section 122(1) requires such an order to be issued by the Minister of Labour, Manpower Planning and Social Welfare. I am assured by counsel for the respondent that the issue of the show cause order was authorised by the Minister of Labour, Manpower Planning and Social Welfare. No point is taken on this issue by the petitioner and this judgment proceeds on the basis that the show cause order was duly authorised by the Minister.

The show cause order called on the petitioner and the respondent to appear before a nominated labour relations officer in Bulawayo on 16 January 1992 at 2 pm. It also directed "that the collective job action ... be terminated by 1 pm Thursday 16th January 1992."

The parties duly appeared at the time and place set out in the show cause order and argued their cases. The matter was adjourned to enable the presiding officer to make his decision. At approximately noon on 17 January, the presiding officer reached his decision. The presiding

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officer told his superior in the office of his decision and that his order included a directive that any employee of the respondent who did not return to work by 2 pm on that day would be liable to immediate dismissal.

Shortly after this discussion between the presiding officer and his superior, the General Secretary of the petitioner telephoned that superior to discuss another matter related to the strike. In the course of that conversation, the presiding officer's superior told the petitioner's General Secretary that the presiding officer had made his order and "any strikers who failed to return to work by 2 pm that day, 17 January, would be immediately dismissed." He also said that he "would serve the order on the petitioner later that day". The order was served on the petitioner by hand at approximately 3 pm on the afternoon of 17 January.

Most, if not all, of the striking workers did not return to work by the time fixed in the presiding officer's order. After that time had expired, the respondent's General Manager arranged for a letter to be addressed to each of the strikers who failed to return to work. In that letter it was said:

BLACKIE J

"1. It has been brought to my attention that you have been engaged in an unlawful collective job action from the 14th January 1992 to the 17th January 1992. Furthermore you have failed to obey a lawful instruction to return to work following the issuing of show cause orders and the General Manager's appeal to you to resume work. Your actions were very irresponsible and costly to the railways, in that they disrupted normal train operations, and constituted serious misconduct, which the administration cannot condone.

2. In view of the foregoing, I have decided in accordance with a disposal order issued by the Ministry of Labour Manpower Planning and Social Welfare to terminate your services with effect from 17th January 1992."

It is obvious from the terms of that letter that the cause of the dismissal of each of those who was dismissed was their failure to return to work by 2 pm on 17 January after having been directed to do so in the presiding officer's order.

The point at issue in this application is the validity of those dismissals in the light of the fact that the order was not formally served on the petitioner until after the expiry of the time by which the employees were to return to work.

It is the respondent's contention that the contents of the order were communicated to the petitioner at approximately 12 noon on 17 January in the telephone conversation between the presiding officer's superior and the General Secretary to the petitioner. This, it is submitted, constitutes adequate communication of contents of the order and, if the petitioner's members did not abide by its directives, they were subject to its penalties.

I cannot accept that the telephone conversation between the presiding officer's superior and the petitioner's General Secretary amounted to proper or adequate notice of the presiding

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officer's order. Section 21(2) of the Labour Relations (General) Regulations 1985 SI 368/1985 (the Regulations) requires an order issued in terms of s 123 of the Act be served on the parties by hand or by post. No reasons have been given in these proceedings to suggest why that procedure could not be complied with or that it is either possible or desirable to dispense with compliance with s 21(2) of the Regulations. Both the parties concerned were in Bulawayo; they were in close touch with each other. There is absolutely no reason that I can discover why the proper procedure should not have been followed. Further there is no provision in the Act or Regulations which gives either the presiding officer or this court the power to dispense with service of the

BLACKIE J

order in terms of the regulations. Even if I had such power, I would, in this case, have declined to exercise it.

Important rights such as the right to employment, the right to dismiss, the right to control unlawful industrial action are involved in this case. I do not think that these should be subject to service of orders by remarks made in a telephone conversation on another matter by someone other than the presiding officer. It makes no difference that the person communicating the information is the superior of the presiding officer.

The presiding officer, in his order, gave the strikers the option to return to work before they were to be dismissed. They were entitled to be properly notified of that option and of the penalty attaching to their failure to return to work. In my view they were not so notified in this case and I consider that their dismissal is therefore unlawful and should be set aside.

The petitioner has been successful in the relief sought by it. However, it is clear from the papers that the respondent's General Manager ordered the issue of letters of dismissal to the strikers on the bona fide and not unreasonable belief that the presiding officer's order had been duly served on the petitioner. If there is any fault in this case it lies with the relevant employees in the Ministry of Labour, Social Welfare and Manpower Planning in failing to ensure that the presiding officer's decision was properly and timeously served on the petitioner. Neither the Ministry nor those officials are parties to these proceedings and so no order for costs (if such order is appropriate) can be made against them. The petitioner does not wish to pursue any claim for costs against the respondent and it seems to me that the most appropriate order is that there should be no order as to costs.

In the result I make the following order:

1. That the dismissal of employees of the National Railways of Zimbabwe pursuant to the Disposal Order issued by the Senior Labour Relations Officer on the 17th January 1992 be and is hereby declared to be null and void.

2. That there shall be no order as to costs.

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

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Webb, Low & Barry, respondent's legal practitioners

S v ZIMBOWORA 1992 (1) ZLR 41 (SC)

Court **Supreme Court, Harare**

Ebrahim JA (in Chambers, in terms of s 9A of the Supreme Court of Zimbabwe Act, 1981)

Criminal appeal

27 January 1992

Flynote

Evidence - witness - single witness - need for caution and corroboration.

Headnote

The appellant had been convicted of three counts of contravening the Labour Relations Act, 1985. The State case had rested entirely on the evidence of the complainant.

On appeal, the Supreme Court said that although the trial court was entitled to convict the appellant on the single evidence of the complainant, it was necessary for such evidence to be clear and satisfactory in every material respect. As the complainant was a witness with an interest to serve, the trial court was not only required to approach her evidence with caution but should also have sought corroboration of her evidence.

The conviction was set aside by the Supreme Court as the complainant's evidence was not satisfactory in all material respects and no evidence was led to corroborate her assertions.

Cases cited:

R v Mokoena 1932 OPD 79

R v Ellis 1961 R & N 468 (FS)

S v Bvundura S-125-82 (unreported)

S v Murenda S-86-84 (unreported)

S v Jabangwa S-25-89 (unreported)

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

S v Shako S-88-90 (unreported)

S v Mpofu S-161-90 (unreported)

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EBRAHIM JA

S v Gwanzura S-44-91 (unreported)

S v Nhemachena S-89-86 (unreported)

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

S v Wheeler & Anor S-162-87 (unreported)

S v Shoniwa 1990 (1) ZLR 311 (S)

Judgment

Ebrahim JA: In this matter the Attorney-General has filed a notice conceding that the convictions could not be supported. As the concession was proper, the case was withdrawn from the roll to be dealt with in Chambers. I shall now set out the reasons why the appeal must succeed.

The appellant was charged in the magistrate's court with three counts relating to contraventions under the Labour Relations Act, No. 16 of 1985. It was alleged in respect of the first count that he failed to pay the complainant her minimum wage for her employment from March 1988 to February 1990. In respect of the second count he was said to have failed to pay her for overtime worked. And finally, in respect of the third count, the allegation was that he did not pay her the leave pay she had accrued whilst she was in his employ.

The trial magistrate took all counts as one for sentence and imposed a fine of $1 000 or, in default of payment, ten months' imprisonment with labour. He also ordered the appellant to pay the complainant the sum of $10 362,24 to recompense the shortfall of the amount apparently due to the complainant.

The State case was based entirely on the evidence of the complainant and the defence case on the evidence of the appellant. The court *a quo* was entitled to convict the appellant on the single evidence of the complainant but it was necessary for such evidence to be clear and satisfactory in every material respect. See *R v Makoena* 1932 OPD 79 at 80; *R v Ellis* 1961 R & N 468 (FS); *S v Bvundura* S-125-82; *S v Murenda* S-86-84; *S v Jabangwa* S-25-89; *S v Corbett* 1990 (1) ZLR 205 (S); *S v Shako* S-88-90; *S v Mpofu* S-161-90; and *S v Gwanzura* S-44-91.

The complainant, however, was a witness with an interest to serve and therefore the learned trial magistrate was not only required to approach her evidence with caution but should have sought corroboration of her evidence. See *S v Nhemachena* S-89-86; *S v Mupfudza* 1982 (1) ZLR 271 (S) at 273; *S v Wheeler & Anor* S-162-87; and *S v Shoniwa* 1990 (1) ZLR 311 (S) 314.

An examination of the record in the present case reveals that the only evidence for the State was that of the complainant. No evidence was led to corroborate

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her assertions. Her evidence, in my view, is not satisfactory in all material respects. The complainant admitted that she began working in 1988 for the appellant and did so on a "commission" basis. She said she did not understand that this related to profits in the business. It was always the appellant's contention that the complainant was never at any stage employed by him but that they had formed a loose partnership, as a result of which she would receive payment in the form of a commission flowing from sales achieved by her. There is, therefore, merit in Mr *Dyke's* contention that the complainant's concession that she received payment by way of a commission from the appellant is more consistent with the appellant's version of events rather than that of the complainant's.

The complainant also stated that her wages fluctuated rather than remained constant, as would be expected in an employer-employee relationship. This concession is more in line with the appellant's version that the arrangement was one of a profit-sharing partnership in which drawings would relate directly to income generated.

A further unsatisfactory feature of the complainant's evidence was the fact that she failed to complain to the appropriate authorities that she was not receiving her correct wages until almost two years had elapsed. She was not able to provide a sensible explanation for her lapse in this regard.

It seems to me that the evidence adduced on behalf of the State was insufficient to discharge the onus upon it, particularly in view of its reliance on the evidence of a single witness, which witness did not satisfy the tests enunciated in the authorities I have outlined above.

In the result, I agree with the concession made by the Attorney-General and accordingly set aside the conviction and sentence.

My brother McNALLY JA agrees with this judgment.

IN RE MUSKWE 1992 (1) ZLR 44 (HC)

Court **High Court, Harare**

Adam J

Criminal review

29 January 1992

Flynote

Criminal law - contempt of court - intention to bring court into disrepute required

Criminal procedure - contempt of court - when summary procedure inappropriate

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Constitution - s 18(2) - right to fair hearing - whether breached when contempt dealt with summarily

Courts - contempt of court - dangers involved in dealing with contempt summarily

Headnote

There is a great danger in using the summary procedure provided by s 79(1) of the Magistrates Court Act [*Chapter 18*], as the magistrate is witness, prosecutor and judge, and it is wiser for the magistrate not to deal with the case himself.

The court should only use the summary procedure to deal with contempt if this is necessary to protect the reputation or authority of the court. Where there is disorder in the court the court should normally rather use its other powers to forcibly remove an offender from the court and detain him, without punishing him immediately for contempt. The normal procedure for contempt of court is to refer the matter to the Attorney-General to decide whether to prosecute by indictment, or to direct the offender to appear in court at a specified time to show cause why he should not be cited for contempt.

Where the summary procedure is utilized, the offender should still generally be made aware of the complaint and be given the opportunity to defend

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himself or be given time to take independent advice and make an apology. There is no absolute rule at common law requiring that the offender be heard before a summary punishment was imposed. It depends on the preceding events, the nature of the contempt itself, and the offender's knowledge of court procedure. However, the courts have recognised that their power to punish contempt summarily must be exercised with the greatest caution.

The courts are also obliged to ensure that the procedure adopted does not violate the offender's constitutional rights, in terms of s 18(2) of the Zimbabwe Constitution, to receive a fair hearing from an independent and impartial court when on trial for a criminal offence.

An essential element of contempt under s 79(1) is an intention to bring the court into disrepute. If intention is inferred from the accused's actions, the inference must be the only reasonable inference which can be drawn.

The contempt shown can be purged by an apology unless it can be shown it was not sincere. The review court set aside the conviction. It held that it had been inappropriate for the magistrate to have dealt with the case herself. She had also failed to give adequate reasons for her decision and had failed to examine whether intention was present and whether, if there had been contempt, it had been purged by the subsequent apology from the legal practitioner.

Cases cited:

R v Almon (1765) 97 ER 94

R v Kaplan (1893) 10 SC 259

A-G v Crockett 1911 TPD 893

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R v Mtengudi 1936 SR 78

R v Silber 1952 (2) SA 475 (A)

Duffey v Munnik & Anor 1957 (4) SA 390 (T)

R v Hawkey 1960 (1) SA 70 (SR)

S v van Niekerk 1970 (3) SA 655 (T)

S v Nel 1991 (1) SA 730 (A)

R v Moran (1985) 81 Cr App R 51

R v Cohn (1985) 15 CCC (3d) 150

R v Martin (1985) 19 CCC (3d) 248

S v Sigwahla 1967 (4) SA 566 (A)

[Editor's note: The first portion of this judgment sets out the facts of the case as contained in the trial record. In summary the facts were these:

A magistrate at the resumed hearing of a criminal case in which a legal practitioner was representing the accused, fined the legal practitioner for

ADAM J

committing a contempt of court in contravention of s 79(1) of the Magistrates Court Act. At a previous hearing there had been an altercation between the magistrate and the legal practitioner over the legal practitioner's line of questioning of a witness. The legal practitioner had told the magistrate that if he was not allowed to conduct the questioning as he saw fit, he would not be able to continue with the case. After an exchange between the magistrate and the legal practitioner in which the magistrate seemingly gave permission for the legal practitioner to renounce his agency and depart, the legal practitioner left the court room. When the legal practitioner realised that the magistrate had been offended by his conduct, he had apologised to her.

The magistrate decided that he was guilty of contempt in that he had done an act calculated to bring the dignity of the court into disrepute.

The judge then went on to deal with the law as follows:]

Judgment

Adam J: Now s 79(1) of the Magistrates Court Act provides that if anyone wilfully insults the magistrate sitting in court or wilfully interrupts the proceedings or otherwise misbehaves in court, or being a witness refuses to answer any question, the magistrate can order that the offender be detained in custody until the rising of the court and the magistrate may issue a

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warrant committing him to prison for a period not exceeding 7 days or may impose a fine not exceeding $200 and in default of payment to a period not exceeding 6 months imprisonment and where the magistrate fines or commits the offender he shall without delay transmit to this court for consideration by a judge in chambers a statement certified by the magistrate to be true and correct grounds and reasons for his actions and also furnish a copy to the offender.

In England, since *R v Almon* (1765) 97 ER 94 three procedures were available to prosecute the offence of criminal contempt - the summary process; criminal information and indictment. In *R v Kaplan* (1893) 10 SC 259 at 263 DE VILLIERS CJ said:

> "The offence of defeating the course of justice may be committed in many different ways. Where it amounts to contempt of court, the court which is thus brought into contempt may, if it be a Court of Record, summarily punish the offender without the intervention of a jury, as was decided by the Privy Council in McDermott's Case (2 LR : PC 341), which was an appeal from British Guiana, where the Roman-Dutch law prevails. But the offence is nevertheless a 'criminal offence' as was expressly laid down by the Privy Council in In *re Pollard* (2 LR : PC 106) ... My own personal view has

> always been that, except where immediate punishment is necessary for the maintenance of the authority of the court, it is a wiser course for the court not to take into its own hands the summary punishment of offenders whose contempt is of such a nature as to render them liable to an indictment."

Also, in *Attorney-General v Crockett* 1911 TPD 893 at 900 DE VILLIERS JP stated:

> "Generally speaking contempt of court is a criminal offence according to Roman-Dutch law (*R v Kaplan* 10 SC 263, *S v Dormer* 4 SAR 64 and authorities cited there and In re Glasson 1911 CPD 579). The principle on which the Dutch courts punished for contempt of court was that it was in the interests of the State to keep the administration of justice untainted and to quash any attempt to defeat and obstruct the due course of justice (*R v Foye* & Carlin 2 Buch AC 125)."

While WESSELS JA said at 915:

> "It is clear from what has been said that contempt of court is an offence. It is both according to Roman-Dutch law and according to English law. The jurisdiction of the court to try an accused at all for a contempt of court is founded on the fact that by the Roman-Dutch law such contempt is an offence..."

This court in *R v Mtegudi* 1936 SR 78 held that a similar provision to s 79(1) of the Act contemplated persons to be tried summarily in whose presence the contempt was alleged to have been committed.

While in *R v Silber* 1952 (2) SA 475 (A) SCHREINER JA at 480G-H stated:

> "The power to commit summarily for contempt *in facie curiae* is essential to the proper administration of justice ... But it is important that the power should be used with caution for, although in exercising it the judicial officer is protecting his office, rather than himself, the facts that he is personally involved and that the party affected is given less than the usual opportunity of defending himself make it necessary to restrict the summary procedure to cases where the due administration of justice clearly requires it. There are many forms of contempt *in facie curiae* which require prompt and drastic action to preserve the court's dignity and the due carrying out of its functions."

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ADAM J

In *Duffey v Munnik & Anor* 1957 (4) SA 390 (T) RAMSBOTTOM J observed at 391, 394:

> "It will be observed that the magistrate is given power to act summarily. He is entitled to maintain order and to secure the dignity of his court by imposing a fine summarily then and there ... In such a case he acts upon his own observation. He is, as has been said, witness, prosecutor and Judge . The power to act summarily in that way is conferred upon him, but that is not the only way in which the decorum of the proceedings in the magistrate's court can be maintained. The alternative procedure ... the more normal procedure where a person is charged with contempt of court, and a summons may be issued in which the charge is formulated upon which the person charged is tried in the magistrate's court in the ordinary way ...
>
> It is quite clear that the magistrate found Mr Duffey's conduct amounted to contempt of court, in that he was under the influence of liquor in the court. The further finding, 'and for his conduct in court', seems to be ancillary to the finding of intoxication. It looks as if the magistrate regarded that conduct as flowing from, or arising out of, intoxication ... It had never been suggested to Mr Duffey that he was under the influence of liquor and unfit to proceed with the trial. He was apparently stopped in his cross-examination and informed that the court was imposing upon him a fine of £10... It is clear that he had not been asked any question in that regard and that he was given no opportunity at all of making an explanation or otherwise defending himself ... The magistrate observing him, observing his behaviour, drew the inference that he was intoxicated. That inference may have been right; I do not know. There was evidence from which he could draw that conclusion, but the trouble is that the person found guilty was never informed in any way that the magistrate considered him to be under the influence of liquor ... he was given no opportunity of making an explanation or otherwise defending himself .. In the ordinary case where there is insolence to the magistrate or disobedience to a court's ruling the incident happens then and there; the person punished knows what he has done, and he is punished for an act of which he is fully aware ... It is essential that all judicial officers, whether magistrates or Judges, should have power to maintain order in their own courts. A magistrate has the power not only to commit for contempt but to remove or cause the forcible removal and detention of a person who is causing a disturbance in his court. The fact that he has the latter power may in a proper case move him to refrain from acting summarily ... The fact that he has that power enables him to maintain order, where there is disorder, by causing the removal of the offender without fining for contempt."

ADAM J

In *R v Hawkey* 1960 (1) SA 70 at 71 this court adopted the views of RAMSBOTTOM J and BEADLE ACJ at 71G-H said:

> "There is no doubt that the court in a proper case, when an obvious act of contempt is committed in its presence, may summarily fine and punish the offender without conducting, as it were, a minor trial to satisfy itself that there was a contempt of court. But there are cases where the action of the person concerned may not be so unequivocal as to justify the assumption that the person undoubtedly intended to be contemptuous; and in such cases the *audi alteram partem* rule should be observed; and, before the court summarily convicts the person of contempt of court, that person should be given some opportunity of making an explanation and of apologising. It does not necessarily follow that the court would accept that explanation or accept the apology ... But in cases when it cannot be said with certainty that the person concerned had been openly contumacious, he ought to be given some opportunity of making an explanation before being summarily punished."

Further, in *S v van Niekerk* 1970 (3) SA 655 (T) at 657F-G CLAASSEN J stated:

> "I think that before conviction can result the act complained of must be not only be wilful and calculated to bring into contempt but must also be made with the intention of bringing Judges in their judicial capacity into contempt or casting suspicion on the administration of justice. For this type of intention it is sufficient if the accused subjectively foresaw the possibility of his act being in contempt of court and he was reckless as to the result. This form of intention is known as *dolus eventualis*."

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Recently, in *S v Nel* 1991 (1) SA 730 (A), where the appellant during motion proceedings had been convicted of two counts of contempt of court, in that he at various times insulted the presiding judge, the Appellate Division held although the appellant was a layman it was clear that not only did he have the intention to insult the judge but was also fully aware that he was thereby committing contempt of court. The headnote reads as follows:

> "A presiding judge or magistrate who is of the opinion that someone has acted in contempt of court should first consider whether it is necessary and desirable for him to take action. Very often conduct which strictly speaking constitutes contempt of court can quite fittingly merely be ignored without really impairing the dignity or the authority of the court or the orderly conduct of the proceedings Too liberal a use of the court's powers to punish

ADAM J

> persons for contempt can undermine the very reason for the existence of such power. If a judge or magistrate decides that the relevant contemptuous conduct is not of such a nature that it can merely be overlooked, there are two avenues open to him. He can refer the matter to the Attorney-General to decide whether the person concerned should be prosecuted in the ordinary course. That will be the obvious choice if it is not necessary to act more speedily against the person concerned in protection of the reputation or the authority of the court or the maintenance of orderliness of the proceedings. On the other hand, if there is such a need the judge or magistrate should there and then attend to it. If he decides to do this he then acts 'summarily', in the wide sense of the word, against the person concerned, ie in contrast with the ordinary process of law applicable in criminal proceedings. But in such a case he will generally still not act 'summarily' against the person in the narrow sense of the word, ie by finding him guilty of contempt without first giving him the opportunity of being heard. The idea of finding someone guilty of a criminal offence without being given an opportunity of making representations in regard thereto is such a drastic deviation from the most fundamental principles of our legal system that it cannot be permitted other than on the most exceptional circumstances. Although there is no inflexible rule that a person must first be heard before he can validly be found guilty of contempt it is a salutary point of departure that he be given an opportunity of addressing the court before he be found guilty. Whether a conviction has been validly entered without a prior opportunity of representations having been given depends on the particular circumstances of each case. What will be looked at *inter alia* is the run-up to the conduct which is contemptuous and the nature of the contempt itself, and in addition thereto it is of importance whether the person is a legal practitioner or a layman and in the latter case what his knowledge and experience of court procedure is.
>
> Contempt which is committed *in facie curiae* is a unique offence; it is a distinct procedure whereby the offender can there and then be found guilty and sentenced, and the sentence which is imposed also has unique characteristics. Someone who commits contempt *in facie curiae* is not an ordinary criminal in the everyday meaning of the word and he ought not to be treated as such. The reason for the existence of the summary procedure (in the wide sense) in terms of which the offence can immediately be dealt with is the necessity that a court, as the axis on which the administration of justice turns, must be in a position to protect its reputation and

ADAM J

> the dignity and to ensure the orderly conduct of its proceedings. The primary objective of the application of the contempt procedure is to maintain the reputation and the dignity of the court and the orderliness of its proceedings. It is to achieve that objective that the court exercises its power to punish the offender. The most important function of the imposition of punishment in this case is to enforce the court's authority. There is no room whatsoever for any notion of retribution. There can also be limited scope for reformation: for the most part (leaving aside exceptional cases) the purpose of punishment which is imposed is to bring the offender to his senses in the very proceedings in which the offence is committed. Deterrence is by the same token often and chiefly directed at getting the offender to refrain from continuing with his contemptuous conduct in the proceedings which are underway. The punishment is not meant to hurt the offender but to bring about an end to the outrage to

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the court's esteem and authority. The extent of the punishment stays in the background; in the foreground is the esteem and authority of the court; and in between the one and the other there is no direct relationship. The authority of the court is too precious to attempt to measure it against any punishment which may be imposed for conduct which harms it. Esteem for the court cannot be achieved by heavier punishments for insults to the court. These considerations indicate why a heavy sentence in these sort of cases is generally inappropriate in the ordinary course of events. This probably explains why our lower courts were in the past moderate in the punishment which they imposed for contempt *in facie curiae*, as appears from the reported cases. This is a salutary practice which deserves encouragement and no good reason exists why the same approach should not be applied in the Supreme Court."

Further, in *R v Moran* (1985) 81 Cr App R 51 at 53 LAWTON LJ said:

"The following principles should be borne in mind. First, a decision to imprison the man for contempt of court should never be taken too quickly. The judge should give himself time for reflection as to what is the best course to take. Secondly, he should consider whether that time for reflection should not extend to a different day because overnight thoughts are better than thoughts on the spur of the moment. Thirdly, the judge should consider whether the seeming contemnor should have some advice ...Justice does not require a contemnor in the face of the court to have a right to legal advice. But if the circumstances are such that it is possible for the contemnor to have advice, he should be given an opportunity of having it. In practice what usually happens is that somebody gives the contemnor advice. He takes it, apologises to the court and that is the end of the matter. Giving a contemnor an opportunity to apologise is one of the most important aspects of this summary procedure, which is in many ways

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Draconian. If there is a member of the Bar in court who could give advice, a wise judge would ask that member of the Bar if he would be willing to do so."

In addition the constitutional right to be tried by an independent and impartial tribunal under the Canadian Charter of Rights and Freedoms has been raised in a number of cases. In *R v Cohn* (1985) 15 CCC (3d) 150 the Ontario Court of Appeal held that the offence of contempt in the face of the court, such as the refusal of a witness to testify, did not violate the principles of fundamental justice, nor the right against self-incrimination, nor the right to a fair trial and presumption of innocence found in the Canadian Charter of Rights and Freedoms. GOODMAN JA observed at 157-162, and 164-68:

"With respect to contempt committed in the face of the court, case-law indicates that there are three methods for the initiation of summary proceedings:

(1) orally citing for contempt and dealing with the matter at once or after allowing the alleged contemnor a short period to obtain counsel;

(2) orally directing the alleged contemnor to appear in court at a specified time to show cause why he should not be cited for contempt ...or

(3) sending a letter to the alleged contemnor directing him to appear in court to answer the charge ...

It is clear that the courts, in exercising their inherent jurisdiction to punish criminal contempt by summary process of committal have recognised the arbitrary and unlimited power historically associated therewith and their obligation to exercise it with the greatest of caution ...

With respect to the second argument, this court has stated in *R v Trayner* ...

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> 'At the moment of being cited for contempt the appellant was presumed to be innocent. Moreover, the appellant was not represented by counsel ...the appellant should have been advised by the court of his right to give evidence under oath, to call witness or to request an adjournment.'

... In so far as the third argument is concerned, it is a fact that the appellant was tried before the very judge before whom the contempt took place. It is clear that the refusal of a witness to be sworn ...or to answer questions at a trial when ordered ...constitutes contempt in the face of the court.

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Where such refusal takes place on the grounds of alleged duress on the part of a third party and the refusal is made to the presiding judge in a polite and respectful manner, it cannot be said that the trial of the contempt proceedings by such judge would reasonably create in the mind of the alleged contemnor an apprehension of bias or lack of impartiality on the part of the judge ...There is no basis for a finding that the presiding judge in the present case was other than independent and impartial ...

In so far as the fourth argument is concerned, it appears to be based on the common practice in contempt cases where the presiding judge cites the alleged contemnor for contempt and requires him to show cause why he should not be convicted for contempt. In cases involving contempt in the face of the court based on a refusal of a witness to be sworn or to give evidence, the judge before whom the contempt took place is, in effect, prosecutor, witness and judge with respect to the contempt offence. The accused is immediately put on his defence. It must be borne in mind, however, that in a case such as this there can be no doubt with respect to the facts which form the basis of the charge and they would in every such case be sufficient to prove the offence beyond a reasonable doubt. It therefore is incumbent upon the alleged offender to adduce some evidence in order to avoid a conviction. It is not a matter of the presumption of innocence not being made inapplicable in contempt proceedings. In a case such a this it is simply a matter that the facts known to the presiding judge which took place in his court and with respect to which there can be no doubt and no better proof adduced are such as to amount to *prima facie* proof unless the alleged contemnor calls evidence or gives evidence which affords him a proper defence ...

At its highest, the application of a rule nisi by the presiding judge merely shifts the burden of adducing evidence as distinct from shifting the burden of persuasion to the accused. This court has already so held in *R v Pereira* ... where MARTIN JA, speaking for the court said:

> 'Summary proceedings for contempt in the face of the court do not infringe the right of an accused to be tried before an impartial tribunal and his right to be presumed innocent. The burden on the accused is an evidential one only and if at the end of the proceedings there exists a reasonable doubt as to guilt, he is entitled to be acquitted.'

... Before leaving ... it should be stated that there are undoubtedly cases where the judge before whom the alleged contempt is committed should not be the judge presiding at the contempt proceedings, for example, where the act complained of consists of insulting or insolent behaviour towards such

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ADAM J

judge. There may be cases where it is necessary for the prosecution to call evidence before there is any necessity for the alleged contemnor to adduce evidence, for example, where the act complained of is not apparent in the record, such as a gesture of a person perceived by the presiding judge as an insulting or insolent gesture towards him. There may be cases where it is imperative that the summary procedure be such that the alleged contemnor be given adequate time to prepare his defence, for example, where it is necessary to call witnesses to prove a particular defence. The failure of the prosecution to pay heed to the rights of the alleged contemnor in such circumstances may result in a denial of natural justice to such person or some other violations of his rights under the Charter. It is not practical nor do I think it appropriate to endeavour in this appeal to catalogue in an exhaustive manner the situations which may result in such violations. Suffice to say it will depend on the

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circumstances of each case. ... It cannot be said that the common law with respect to the offence of contempt of court and the procedure for the prosecution of the offence would be on its face unreasonable when measured against the rights and guarantees in the Charter ... On the contrary ... the common law principles enunciated in the more recent cases in this jurisdiction are consistent with and do not conflict with or infringe upon the rights guaranteed by the Charter. It is, accordingly, the responsibility of the court of first instance to ensure that the procedure adopted in the prosecution of a contempt of court charge complies with such principles and that it does not have the effect of violating the right of an accused under the Charter."

In *R v Martin* (1985)19 CCC (3d) 248, the accused was convicted of fraud (the trial court disbelieving the accused's testimony). During the course of sentence submissions in a screaming outburst the accused said that the trial judge felt good about her child's illness and "it's scandalous"which resulted in her removal and subsequent conviction of contempt of court. The Ontario Court of Appeal held that the contempt proceedings ought not to have been conducted by the same trial judge who had convicted the accused and made adverse findings of credibility since, on common law principles, there arose a reasonable apprehension of bias. Further, the accused's behaviour could be said to be insulting or insolent towards the trial judge and the accused might well have wished to call evidence with respect to the judge's inflection in his tone of voice on making the remarks which sparked the accused's outburst. In the circumstances the accused's constitutional right to be tried by an independent and impartial tribunal under the Canadian Charter of Rights and Freedoms had also been denied. Lacoureche JA said at 251-253:

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"These words were spoken by the appellant in a very loud voice, characterized ... as 'screaming'. The appellant returned to the court the next day and, following the citation for contempt, addressed an apology to the court ... Following that the Crown tendered a transcript of the previous day's outburst and submissions were made without further evidence.

...

At the contempt hearing, following the citation, counsel for the appellant did not request an adjournment of the proceedings nor did he raise any question concerning the independence or impartiality of the presiding judge.

...

In this respect, we note that the learned trial judge had the appellant removed from the court-room because she was screaming. He specifically said that she was not removed because of contempt. So that the citation apparently related to the insulting and insolent language and not to the disruption caused by the appellant's disorderly conduct, although that may have been part of the contempt picture. There was no mention of the disruption in the citation for contempt.

...

The present case does not come within the class of very exceptional cases mentioned in *R v Cohn*. In *R v Pereira* ... this court said ...:

> 'Summary proceedings for contempt in the face of the court do not infringe the right of the accused to be tried before an impartial tribunal and his right to be presumed innocent.'

This isolated sentence in the *Pereira* endorsement was obviously never intended to be and should not be interpreted as a statement to the effect that the presiding judge before whom language is spoken or actions capable of constituting contempt take place is, in all cases, an impartial and independent tribunal to try the issue

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summarily.

...

In our view, the language attributing gross insensitivity to the presiding judge may be viewed as calculating to lower his authority and could be characterized as contempt ... the learned trial judge erred in stating that he was bound to register a conviction for contempt, even if he accepted the apology at its face value ... if the trial judge meant to say that even a sincere apology cannot purge contempt, he erred in law in that respect."

It is trite that before a conviction under s 79(1) of the Act can be made the act complained of must be wilful. For this it is enough if the accused subjectively foresaw the possibility of his act being in contempt of court and he was reckless

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as to the result - *dolus eventualis*. Subjective foresight may be proved by inference but this inference must be the only one which can reasonably be drawn: *S v Sigwahla* 1967 (4) SA 566 (A) at 570. As pointed out the burden on the accused is an evidential one and "if at the end of the proceedings there exists a reasonable doubt, he is entitled to be acquitted."

Further, it is necessary to examine the Zimbabwe Constitution as it pertains to contempt proceedings. Section 18 of the Zimbabwe Constitution, like the Canadian Charter of Rights and Freedoms, enshrines the constitutional right to be tried by an independent and impartial tribunal.

In the instant case the accused's alleged contemptuous conduct was directed at the trial magistrate and, as GOODMAN JA said, this is the type of case where the trial magistrate before whom the alleged contempt is committed should not be the magistrate presiding at the contempt proceedings. She would be a judge in her own cause. It follows that the accused's constitutional right under s 18 of the Zimbabwe Constitution has been denied.

Furthermore, in my view the power to act summarily in the "narrow sense", that of finding the alleged contemnor guilty without first affording him the opportunity of being heard, violates sections 11 and 18 of the Zimbabwe Constitution which specifically provide for fundamental rights and freedoms of the individual and the protection of law. The Zimbabwe Constitution does not permit such "a drastic deviation from the most fundamental principles" recognized by it. The summary procedure in the "wide sense"in those limited cases alluded to in *S v Nel , supra*, and mentioned by GOODMAN JA mandates that the contemnor be made aware of his contemptuous conduct, and be given an opportunity to call evidence or give evidence himself and to address the court.

If I am wrong in holding that the accused's right under s 18 of the Zimbabwe Constitution has not been denied, the transcript of the criminal trial reveals that the accused informed the presiding magistrate that he felt strongly that he should not have proceeded because he was not being given a fair hearing, that he informed the trial magistrate he might have to leave and the presiding magistrate told him he could do so and inquired about his renunciation of agency. The transcript further shows that at the contempt proceedings on a later date the accused informed the presiding magistrate that he had intimated that he was not in a position to proceed, that the trial magistrate actually told him to leave and so he left and further, if the presiding

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magistrate regarded it as a walk out of court, he regretted it and apologised to the trial magistrate. In the trial magistrate's certified reasons she merely records that she found the accused's

ADAM J

actions of walking out of court while the proceedings were in progress as abandoning his client and therefore an act of contempt of court calculated to bring the dignity of the court into total disrepute. There is nothing said by her that the trial magistrate found that the accused's conduct was with the intention of bringing the court into contempt. Without adequate reasons it is difficult for this court to contemplate on what basis it could be maintained that the accused wilfully insulted or misbehaved towards the court when in fact the trial magistrate advised the accused that he could leave. It was most improper for the prosecutor to gratuitously tell the court that he thought that this was contempt of court because the accused had not renounced agency and just walked out. Unless it could be shown that the apology tendered by the accused was not sincere, any contemptuous conduct by the accused had been purged. Even on this the trial magistrate failed to provide any reasons.

In the circumstances the conviction and sentence against the accused are set aside and any fine paid by him shall be returned forthwith.

MUZERENGI v MUCHEKWA 1992 (1) ZLR 58 (HC)

Court **High Court, Harare**

Annotations **Link to Case Annotations**

Robinson J

Civil Petition

30 January 1992

Flynote

Civil procedure - heads of argument - filing of - legal practitioners must file heads before the case in accordance with the rules

Headnote

The provisions of R 232C(1)(a) and R 232C(2) of the High Court Rules 1971, which prescribe how long in advance of the hearing heads of argument of the legal representatives of the applicant and the respondent must be filed, must be strictly complied with. Under the Rules applicant's heads must be filed not less than five days before the hearing, excluding Saturdays, Sundays and public holidays, and respondent's heads not less than three days before the

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hearing, excluding Saturdays, Sundays and public holidays.

It is imperative that these Rules be complied with because advance filing of heads of argument allows the judge hearing an opposed matter to study and consider before the hearing the points and authorities raised in the heads. This results in a more meaningful hearing for all concerned. It also signals that an opposed matter is likely proceed on the appointed date.

Heads of argument should not, therefore, be filed at the last moment in breach of the Rules. There is no excuse for non-compliance with these provisions as opposed applications are usually set down well in advance of the date of hearing.

Under amendments to the Supreme Court Rules effected by SI 14 of 1992 an appeal is now deemed to have been abandoned and is dismissed if the legal representatives of the parties do not file their heads timeously. This shows the importance which the Supreme Court attaches to timeous filing of heads.

Legal practitioners were warned that if heads are filed out of time in an opposed

ROBINSON J

case in the High Court, the matter would in future be postponed and the legal practitioners who were at fault would be made to bear the other side's costs.

M Madzivanzira for the petitioner

L Kabote for the respondent

Judgment

Robinson J: At the outset of the hearing of this matter, I pointed out to the parties' legal practitioners that both had filed their heads of argument out of time. In this regard, I understand that there has been a divergence of views as to the dates by which heads of argument in opposed applications ought to be filed by legal practitioners. Quite frankly, I do not know why there should be any doubt on the point, since the Rules of Court are quite clear and explicit; more specifically, R 232C(1)(a) provides that an applicant who is to be legally represented at the hearing shall file his heads of argument with the Registrar "not less than five days before the hearing" and R 232C(2) provides that a respondent who is to be legally represented at the hearing shall file his heads of argument with the Registrar "not less than three days before the hearing".

The provisions of the Interpretation Act [*Chapter 1*] have no bearing on the matter and, accordingly, in the light of R 4A of the Rules of Court, which provides that where anything is required by the Rules to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of the period, it follows that, in the present case, which was due to be heard on Thursday, 30 January 1992, the applicant's heads of argument should have been filed by not later than Wednesday, 22 January 1992 and the respondent's heads by not later than Friday, 14 January 1992.

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Legal practitioners are forewarned that, in future, they will be required to observe and comply with R 232(C) in regard to the filing of their heads of argument. This will have the dual advantage of signalling to the judge due to hear the opposed matter that it is likely that the matter will proceed on the appointed date and of enabling the judge to study and consider the points and authorities raised in the heads before the date of hearing which, in turn, should result in a more meaningful hearing for all concerned.

If one has regard to the fact that opposed applications are usually set down well in advance of the date of hearing, there can be no excuse in such a case for a legal practitioner who has lived with the matter, so to speak, not to prepare his or her heads of argument or to brief counsel to do so on his or her behalf in good time so that the heads are filed and served in accordance with the Rules of Court, instead of filing and serving the heads, as is so often the case, at the very last

minute, out of time. If legal practitioners hope to obtain a considered *ex tempore* judgment from the judge hearing the matter, then they must play their part by ensuring that the judge receives the papers and both sets of heads of argument so that, in addition to the number of clear court days before the date of hearing, the judge also has the benefit of a weekend within which to study and consider the papers.

The fact that the Rules of the Supreme Court have just recently been amended by the Rules of the Supreme Court (Amendment) Rules, 1992 (No. 12) (SI 14 of 1992) to centre the hearing of a civil appeal around the filing of the appellant's heads of argument where the appellant is to be legally represented at the hearing of the appeal, so that if the appellant's heads are not filed timeously, the appeal is to be regarded as abandoned and is to be deemed to have been dismissed, is evidence of the importance which the Supreme Court attaches to the timeous filing of heads of argument, thereby fortifying this court in its insistence that, in future, legal practitioners must file and serve their heads of argument in accordance with the Rules of Court.

In view of what I have said, I would warn legal practitioners that if they fail to file and serve their heads of argument timeously and the matter is a complex one requiring research on the part of the judge prior to its hearing, then if it is the applicant's legal practitioner who is out of time, I shall have no hesitation in postponing the matter and if, as is almost invariably the case, it is the personal fault of the applicant's legal practitioner for not having prepared, filed and served his or her heads of argument in time, in ordering the applicant's legal practitioner or firm of legal practitioners, as the case may be, to pay the respondent's wasted costs. On the other hand, if it is the respondent's legal practitioner who is personally at fault in not having prepared, filed and served the respondent's heads in time, then when postponing the matter and ordering the respondent's legal practitioner or firm of legal practitioners, as the case may be, to pay the applicant's wasted costs, I shall tell the applicant's legal practitioner that, in fairness to the applicant, I am prepared to arrange a special early hearing of the matter, out of court hours if necessary, during that Civil Term or in the vacation. I shall adopt this procedure too if it appears unfair to allow the applicant to be prejudiced because of the fault of the applicant's legal

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practitioner in having failed to file and serve the applicant's heads of argument timeously.

[The remainder of the judgment is not material to this report - *Editor*.]

Gambe, Chinyenze & Makarau, applicant's legal practitioners

Ahmed & Ziyambi, respondent's legal practitioners

MORRIS & ANOR v KAMBADZI & ANOR 1992 (1) ZLR 61 (HC)

Court **High Court, Harare**

Gibson J

Civil application

25 September 1991 & 5 February 1992

Flynote

Contract - suspensive condition - sale of house - sale subject to suspensive condition - whether doctrine of fictional fulfilment applied

Headnote

A contract of sale of a house was subject to a suspensive condition that the sale was conditional on the seller finding suitable alternative accommodation within five weeks of the date of the agreement. The seller was not able to find suitable alternative accommodation before the date specified but the buyer argued that he had frustrated the fulfilment of the contract and the doctrine of fictional fulfilment should apply.

Held, the doctrine of fictional fulfilment applies against a party to a contract subject to a suspensive condition where:

a) that party intentionally and designedly takes a positive step to prevent the condition being fulfilled; or

b) that party has a duty to take positive steps to bring about the fulfilment of the condition and he had intentionally or negligently failed to take positive steps to bring about the fulfilment of the condition.

Held, on the facts that the seller had taken steps to find alternative accommodation of a suitable nature and had failed. On the facts it could not be said that the seller had wilfully frustrated the fulfilment of the condition. Neither could it be said that the seller had failed to take reasonable steps to carry out any duty that might rest upon him to try to ensure that the condition was fulfilled. The buyer's application to enforce the contract must therefore fail.

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Cases cited:

Macduff & Co Ltd v Johannesburg Consol Invstm Co Ltd 1924 AD 573

Gowan v Bowern 1924 AD 550

GIBSON J

E Chatikobo for the applicants

D Carter for the respondents

Judgment

Gibson J: The application relates to an agreement for the sale of a house at Cranborne Park in Harare. The applicants wish to enforce the contract of sale signed by both parties. The respondent is resisting the application on the ground that the sale agreement was subject to a suspensive condition which was never fulfilled in terms of the contract. It is common cause that the standard *pro forma* agreement of sale was qualified in one respect by a special condition which read as follows:

> "This sale is further conditional upon the seller acquiring suitable alternative accommodation on or before 22/9/1990. It is signed and dated by the applicants on 20/8/90 and by the first respondent on 15/8/90."

Thus the first respondent had just five weeks in which to fulfil that condition.

The applicants aver that they duly paid the deposit in terms of the contract and subsequently raised the mortgage to cover the balance of the purchase price. The applicants state further that they have also paid all the dues necessary ie to their legal practitioners and have asked for the conveyance of the property. The applicants aver that in January 1991 they began to doubt seriously the first respondent's intention to satisfy the special condition of the contract. They state that they caused a letter to be written by their legal practitioners telling the first respondent that they were insisting upon the contract going forward. The applicants attach a letter from Ridgeway Grant, the first respondent's estate agent in which the estate agent point out the terms of the special condition, namely, that the first respondent had first to find suitable alternative accommodation. The letter says that the first respondent was still looking around. This letter is dated 13/2/1991.

The first respondent admits that he advertised his house for sale through Ridgeway Grant the estate agents and told them that he required a house not exceeding $200 000 or a one acre plot worth not more than $50 000. The first respondent avers that subsequently the estate agent valued his house at $165 000. The first respondent claims further that on the same day his property was valued, the estate agents told him about a plot within the price range- but then advised against its suitability. A week later he says he got a telephone call from the same estate agent mentioning a house on two acres in Chadcombe costing $165 000. He went to view the house with the estate agent, but they did not get inside. The reason given by his estate agent was that he, the estate agent,

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GIBSON J

had not made an appointment for viewing. The following day, the first respondent says, he went to view the house on his own. He found that it had already been sold. The first respondent avers that after signing the agreement of sale which he was told was to enable the applicants to process the mortgage application he phoned the estate agents to enquire about progress in the search for alternative accommodation and was told of a plot costing $70 000 in Greendale. The first respondent says he turned that plot down because it was too expensive for his means.

The first respondent states that thereafter the first applicant called on him. During their discussion he says the latter pointed out that since the special condition had not been met he was cancelling the agreement. The first respondent also produces a letter, annexure G, written by his estate agent to the applicants' legal practitioners. In this letter Ridgeway Grant point out, among other things, that the deposit was repaid to the applicants at the latter's request on 17/12/1990. The first respondent alleges that this shows that the applicants accepted his decision to cancel the sale agreement.

The applicants accept that the agreement was subject to the overriding condition that the sale was subject to a further condition that the seller must acquire suitable accommodation on or before 22/9/1990. The applicants then argue that this is a classic case for the application of the doctrine of fictional fulfilment. They argue further that as the first respondent has deliberately prevented the condition precedent being fulfilled, he is therefore bound by the contract. The applicants point out that the first respondent had three opportunities to acquire property which he let go - ie the house in Chadcombe, the plots in Marlborough and Greendale. The first respondent's argument is that he cannot be blamed for the failure to acquire property in the short space of 5 weeks. His case is that the failure to acquire property in that short space of time was reasonable in all the circumstances, that when the applicants accepted this special condition they ran the risk of the condition not being fulfilled by virtue of the brevity of the period.

The crucial question is whether the first respondent was wilful in turning down the property which his agent introduced, and whether there was anything more which he could have done.

The applicants' legal practitioners argue that if the special condition was a suspensive condition the case falls within the doctrine of fictional fulfilment, reference being made to the case *Macduff & Co Ltd v Johannesburg Consolidated Investment Co Ltd* 1924 AD 533. This case was referred to with approval in the case decided a short while later of *Gowan v Bowern* 1924 AD 550. At 553,

GIBSON J

INNES CJ examined the doctrine and said:

> ". . . It was a doctrine of the Roman Law that a condition should be regarded as fulfilled if its non-fulfilment was brought about by the person who would have been under an obligation if it had actually been fulfilled . . . The test to be applied is *dolus*. Whether it is consistent with good faith for the promissor to have prevented the fulfilment of the condition. And that must be gathered from the nature and terms of the contract and from all the relevant

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> circumstances. . . . It was suggested that he might be answerable for *culpa* . . . It is difficult to see how the principle of fictional fulfilment of a condition can operate on the mere ground of culpa. It will I think be found in cases in which there may be a duty on the promissor to take any active steps to bring about the fulfilment of a condition, that duty arises either from a term of the contract itself or because the omission of such steps would render the happening of the condition impossible."

In this passage INNES CJ appears to have accepted that there were two bases upon which a promissor might be held to be bound,

(a) where he has designedly taken a positive step to prevent the condition being fulfilled;

(b) where the promissor is held to have been liable for culpa, namely, where it is found that he had a duty to take a positive step to bring about the fulfilment of the condition, but has failed to do so.

The applicant's case was argued on both the first and the second ground. The second ground was relied upon in the alternative. In the first stage the argument was that there was a deliberate and wilful act to frustrate the agreement by the first respondent. What is the test?

In this respect the test is reiterated at page 571, in the *Gowan* case:

> "The Court must hold that if a contract is made subject to a causal condition then if the person in whose interest it is that it should not be fulfilled deliberately does some act by which he hinders the accomplishment of the condition, he is liable as if the condition had been fulfilled. But a party cannot be said to frustrate a condition unless he actively does something by which he hinders its performance. There must be an intention on his part to prevent his obligation coming into force."

The words are very clear.

GIBSON J

The applicants' argument is that the respondent had three opportunities to acquire property for themselves - the house in Chadcombe, the plot in Marlborough and the plot in Greendale. It is my view that the applicants are not being reasonable in their criticism. Firstly, it is clear in the opposing affidavit that the plot in Marlborough and the house in Chadcombe were acquired before the special condition came into being. As I understand the respondent's affidavit, it was as a result of the inability to settle on a suitable property that the representative of the estate agent, Mr Crowley, persuaded the respondent to sign the agreement of sale so that the applicants may process their application for a mortgage - see p 12 of the respondent's affidavit. Circumstances and conduct falling outside the time set by the special condition cannot be considered. Assuming the respondent's conduct in turning down the above three properties was relevant and material, I would still venture to think that there was nothing wilful or unreasonable in the respondent's failure to accept any of the three properties. The respondent makes it clear in his affidavit that he was positively interested in the house in Marlborough. He went to view it first with the estate agent's representative. When he did not get inside to look round the house, the agent having made excuses, the respondent made his way back independently the following day - only to learn that the house had already been sold.

Regarding the $50 000 plot in Marlborough, the respondent's explanation (which has not been

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challenged) is that though the estate agent gave him the details of this plot he also advised against it because the type of ground needed special foundations. I read into this remark the message that it would have been far too expensive for the respondent's means to build a secure and stable home. After all, when anybody sets out to build a home he has to have regard to his budget and means. Turning now to the plot in Greendale, this was priced at $70 000. This figure exceeded the respondent's limits by $20 000. The respondent has not been challenged in his say so. How could it be said of the respondent that he was unreasonable or wilful and was trying to frustrate a condition by this action when that condition had not even come into being?

It must be accepted that only the respondent knew the precise limits of his resources. It is unreasonable to maintain that because he refused to purchase a stand way above the limits he set himself the respondent had done so in order to frustrate a contract to which he had bound himself.

The alternative argument by the applicants is that:

> "The respondent himself is the first to admit that his agent did less than was required to secure alternative accommodation. The applicants cannot be

> blamed for the agent's failure to serve his master with a modicum of diligence.
>
> The respondent himself did nothing on his own to secure alternative accommodation. His failure to take steps to obtain alternative accommodation, especially in the full knowledge that his agent was not doing anything amounts to a constructive design to prevent the fulfilment of the suspensive condition. Thus it must be held that the condition is deemed to have been fulfilled."

Chief Justice Innes, in the passage in the *Bowen* case, quoted above, accepted that a species of *culpa* may render a promissor, who may be under a duty to take an active step to bring about the fulfilment of a condition, liable for the non-fulfilment of the suspensive condition, and that may arise from a term of the contract or because the omission of such steps makes the fulfilment of the condition impossible (p 553). WESSELS JA at p 571 supports the contention that *culpa* may found liability where there is an omission to do something when there is duty to do, he says:

> "The only *culpa* for which a promissor *sub conditione* is liable is some deliberate act, some act done with the intention of causing the condition to fail or, perhaps, also a deliberate omission where there is a duty to do something, by which he frustrates the happening of the condition in his own interests in order to enrich or benefit himself. It seems to me difficult to extract from the texts of the *Corpus Juris* that mere negligence on the part of the promissor which may incidentally cause the condition to fail is enough. *Aliud est moram facere aliud obstare conditioni.* Cujacius, Vol 8, C 739. He need not be diligent so that the condition may be fulfilled."

The applicants' criticism that the respondent became fully aware that his estate agent was not doing enough to procure a suitable house for him and therefore is himself to blame is not tenable. If the argument suggests that the respondents were under a duty to go out and search for a house or plot to buy then it must fail because the suggestion is not in touch with modern day realities.

Any reasonable person buying a house or lot upon which to build invariably approaches a

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registered firm of estate agent, who, encouraged by the inducement of the commission offered will do his best to ensure that he earns his commission. In this case, the respondent having asked the firm of estate agent to look for a suitable property for him did not simply sit back and wait to be contacted. He says he kept in touch with the estate agents by telephone and,

GIBSON J

when property was introduced, he inspected it to see whether it suited his needs. The respondent could not have done more. It is my view that the respondent could not be criticised for not doing more in the short space of time available.

In the result therefore the application fails.

It is ordered that the application be and is hereby dismissed with costs.

Gutu & Jackachira, applicants' legal practitioners

Sawyer & Mkushi, respondents' legal practitioners

S v MULEYA 1992 (1) ZLR 68 (HC)

Court **High Court, Bulawayo**

Cheda J

Criminal review

10 January 1992

Flynote

Criminal procedure - fair trial - serious irregularity - accused not allowed to present his defence

Headnote

The accused had pleaded not guilty to a charge. At the end of the cross-examination of the complainant by the accused, the magistrate found the accused guilty without giving him a chance to present his defence. He did so because he was of the opinion that there was no triable issue. On review:

Held, that this was a serious irregularity. An accused has a right to receive a fair trial and he is always entitled to present his defence no matter how untenable or unreasonable it might appear to be. It is a serious miscarriage of justice to stop the trial in the middle like this. It is only where the accused changes his plea or makes certain admissions that a full trial may become unnecessary.

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Judgment

Cheda J: The accused pleaded not guilty to stock theft. The complainant gave evidence in the trial and the accused cross-examined the complainant.

At the end of this cross-examination the accused was immediately found guilty before he presented his defence.

I referred the matter to the trial magistrate who accepts that the trial was not completed but because the trial court was of the opinion that there was no triable issue it proceeded to convict the accused.

This is a very serious irregularity. The accused is entitled to a fair trial which must be in accordance with our law of procedure.

CHEDA J

The accused is entitled to present his defence no matter how unreasonable it may appear. Otherwise if the courts were to be allowed to form an opinion then stop in the middle of the trial and convict the accused this would lead to a serious miscarriage of justice.

Once the accused has pleaded not guilty there should be a full and fair trial, no matter what opinion the court may have.

The full trial may not be necessary where the accused changes or alters his plea or makes certain specific admissions which change the position.

In this case there was a serious misdirection by the magistrate in not completing the trial.

The conviction and sentence are set aside and the magistrate is ordered to recall the accused and complete the trial.

In the event that accused is convicted, the sentence should not exceed the one that was previously imposed, and any term of imprisonment already served should be taken into account when accused is committed to prison.

Muchechetere J: agrees.

S v HOVE 1992 (1) ZLR 70 (HC)

Court **Supreme Court, Harare**

Ebrahim JA (in Chambers, in terms of s 9A of the Supreme Court of Zimbabwe Act 1981)

Criminal appeal

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10 February 1992

Flynote

Criminal procedure - legally unrepresented accused - court failing to explain that onus rested on him to prove defence to statutory offence

Headnote

The appellant was convicted of contravening s 3(a) of the Criminal Law Amendment Act [*Chapter 58*], in that he had had sexual relations with a girl under the age of 16. The appellant, who was not legally represented, had maintained that he believed that the complainant was over 16. In terms of the statutory provision it is only a defence if the accused proves on a balance of probabilities that he *bona fide* believed, and had reasonable cause to believe, that the complainant was above the age of 16.

Held, that where an accused is not legally represented he must be advised of the onus which rested on him when advancing a defence provided for in terms of the statutory provision.

Cases cited:

R v Carmody 1969 (2) RLR 525 (A)

S v Ryce S-138-88 (unreported)

R v Henstock 1950 SR 252

S v Zimbowora 1992 (1) ZLR 41 (S)

Judgment

Ebrahim JA: In this matter the Attorney-General filed a notice conceding that the conviction could not be supported. As the concession was proper, the case was withdrawn from the roll to be dealt with in Chambers. I shall now set out the reasons why the appeal must succeed.

EBRAHIM JA

The appellant was convicted of having carnal knowledge of the complainant, a girl under the age of sixteen years, in contravention of s 3(a) of the Criminal Law Amendment Act [*Chapter 58*] and was sentenced to eight months' imprisonment with labour of which four months' imprisonment with labour was suspended for five years on conditions of good behaviour.

The appellant admitted having intercourse with the complainant but stated that he was in love with her and that she had told him that she was nineteen years of age. A dentist's report produced in evidence showed her to be between the ages of fourteen and fifteen years of age. Against this background the following observations are pertinent.

> "In order for him to escape conviction it was incumbent upon him, therefore, to prove on a balance of probability: (i) that he *bona fide* believed the complainant to be above the age of sixteen years; and (ii) that he had reasonable

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cause for such belief. See *R v Carmody* 1969 (2) RLR 525 (AD) at 527E"

per GUBBAY JA (as he then was) in S v Ryce S-138-88. He went on to say:

"Although these evidential requirements are separate, the first relating to the subjective state of mind of the accused person, and the second to whether that state of mind was one which a reasonable man placed in the position of the accused would have entertained, a most cogent indication of the *bona fides* of the belief is whether or not it was a reasonable one. Only in rare instances is there room for a finding that the belief, though not reasonable, was nevertheless *bona fide*."

The appellant was not legally represented at his trial and there is nothing on the record to indicate that he was advised of the onus which rested on him in terms of the proviso to s 3(a) of the Act. It seems to me that where there is an onus placed upon an accused person a trial court should advise him accordingly, see *R v Henstock* 1950 SR 252.

A further unsatisfactory feature is the failure by the magistrate to give reasons for concluding that in his estimation the complainant was under sixteen years of age. In *S v Ryce supra* GUBBAY JA said:

"The magistrate was entitled to take into account his estimation of the complainant's age from her appearance in deciding whether or not the appellant had reasonable cause to believe that she was of the age of sixteen

EBRAHIM JA

years or above. See *R v Henstock* 1950 SR 252 at 254. But it is unfortunate that he did not record what caused the impression in his mind that she was between fourteen and fifteen years old. Was she small of stature and of slight build? Was her body not fully developed? Was her face childlike? Was she an unsophisticated and timid girl? These are matters of which this Court should have been advised, for without any reference being made to them there is merely a personal opinion of appearance without the factual evidence in support of it. Regrettably, therefore, little weight may be attached to the magistrate's estimation of the complainant's age."

The prosecutor also appears to have made little effort to strengthen his case by leading corroborative evidence. The complainant hinted in her evidence that she suspected that she had become pregnant following her association with the appellant. No evidence was led to show whether this was so or not. It was the State's allegation that the complainant had been introduced to the appellant by her uncle. The uncle was not called to confirm this assertion.

The court *a quo* was entitled to convict the appellant on the single evidence of the complainant: *S* v *Zimbowora* 1992 (1) ZLR 41 (S) and the cases cited therein. But here the complainant was a witness with an interest to serve and therefore there was need to approach her evidence with caution and to produce corroborative evidence, if available: *S v Zimbowora , supra*. The failure by the prosecutor to lead evidence of a corroborative nature seriously weakened his case and does not inspire confidence leading to the acceptance of the evidence of the complainant, a single witness.

Mr *Ndhlovu*, representing the Attorney-General, recognised the weaknesses apparent in the State case and conceded that he could not support the conviction. I am satisfied that his concession is well founded and accordingly set aside the conviction and sentence.

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My brother KORSAH agrees with this judgment.

DE KLERK & ORS v MAKVURA 1992 (1) ZLR 73 (HC)

Editor's Note:(1)

Court **High Court, Harare**

Chambakare J

Civil action

27, 28 & 29 November 1991 & 12 February 1992

Flynote

Civil procedure - res judicata - delictual claim for damages - claim could not be brought in two separate actions - whole claim must be made in single action

Damages - delictual claim must be brought in single action

Headnote

The first plaintiff suffered damage to his motor vehicle and bodily injuries arising out of a motor accident caused by the negligence of the defendant. His vehicle was insured and the insurance company paid him out the amount of insurance owing to him, less the salvage value of the damaged car. The insurance company wished to recover the amount it had paid out to the first plaintiff. It brought an action in the magistrates court in the name of the first plaintiff, acting under the doctrine of subrogation as the first plaintiff subrogated his rights to his insurance company. Judgment was obtained against the defendant.

The plaintiff then sought to sue in the High Court for more damages in respect of his motor vehicle (the insurance payment did not represent the full value of the vehicle) and for damages in respect of his bodily injuries.

Held, that *res judicata* applied. The first plaintiff was not entitled to bring his claim in two separate actions. He had to bring the entire claim in a single action. If he was intending to bring a claim for a larger amount, he should not have subrogated his rights to the insurance company. Therefore the claim by the first plaintiff had to fail.

Cases cited:

Ackerman v Loubser 1918 OPD 31

Shearman v Folland [1950] 2 KB 43; [1950] 1 All ER 976 (CA)

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Avex Air (Pty) Ltd v Borough of Vryheid 1973 (1) SA 617 (A)

Schnellen v Rondalia Assurance Corp of SA Ltd 1969 (1) SA 517 (W)

A Pycroft for the plaintiffs

A Chizikani for the defendant

Judgment

Chambakare J: Although not specifically stated the defendant pleads *res judicata.* As stated in the declaration the first plaintiff claims damage for the motor vehicle in the sum of $15 000, pain, suffering and contumelia in the sum of $1300. What transpired after the accident was that the plaintiff approached General Accident, his insurers. The motor vehicle had been insured for $1500. He was paid a sum of $960, being $1500 less $540 salvage value at 36%. He however was paid towing charges he had spent and his total was $1021. He appears to have received the amount on 3 January 1989. On 28 April 1989 the first plaintiff together with the others, filed these proceedings after issuing out summons to the defendant.

On a date not clear from the evidence the insurers under the doctrine of subrogation issued out a summons against the defendant in the name of the plaintiff in which it had paid out to the first plaintiff. Judgment in that amount was granted on 6 June 1989. It appears that an attachment was made but failed to realise any assets. Thereafter a summons for civil imprisonment was issued and the same was produced as exhibit 3. Mr *Pycroft* admitted the above facts as correct but argued that under the plea of *res inter alios actae* and the doctrine of subrogation the first plaintiff was entitled to recover damages in spite of the fact that his insurers paid him. The general principle of *res inter alios actae* is that a defendant cannot set up in extinction or mitigation of his own liability the fact that the plaintiff has been recouped or is entitled to be recouped either wholly or in part, by a third party in terms of a contract of insurance: *Ackerman v Loubser* 1918 OPD 31; *Shearman v Folland* [1950] 2 KB 43; [950] 1 All ER 976. The rationale is that a plaintiff does not receive the money as a result of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause for receiving it.

The position here is different. When the first plaintiff received money from his

insurers matters ought to have ended there with them. He should not have subrogated his rights and equities to them when he wished to sue the defendant for a larger amount. The principles apply where the amount under an insurance company is paid to the plaintiff. In that case the defendant cannot claim a reduction in damages simply because the plaintiff was paid as this was tantamount to making the defendant benefit from an insurance where he did not pay any premiums.

The next point is the effect of the principle of subrogation. Mr *Pycroft* argued that under that doctrine the first plaintiff's insurer was entitled to sue the defendant on his behalf. This

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submission is correct. An insurer which has paid the loss suffered can, on subrogation, sue the party liable for the loss in the insured's name: *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 per Botha JA at p 625H. This means that General Accident was entitled to sue the defendant in the name of the first plaintiff. It did so in the magistrates court and judgment was granted in the plaintiff's favour. When the defendant failed to effect payment, a summons for civil imprisonment was issued out.

The issue raised by the amendment to the defendant's plea is whether the first plaintiff can further sue the defendant for more damages for this motor vehicle and general damages for pain, suffering and contumelia which were not included in the claims filed and determined in the magistrates court.

This matter was discussed in *Avex Air (Pty) Ltd v Borough of Vryheid* (*supra*) at p 625 H BOTHA JA held that an insurer on subrogation cannot sue for that part of the loss only for which it is liable under a relevant policy of insurance, and which it has paid and leave the balance of the loss to be recovered by the party who suffered the loss. This is because a single cause of action cannot support a plurality of claims: *Schnellen v Rondalia Assurance Corp of SA Ltd* 1969 (1) SA 517 at p 520.

Spencer Bower on *Res Judicata* cited in *Schnellen's* case *supra* put it succinctly at p 311 when he summed up when the plea of *res judicata* applies:

> "[W]here there is substantially only one cause of action and it is a case not of splitting separable demands but of splitting into two quantitative parts, the plea is sustained. In homely phrase, a party is entitled to swallow two separate cherries in successive gulps, but not to take two bites at the same cherry. He cannot limit his claim to a part of one homogenous whole, and treat the inseparable residue as available for future use, like the good parts of a curate's egg."

CHAMBAKANE J

In this case the first plaintiff bit the cherry by subrogating his rights to the insurer to sue on his behalf for an amount for less than the damage he had incurred as a result of the defendant's act. The authority of Spencer Bower quoted above will not allow him to again sue the defendant on the same cause of action, thereby allowing him "two bites at the same cherry".

The claim by the first plaintiff arising from the accident ought to have been brought together with a claim by his insurers in the suit in the magistrate's court. If the claim exceeded the jurisdiction of the magistrate's court he ought to have withdrawn it and brought the present suit. In that case the defendant could not have pleaded *res judicata* in defence.

In the result the first plaintiff's claim for damages of $15 000 for his motor vehicle and $300 in respect of general damages for pain, suffering and contumelia and $11,35 in respect of medical expenses fails.

Winterton, Holmes & Hill, plaintiffs' legal practitioners

A R Chizikani, defendant's legal practitioner

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CHIROODZA v CHITUNGWIZA TOWN COUNCIL & ANOR 1992 (1) ZLR 77 (HC)

Court **High Court**

Mtambanengwe J

Civil application

12 February 1992

Flynote

Administrative law - irregularities - referral back to tribunal - when matter will not be referred back

Headnote

An urban council had wrongly dismissed the applicant from his post. The applicant had sought an order declaring his discharge from his post to be invalid and an interdict prohibiting the Council from taking any further action to suspend or dismiss him on the same grounds as previously.

The court held that the dismissal was a nullity because certain mandatory provisions pertaining to notice and Ministerial approval of the decision in the Urban Councils Act [*Chapter 214*] had not been complied with. Where a decision of an administrative tribunal has been set aside on the grounds of irregularities, the matter will usually be referred back to the tribunal because the courts are slow to exercise a discretion allocated by statute to the tribunal. It may, however, decide not to refer the matter back where:

- the decision is a foregone conclusion and reference back will be a waste of time and will cause further prejudice to the applicant;
- the tribunal has exhibited such bias or incompetence that it would be unfair to the applicant to refer the matter back to the same tribunal.

Here the court decided that as the tribunal had displayed considerable bias and incompetence in the handling of the case, it was unfair to refer the matter back for re-consideration by the same tribunal. However, it did not grant the interdict as in terms of s 90(13) of the Urban Councils Act [*Chapter 214*] there was provision for the appointment of an independent person to conduct an inquiry. The court ordered that if the Council decided to take any further steps to discharge the applicant, it would have to appoint an

MTAMBANENGWE J

independent person to conduct the inquiry and, if the inquiry had not been completed within three months, the applicant would have to be re-instated in his present position.

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Cases cited:

Schierhout v Min of Justice 1926 AD 99

Johannesburg City Council v Admin, Tvl 1969 (2) SA 72 (T)

Traube v Admin, Transvaal & Ors 1989 (2) SA 396 (T)

Agricultural Supply Assn (Pty) Ltd v Min of Agriculture 1970 (4) SA 65 (T)

Aircondi Refrigeration (Pty) Ltd v Ruskin NO & Ors 1981 (1) SA 799 (W)

Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange 1983 (3) SA 344 (W)

Rose v Johannesburg Local Road Tpt Bd 1947 (4) SA 272 (W)

Metropolitan Properties Co (FGC) Ltd v Lannon & Ors [1968] 3 All ER 304

A N B Masterson for the applicant

R Y Phillips for the respondent

Judgment

Mtambanengwe J: The applicant in this matter was first respondent's Chief Executive Officer appointed in terms of the Urban Councils Act [*Chapter 214*]. On 12 November 1990 he was suspended by first respondent's chairman. This suspension followed on an earlier suspension and purported dismissal of applicant, the validity of which dismissal of applicant contested in case no. 3529/90. Though first respondent did not oppose his application for reinstatement, the suspension on 12 November 1990 was on the same grounds as in the previous case. They were detailed in a letter to applicant by first applicant's Chairman, dated 12 November 1990 (pp 57-60 of the papers in case no. 3529/90).

Henceforth I shall refer in this judgment to first respondent as the Council, the second respondent (Minister of Local Government, Rural and Urban Development) as the Minister, the Urban Councils Act as the Act.

Section 90(14) of the Act provides that where an employee has been suspended in terms of subs (10) or (11):

> "(a) his suspension, unless earlier lifted, shall terminate when the council has decided not to discharge him or after six months has elapsed, whichever occurs the sooner."

MTAMBANENGWE J

By 13 May 1991 (ie six months from the date the suspension was imposed) the Council had taken no decision either not to discharge or to discharge the applicant. The applicant contends, therefore, that his suspension automatically lapsed on that date in terms of s 90(14)(a), and that

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he was automatically reinstated by operation of law. He therefore prays for a declaratory order confirming his reinstatement. The Council on the other hand contends that the applicant was subsequently discharged in terms of s 90(14)(c) which reads -

"(c) if he is not subsequently discharged, he shall be entitled to the full amount of his salary or wages and any allowances that would otherwise have been paid to him in respect of the period of his suspension, less any allowance paid to him in terms of paragraph (b)."

Alternatively, it contends that applicant was discharged in terms of s 90(8) of the Act. Thus if the discharge was in terms of para (c) of s 90(14) that means the suspension procedure was followed all the way to completion inclusive of the observance of the provisions of s 90(8). This must be so on a proper reading of subs 14 of s 90.

On this aspect of the matter, the crisp point to be decided is, therefore, whether the applicant was validly discharged in terms of either subs (14) or subs (8) of s 90 of the Act.

The applicant's draft order is as follows:

"1. The applicant is declared to be the lawful incumbent of the position of Chief Executive Officer of the Chitungwiza Town Council and entitled to all the benefits of that office.

2 The respondent shall forthwith pay to the applicant the sum of 15,898.95 and shall, within 14 days of the making of this order, furnish the applicant with a full statement of what further monies he is entitled to taking account of any increases of salary and allowances to which Applicant would have been entitled had he remained in office without suspension since November 12, 1990, and thereafter immediately pay to the Applicant the further monies to which he is presently entitled. The Council shall further continue to pay to Applicant his salary and allowances of not less than $2421,16 on or before the last day of each month as from 30 June 1991 and grant him such other benefits of office as he may be entitled to until Applicant's appointment as Chief Executive Officer is lawfully terminated.

MTAMBANENGWE J

3. The Council is interdicted against taking any further action to suspend or dismiss the applicant in respect of any act or omission by the applicant which occurred prior to 14 December 1989.

4. The costs of this application shall be borne by the first respondent."

The relevant provisions of the Act are contained in s 90, subss (7) and (8) and (11) to (14), which read as follows:

"(7) Subject to subsection (8) and to the conditions of service of the employee concerned, a council may at any

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time discharge an employee -

(a) upon notice of not less than three months;

or

(b) summarily on the ground of misconduct, dishonesty, negligence or any other ground that would in law justify discharge without notice.

(8) A council shall not discharge a senior official unless -

(a) a special meeting is convened to consider the matter by notice -

(i) given at least seven days before the date of the meeting; and

(ii) stating that the meeting is convened only to consider a proposal to discharge the senior official specified in the notice;

and

(b) the discharge is agreed to at the meeting convened in terms of paragraph (a), or at an adjournment thereof held within seven days, by a majority of the total membership of the council; and

(c) the discharge has been approved by the Minister.

(11) If it appears to the mayor that a senior official has been guilty of such conduct that it is desirable that that senior official should not be permitted to carry on his work, he -

(a) may suspend the senior official from office and require him forthwith to leave his place of work; and

(b) shall report the suspension -

(i) immediately to the Minister; and

(ii) at the first opportunity to the council.

(12) If directed to do so by the Minister, a mayor shall immediately lift a suspension of a senior official whom he has suspended in terms of subsection (11).

MTAMBANENGWE J

(13) Where a council has received a report of a suspension in terms of subsection (10) or (11), the council shall without delay -

(a) conduct an inquiry or cause an inquiry to be conducted into the circumstances of the suspension; and

(b) after considering the results of the inquiry, decide whether or not-

(i) to lift the suspension; or

(ii) subject to subsection (8), to discharge the employee;

and shall inform the employee and, where appropriate, his head of department accordingly.

(14) Where an employee has been suspended in terms of subsection (10) or (11) -

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(a) his suspension, unless earlier lifted, shall terminate when the council has decided not to discharge him or after six months has elapsed, whichever occurs the sooner;

(b) during the period of his suspension he shall not be entitled to his salary or wages in respect of that period, but he may be paid such allowance, not exceeding the amount of his salary or wages, as the council may fix;

(c) if he is not subsequently discharged, he shall be entitled to the full amount of his salary or wages and any allowances that would otherwise have been paid to him in respect of the period of his suspension, less any allowance paid to him in terms of paragraph (b).'"

I shall refer to s 90 generally as the section and to all subsections thereof as just subsection so and so.

It is common cause that an *ad hoc c*ommittee was appointed by Council on 29 November 1990 to, in terms of subs (13) of the section, "conduct an inquiry . . . into the circumstances of the suspension". The argument on behalf of Council is that subsection (13) was complied with or that there has been substantial compliance with the statutory provisions, any breach thereof being both technical and innocent.

Half-heartedly, it seems, Mr *Phillips*, for the Council, echoes par 5 of the Council's opposing affidavit where it states, in answer to the applicant's claims that come the 13th May 1991, he has been automatically reinstated in terms of para (a) of subs (14) (para 8 of his founding affidavit):

"5. paragraph 8 is a matter of argument but suspension of an employee or

senior official is an option given by section 90 of the Urban Council Act. A person could be discharged without ever having been suspended. Furthermore in terms of s 90(14)(c) the applicant has been subsequently discharged."

I agree that on a proper reading of s 90 of the Act a discharge could take place without prior suspension, as suspension, in terms of subs (11), is not mandatory and subs (7) provides for summary discharge or discharge on notice. But either way the mandatory provisions of subs (8) have to be complied with.

It is necessary at this juncture to outline and comment on the events that followed applicant's suspension on 12 November 1990, in order to determine the validity or otherwise of the opposing contentions. They are as follows:

The *ad hoc* committee appointed by council, chaired by Councillor Oliver Jeche, held its first meeting on 23rd April 1991. It sat again on 4 May, 9 May and 10 May 1991. Thereafter the full council met on 13 May 1991 when applicant's case was presented (a report was presented to Council). It was resolved:

"(a) That the Council adopts recommendation of the committee on the case of Tichaona Ngoshi Chiroodza -

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Chief Executive Officer (2057) as contained in the minutes of the 22nd Meeting held on 10 May 1991.

(b) That a Special Council meeting to consider the discharge of Mr TN Chiroodza be held on Monday 20 May 1991."

On 20 May 1991 the Council met "specifically" to consider a proposal to discharge applicant. It resolved:

"That the Chief Executive Officer Mr TN Chiroodza (2057) be discharged from Council employment from the date of suspension (13 November 1990) and that the Ministry of Local Government, Rural and Urban Development be advised accordingly."

I pause to say:

To start with as regards the 20 May resolution, it is clear from its wording that the Council had a misconception about the procedures to be observed in order to effect a valid discharge of a Senior Official. The Minister's approval has to be obtained first and any purported discharge is of no force or effect unless and until in terms of subs 8(c) of the section that approval has been given.

MTAMBANENGWE J

Secondly, the minutes of Council dealing with applicant's discharge reveal that no proper notice was given in terms of subs (8) when the first "special meeting of council was held on 13 May 1991". (Annexure "K" to Council's Affidavit). That meeting ended with the resolution I have already quoted above - to adopt the recommendation by the *ad hoc* committee. The recommendation adopted was:

"a) That in view of the aforementioned findings of the Committee on the fourteen (14) charges preferred against Mr Tichakunda Ngoshi Chiroodza (2057) Chief Executive Officer, Mr Chiroodza be found guilty of contravening Council's General Conditions of Service - Section 51(b), (d) (h) (i) and (ii) and (r) and the amended Urban Councils Act - Chapter 214 - Section 89 and the Second Schedule -Section 43 and that he be dismissed from Council employment".

It is clear that once the Council resolved to adopt the above recommendation, as it did on 13 May 1991, the "special" meeting called for 20 May 1991 was a charade - an absurd pretence to comply with the statutory provisions of subs (8). The recommendation was adopted on 13 May and there was nothing more to consider. This is made clear by the fact that the meeting on 20 May (p 123) only lasted a bare 5 minutes, the one on 13 May 1991, called without a notice in terms of subs (8), dealt with no other matter except the Consideration of Applicant's discharge. It was specifically held:

"1. To consider the report of the *ad hoc* committee on the case of Mr TN Chiroodza - suspended Chief Executive Officer (2057)."

The point of notice was raised in that meeting during consideration of the report of the *ad hoc* committee (see p 2 of the minutes at p 124 of the papers).

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To complete this narrative of events it should be noted that the Minister did not give his approval to the discharge. In his heads of argument, Mr *Phillips* indicated that he would make application to include among the papers a letter from the Senior Minister of Local Government, Rural and Urban Development dated 22 October 1991. Little did he realize that he was opening a Pandora's Box! He made the application and applicant's counter to that was to file a supplementary affidavit to deal with that letter. The letter reads:

> "Termination of Services : Mr T N Chiroodza
>
> Reference is made to your letters reference 2057/Mr Magadu dated 24 May 1991 and 2057/Mr Matanhike dated 4 October 1991.

MTAMBANENGWE J

> After a reconsideration of the Council's submissions and various representations to this Ministry, approval is hereby granted to your Council in terms of the s 30(8)(c) of the Urban Councils Amendment Act No 15 of 1986 to terminate the services of your Chief Executive Officer, TN Chiroodza.
>
> Yours faithfully
>
> JW Msipa
>
> Senior Minister of Local Government, Rural and Urban Development"

Applicant states in regard to this letter that the purported approval by the Ministry by this letter, of applicant's discharge by Council, is a result of a reconsideration of Council's submissions and of various representations to the Ministry. In the supplementary affidavit applicant makes the point, and I agree, that the Minister cannot change his mind after he has considered the matter and decided not to approve the discharge, as is shown in the Council's minutes of October 1991:

> "On 16 August 1991, the Ministry replied stating that (i) since six months had elapsed before the Council had decided on Mr Chiroodza's case, he must be reinstated and (ii) the Council's Ad Hoc Committee all over again. In view of the advice from the Ministry, the Administration Officer said he held discussions with Mr Moyo of Scanlen and Holderness - the Council lawyers, who was of the opinion that since six months had elapsed, Council had no defence. He said he also had discussions with Mr Mambara, the writer of the reply from the Ministry who was of the same opinion. The Administration Officer said he was also of the same opinion."

(para 6 of the Supplementary Affidavit at p 157 of the papers).

In this connection, it is noted that on 17 June 1991 an affidavit was filed on behalf of the Minister who is second respondent in these proceedings. It stated that the ministry had instructed the Council to set up the *ad hoc* committee following applicant's reinstatement on 12 November 1991 but as at 13 June 1991 no report back had come to the Ministry from Council. It ends in para 9 with the deponent (Senior Secretary of the Ministry) stating:

> "9. In the premises I submit that I have nothing to defend in this matter and that the matters deposed to in applicant's notice of motion are not within my knowledge and therefore first respondent may so contest the matter alone if they so wish."

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MTAMBANENGWE J

In the light of the above Mr *Phillips'* alternative argument- that the time lapse (13 May - 20 May 1991), when the suspension automatically lapsed in terms of s 90 (14)(a) before a decision by Council, was short and that there was substantial compliance with the statutory provisions - cannot be sustained. The mandatory provisions of the Act that have to be followed in a situation like this have not been complied with. The all important subs (8) which prohibits a discharge without compliance with its provisions regarding special council meeting on seven days' notice and ministerial approval was not complied with. It follows from that alone that the purported discharge of applicant is a nullity. See *Schierhout v Minister of Justice* 1926 AD 99 at p 109 *et seq*. I would accordingly grant paras 1 and 2 of applicant's draft order (subject to certain comments I shall make later on).

THE CLAIM FOR AN INTERDICT

In para 3 of his draft order applicant seeks an interdict against the council taking any further action to suspend or dismiss him in respect of any act or omission by him which occurred prior to 4 December 1989.

The requirements for such an interdict have been stated in many cases as that:

(1) The applicant must have a clear right;

(2) The right has been infringed or the applicant has a reasonable apprehension that it will be infringed

(3) The applicant has no other remedy reasonably available to him.

Mr *Masterson* for the applicant submits that the statutory provisions of s 90 of the Act clearly give the applicant the right to the protection of a series of procedural steps and the prior approval of the Minister before he can be dismissed. He goes on to say that the nature of those procedural requirements clearly imply the need to comply not only with the specific statutory requirements set out in s 90 but also with the fundamental principles of natural justice to ensure a fair trial. There can be no doubt that the right as described by Mr *Masterson* accrued to the benefit of the applicant as a matter of law on his appointment to the Office of Chief Executive of Council. It has not been suggested in these papers, or in argument, that that is not so.

I regard the claim for an interdict in this matter as amounting to an invitation for the court to substitute its own decision for that of the Council, having come to the conclusion that the decision of Council cannot stand. The proper approach to the question whether the court should do so or should refer the matter back to Council was first stated by HIEMSTRA J in *Johannesburg City Council v*

MTAMBANENGWE J

Administrator, Transvaal 1969 (2) SA 72 (T). I quote GOLDSTONE J at p 408A - D in *Traube v Administrator, Transvaal & Ors* 1989 (2) SA 396 (T):

" In *Agricultural Supply Association (Pty) Ltd v Minister of Agriculture* 1970 (4) SA 65 (T) COLMAN J said this at

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72A-D:

> ' In Johannesburg City Council v The Administrator of the Transvaal 1969(2) SA 72(T) HIEMSTRA J summarised, conveniently, the considerations which have been recognized in the relevant authorities. In the ordinary course, he said, a matter of this kind will be referred back, because the court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. But it may do so -
>
> (a) if the end result is a foregone conclusion and a reference back will merely waste time; this criterion will be of particular importance if delay will be prejudicial to the applicant;
>
> (b) if the tribunal or functionary has exhibited bias to such a degree that a reference back would be unfair to the applicant;
>
> (c) if the tribunal or functionary has exhibited incompetence to such a degree that it would be unfair to the applicant. (I have paraphrased and rearranged the language of the learned judge).'"

See too *Aircondi Refrigeration (Pty) Ltd v Ruskin NO & Ors* 1981 (1) SA 799 (W) at 805D-H; *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W) at 368-9.

> "In some of the cases mentioned in the passage cited above the court, applying those principles, exercised the discretion itself. However in the *Agricultural Supply Association's* case *supra* COLEMAN J referred the matter back although he had found respondent to have been in legal error. He made the referral order with two safeguards. He said at 72-73:
>
> "I am of the view, therefore, that the matter must be sent back to the respondent. But in order to be fair to the applicant it will be necessary to couple that order with two safeguards, even at the risk of putting the respondent and his department to some inconvenience.
>
> In the first place, I propose to fix a time for reconsideration which is somewhat shorter than it would have been if there were no urgency. But it is not, in my view, so short a time that the respondent (assisted by members of his Department who have been studying the relevant varieties for so long) will not be able to give the matter such full and proper consideration as it deserves. Secondly, I shall ask the respondent, if he

MTAMBANENGWE J

> refuses to list any of the applicant's varieties, to furnish such information as will enable the applicant to move the court swiftly for further relief if so advised. In that regard, it seems to me, a request, as opposed to an order, will suffice. The respondent has shown a willingness to assist the court fully; and in any event, a refusal to furnish the information would support an inference against him."

Applicant in the present case was first suspended by Council on 14 December 1989, but following intervention by the Ministry the suspension was lifted on 2 February 1990. He was again suspended on 5 February 1990, when he received a letter from Council purporting to discharge him from employment. He was paid his salary for December 1989 and January 1990 but received no pay from February to September 1990. He contested the validity of the purported dismissal and although Council did not oppose his application he was not reinstated till November 12 when he was again immediately suspended on reporting back to work. Case No 3529 continued to the stage when it was heard and a determination, only relating to applicant's salary, allowances and what deductions the Council could make, was made. This

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was necessitated by Council's tardiness in working out and paying out what applicant was entitled to for the months he was under suspension.

Suffice it to say Council accepts that it was in error as regards the way it proceeded in respect of the discharge of applicant forming the subject matter of Case No. HC 3529/90.

In the present application the papers reveal that the enquiry caused by Council to be conducted in terms of subs (13) did not commence until 23 April 1991 - some five months after the suspension was imposed. From 8 January to 23 April abortive attempts were made to carry out the enquiry but this was done in a manner calculated to deny applicant his legal rights of representation by a legal practitioner and to prepare for any hearings. His objections to the composition of the *ad hoc* committee (alleging that some members of that committee such as the chairman were biased) were brushed aside. Council's reply to applicant's complaints about the delay is contained in paras 19 to 22 of its opposing affidavit:

> "19. Re paragraph 20: There was difficulty concerning the commencement of the enquiry, in part because it was believed that the High Court has resolved some of the issues contained in the Applicant's letter of suspension. However, the High Court judgment did not become available until 31st May 1991 and well prior to that the Committee had felt it prudent to

> commence the hearing especially in view of Section 90(13) of the Act.
>
> 20. Paragraphs 20.2, .3, .4, and..5 are essentially correct.
>
> 21. The hearings commenced on 23 April and resumed on Saturday 4th May 1991. The Applicant's lawyer was not available before that date
>
> 22. Re Paragraph 20.8 in my view the Applicant is inconsistent, On the one hand he complains about the failure to commence the enquiry and on the other fails to attend one hearing and walks out when efforts were being made to complete the enquiry. The Applicant appears to have deliberately set out to attend to create a further procedural irregularity such as dogged the previous proceedings."

As regards para 21 (quoted above) it is interesting to note that applicant in para 20.2 of his founding affidavit states (and Council says that this is essentially correct):

> "20.2 Notwithstanding this background, on 8 January 1991, I received the letter annexure 'D' dated 7 January requiring me to appear before the Committee of Enquiry at 2.00 pm on 9 January. This was little more than 24 hours later. Immediately I consulted my lawyer and he accompanied me to the Council next afternoon. When we arrived, however, we were kept waiting for about an hour and then the Committee declined to proceed with the enquiry because I was to be represented by a lawyer. It is to be noted that the Council's general Conditions of Service specifically provide, in s 54(2) that an employee facing a disciplinary enquiry may be represented by a lawyer . . ."

Paragraphs 20.3 to 20.5 of that affidavit, which Council accepts as correct, also reveal attempts in February 1991 by the *ad hoc* committee, through Council's Chairman, to compel applicant to attend to answer the charges against him without his legal practitioner.

I remark in passing that Council has shown a lot of bad faith in the way it has pursued this matter and sought to justify its irregular proceedings against applicant. In his letter to applicant

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dated 13 May 1991 (annexure "A" at p 20) Council's Chairman attempted to suggest that in connection with the current matter the Minister had withdrawn his approval of applicant's original appointment. He wrote:

> "I have been informed that you have reported for work at the Council's Offices. Please note that following an inquiry carried out by Ministry Officials, the Minister withdrew his approval of your appointment; (see

> s 90(2) and 90(5)). Furthermore an *ad hoc* committee appointed by the Council has completed its inquiry into your conduct and Council awaits its report. In these circumstances you are urged to vacate the offices pending the decision of Council."

Council also tried to use an undated letter (see annexure I at p 118) which was obviously an approval by the Minister of an earlier dismissal of applicant, which itself was invalid. In its affidavit in this matter council did not reveal to the court that the Minister had declined to approve applicant's discharge, and the letter by a Mr Mabara, which is referred to in its minutes of October 1991 (revealed in applicant's supplementary affidavit) as "the reply from the Ministry" was not revealed. Finally it was so determined to get rid of applicant that it had to make representations to the Minister to reconsider his decision as is reflected in the Minister's letter of 22 October 1991 and in its minutes referred to at p 157 of the papers.

I do not think that it is necessary to embark on a further detailed examination of the Council's conduct and attitude towards the applicant in this matter. The points I have already highlighted satisfy me beyond any doubt that the Council has shown a lot of incompetence in the handling of applicant's case, it has shown a lot of bias and a determination to get rid of applicant at any cost, and its *ad hoc* committee consisted of personalities with financial interests that would conflict with their duties of inquiring into the conduct of applicant. It (the Council) ignored representations made by applicant against those persons sitting in judgment over him; the chairman of the *ad hoc* committee is glaring example of this point. In paras 12 to 14 of his affidavit he dismisses allegations made against him regarding *possible* financial and other conflicts between him and applicant by simply minimising the incidents. In *Rose v Johannesburg Local Road Transportation Board* 1947(4) SA 272(W) at p 287 LUCAS AJ quotes the following passage from Halsbury (Vol 21 sec 952-953):

> "The principle *nemo debet esse judex in causa propria sua* precludes a justice, who is interested in the subject matter of a dispute, from acting as a justice therein . . .. A distinction must be drawn between pecuniary interest and prejudice. The smallest pecuniary interest is, subject to any statutory authority to the contrary, a bar to the justice acting, but where the interest is not pecuniary the question arises whether the interest is of such a substantial character as to make it likely that he has a real bias in the matter. That which then has to be considered is the effect likely to be produced upon the minds of the public as to the fairness of the administration of justice, and this is a question of degree to be decided in every case."

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After stating that these principles have been applied in a number of cases in our courts (see examples given), his Lordship went on to state:

> "The right of everyone to equal justice before the law, the rule of law, requires that every party in a matter upon which a judicial body is called upon to give a decision should be entitled to what must appear to be a fair, impartial, and unbiased consideration of his case."

The papers before me show that apparently the root cause of the conflict between applicant and certain members of the Council, including those on the *ad hoc* committee, is a perceived grievance felt by some members at the financial control that applicant rightly or wrongly insisted on. I need not go into details; suffice to say applicant appears to have treaded on the pecuniary interests of Council's members, one example of which being the question of what applicant considered improper and irregular payment of allowances to Council members (pp 96-97 and 100-104 and see p 17 para 235 of applicant's affidavit).

In *Metropolitan Properties Co (FGC) Ltd v Lannon & Ors* [1968] 3 All ER 304 at p 310A-B LORD DENNING MR had this to say regarding bias:

> " . . . It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision, cannot stand: see *R v Huggins*; *R v Sundex & Justices per* VAUGHAN WILLIAMS LJ ..."

See also Baxter *Administrative Law* pp 536-541 and 557-567.

All this brings me to the conclusion that applicant has every reason to be apprehensive that his case, if referred back to be reconsidered by Council, will not be handled any more competently or without the bias against him that Council has exhibited up to this stage. I am also of the opinion that the delay and the suspense and inconvenience occasioned to applicant have become quite oppressive, to say the least. In his submissions Mr *Masterson* goes as far as saying the Council itself as opposed to the *ad hoc* Committee is not untainted

by these strictures. That is evident from the papers. But I think that were it (Council) in the end, called upon to consider applicant's case, and that consideration was based on the results or findings of a properly conducted inquiry carried out by independent persons, with the benefit of proper legal advice, Council would then come to a proper decision as it must know now that to do otherwise will result in its decision being upset again. In his founding affidavit, in par 17.3 applicant says:

> "The Council itself is unwilling and indeed unable to give proper consideration to my case and will remain so unless an independent enquiry is held (see para 24 below)"

In para 24 he says:

> "Against this attempt to synopsise a background that goes back to 1988, and before that has been debated and

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redebated and upon which impressions, stances and allegations have long been entrenched. I submit that I cannot now be accorded a fair trial on things which happened so long ago. I respectfully submit therefore that my clear right to a fair trial is being infringed. I also respectfully submit that i have no remedy against the situation of this facade other than the order to be sought in paragraph 3 of the Draft Order. If matters are allowed to continue as they have been I must face another injust dismissal and I must again endure the financial deprivations that the Council has imposed on me for the last 16 months."

In my view the remedy to this anguished cry is indicated in para 17.3 of his founding affidavit and in subs (13)(a) of s 90 of the Act (as underlined):

"(13) the council shall without delay: -

(a) conduct an inquiry or cause an inquiry to be conducted into the circumstances of the suspension, and . . ."

I would therefore refuse the order sought in para 3 of the Draft Order but subject to two safeguards. Paragraph 1 of the draft order will also be reworded. For to make the declaration, as sought in para 1, and to grant the interdict sought in para 3 presupposes that the court, on the papers before it, is able to resolve all the disputed facts and can come to only one conclusion, that on these facts there is no case to answer on applicant's part . The court is not in a position to do so.

It is therefore ordered:

1992 (1) ZLR p92

MTAMBANENGWE J

1) That the purported discharge of applicant following his suspension on 12 November 1990 be and is hereby declared null and void.

2) The respondent shall forthwith pay to the applicant the sum of $15898,95 and shall, within 14 days of the making of this order, furnish the applicant with a full statement of what further monies he is entitled to taking account of any increases of salary and allowances to which applicant would have been entitled had he remained in office without suspension since 12 November 1990, and thereafter immediately pay the applicant the further monies to which he is pressently entitled. The Council shall further continue to pay to applicant his salary and allowances of not less than $2421,16 on or before the last day of each month as from 30 June 1991 and grant him such other benefits of office as he may be entitled to until appointment as Chief Executive Officer is lawfully terminated.

3) If Council again decides to take any further steps to suspend or discharge applicant for any act or omission by applicant which occurred prior to December 1989 it shall appoint an independent person or persons in terms of subs (13) of s 90 of the Urban Councils Act [*Chapter 214*] to conduct such inquiry as may be necessary, and if such inquiry is not completed within 3 months of any further suspension of the applicant, the applicant shall be reinstated in his present position on the expiry of the said period of 3 months.

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4) The costs of this application shall be borne by the first respondent.

Coghlan, Welsh & Guest, applicant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners

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

S v FERREIRA 1992 (1) ZLR 93 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & Ebrahim JA

Criminal appeal

4 & 13 February 1992

Flynote

Criminal law - culpable homicide - traffic offences - negligence - what constitutes - children on road - special duty of care on motorist

Headnote

The appellant knocked down and killed a seven-year-old boy. The boy had dashed out in front of the appellants's vehicle from the side of the road where he had been standing.

The trial court convicted the appellant of culpable homicide. Dismissing the appeal against conviction:

Held, a motorist must exercise special care and vigilance when he knows that there are young children in the vicinity of the road because young children are known to have a propensity for impulsive and sometimes irrational action. Thus greater care is demanded of the motorist towards children than is necessary for the safety of adults. The motorist is not, however, obliged to take precautions against every possible manoeuvre which the child could imaginably perform, but only conduct falling within common experience.

Held, further, the fact that the child was in the company of two adults did not entitle him to assume that the adults would exercise sufficient control over the children to protect them from danger. At very least it must be patent that the adults are in fact exercising effective control over the child by, for instance, holding the child's hand before such an assumption can be made. Here the appellant had not assumed that the two adult men were responsible for the children and had not seen any effective control being exercised by the adults over the children.

Held, further, that the appellant had been negligent in that, having seen the children, he had continued to drive at a speed which in the circumstances

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GUBBAY CJ

was excessive and by not significantly slowing down, he had prevented himself from taking effective evasive measures. The running out of the child was reasonably foreseeable and was not a *novus actus interveniens.* Thus the appellant had correctly been convicted of culpable homicide.

Cases cited:

South British Ins v Smit 1962 (3) SA 826 (A)

Neuhaus NO v Bastion Ins Co Ltd 1968 (1) SA 398 (A)

S v Phyffers 1970 (4) SA 104 (A)

Ndlovu v AA Mutual Ins Assn Ltd 1991 (3) SA 655 (E)

S v Harvey 1962 (3) SA 119 (E)

S v Mosia 1975 (4) SA 65 (A)

AA Mutual Ins Assn Ltd v Manjani 1982 (1) SA 790 (A)

Levy NO v Rondalia Assurance Corp of SA Ltd 1971 (2) SA 598 (A)

S v Duri 1989 (3) ZLR 111 (S)

S v Christodoulatis 1976 (2) RLR 35 (A)

S v Claassen 1979 RLR 323 (A)

M R D Stonier for the appellant

J T Manokore for the respondent

Judgment

Gubbay CJ: At about four o'clock on the afternoon of 12 June 1987 the appellant, in the company of a front seat passenger, was driving a Peugeot 504 motor vehicle, which was towing a boat trailer, along the main Butawayo-Beit Bridge Road in the direction of Esigodini. Following closely behind was another vehicle in which were two of his friends. The party were on their way to Inyankuni dam where they intended to spend the weekend fishing. The weather was clear and the traffic light. The stretch of road in the vicinity of the 40 kilometre peg was straight and level, and its surface in good condition. Visibility ahead extended for some 500 metres.

When about 150 to 200 metres from the 40 kilometre peg the appellant noticed two male adults and four young children standing together on the right hand verge, at a sign post, about three to four metres from the edge of the road. On the appellant's left, and immediately opposite to the group, was the junction of Homestead Road (a minor untarred farm road) and

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the main road.

The appellant, who was driving at a speed of 90km/h reacted to the scene in front of him by removing his foot from the accelerator, but did not place it on the brake pedal; nor did he sound the hooter. A vehicle going towards Bulawayo passed his. As the appellant approached closer one of the children, a small boy, made

GUBBAY CJ

a sudden dash from the verge directly into the line of travel of his vehicle, which was on the correct side of the road. The appellant applied his brakes fiercely and veered slightly to the left. He succeeded in reducing his speed to 60 km/h but it was impossible to avoid a collision. The offside front of the vehicle struck the child and threw him up on the windscreen. He was carried a distance of 36 metres before falling off onto the road, where the rear wheels of the vehicle passed over his body.

The appellant brought the vehicle and trailer to a standstill five metres beyond the point where the child was lying. He and his companion went to the child, who was seven years old, only to discover he was already dead.

Arising out of this catastrophe the appellant was charged in the court of the magistrate, at Gwanda, with the crime of culpable homicide. He pleaded not guilty, but was convicted and sentenced to a fine of $200 or, in default of payment, one month's imprisonment with labour. Against that conviction he appeals on the ground that the magistrate was not justified on the evidence in holding that the resultant death was attributable to any negligence on his part.

There is a very definite duty upon a motorist who knows himself to be in the near vicinity of young children, for they have a propensity for impulsive and sometimes irrational action. Children should not be credited with the same mature intelligence and presence of mind as grown-up people. A motorist must anticipate that a child on or just next to the road may unexpectedly decide to run across oblivious of danger. He must keep his vehicle under such control as to be able to suddenly pull-up if a child starts to cross the line of his route. He must prepare himself for such an eventuality. It has been aptly remarked that young children are "as wide as the road" and are liable to get into the way of a motorist without any overt warning. Thus greater care is demanded towards children than is necessary for the safety of adults.

This doctrine has been applied in many cases. See, for example, *South British In Co Ltd v Smit* 1962 (3) SA 826 (A) at 837A-B; *Neahaus NO v Bastion Ins Co Ltd* 1968 (1) SA 398 (A) at 406A-D; *S* v *Phyffers* 1970 (4) SA 104 (A) at 109F-G; *Ndlovu v AA Mutual Ins Assn Ltd* 1991 (3) SA 655 (E) at 661C-E. However this is not to suggest that precautions must be taken against every possible manoeuvre which a child might imaginably perform, and not merely against such conduct as would fall within common experience. To place such a burden upon a motorist would be totally unrealistic and impracticable of fulfilment. See *S v Harvey* 1962 (3) SA 119 (E) at 120E-F; *S* v *Mosia* 1975 (4) SA 65 (T) at 66F; *AA Mutual Ins Assn Ltd v Manjani* 1982 (1) SA 790 (A) at 796E-F.

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What HOLMES JA in *Levy NO v Rondalia Assurance Corp of SA Ltd* 1971 (2) SA 598 (A) referred to as "the totality of facts" must be considered in ascertaining whether the necessary degree of special care and vigilance, owed by the motorist to the young child near the road, has been shown. The learned Judge of Appeal listed these factors, though not exhaustively, at 600A-B as:

> " . . . the visibility of the children; their apparent age; their proximity to the edge of the road and to the path of the vehicle; their immobility or liveliness; the indications, if any, of an intention to cross the road; the extent of their supervision by a responsible person; the apparent awareness of the latter, and of the children, of the approach of the motorist; the available width of the road; and the stopping power of the vehicle in relation to speed, brakes and road surface."

At the end of his judgment the magistrate stated his general conclusions as follows:

> " The accused observed there were people on the side of the road when he was at least 150 metres away. He must have noticed there were children amongst these people but did not apply brakes. There was nothing obstructing him to notice the deceased run from (where he had been standing) since he had by-passed the only vehicle from the opposite direction. Having noticed the presence of children and appreciating the unpredictability of the children, the accused should have endeavoured to reduce his speed. His conduct fell short of what is expected of a driver when he observes children on the road."

In order to determine, then, whether the magistrate's view that a reasonably possible collision was a foreseeable occurrence, the cumulative effect of the particular circumstances pertaining at the time must be taken into account

It is clear to my mind that the scene confronting the appellant was such as to impose upon him a duty to substantially reduce his speed of 90 km/h, albeit there was no indication at that stage of an intention on the part of any of the children to cross the road. Obviously, the appellant was alive to the possibility of a sudden movement into the road by one or more of the children for he took his foot off the accelerator. But that action was totally inadequate. The vehicle was travelling along a level stretch of road and the precaution the appellant took over the rapidly decreasing distance would have barely, if at all, slowed the vehicle down. He ought, additionally, to have realised that the braking power of the vehicle would be adversely affected by the weight of the boat carrying trailer.

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The children were fairly close to the edge of the road and although it may have appeared to the appellant that the group was looking in his direction, he could not have been certain that each of the four children was aware of his fast approaching vehicle. Moreover, the children, whom the appellant fairly acknowledged were "very young", were directly opposite to the Homestead Road T-junction, which would be a reason for anyone of them to cross the main road to go to the farm road.

Mr *Stonier* contended that a most material circumstance was that the appellant was entitled to

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assume that as the four children were with the two adults, sufficient control would be exercised so as to protect them from danger.

The few decisions in which the feature of adult control or supervision was considered are discussed in the judgment of ERASMUS J in *Ndlovu v AA Mutual Ins Assn Ltd supra* at 661C-662E. They are illustrative rather than definitive of the principle involved, but what emerges from them is that, at the very least, it must be patent to the motorist that some degree of effective physical control is being exercised over the child, as for instance, it being held by the hand. A motorist is not entitled to treat a child as an adult solely because he happens to be in the company of an adult.

It was not suggested by the appellant that on seeing the group he instantly assumed that the two adult men were responsible for the children, let alone that he noticed some effective physical control being exercised over any one of them. They were all standing together; there was nothing more to it than that.

It necessarily follows in my opinion that the appellant failed to adequately prepare himself for a sudden movement by the deceased child. He continued to drive at a speed of about 90 km/in which, in the circumstances, was excessive. In not significantly slowing his vehicle down the appellant incapacitated himself from taking effective evasive measures and such omission constituted negligence. See *S v Duri* 1989 (3) ZLR 111 (S).

Since the fatal consequence was reasonably foreseeable and there was no *novus actus interveniens,* the necessary causation existed in law. See *S v Christodoulakis* 1976 (2) RLR 35 (A) at 36H-37B; *S* v *Claassen* 1979 RLR 323 (A) at 330B.

I would accordingly dismiss the appeal.

Manyarara JA: I agree

Ebrahim JA: I agree

Winterton, Holmes & Hill, appellant's legal practitioners

S v MUTINGWAZI 1992 (1) ZLR 98 (HC)

Court **High Court, Bulawayo**

Muchechetere J

Criminal review

14 February 1992

Flynote

Criminal procedure - remittal - power of superior courts order remittal of case for taking of evidence omitted

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Headnote

Although the High Court has the power in terms of s 41(d) of the High Court of Zimbabwe Act 1981 to order the remittal of the case to the trial court for the taking of essential evidence which has been omitted, this power is generally used sparingly and is more appropriately used in cases where the State has omitted to lead evidence on the essential elements of the offence and a reasonable explanation is furnished to the court as to why it was not led, or where the State has failed to lead evidence on an essential element of the offence alleged and it is in the interests of justice to remit the case.

Cases cited:

R v Hepworth 1928 AD 265

S v Buitendag 1976 (1) RLR 345 (A)

R v Letuli & Anor 1953 (4) SA 241 (T)

R v Boshoff 1956 R & N 61 (SR)

S v Maphosa S-12-91

Judgment

Muchechetere J: The accused was charged with theft. It was alleged that between 1 September 1990 and 30 April 1991 she stole 3 metres of clothing material from her employers, the Ministry of Health. She pleaded not guilty to the offence.

The trial magistrate forwarded this matter for review before delivering her judgment. She stated that she had stopped the proceedings in terms of the

provision of s 58(1) of the Magistrates Court Act [*Chapter 18*] and that she sought the reviewing judge's directions on the matter. She went on to state the following:

> " . . . After perusing the record in preparation for judgment and after listening to the submissions of Counsel the following regrettable facts have come to light
>
> (a) there is no evidence of the complainant;
>
> (b) the allegedly stolen material should have been formly produced which it wasn't;
>
> (c) the book showing the amount of uniform material before and after issue as well as the actual signed for on the day in question, should have been produced but it was not.
>
> I personally think that the State could have applied for leave to call the omitted evidence but it has not done so. Counsel for the defence has urged acquittal on the basis of the omitted evidence *inter alia. . .*"

I agree with the views of the Attorney-General's Office, for which I am obliged, that it was not proper for the learned trial magistrate to stop the proceedings in terms of the said s 58(1) of the

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Magistrates Court Act. The section reads:

> "58. (1) When in the course of trial, whether or not any evidence has been led, it appears that the offence is from its nature only subject to the jurisdiction or more proper for the cognizance of a court of greater jurisdiction, or when the public prosecutor so requests, the magistrate shall stop the trial and immediately adjourn the case and remand the accused and submit a report to the Attorney-General, together with a copy of the record of the proceedings. . ."

In the first instance, it is clear from a reading of the section, that on stopping the proceedings in terms thereof, the magistrate submits "a report to the Attorney-General . . ." There is no reference to any review procedure by the High Court under that section. The proceedings should have been forwarded to the Attorney-General's office. Secondly, a magistrate can only utilise the provisions of the section if it appears to him that the offence in question can be more properly dealt with by a court greater jurisdiction or when the Public Prosecutor so requests. Neither is the case here.

This is a case where the trial magistrate should have considered utilising the powers conferred upon her by s 218 of the Criminal Procedure and Evidence Act [*Chapter 59*]. That section reads as follows:

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> "The court may at any stage subpoena any person as a witness or examine any person in attendance though not subpoenaed, as a witness, or may recall and re-examine any person already examined; and the court shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case."

The above is fortified by the views of CURLEWIS JA (as he then was) in *R v Hepworth* 1928 AD 265 at page 277 where he said:

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice; he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

And in *S v Buitendag* 1976 (1) RLR 345 (A) at p348F-G BEADLE ACJ stated:

> "I do not think that it is the duty of any court to attempt to prove the case for the defence . . . Where, however, there are conflicts which can be removed by the calling of evidence and neither the prosecutor nor the defence seek to call that evidence, it is the court's duty to call it and similarly, where there are technical omissions in a case which can be cleared up by the calling of evidence, again it is the court's duty to call that evidence . . ."

It should also be pointed out that it is in a situation where the matter has been finalised, that is, where the accused has been convicted and sentenced and the matter subsequently comes up either on appeal or review that a superior court has the power to remit the matter back to the magistrates court for the taking, in appropriate circumstances, of some essential items of evidence that may have been omitted - see s 41(d) of the High Court of Zimbabwe Act 1981.

That power is generally used sparingly and more appropriately in cases where the State has omitted to lead evidence on the essential elements of the offence and a reasonable explanation

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is furnished to the court why it was not led, or due to an oversight the State fails to lead evidence material to the element of the offence alleged in the charge sheet. In all cases the interests of justice is taken into account. See *R* v *Letuli & Anor* 1953 (4) SA 24 (T); *R* v *Boshoff* 1956 R & N 61 (SR) and *S* v *Maphosa* S-12-91.

MUCHECHETERE J

From the above it is clear that it is for the learned trial magistrate to exercise her discretion in terms of the provisions of s 218 of the Criminal Procedure and Evidence Act [*Chapter 59*] on whether she should call witnesses on the matters she has raised. From what she states it appears that the evidence would be mostly of a formal nature and that the State had not called it because it was represented by "... an inexperienced counsel - straight from University ..." whilst on the other the defence was represented by "... a senior and experienced counsel ..." . In the circumstances the matter is remitted to the learned trial magistrate for her to complete the trial.

Cheda J: agrees.

S v MUCHAMBA 1992 (1) ZLR 102 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Manyarara JA

Criminal appeal

17 February 1992

Flynote

Criminal law - superior orders - obedience to orders which are manifestly illegal

Criminal procedure - plea - change of plea after conviction and sentence

Criminal procedure (sentence) - Customs and Excise Act [Chapter 177] - s 165 - smuggling of goods into country by member of National Army - first offender - appropriate sentence.

Headnote

On appeal against a conviction for smuggling, counsel for appellant argued that the appellant's guilty plea in the trial court had not been made voluntarily, advisedly and understandingly, and that there had therefore been a miscarriage of justice. He submitted that the sentence imposed should be set aside and the case should be remitted to the trial court

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so that an application could be made to change the plea to one of not guilty.

The appellant together with other members of the National Army had stolen goods and smuggled them into Zimbabwe from Mocambique using an army truck. He was convicted of contravening s 165 of the Customs and Excise Act and sentenced to 10 months' imprisonment with labour, of which 4 months was conditionally suspended. The appellant was a first offender. The appellant also appealed against the sentence imposed.

Held, as the trial court had already convicted and sentenced the appellant it was *functus officio* and that court could not therefore entertain an application for change of plea.

Held, further, that on the facts there was no valid basis for the Supreme Court exercising its powers in terms of s 11(2) of the Supreme Court Act for

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setting aside or altering the conviction or sentence on the ground that a substantial miscarriage of justice had occurred. The appellant's defence of superior orders could not succeed on the facts and the appellant had in fact volunteered further information to the trial court as to the planning for the offence and the sharing of the spoils.

Held, further, that the fact that the appellant had acted on the orders of a superior officer in smuggling goods into Zimbabwe from Mocambique, did not constitute a defence for the appellant as the orders were manifestly illegal and he should have questioned them and refused to obey them.

Held, further, that in relation to sentence that a first offender has no automatic right to receive a fine instead of being imprisoned.

Held, further, that given the seriousness of the offence, the prevalence of the offence in the area, the premeditation and planning involved in the commission of the offence, the substantial value of the goods involved and the fact that the goods were for resale, the sentence imposed was appropriate. An aggravating feature was that the appellant had used his deployment in Mocambique to smuggle goods across the border.

Cases cited:

S v Pillay 1981 (4) SA 151 (N)

S v Maseko 1986 (2) ZLR 52 (SC)

R v Werner & Anor 1947 (2) SA 828 (A)

S v Manyesa 1975 (2) RLR 57 (A)

G T Matendadzamera for the appellant

L R Goredema for the respondent

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Judgment

Korsah JA: The appellant is a member of the National Army. On 25 June 1990 he and five other members of his unit were convicted on their pleas of guilty to contravening s 165 of the Customs and Excise Act [*Chapter 177*] (as amended by s 25 of Act 30 of 1976). He was sentenced to ten months' imprisonment with labour of which four months was conditionally suspended. He appealed against both conviction and sentence. We dismissed the appeal on the turn and intimated that our reasons would be given later.

It is necessary to set out in summary form the events that gave rise to the charge preferred against the appellant as they are relevant, not only to his conviction, but to the sentence imposed as well.

The appellant was attached to the C Company of the Mechanised Battalion. As such, he was under the charge of Captain Vitalis Gift Tunha. The C Company,

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at the relevant time, was on military duty in Mozambique. On a date unknown to the State, a heavy vehicle with a full load of grinding mill engines overturned at a place within Mozambique. The C Company of the Mechanised Battalion was entrusted with the responsibility of guarding the property at the scene of the accident.

The C Company, of which the appellant was a member, stole four of the grinding mill engines and hid them within Mozambique. On 23 June 1990, Captain Vitalis Gift Tunha ordered the other five accused persons, inclusive of the appellant, who was the driver of the vehicle, to drive into Mozambique, fetch the engines and load firewood on top of the engines to conceal them and drive them across the border into Zimbabwe.

That mission was successfully accomplished and the appellant had the firewood off-loaded at the Army Base in Zimbabwe. Fresh orders were then issued to the appellant by Captain Tunha to ferry the four stolen engines to Harare. As luck would have it, on his way to Harare, the vehicle driven by the appellant was intercepted along the Harare/Nyamapanda Road by the Officer-in-Charge of Customs and Excise, Denford Zambezi. He searched the vehicle and discovered aboard it two Lister-Petter Grinding Mill engines, bearing serial numbers 3906222 TS 3A001 and 3905461 TS 2A001 respectively.

Upon being asked who the owner of the engines was, the appellant said they belonged to Captain Tunha. The engines were seized and the matter reported E to the pollee. The value of the smuggled engines was estimated at$13 914 and the prejudice to the State in terms of revenue was $9 044.

At his trial the appellant, when the elements of the offence were being canvassed, admitted to unlawfully smuggling the two Lister engines into Zimbabwe from Mozambique, that he intended to evade the duty payable to customs therefor, and that he had no right nor lawful excuse to bring the goods into Zimbabwe without payment of duty.

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In his plea in mitigation he made a clean breast of the matter. He said:

> "We planned the offence together. We are *(sic)* going to share money from the sale. I was intercepted on my way to Harare."

It was contended by counsel for the appellant firstly, that there was a miscarriage of justice in that the appellant's plea was not made voluntarily, advisedly and understandingly; and that the interests of justice would best be served by setting

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aside the sentence imposed by the learned trial magistrate and remitting the matter for the magistrate to entertain an application by the appellant for a change of plea to one of "not guilty".

Unlike the circumstances in *S v Pillay* 1981 (4) SA 151 (N) and *S v Maseko* 1986 (2) ZLR 52 (S), the appellant herein had not made an application for a change of plea to the trial court before the imposition of sentence. After sentence was pronounced by the trial court in the instant case, that court became *functus officio* and could not entertain such an application on any ground.

There is no formal application before this court to have the conviction set aside C for the reason that the plea was not voluntarily, understandingly and correctly made.

The law-maker, in his wisdom, conferred upon the Supreme Court the power to set aside or alter a conviction or sentence if it appears to that court that a substantial miscarriage of justice has in fact occurred See s 11(2) of the Supreme Court Act. The question is: has such a serious miscarriage of justice occurred in this case to justify the conviction or sentence being set aside?

It was contended on behalf of the appellant that the learned magistrate should have entered a plea of not guilty as it was accepted by the State that the appellant was acting upon the orders of a superior officer. It is well settled that a subordinate of ricer, where the orders of his superior are manifestly illegal, as in this case, is not only justified in questioning them, but even in refusing to execute such commends. See *R v Werner & Anor* 1947 (2) SA 828 (A). So, obedience to superior orders does not avail the appellant as a defence.

Furthermore, as counsel for the State rightly pointed out, the appellant volunteered extra information to the court when he said that they planned the offence together and were going to share the money from the sale. The conviction was, therefore, unassailable.

As regards sentence, it was contended on behalf of the appellant that where a statute provides for a sentence of a fine with an alternative of imprisonment a sentencing officer must first consider the imposition of a fine and proceed to impose a term of imprisonment only in the absence of mitigatory features. But that exactly is the exercise upon which the learned trial magistrate embarked before arriving at the decision to impose a custodial sentence.

The appellant was a member of the National Army who, together with others.

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KORSAH JA

had been entrusted with safeguarding property on a vehicle involved in an accident. In breach of trust to protect that property, he stole part of the consignment and smuggled it across the border into Zimbabwe. He was fortunate not to have been charged with theft

The learned trial magistrate took into account the seriousness of the offence of smuggling and its prevalence in the area; the premeditation and planning that the commission of the offence involved; the value of the goods smuggled across the border and the fact that they were for re-sale. In *S v Manyesa* 1975 (2) RLR 57 (A) at 59E-H MACDONALD JP with whom DAVIES AJA concurred, expressed himself thus:

> "I agree that in future a prison sentence may appropriately be imposed for a first offence of smuggling for the following principal reasons: The prevailing economic conditions offer an unusual opportunity to make large profits by smuggling and it is in the national interest that people should be deterred from taking advantage of this opportunity. In general it is greed and not dire need which motivates persons who smuggle and the risk of a prison sentence is likely to have a marked deterrent effect; the prospect of a fine on the other hand is likely to be regarded as no more than a business risk. A prison sentence may be appropriate not only in the case of persons who because of their occupation have an increased opportunity to smuggle but also where the value of smuggled goods is substantial or where they are intended for re-sale or some other business use" (emphasis added).

The appellant's employment, or should I say deployment to safeguard the goods in Mozambique, or both, offered him an increased opportunity to smuggle. The value of the goods smuggled was substantial. And they were intended for re-sale. A first offender has no vested interest in the imposition of a fine. In the circumstances of this case the sentence imposed by the learned trial magistrate cannot be impeached.

The above are our reasons for dismissing the appeal.

Gubbay CJ: I agree

Manyarara JA: I agree

Sawyer & Mkushi, appellant's legal practitioners

S v NDABANE 1992 (1) ZLR 107 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & McNally JA

23 January & 18 February 1992

Criminal appeal

Flynote

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Evidence - Road Traffic Act, 1976 - s 46(1) - driving under influence of intoxicating liquor - breathalyser test - done well after the two hour period specif ed in s 46(2) of Road Traffic Act - necessity for scientific or medical evidence in such circumstances.

Headnote

A breathalyser test was performed upon the appellant some three-and-a-half hours after the alleged offence, namely "drunken driving" in contravention of s 46(1) of the Road Traffic Act, 1976. In terms of s 46(2) only if the measurement of blood alcohol is carried out within two hours of the alleged offence, will the presumption apply that the person's blood alcohol level at the time of the accident was not less than that recorded by the breathalyser test. No scientific or medical evidence had been adduced to show by means of "back calculation" what the blood alcohol level of the appellant would have been at the time of the accident.

Held, that there was a necessity for the State to adduce scientific or medical evidence where the blood alcohol reading was taken outside the prescribed two hour limit. Such expert evidence was required when the State wished to rely upon the result of a blood alcohol measurement in order to persuade the court that the person concerned must have drunk more alcohol than he claimed, or that his blood alcohol concentration at the time of the accident must have been in excess of the prescribed limit The expert who had performed a "back calculation" would be able to testify as to the estimated blood alcohol level at the time of the accident. A back calculation was a calculation of the amount of alcohol elimininated in the period between the accident and the taking of the specimen. But as such calculation involved

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a number of factors, such as individual personal physiology, the amount of food eaten and the type of alcohol imbibed, reliance could only be placed on such evidence where it was readily understandably clearly established the presence of excess alcohol at the time of the accident. Without accepable scientific evidence it would be impossible for the State to establish beyond a reasonable doubt that at the time of the accident the blood alcohol concentration was not less than the prohibited amount (*per* GUBBAY CJ and MANYARARA JA).

Held, McNALLY JA that in general a blood alcohol reading taken outside the prescribed limit must be treated with great circumspection. But sometimes certain conclusions can be drawn where the test is performed outside the two hour limit even if there is no scientific evidence is called to make a back calculation.

Cases cited

S v Chimedza S-71-88 (not reported)

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

Gumbley v Cunningham [1989] 1 ALL ER 5 (HL)

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S v Edley 1970 (2) SA 223 (A)

S v Skeal 1989 (3) ZLR 253 (S); 1990 (1) SACR 162 (ZS)

G Masimirembwa for the appellant

LR Goredema for the respondent

Judgment

Gubbay CJ: The appellant was charged in the main with contravening s 46(1)of the Road Traffic Act, 1976, in that on 30 May 1990 he had driven a Rover 2600 motor vehicle along Leopold Takawira Street into Samora Machel Avenue while under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of such vehicle. In the alternative he was charged with having driven the Rover 2600 motor vehicle negligently on the occasion in question, in violation of s 43(1)(a) of the Act.

Despite a denial of both these alleged offences, the appellant was convicted on the main charge and consequently acquitted on the alternative. He was sentenced to a fine of $400 or, in default of payment, to one month's imprisonment with labour. In the absence of special circumstances surrounding the commission of the offence he was, in addition, prohibited from driving all classes of motor vehicle for a period of six months and his driver's licence was cancelled. An appeal was noted against both conviction and sentence.

The conviction was attacked by Mr *Masimirembwa* on the ground that the

acceptable evidence fell short of proving beyond a reasonable doubt that the appellant's admitted intake of intoxicating liquor had rendered him incapable of exercising proper control of his motor vehicle, and only disclosed the commission of the lesser offence of negligent driving.

In seeking to establish the main charge the prosecution relied on the cumulative weight of the following features:

(1) the breathalyser test taken by the appellant, which had revealed a concentration of 157 milligrams of ethyl alcohol in 100 millilitres of blood;

(2) the observation of two witnesses at the scene of the accident to the sobriety of the appellant;

(3) the manner of the appellant's driving, in the light of his prior ingestion of alcohol.

The trial magistrate excluded from consideration the breathalyser reading. He did so because it was common cause that the appellant had been tested wed outside the two hour period specified in s 45(2) of the Act as giving rise to the presumption that his blood alcohol level at the time of the accident was not less than that recorded by the breathalyser machine; in fact some three-and-a-half hours had elapsed. The magistrate referred to *S v Chimedza* S-71-88

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(not reported) where at p 5 of the cyclostyled copy of the judgment KORSAH JA said:

> "Where there is no acceptable scientific evidence in terms of subs (2), it is impossible for the State to establish beyond a reasonable doubt that at the time of driving concentration of alcohol in the accused's blood was not less than the prohibited degree."

In that case a specimen of blood had been taken two-and-a-half to three hours after the accident and on analysis revealed a concentration of not less than 205 milligrams of ethyl alcohol in 100 millilitres of blood

In its more recent judgment in *S v Ruzario* 1990 (1) ZLR 359 (S) this court was at pains to emphasise the necessity for the State to adduce scientific or medical evidence where the blood alcohol reading was taken outside the prescribed two hour period. It is regrettable that no heed was taken of the warning in this matter. This is what was said at 362E-H:

> "If the State wished the court to conclude from the blood analysis recorded, that the appellant must have drunk more alcohol than he claimed, or that his

GUBBAY CJ

> blood alcohol concentration must have been in excess of the prescribed limit at the time of the collision, it was incumbent upon it to adduce expert scientific or medical evidence to show this by means of 'back calculation'; that is, by a calculation of the amount of alcohol eliminated in the seven and-a-half-hour period between the accident and the taking of the specimen.
>
> But even in such event, it is to be noted because back calculations involve a number of factors, such as individual personal physiology, the amount of any food eaten and the type of alcohol imbibed, the prosecution should only rely on such evidence where it is readily understandable and clearly establishes the presence of excess alcohol at the time when the accused person was driving. See *Gumbley* v *Cunningham* [1989] 1 All ER 5 (HL) at 9e-f."

In the circumstances it is clear to my mind that the only relevance of the breathalyser reading was that it established that the appellant had partaken of alcohol, a fact which, as it happened, was not in contention.

The two witnesses who spoke of the appellant's condition were the complainant taxi driver, Maxwell Mugauri, and one of the police details who attended the scene of the accident, Constable Lloyd Nyakudarika.

Mugauri's evidence was not entirely consistent. In examination-in-chief he omitted to say that the appellant appeared to him to be drunk and claimed that he did not have an adequate opportunity to observe the appellant. Under cross-examination, however, he maintained that the appellant was unable to stand or walk properly, though he conceded that the appellant had not staggered and had walked at the same pace as he did from the scene of the accident to the Jameson Hotel. He made no mention that the appellant was argumentative or that his speech was in any way affected.

Constable Nyakudarika who arrived at the scene two-and-a-half hours after the accident, said that he detected a faint smell of alcohol on the appellant's breath. His eyes were bloodshot (a condition which the appellant was able to show was permanent) but he was steady on his feet. What led to the impression that the appellant was drunk was that he was argumentative,

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unco-operative and spoke in a loud voice using a mixture of the Ndebele and English languages. The appellant had to be forced into the police vehicle and was conveyed to Harare Central Police Station.

The magistrate accepted that there were short comings in the evidence of

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Constable Nyakodanka and that he had fared poorly under cross-examination. Nonetheless he found that the appellant had behaved in an obstreperous manner and that the opinion that he was drunk was justified. He made no comment, however, on the fact that at the time of the accident the appellant had not acted aggressively towards Mugauri.

It seems to me that there maybe some truth in the appellant's claim that the cause of his annoyance was that Constable Nyakudarika persisted in speaking to him in Shona and paid far more attention to the taxi driver than he did to him.

Be that as it may, if the evidence of the two witnesses is taken as a whole I do not consider that, in itself, it was sufficiently cogent to establish that the appellant's degree of intoxication was such as to make him incapable of exercising proper control over his motor vehicle. See *S v Edley* 1970 (2) SA 223 (A) at 226C-D. Of course, it could be that the appellant's state of intoxication worsened between the time of the accident and the arrival of the police.

The real question is whether the only reasonable inference to be drawn from the manner of the appellant's driving was that the normal skill and judgment required in the manipulation of a motor vehicle must have been, at the relevant time, impaired or diminished as a direct result of the consumption of alcohol. See *S v Skeal* 1989 (3) ZLR 253 (S) at 256; 1990 (1) SACR 162 (ZS) at 163i. It must not be overlooked that it is not sufficient that the inference is merely an inference which can be reasonably drawn. Before one is entitled to draw such an inference it must be consistent with all the facts and it must be the only reasonable inference to be drawn from all the facts.

It is not open to doubt that the accident was caused by a high degree of negligence on the part of the appellant. What the appellant did at the robot controlled intersection was to turn right into Samora Machel Avenue from Leopold Takawira Street directly in the path of the oncoming taxi which was travelling straight, in a northerly direction, across the intersection. But for the taxi driver's presence of mind and quick reaction in applying his brakes, a fairly serious accident would have occurred. In the event, the taxi, which was being driven at a fairly moderate speed, struck the nearside rear door of the appellant's Rover. Traffic was light at the time and visibility was excellent.

The appellant was able to offer no satisfactory explanation for his failure to give way. He must have seen the approaching taxi and concluded that there was sufficient time to pass in front of it. The magistrate expressed the view that "this bravado" was caused by alcohol. That was certainly a reasonable inference to

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GUBBAY CJ

draw - it may even be a probable inference - but I do not think it was the sole reasonable inference.

The appellant testified that he had driven from the suburb of Belvedere, which is a few miles from the intersection in question. There was no evidence that he had driven in any way erratically in following that route. Of course it is possible that motorists either did not take note of the manner of his driving or could not be bothered to do anything about it. But it must be assumed in his favour that he was able to exercise proper control of his vehicle during the course of that journey. This being so, it is my view that it would be unsafe to exclude as one reasonable inference that the appellant's precipitate and dangerous action at the intersection was due simply to a miscalculation that he would be able to "beat" the path of the oncoming taxi, and **not** that the risk he took was the cause of his vision or senses being dulled by liquor.

The conviction must therefore be altered to one of contravening s 43(1)(a) of the Road Traffic Act.

It was conceded by Mrs *Goredema,* who appeared for the State, that an alteration of the conviction to the lesser offence warranted a consequent reduction in the sentence. She suggested that the prohibition from driving and the cancellation of the appellant's driver's licence be set aside but that the quantum of the fine

be allowed to stand.

Taking account of the appellant's unblemished driving record, spanning a period of twenty six years, I share counsel's view that to subject him to a period of prohibition is not justified. I am also satisfied that the high degree of negligence involved in the accident merits the imposition of a fine of $400.

In the result, the appeal is allowed to the following extent:

(1) The conviction is altered to one of contravening s 43(1)(a) of the Road Traffic Act.

(2) The orders prohibiting the appellant from driving and cancelling his driver's licence are set aside. For the rest, the sentence is confirmed.

McNALLY JA

McNally JA: I agree with the learned CHIEF JUSTICE on the facts of this case. The evidence was so badly presented that it was difficult to obtain a clear picture of the way in which, and the stage at which, the appellant showed signs of intoxication. Moreover no effort was made to establish how long it was since the appellant had been drinking.

My concern is simply about the extent of the applicability of the general statements cited from the cases of *Chimedza supra* and *Ruzario supra*. I am in complete agreement with the

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statement in *Ruzario supra,* insofar as it applies to the facts of that case. I am equally in agreement with the statement in *Chimedza supra*, as it relates to the facts of that case and insofar as it applies to a case involving s 45 of the Road Traffic Act No. 48 of 1976.

However, more especially where the court is dealing with a case under s 46 of the Act (drunken driving) I would not wish to go further than to say, in general terms, that a blood alcohol reading taken outside the prescribed time limit, must be treated with great circumspection.

Take, for example, the case where a blood alcohol reading of 200mg/100ml is recorded three hours after the accident and five hours after the accused last consumed alcohol. Reference to either of the standard text-books available in Zimbabwe, namely *Alcohol, Drugs & Road Tragic* published by Juta's, or *Drink Drugs & Driving* published by Sweet & Maxwell, will show that certain conclusions can be drawn, even without scientific evidence.

One conclusion is that if five hours have elapsed since the accused consumed alcohol, the reading must have been taken on the downward curve of the blood alcohol graph. Therefore, at some stage the accused's blood alcohol level must have been higher than 200mg/100ml.

The second conclusion is that at the time of the accident, the accused's blood alcohol level F must have been in the vicinity of 200mg/100ml and almost certainly higher.

Given such facts I would not wish to rule out the possibility that a court might properly find such a person guilty either under s 45 or under s 46 of the Act, on that evidence alone.

Insofar as the statements in *Ruzario , supra*, and *Chimedza , supra*, may be interpreted as being of absolute application, I would respectfully record my reservation to the extent indicated.

MANYARARA JA

Manyarara JA: I am in respectful agreement with the learned CHIEF JUSTICE that this appeal should be allowed.

I have considered very carefully the reservation expressed by my brother McNALLY relating to the interpretation of the statements made in *Ruzario , supra*, and *Chimedza , supra*. My respectful view is that the warning sounded in *Ruzario , supra*, would cater adequately for the examples he has given. I suggest that convicting the present appellant under s 45 or s 46 on evidence which my brother McNALLY himself views as "badly presented" indicates the validity of the wanting.

For this reason alone, I do not think that one can safely postulate the likely situations to which the statements made in *Ruzario supra* or *Chimedza supra*, may not apply. A proper occasion for doing so may yet arise but this case does not seem to be such an occasion.

Therefore, I agree with the whole of the learned CHIEF JUSTICE'S judgment allowing the appeal to the extent he has done.

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Masimirembwa & Associates, appellant's legal practitioners

S v STEPHEN 1992 (1) ZLR 115 (HC)

Court **High Court, Harare**

Chidyausiku J

Criminal trial

22 July 1988 & 20 February 1992

Flynote

Criminal law - mental disorder or disability - hysterical dissociation - accused still capable of minimal degree of self - control and of forming mens rea - special verdict thus not applicable

Criminal procedure (sentence) - murder - extenuating circumstances - acts done in state of diminished responsibility with only very minimal degree of self-control - appropriate sentence

Headnote

In a state of hysterical dissociation with only a very minimal degree of self control, a man had killed one of his sons and had attempted to kill his second son and his wife.

The court found that a person who is capable of some degree of self-control becomes capable of forming the *mens rea* for murder. Although he was suffering from a mental disorder or disability at the time he committed the crimes, he was still responsible at law for his actions and therefore a special verdict in terms of s 28 of the Mental Health Act, 1976 was not returnable.

Instead the court found that he was guilty of murder with extenuating circumstances because of diminished responsibility.

The court found that in the particular circumstances of this case the guilt verdict amounted really to a technicality. No moral blameworthiness attached to the accused. The court sentenced the accused to imprisonment until the court rose.

Cases cited

A-G v *Senekal* 1969 (2) RLR 368 (A); 1969 (4) SA 478 (RA)

CHIDYAUSIKA J

R v Mawonani 1970 (1) RLR 41 (A); 1970 (3) SA 448 (RA)

S v Ncube 1977 (2) RLR 304 (G); 1978 (1) SA 1178 (R)

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S v Chin'ono 1990 (1) ZLR 244 (H)

R Goba for the State

W J Mutezo for the accused

Judgment

Chidyausika J: The accused in this case is charged with the murder of his son Tom Edward and the attempted murder of his other son Tongai Edward and his wife Fargrace Edward.

When the charges were put to the accused his reply was that he did not deny the allegations made against him. He did not know what he was doing at the time he committed the alleged offences.

The circumstances surrounding the commission of this offence are common cause and are contained in an agreed statement of facts Exhibit 1. The accused is aged 35 and the deceased was the accused's son by a divorced wife and not by Fargrace, the complainant in one of the counts of attempted murder. The accused had at the time of these offences two other children by his present wife Fargrace, namely Never and Tongai in that order of birth. On 9 December 1982 accused was sleeping in bed with Tom while his wife was sleeping on a mat on the floor with Tongai. Never was not home. The accused suddenly woke up in the early hours of the morning and without warning throttled his wife, stabbed Tom to death and stabbed Tongai injuring him seriously. The accused also stabbed himself in the chest several times, inflicting on himself serious injuries. He used a pair of scissors and a table fork to inflict these injuries The State accepts that the accused did not know what he was doing at the time and the next thing that he remembers is finding himself in Bindura Hospital and receiving a report from his mother and the nurses to the effect that Tom was in the mortuary having been stabbed to death by him. Tongai was in Harare Hospital with stab wounds inflicted by him and that he had attempted to kill his wife by throttling her. He was also advised that he had inflicted severe wounds on himself. This was the first time that accused had behaved in an unusual manner and there has been no recurrence since then.

According to the agreed statement of facts the accused does not recall or remember what happened and the indications to the police were made on the basis that he knew where his wife and his children sleep and that he knew where tools were kept. The accused had taken custody of the deceased from his ex-wife in 1977 and had lived with him ever since. The accused lived very amicably

with his family before this incident. The agreed statement of facts concludes by stating in para 15:

> "The accused was suffering from hysterical dissociation which is a trance-like state in which there is a mental disjunction but no underlying brain disease".

Dr Vermeulen, a psychiatrist, examined the accused in 1985 and then again sometime in

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1988. His findings and conclusions in respect of the 1985 examination are contained in a report produced as Exhibit 2. Paragraphs 4 to 8 of that report, which is in affidavit form, read as follows:

"4. The accused has never been treated for mental illness and has shown no evidence of mental illness whilst in prison or when seen by me.

5. The accused claims that he cannot remember what happened at the time of the alleged crime. He says that he stabbed his children and himself whilst being asleep.

6. The accused has numerous scars over his chest and a few over his abdomen.

7. In my opinion the accused was suffering from an hysterical dissociative state at the time of the alleged crime and was not legally responsible for his actions.

8. In my opinion the accused is fit to stand trial."

In July 1988 Dr Vermeulen prepared another report in the form of an affidavit. It is not clear whether the report was as a result of a further examination of the accused or made simply because the doctor had since changed his opinion. The second report was produced as Exhibit 3. It reads in part as follows:

"1. I am a Government Psychiatrist stationed in Harare and designated as having a special knowledge of psychiatry in terms of section 78 of the Mental Health Act, 1976.

2. My qualifications include MB, ChB, Dip Data, BA Hons, BSc Hons, DPM, MRCPsych.

3. I refer to my previous affidavit concerning the accused EDWARD STEPHEN in which I gave my opinion that the accused was suffering from an hysterical dissociative state at the time of the alleged crime and was not legacy responsible for his actions.

CHIDYAUSIKU J

4. In 1985, when I prepared die above affidavit a diagnosis of hysterical dissociation was sufficient for obtaining a special verdict in terms of Section 28 of the Mental Health Act, 1976. However, since then there have been two significant developments: (1) the courts have increasingly made use of the concept of 'a state of diminished responsibility' and (2) I have started recommending a special verdict almost only in cases where the mental disorder is a manifestation of actual or presumed disease of the brain eg organic psychosis, schizophrenia, epilepsy and mental retardation.

5. Hysterical dissociation is a trance-like state in which there is a mental dysfunction but no underlying brain disease.

6. In 1988 my opinion is that the accused was in a state of diminished responsibility at the time of the alleged offences. . ."

Dr Vermeulen gave evidence. He explained why his opinion in 1988 differs from that of 3 years earlier in 1985. His explanation was that the state of diminished responsibility is, as it were, a half-way house between the condition of sanity where a person is legally responsible for his action and insanity where a person was not responsible in law for his actions. In the past, the practice had been whenever a person was suffering from a state of diminished responsibility psychiatrists recommended a special verdict for the benefit of the accused. In his view the accused benefited from such a recommendation because the accused would avoid the death

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sentence or a severe prison term. He has since 1985 been invited by the courts, in particular the Supreme Court, to examine a number of accused persons to establish if they had suffered from diminished responsibility at the time of the commission of an offence. This, in his view, indicates an acceptance by the courts of the condition of the state of diminished responsibility. Because of this accede of the concept of diminished responsibility it was no longer necessary for psychiatrists to recommend special verdicts for the benefit of the accused as was the case in the past.

Dr Vermeulen explained that there are two conditions of hysterical dissociation.

The one is caused by an underlying disease of the mind, such as schizophrenia, and the other is brought about by external stimuli, such as provocation or mental distress. In the latter case there is no underlying disease of the mind. In the case where the condition of heroical dissociation has an underlying disease of the mind as its cause the accused has absolutely no control over his actions. In the case of hysterical dissociation without an underlying disease of the mind or caused by external stimuli such as provocation the accused has **some** degree of

CHIDYAUSIKU J

self-control. The degree of self-control varied from individual to individual and the surrounding circumstances causing the condition. His evidence was that the accused in this case was, at the time of committing the offences suffering from the condition of hysterical dissociation without an underlying disease of mind as its cause. His condition was induced by external stimuli or stimulus which he was unable to determine.

In his view the accused had some degree of self-control at the time he committed the offences. He conceded, however, that that degree of self-control may have been minimal. The existence of some degree of self-control at the time of the commission of the offence led him to conclude that the accused was suffering from diminished responsibility.

The doctor likened the condition of people suffering from hysterical dissociation without an underlying disease of the mind, such as the accused, to a group of women on a stage under hypnosis. If the hypnotiser were to order the women to undress some of the women would wake up from the hypnosis indicating a certain degree of self-control. However, those women accustomed to undressing in the course of their employment, such as models or night club entertainers, would obey the order to undress, thus exhibiting a lesser degree of self-control than the others.

The doctor's evidence was that the accused was very unlikely to have another attack of hysterical dissociation. He rated his chances of having another attack as the same as those of any other normal healthy person. I might add that events since the commission of the offence support the doctor in this regard. These offences occurred in 1982. The accused has since then lived normally with his family and has gone about his duties as a tractor driver without any problems or sign of abnormality. The couple has since had a couple of children and the wife is presently expecting. The State closed its case after leading Dr Vermeulen's evidence. The

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defence did not call any evidence.

The court felt it might benefit from a second psychiatrist's opinion and accordingly ordered that the accused undergo a second examination by a different psychiatrist. He was examined by Dr Chikara. His findings and conclusions corroborated those of Dr Vermeulen's as contained in his second affidavit exhibit 3.

The court also called the accused's wife who happened to be in court at the time of Dr Chikara's evidence. She gave an account of what occurred on the morning the offences were committed. Her evidence was basically what is contained in

CHIDYAUSIKU J

the agreed statement of facts. She also said that after she had broken from the accused who was throttling her she ran out of the house. The accused then secured the door from inside and most probably proceeded to stab his children and himself. This, in my view, tends to indicate that the accused to some degree appreciated what was happening around him. In particular the accused appeared to realize that unless he secured the door his intended victims might escape or by securing the door he would prevent interference from outside.

Both the State and the defence counsel have urged me not to return a special verdict in this case. I now want to consider the question of what is the appropriate verdict in this case.

The question of what is an appropriate verdict in these or similar circumstances has been discussed at length in previous decided cases. In particular the issue was discussed in the following cases:

A-G *v Senekal* 1969 (2) RLR 368 (A); 1969 (4) SA 478 (RA).

The accused committed murder at a time when his mind was temporarily disabled or disordered due to concussion induced by a severe assault to the head. The accused had fully recovered at the time of the trial and the likelihood for recurrence was nil. The Appellate Division held that a special verdict should have been returned.

*R*v *Mawonani* 1970 (1) RLR 41 (A); 1970 (3) SA 448 (RA).

The accused fatally stabbed his brother while he was in a state of hysterical dissociation at a seance. The accused was a spirit medium and was trying to communicate with the ancestral spirits. The deceased and the accused were fond of each other. The accused did not know he had killed his brother. When told he had killed his brother he did not believe it. Upon realising that it was true he was overcome with grief. At the trial the accused had recovered and there was no probability of recurrence. A special verdict was resumed.

S v Ncube 1977 (2) RLR 304 (G); 1978 (1) SA 1178 (R).

The accused fatally stabbed his brother he was fond of while sleep walking and reacting to threatening realities of his dream. His condition was described by the doctor as hysterical dissociation just like in *Mawonani's* case (*supra*). The accused had completely recovered at the

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time of his trial and recurrence was mast unlikely. A special verdict was returned.

In all the above cases the question of when a special verdict in terms of s 28 of the Mental Health Act No. 23 of 1976 should be returned was consider. The

main proposition that emerges from the above cases is that if the accused's mind is defective, disabled or disordered at the critical time, the time of the commission of the offence, so as not to be liable in law for his action then, a special verdict has to be returned. The duration of the disorder, defect or disability is irrelevant. It only needs to exist at the time of the commission of the offence. The cause of the defect need not be permanent. The cause of the disorder, disability or defect is irrelevant. It could be organic, functional or physical in its origin. Complete recovery and unlikelihood of recurrence are also irrelevant.

The issue that was not dealt with squarely in the above cases is the question of the degree of the defect, disorder or disability necessary for a person not to be responsible in law for his action. It is common sense to assume that different degrees of the disability or disfunction of the mind at the time of the commission of an offence will be found in different accused. It would appear to me that the above cases were decided on the basis that the degree of the defect, disability or disfunction of the mind was absolute, in the sense that the accused, because of the condition of their minds, were not able to appreciate the nature of their actions or, if they appreciated the nature of their actions, were by reason of their mental condition unable to exercise any self-control.

SMITH J in *S v Chin'ono* 1990 (1) ZLR 244 (H) pointed out that the above cases do not indicate what actually hysterical dissociation meant and the scope or parameters of that condition. I agree with that observation.

In the case before me medical evidence establishes that hysterical dissociation is dreamlike or trancelike state which is brought about by either an underlying disease of the mind or external stimuli. When it is brought about by an underlying disease of the mind the victim has absolutely no control over himself. His actions are completely involuntary. In my view a person acting in this manner cannot be responsible in law for his actions because a person acting involuntarily is incapable of forming any *mens rea.* In the present case the evidence is that the accused was capable of self-control. The degree of self control may be minimal. In my view once a person is capable of some control of his action he becomes capable of forming *mens rea* and therefore liable in law for his actions. The question of the extent of the self-control becomes only relevant for the purposes of sentence.

Thus in the present case the court is satisfied that although the accused was mentally disordered or defective at the time of the offence he was capable of exercising self-control and thus was responsible according to law for his action at the time of the commission of the

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offence. Because of the nature of the assault

CHIDYAUSIKU J

and the mental condition of the accused at the time of murder the accused cannot but have a constructive intent.

In the result the accused is found guilty of murder with constructive intent on the first count and guilty of attempted murder as charged in respect of counts 2 and 3.

The State concedes that there are extenuating circumstances on the count of murder. In view of the court's finding on the mental state of the accused at the time the offences were committed the concession is properly made. The court finds that there are extenuating circumstances in this case. The extenuating circumstances are that the accused was suffering from hysterical dissociation leading to a state of diminished responsibility at the time of the offence.

I now turn to the question of sentence. The accused has been found guilty on what really amounts to a technicality. The medical evidence is that at the time of the offences the accused had some self-control. The degree of the self-control was, however, minimal, indeed close to non-existent. He was in a state of hysterical dissociation. The accused did nothing to induce this condition. It is something that could have happened to any other normal person. In these circumstances no moral blameworthiness can be attached to the accused. For these reasons the accused is sentenced to imprisonment with labour until this court rises. In other words the accused cannot leave for home until 4.30. All counts have been treated as one for the purposes of sentence.

Mugabe, Mutezo & Partners, accused's legal practitioner

Attorney-General's Office, State's legal practitioners

S v NGWENYA 1992 (1) ZLR 123 (HC)

Court **High Court, Bulawayo**

Muchechetere J

Criminal review

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21 February 1992

Flynote

Criminal procedure - sentencing of accused by different magistrate from the magistrate who convicted him - when permissible

Headnote

The accused had pleaded guilty to the charge and the accused had been found guilty after the magistrate had dealt with the case in terms of s 255(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*]. The case had then been adjourned. The case was then resumed before a different magistrate who proceeded to hear mitigation of sentence and then imposed sentence.

On review, it was held that s 312(5) of the Criminal Procedure and Evidence Act allows a magistrate other than the one who convicted the accused to impose sentence upon the accused. This can be done "in the absence of the magistrate who convicted" the accused. The words "in the absence of" should be given the widest possible meaning, namely, that they apply whatever the reason for the convicting magistrate's absence. Thus the absence may be due to retirement, leave, discharge from the service, death and so on.

However, the second magistrate who sentences the accused must comply with the requirements of s 312(5), namely, he must:

(i) note on the record the reasons for the absence of the trial magistrate; and

(ii) allow the accused the opportunity to address in mitigation; and

(iii) consider the evidence recorded and on which the verdict was returned.

Case cited:

S v Mbabvu & Anor 1980 ZLR 515 (G)

MUCHECHETERE J

Judgment

Muchechetere J: The accused was charged with stocktheft . He appeared before a magistrate (hereinafter referred to as "the trial magistrate") and pleaded guilty to the offence. The trial magistrate thereafter conducted the proceedings in accordance with the provisions of s 255(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*] and at the end found the accused guilty of the offence. The matter was thereafter adjourned. It was resumed some months later before a different magistrate (hereinafter referred to as "the sentencing magistrate"). The sentencing magistrate proceeded to hear mitigation of sentence and thereafter sentenced the accused to a fine of $100 or in default of payment 50 days' imprisonment with labour. In addition the accused was sentenced to 3 months' imprisonment with labour, the whole of which was suspended for 5 years on the usual conditions of good

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behaviour.

The matter to resolve in this case is whether it was proper for the sentencing magistrate to take over the matter in view of the fact that the trial magistrate was already seized with the matter. The scrutinising regional magistrate, who drew my attention to this matter on review, is of the view that the takeover by the sentencing magistrate was inappropriate. In this connection, he cites s 163(5) of the Criminal Procedure and Evidence Act [*Chapter 59*], which reads:

> "Any person who has been called upon to plead to any indictment, summons or charge shall, save as is specially provided in this Act or in any other enactment, be entitled to demand that he be either acquitted or found guilty by the judge or magistrate before whom he pleaded:
>
> Provided that:
>
> (i) where a plea of not guilty has been recorded whether in terms of section *two hundred and fifty-five A* or otherwise, the trial may be continued before another judge or magistrate if no evidence has been adduced;
>
> (ii) where a plea of guilty has been recorded the trial may be continued before another judge or magistrate if no evidence has been adduced or no explanation has been given or inquiry made in terms of paragraph (b) of subsection (2) of section *two hundred and fifty-five."*

The sentencing magistrate, on the other hand, considers that there was nothing improper in his taking over the case. He goes on to state that this has been the practice with circuit courts for many years. In support of his views he cited s 312(5) of the Criminal Procedure and Evidence Act [*Chapter 59*] which reads:

MUCHECHETERE J

> "If in a magistrates court, sentence is not passed upon an offender forthwith upon his conviction, . . . any magistrate of that court may, in the absence of the magistrate who convicted the offender. . . pass sentence on the offender after consideration of the evidence recorded and in the presence of the offender."

My reading of s 163(2) of the said Act brings me to the conclusion that it does not apply to the present situation. In my view, that section applies to a case where a person has entered a plea, and a verdict has not yet been delivered. That is a different situation from this case where the accused had been found guilty and all that remained was for him to be sentenced. It is in this situation that the provisions of s 312(5) of the Act would apply. I therefore agree with the views of the sentencing magistrate that, in terms of s 312(5), it was not improper for him to take over the case "in the absence of the magistrate who convicted the offender".

I also agree with the views of the Attorney-General's office that since the words "in the absence of the magistrate who convicted" are unqualified by the statute they should be given the widest possible meaning, which is, that the magistrate in question could be absent for whatever reason eg retirement, leave, discharge from service and death etc. It should, however, be pointed out that when a magistrate intends to utilise the provisions of s 312(5) of the said Act he should follow the procedure laid down in the headnote of *S v Mbabvu & Anor* 1980 ZLR 515 (G) which reads:

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". . . Held, that when utilising the provisions of 312(5) of the Code, the sentencing magistrate must (1) note on the record the reasons for the absence of the trial magistrate, (2) allow the accused the opportunity to address in mitigation, (3) consider the evidence recorded and on which the verdict is resumed . . ." (the emphasis is mine).

In this case the sentencing magistrate did not comply with the first requirement. Although he noted that the trial magistrate was absent he did not note the reasons for the absence. This failure could lead to the quashing of the proceedings of the sentencing magistrate. I however agree with the views of the Attorney-General's office that in the circumstances that would result in an injustice to the accused. I say this because the sentencing magistrate gave the following reasons for his takeover of the case:

" . . . the accused had been on remand for minor stock-theft, that of a goat, for over 2 months after pleading guilty and being convicted. The accepted

MUCHECHETERE J

practice has been not to remand an accused in excess of 6 weeks, subsequently reduced to 4 weeks by the Senior Public Prosecutor , Bulawayo, after conviction, solely in order to wait for a search for previous convictions by CCB in Harare. Unwarranted prejudice to the accused was increasing due to a lack of application by an organ of State. The prosecutor spontaneously and specifically asked that sentence be passed by the current circuit magistrate at Inyathi without having to have the convicting magistrate in come all the way to Inyathi at some as yet indefinite date convenient to the magistrate and the State, or to have the police prosecutor Inyathi take the accused at some future arranged date all the way into Bulawayo for probably only (one) case lasting a matter of minutes."

It is therefore clear from the above that if I were to quash the proceedings at this stage this would add to the considerable inconvenience and therefore injustice to the accused who would have to be recalled for sentencing. The sentence passed by the sentencing magistrate in any event appears to me to be fair and appropriate. The interests of justice would therefore be served by leaving the matter as it is.

In conclusion I should state that notwithstanding the above criticisms I will certify the proceedings as being in accordance with real and substantial justice.

Blackie J: agrees.

LEVY v GEOFF'S MOTORS (PVT) LTD 1992 (1) ZLR 127 (SC)

Court **Supreme Court, Harare**

Korsah JA, McNally JA & Ebrahim JA

Civil appeal

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28 January & 24 February 1992

Flynote

Contract - compromise agreement - whether acceptance of offer to ply lesser amount as full settlement of debt

Headnote

Respondent had carried out certain repays on a tractor belonging to the appellant. An account was rendered for these repairs. The amount charged was considerably in excess of the amount which had been quoted by the respondent's general manager as being the approximate cost of the repairs.

The appellant spoke to the general manager about the amount which had been charged for the repairs. The appellant then sent a cheque to respondent for less than the amount in the account. He endorsed this cheque as being in full settlement of his debt to the respondent company. The respondent company then cashed this cheque.

The appellant argued that there has been a compromise offer in settlement which had been accepted by the respondent company.

Held, the appellant bore the persuasive burden of proving that, knowing that the appellant had made a compromise offer, the respondent had accepted his compromise offer in full settlement of his debt.

Held, further, in the particular circumstances there was nothing to indicate that the general manager of the appellant had accepted the compromise offer.

The appellant's subsequent endorsement of his cheque was based on his misconception that there had been an agreement to accept the lesser amount in settlement. The cashing of the cheque could not be construed as an acceptance of the compromise offer. In sending the cheque with the endorsement, the appellant had attempted to annex the condition that this payment was in final settlement to his debt. The respondent company was

KORSAH JA

entitled, as it did, to reject this condition and bank the cheque and claim the residue of the debt.

Cases cited:

Kollenberg & Co v Barclay 1916 SR 34

Fernandes v Rodrigues 1932 SR 31

Harris v Pieters 1920 AD 644

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Paterson Exhibitions CC v Knights Advertising & Marketing CC 1991 (3) SA 523 (A)

A P de Bourbon SC for the appellant

R. M Fitches for the respondent

Judgment

Korsah JA: The sole issue for determination in this case is whether there was a compromise that the appellant should pay the sum of $2 500 in full and final settlement for spare parts and repairs supplied and effected by the respondent to the appellant's tractor engine. Most of the facts are common cause.

In or around September 1986, the appellant's tractor engine was taken by his manager Mr Lendron to the respondent's workshop for urgent repairs to be effected thereto. It was alleged by the appellant that some time thereafter a telephone conversation took place between the appellant and Mr du Ploy, the general manager of the respondent company. The appellant could not recall who initiated the phone call and Mr du Ploy had no recollection whatsoever of such a call or the conversation alleged to have transpired between them during that telephone call.

In fact the appellant and Mr du Ploy had never met and did not know each other at the time. But the appellant said that in the course of that telephone conversation they discussed what it would cost to repair the engine, the subject matter of this dispute, and Mr du Ploy indicated that the cost of repairs would be in the region of $2 500. He said that on that basis he instructed Mr du Ploy to continue and repair the engine.

Subsequently, the respondent rendered an account of the cost of repairs to the appellant. That account amounted to $4 261,52 and was brought to the attention of the appellant on 20 November 1986. Again, the appellant alleged that he made a telephone call to the respondent company and spoke to Mr du Ploy whom he still had never met. Mr du Ploy, again, had no recollection of this telephone call or the conversation which allegedly ensued.

KORSAH JA

According to the appellant on the occasion of this telephone call, he reminded Mr du Ploy that in their previous conversation the price that he had quoted for repairs to the engine was $2 500 and protested the account in excess of $4 000 which had been sent to him in respect of those repairs. He said he reiterated that the amount that he must pay for the repairs effected should be the $2 500 indicated to him initially, and Mr du Ploy said: "OK send out your cheque and I will sort it out." The appellant said he understood this last statement to mean that Mr du Ploy was going to adjust the invoices so that the cost of repairs to the engine would not exceed $2

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500. Accordingly, on the same day, he made out a cheque for $2 500 in favour of the respondent company, and endorsed at the back thereof: ". . . in full settlement of Job 2829 as agreed with your Mr Dirk Duploy".

Since it was the appellant who was alleging that there had been a compromise to pay a lesser sum in satisfaction of the full amount which the respondent company was claiming for the repairs effected by them, it was common ground that the appellant bore the persuasive burden of proof to establish that the respondent company had, with knowledge of his offer, by conductor affirmation, accepted the lesser sum in full and final settlement of his indebtedness to the respondent.

The appellant's assertion that Mr du Ploy had assured him that the repairs would cost "approximately" $2 500 presents no difficulties. That statement was vague and imprecise, and having been made before the respect sent its invoice for $4 261,52 it cannot be relied upon What presents some difficult is the by the appellant that when he protested the respondent's invoice and insisted on paying $2 500 Mr du Ploy told trim (although this is disputed by Mr du Ploy) "send your cheque and I will sort it out - .

I do not think that this statement, assuming it was made by Mr du Ploy, is a clear acceptance of an offer by the appellant to pay $2 500 in full and final settlement of the submitted invoice for the cost of repairs. To my mind it does not obviate the suggestion: "let us have your choline for that amount while we look into the matter". It is not an unequivocal aloe of the appellant's offer.

The greatest apparent difficulty, however, is encountered when regard is had to the appellant's cheque for $2 500, at the back of which is endorsed "in full settlement of Job 2829 as agreed with your Mr Dirk Duploy". As stated above,

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KORSAH JA

if what Mr du Ploy was alleged to have said was not susceptible of interpretation as an unequivocal acceptance of the appellant's offer, then the endorsement on the reverse of the cheque is not a reflection of any agreement reached between the parties. It was based on a misconception by the appellant that an agreement had been reached between them.

As Professor Christie points at p 112 of his work *Business Law in Zimbabwe:*

> "Difficulties frequently arise when a debtor sends his creditor a cheque for less than the amount claimed, expressly stating that the cheque is sent in full settlement
>
> On general principles of offer and acceptance the creditor who cashes the cheque in these circumstances ought not to be held to have compromised his original claim unless it is clear that he intended to do so, as when he expressly said so or the debtor has made it clear that he will interpret the cashing of the cheque as an acceptance of his offer of compromise. This was the (perfectly satisfactory) basis on which Kollenberg *& Co v Barclay D* 1916 SR 34 and *Fernandes v Rodrigues* 1932 SR 31 were decided."

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Nowhere on the record is it apparent that Mr du Ploy was fearful of the appellant contesting by litigation the respondent's charges for the repairs effected to his engine, and that rather than enter into a dispute with the appellant, Mr du Ploy, on behalf of the respondent, agreed to accept a cheque for $2 500 in full settlement of the matter. Not even the appellant's own testimony established an unequivocal acceptance of his offer of compromise by Mr du Ploy. This suggestion becomes fanciful in the face of the resolute action by the respondent to recover from the appellant the remainder of the cost of repairs; for the action demonstrates an absence of fear of court proceedings.

The test propounded by INNES CJ in *Harris v Pieters* 1920 AD 644 at 650 appears to me to apply to the facts of this case. The learned CHIEF JUSTICE said

> "The test in all these cases, therefore, is this: was there a tender accompanied by money or cheque, or was there a payment with an attempt to annex a condition? In the former case, if the tender is refused the money should be returned; in the latter, if the condition is rejected the money may be retained and the balance claimed. The result of the test must depend upon the intention of the parties in each case as shown by their statement and conduct."

KORSAH JA

In Paterson Exhibitions cc v Knights Advertising & Marketing CC 1991(3) SA 523 at 529C, CORBETT CJ reiterated the view that while usually acceptance of the compromise may be inferred from the retention of the money which accompanies the tender or offer, in every case it must be a question of fact depending on all the circumstances.

In the instant case, the appellant's own testimony indicates that all that Mr du Ploy said was "send us your cheque while I try to sort out the matter". This is a far cry from saying that Mr du Ploy had unequivocally accepted a compromise on behalf of the respondent. As it was under these circumstances that the appellant sent his cheque in full settlement of the respondent's invoice, he made a payment with an attempt to annex a condition. The respondent was, therefore, entitled to reject the condition, retain the money paid and claim the outstanding amount.

In the result the appeal is dismissed with costs.

McNally 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 MOODIE & ORS 1992 (1) ZLR 132 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Manyarara JA

Criminal appeal

20 January & 24 February 1992

Flynote

Criminal Law - Prevention of Corruption Act 1985 - s 3(1)(b)(i) - presumption that gift given corruptly - rebuttal

Criminal Procedure (Sentence) - Prevention of Corruption Act 1985 - s 3(1)(f) and s 3(1)(b)(i) - non-disclosure to principal of personal profit and giving reward to third party to stop him from reporting actions to principal.

Headnote

The three appellants were convicted of contravening s 3(1)(f) of the Prevention of Corruption Act 1985 on the basis that they had used their position in the company to make a personal profit and had failed to disclose this transaction with intent to deceive his principal or to obtain consideration for himself or another person.

The three appellants had also been convicted of contravening s 3(1)(b)(i), in that they had corruptly given a gift to a third party to stop him reporting their actions to their principal.

On appeal against their conviction for contravening s 3(1)(f), the Supreme Court dismissed the appeal by appellants one and three but set aside the conviction of the second appellant, finding that he had not known, what, if any, profit was involved, nor did he have any right to any particular share of the profit. In any event, he believed that if there was to be a profit the principal had authorised the making of this profit.

The appeals of the three appellants against their conviction for contravening s 3(1)(b)(i) were successful. The Supreme Court found that on the evidence the appellants had succeeded in rebutting the presumption that the gift had

MCNALLY JA

been given corruptly. In the most unusual circumstances of this case, it was reasonably possible that the gift was part of the sharing of the spoils rather than as a corrupt bribe to buy silence. As regards sentence, the Supreme Court found that in the extraordinary circumstances where under the appellants had made a legitimate protest in an illegitimate fashion and in the light of certain other factors, this was a proper case for imposing a caution and discharge.

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Cases cited:

S v Stephens S-53-88 (unreported)

S v Nemapare 1988 (2) ZLR 430 (S)

S v Harington 1988 (2) ZLR 344 (S)

E Chatikobo for the appellant

LR Goredema for the respondent

Judgment

McNally JA: The appellants were charged with seven counts alleging fraud and corruption under Act 34 of 1985. They were all acquitted on counts 4 to 7 inclusive and the third appellant was acquitted on count 1. In the final analysis therefore the appellants (I will refer to them individually by their surnames for convenience) were convicted and sentenced as follows:

Mr Moodie was convicted on one count of contravening s 3(1)(f) of the Prevention of Corruption Act 1985, one count of fraud, and one count of contravening s 3(1)(b)(i) of the same Act. He was sentenced, all counts being taken as one, to a fine of $5 000 or, in default, five months' imprisonment with labour. In addition he received a wholly suspended prison term of twelve months.

Mr Breese was convicted on the same three counts, but only as an accessory after the fact on count 2. He was fined $3 000 or three months' imprisonment with labour, plus six months suspended.

Mr Mawdsley, who was found guilty on only two counts, was fined $2 500 or, three months, plus six months suspended.

The facts of the case were hardly in dispute. They were most unusual. There were startling allegations, quite uncontradicted, about the conduct of the Minister of Home Affairs. The first appellant had been reinstated and re-employed in a very senior capacity by the new management of the very company he is alleged to have defrauded. The third appellant also was still

employed at the time of the trial. The "complainant" company made no complaint. Its auditor gave evidence in a guarded and neutral fashion, and was at pains to say that all transactions were fully and correctly recorded. The main witness for the prosecution was the former managing director of the complainant company, Mr Nott, who had emigrated to South Africa, after being asked to resign. He had no knowledge about any allegations against the appellants until the police approached him. It is not known who alerted the police.

The company concerned was Industrial Steel and Pipe Limited. It was nominally wholly owned

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by a British holding company, but actual control was from Johannesburg. The company was a very large one. It had three divisions - Stewarts & Lloyds, Industrial Pipe and Fitting (IPF), and Tor Structures. It also had a number of large subsidiaries, among them Vivian & Watson (Pvt) Ltd, Baldwins Steel (Pvt) Ltd, and Company Management Services (Pvt) Ltd, which ran the group's administration.

In about 1987 the parent company decided to disinvest in Zimbabwe. At that time Mr Moodie was group personnel manager, company secretary, acting manager of IPF and, for a time, acting manager of Tor Structures. He was also a director of Company Management Services (Pvt) Ltd.

Mr Breese was the accountant for Company Management Services (Pvt) Ltd and Mr Mawdsley was sales manager of IPF.

The decision by the South African investors to disinvest led to the formation of a take-over consortium, including Mr Nott and Mr Moodie, whose application was turned down by the Reserve Bank. Then there was formed a second consortium which included Mr Nott but excluded Mr Moodie. That consortium involved also an organisation called Cold Comfort Farm, a charitable trust. It had considerable political backing, but ultimately failed in the face of a bid by the workers which was finally approved by the Reserve Bank.

The efforts of the second consortium to acquire control led to a certain amount of friction. Mr Nott explained that "the management team was not working harmoniously and that a more effective discipline would be achieved if the second line managers were not included in the ownership consortium". This was why Mr Moodie and a number of other "second line managers" were excluded from the second consortium. However, one "second line manager" remained in the second consortium. He was Mr B Nyabadza, general manager of Baldwins Steel (Pvt) Ltd Mr Nyabadza was also a trustee of the Cold Comfort Farm Trust. Mr Moodie supported the workers application for a take-

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over, and to that extent was pitted against Mr Nott, Mr Nyabadza and the Cold Comfort Farm Trust. The Minister of Home Affairs was also a trustee of the Cold Comfort Farm Trust. The relevance of this fact will emerge later.

Against this background there was also another factor which was a major source of friction. A number of the "second-line managers" were upset at the way in which (in their opinion) Mr Nyabadza was being allowed to make personal profits out of his connection with the group as general manager of Baldwins Steel (Pvt) Ltd Complaints were made to Mr Nott on several occasions at the business review meetings which were held regularly. Mr Moodie says Mr Nott was evasive. Mr Nott says he satisfied himself that nothing untoward was taking place. Nonetheless it seems clear that Mr Nyabadza was being permitted to trade through a private company in the products of Baldwins Steel. It is admitted by Mr *Nott* that a number of the other managers complained, and he specifically admitted that eventually, at one of these meetings, Mr Moodie used the phrase "it is now open season". He (Nott) went on to say:

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"I think it was being suggested at the time that Mr Nyabadza was taking advantage of his position to benefit himself, and I think it was suggested that unless Mr Nyabadza were prevented from doing (this) then the whole principle under which employees were not to benefit themselves at the expense of the company would fall away."

Mr Nott continued:

". . . but I do recall that at the time I took Mr Moodie's remark to be a facetious one."

Since this contention is at the heart of Mr Moodie's defence, and thus of the defence of the other two who played subordinate roles, it is significant that it is accepted by Mr Nott, who was then the group chief executive, that there was strong feeling about Mr Nyabadza's activities, and that Mr Moodie did declare openly at a business review meeting that unless Mr Nyabadza's activities were stopped he (Moodie) would regard it as "open season". The clear meaning of that phrase is that others in management would consider that they too would be entitled to make personal profits from their dealings with the company.

In view of the obvious bitterness which Mr Nott acknowledged, it is difficult to understand why he regarded the remark as "facetious". It must be accepted, at least as a reasonable possibility, that Mr Nott found it impossible or inconvenient to discipline Mr Nyabadza because of Mr Nyabadza's usefulness to the consortium in his capacity as trustee of the Cold Comfort Farm Trust. The other

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managers were therefore in the frustrating position that Mr Nyabadza was being allowed to do what they thought was morally and ethically wrong simply because of his connections. Moreover, and ironically, if he and Mr Nott and Cold Comfort Farm Trust succeeded in their bid for the company, the protesters would have little chance of surviving in their jobs.

Against that background, Mr Moodie contends, he publicly stated his intention to trade for his personal benefit. His evidence was that he wanted to force the hand of management. If they stopped him, they would have to stop Mr Nyabadza, and he would be quite content with that result. If they did not stop him, he would make a profit, and that would help to assuage his feelings of indignation.

I turn then to consider the facts of the first count. In August 1988 a Mr Small of HE Jackson & Successors (Pvt) Ltd had 13,4 tonnes of zinc which he had ordered for a customer who had not taken delivery. Stock-taking was approaching and he wanted to get rid of it. He was prepared to take a profit of only 10% for a quick sale. He telephoned Mr Moodie, knowing him to be a manager with Industrial Steel and Pipe and thus a possible customer. Mr Moodie accepted the offer at $2 200 per tonne and mentioned that he would be buying through Bast Agencies. He asked that the zinc be delivered to IPF, Kwe Kwe. This was done. Small was paid in cash $29 480. He made out a cash sale slip, so it was no great matter to him who the purchaser was. The purchaser's name did not appear on the slip.

Under cross-examination he agreed that he might have mentioned the zinc to Mr Moodie at the race-course, who might have offered him $2 200 per tonne. He was not concerned about the delivery-people commonly purchased goods and asked for them to be delivered to someone

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else.

Mr Moodie conceded that he did this deal, and that he, using the name of his proposed but not yet registered company, Bast Agencies, sold the zinc to IPF at $2 800 per tonne, making a profit of $8 040. $2 800 was the ruling price, and he saved the company from using foreign currency. He contended that he had bought the zinc for his own account, intending to sell it to one of several other customers. Then he heard that his own employer was short of zinc, so he sold it to IPF. The auditor confirmed that the sale was carried out according to the standard practice of IPF and was fully documented.

Mr Moodie and Mr Breese were convicted on these facts of a contravention of s 3(1)(f) of the Prevention of Corruption Ac, No 34 of 1985. The section reads:

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> "If any agent, with intent to deceive his principal or to obtain any gift or consideration for himself or any other person, fails to disclose to his principal the full nature of any transaction carried out in connexion with his principal's affairs or business, he shall be guilty of an offence."

The Regional Magistrate, in a lucid and well-constructed judgment, gave thought to three questions.

1. What is "disclosure"?
2. Was there "disclosure"?
3. If not, was the principal deceived to his prejudice?

He referred to *S v Stephens* S-53-88 (not reported) on the question of disclosure. He concluded there was not proper disclosure. It seems to me that this was a correct conclusion. I am particularly influenced by the fact that Mr Moodie was approached by Mr Small precisely because Mr Small knew he worked for IPF. So he was approached in his capacity as agent. Had he wanted to challenge Mr Nott, he would have made a point of telling him "This is what I am doing. I am making a personal profit. I challenge you to order me to surrender that profit to the company. If you do, I challenge you to do the same in relation to Mr Nyabadza."

Instead of that he chose a slightly, but importantly, different approach. He decided to take advantage of his position with the company to make a personal profit. He knew that he was doing wrong. He justified his wrongdoing to himself on the basis that if others were allowed to get away with it, why should he not join the band wagon. And, because he felt that not only he but others were being treated unfairly, he decided to share his profits with them.

It is true that the transactions were recorded in his principal's books. But it does not seem to me that that amounted to disclosure. As I said in *S v Nemapare* 1988 (2) ZLR 430 at 440D:

> "It is also important to note that the transactions with which we are concerned, from their very nature, could not be wholly concealed. To say therefore that they were not concealed is not in itself a defence. If the facts reveal that the full nature of the transactions was not revealed, the offence is committed unless the defence rebuts the

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presumption that there was an intent to deceive or to obtain a gift or consideration."

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It is also noteworthy that the deal was done through Bast Agencies, a name which meant nothing to Mr Nott. It was not done through Malson (Pvt) Ltd, of whose existence and ownership by Mr Moodie Mr Nott was aware. So even if Mr Nott had looked at the documents he would not have known of Mr Moodie's involvement.

It seems to me that the first appellant, Mr Moodie, was properly convicted on this count.

The second appellant, Mr Breese, was also convicted on this count. His involvement was as accountant. He arranged for the placing of the order with Bast Agencies; he, with Mr Moodie, signed the cheque in payment; he, with Mr Moodie, altered the cheque so it could be cashed. None of these actions in themselves involve impropriety. The order was genuine, the price was reasonable, the goods were delivered.

He was found guilty on the basis:

1. that he must have constructively known that Bast Agencies was making a profit;
2. that he had been advised he was going to share in the profits;
3. that he kept the Bast invoices at his residence.

The evidence as to Mr Breese's state of mind comes entirely from his own testimony. He readily admitted that he knew of Mr Moodie's proposal to trade at a profit. He and Mr Moodie were agreed that the group should not be prejudiced, by which he meant that the group should not be overcharged for purchases or underpaid for sales. He advised Mr Moodie that a price of $2 800 per tonne for the zinc would be reasonable. It is accepted that it was reasonable, quite apart from the saving in foreign currency.

The point that concerns me about Mr Breese's culpability here is that, on his evidence, he understood that Mr Moodie had cleared with Mr Nott his intentions to trade. Therefore the fact that he knew that Bast Agencies was Mr Moodie's trading name is colourless as far as his guilt is concerned. The same may be said of the fact that he kept the Bast invoices at his house. One may wonder whether he really believed Mr Moodie on this point, but the fact is that he said so, and that evidence might reasonably possibly be true. Once he accepted this assurance from his superior officer, Mr Moodie, then his conduct cannot be classified as criminal. He bought, on behalf of his company, a commodity

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(zinc) which it needed, and at a reasonable price. Arguably failure to buy it would have been a dereliction of duty. He says he did not buy the zinc for the profit it would bring him. This too may well be true. He did not know, what, if any profit was involved, nor did he have any right to any

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particular share of any profit which might eventuate. He depended entirely upon the quixotic open handedness of Mr Moodie.

And in any event, believing Mr Moodie, he believed that if there was to be a profit, it had been authorised.

To put the matter another way, there is no evidence that Mr Breese was aware of the transaction between Mr Small and Mr Moodie until after it had happened. When he learnt of it there is no evidence that he identified himself with that transaction in a criminal way, since he understood it was legitimate. And finally, that being so, his involvement in authorising the order and paying for the delivery on behalf of the company was innocent. He did not do it with intent to deceive his principal or to obtain any gift or consideration. He did it because it was a good deal for his company. That it might also bring him a profit was incidental.

I would set aside the conviction of the second appellant on count 1.

The second count involved a charge of fraud. The background was this. IPF commonly sold scrap and it had a fairly lax policy in this regard. This was partly because, from an accounting point of view, the wasted cost of purchasing the materials which ended up as scrap was written into the price of the goods made from the materials. Thus the scrap had, in a sense, already been accounted for. Anything made from the sale of scrap was extra profit. The company did not object to its employees buying scrap (at least in small quantities) and it sold scrap at a uniform price of between $28 - $35 per tonne.

The particular facts were as follows: Mr Moodie, the first appellant, became aware in July 1988 that a Mr Hurd was looking for scrap metal. Mr Hurd had, in fact, approached Mr Mawdsley, the third appellant, who referred him to Mr Moodie. Mr Hurd was shown the scrap at IPF and made an offer of $25 960. Of this $10 000 was for scrap tubing and the balance was for round bar off-cuts. Both the first and the third appellants were involved in the negotiations with Mr Hurd. They arranged he would buy the scrap from Malson (Pvt) Ltd, Mr Moodie's company. Malsons then bought the scrap from IPF at $50 per tonne, a total of $ 4 660. Malsons made a profit of some $21 000.

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The second appellant, Mr Breese, was involved only to the extent that, when Mr Hurd made a cash payment of $20 000, he was asked to count it. Subsequently he was also asked to pay $4 660 to IPF, which he did. On the instructions of Mr Moodie he distributed the balance of the $20 000 between Mawdsley, Malsons, himself and one Bradley.

The receipt for the $4 600, which was not produced but was referred to in evidence, was made out to show Mr Hurd as the payer, rather than Malsons. Mr Mawdsley described this as a clerical error on his part. The State suggested it was an attempt to disguise the involvement of Malsons in the transaction. This interpretation gains support from the fact that later Mr Hurd was asked to pay a further cheque of $5 340 to IPF. The cheque was produced as Ex 6. It has not been cashed. It seems unlikely this was meant to be the balance he owed Malsons, which was $5 960. And of course it was not made out to Malsons. It seems more likely it was intended to

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create the false impression that Mr Hurd had bought the scrap and round bar direct from IPF for the total figure of $10 000 (i.e. $4 660+$5 340).

It seems to me that Messrs Moodie and Mawdsley were clearly over-reaching their employer and rendered themselves liable to a civil action calling upon them to account to the company for their profit (I will revert in a moment to the position of Mr Breese). But the question is, did they commit fraud?

The regional magistrate held that there was a misrepresentation in that:

a) they misrepresented (by necessary implication) to IPF that the best offer available was $50 per tonne;

b) they misrepresented to IPF that the scrap had been sold direct to Hurd.

The first appellant was directly involved in the first misrepresentation; the third appellant was directly involved in the second misrepresentation. I agree with the magistrate's conclusion. And once the misrepresentation exists, the prejudice is obvious.

Mr Breese, the second appellant, is in a different position. He had nothing to do with the misrepresentation. He understood that Mr Moodie had authority to trade. He merely handled the proceeds of that trading. He had nothing to do with the deal itself. The magistrate found him to be an accessory after the fact of fraud. But it is of the essence of such an offence that the person concerned must be aware that a crime had been committed. See Burchell & Hunt *SA Criminal*

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Law & Procedure vol I p 372. Mr Breese thought, so he says, and it is at least reasonably possible that he did think, that Mr Moodie's announcement of his intention to trade for personal profit had been accepted by management. That is what Mr Moodie told him. In that situation it is reasonably possible that Mr Breese handled the $20 000 perfectly innocently, and accepted his "share" of the profits perfectly innocently.

In my view he should have been given the benefit of the doubt and acquitted. I should add that I distinguish Mr Mawdsley's case from his on the basis that Mr Mawdsley was involved in the disguising of the transaction. He caused the $4 660 to be shown as a receipt from Mr Hurd. He asked Mr Hurd to pay IPF the additional $5 340. I agree with the magistrate that these are clear indications of an intent to disguise the transaction. Those actions are inconsistent with innocence.

I turn then to the last count, which alleges a contravention by all three appellants of s 3(1)(b)(i) of the Prevention of Corruption Act. The allegation is that they gave $2 000 (later amended to $1 902) to one David Bradley "as a reward for not disclosing to IPF that goods sold by IPF were being passed through an unincorporated business agency known as BAST and a certain company known as Malson (Pvt) Ltd."

The money was handed to Mr Bradley by the third appellant on the instructions of the first

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appellant and to the knowledge of the second appellant. The provisions of s 15 of the Act raise a presumption, which is rebuttable, that such a gift was given corruptly, that is to say, in this case, for the purpose of stopping Mr Bradley from reporting the actions of the appellants.

The magistrate placed considerable reliance on the fact that none of the parties could explain satisfactorily what the money was for, if it was not for a corrupt purpose.

I would with respect dispute that conclusion. We are dealing with a most extraordinary and unusual situation. Mr Moodie (and those under him to a lesser extent) was acting under a real and genuine sense of grievance. They all believed strongly (whether correctly or not) that Mr Nyabadza and others were profiteering unjustly and without objection from top management. Mr Moodie had set out deliberately to do the same and had probably convinced himself and his subordinates that they were participating in some sort of crusade - ignoring the old maxim that two wrongs do not make a right.

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In that atmosphere it seems to me perfectly believable that Mr Moodie, seeing himself as some kind of latter-day Robin Hood, should wish to share the spoils with his men. In my view the explanation that the gift was a "sharing of spoils" rather than a corrupt bribe to buy silence, makes a great deal of sense. We are dealing here with a set of very unusual facts, and on those facts I consider that the presumption of corruption relating to the gift to Mr Bradley was successfully rebutted.

I would accordingly set aside the convictions of all three appellants on this count.

In the result therefore the conviction of the first appellant Mr Moodie, on counts 1 and 2 is confirmed and his conviction on count 3 is set aside.

The conviction of the second appellant, Mr Breese on all three counts is set aside and accordingly his sentence is also set aside and he is acquitted.

The conviction of the third appellant, Mr Mawdsley, on count 2 is confirmed and on count 3 is set aside.

I turn finally to the question of sentence. The regional magistrate passed an overall sentence which is no longer appropriate, since the third count has fallen away. We are at large to consider an appropriate lower sentence. I agree, however, with the regional magistrate's decision to treat all the offences as one for purposes of sentence. I will treat both offences as one in the case of Mr Moodie.

In assessing sentence some of the very peculiar circumstances were sympathetically considered by the regional magistrate. It is not difficult to appreciate the frustration felt by the first appellant when he saw another member of staff being allowed to profiteer at the expense of the company. For the purposes of sentence I accept, as did the magistrate, that there was substance in his complaint. I agree also that the evidence given by Mr Nott, particularly when he said he thought Mr Moodie was being "facetious", was not acceptable. Mr Moodie was clearly

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being serious when he said that if Mr Nyabadza was not disciplined he himself would take this as an indication that it was now "open season". He would himself look for ways in which to make a personal profit while dealing with company affairs. While I have made the point that two wrongs do not make a right, I accept that Mr Moodie gave a general warning of his intention. I accept also that Mr Moodie's conduct was in the nature of a crusade, or a protest demonstration. He was trying to prove a point, not only

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personally, but on behalf of his colleagues. This is why he distributed his profits to others.

It was the failure of Mr Nott to take positive action, or to respond positively to his challenge, which led Mr Moodie to do what he did. And one must take note of the extraordinary fact that Mr Nott has been asked to leave, while Mr Moodie has been asked to come back as general manager of the manufacturing division. The company, which one would expect to be the complainant, is not complaining. Far from it.

This leads me to the final point. Somebody gave the information to the police. It was not the company. The conclusion is almost irresistible that it was someone involved in the second consortium who was trying to embarrass Mr Moodie because of his alleged association with the workers' consortium.

Left to itself the company would not have complained. At worst he would have been called in and told "All right, you have made your point, now please stop it and we will stop everyone else doing it as well".

It is this aspect which the magistrate did not refer to in his judgment. In his statement to the police, which was placed before the court as Ex 16, Mr Moodie sets out in some detail the harassment to which he was subjected. This included arrest, imprisonment, movement from one place to prevent his release on bail and brow-beating by an immigration official who was apparently under instructions to have him deported.

The allegation was clearly made, and not rebutted, that all this was at the instigation of the Minister of Home Affairs who controls the police and the Immigration Department and who was, according to the evidence, a trustee of the Cold Comfort Farm Trust. It was apparently only on the intervention of the Vice-President of Zimbabwe that Mr Moodie was eventually rescued from these unwelcome, unnecessary, improper, and in

some respects unlawful attentions.

The court has previously made the point that sentences should take account of improper treatment of accused persons - see *S v Harington* 1988 (2) ZLR 344 (S) at 362-364.

In my view the present case is one in which an attempt has been made to use the court for an ulterior motive. The court should mark its disapproval of such conduct in its sentence. The court can also take account of the fact that the

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company has re-employed both Mr Moodie and Mr Mawdsley and has no wish to press claims against them.

Thus the offences may be described as technical. Their actions amounted to a legitimate protest expressed in an illegitimate manner. The main offender, Mr Moodie, has been punished enough by the improper and unlawful harassment to which he has testified. I consider this a proper case for a caution and discharge. And since Mr Mawdsley is a lesser offender, his sentence should be the same.

Accordingly the appeal is disposed of as follows:

1. In the case of the first appellant, Mr Moodie, his convictions on counts 1 and 2 are confirmed, and his conviction on count 3 is set aside. For the reasons set out in this judgment the two counts are taken together for sentence and he is cautioned and discharged.

2. The convictions of the second appellant, Mr Breese, on all three counts, are set aside, and he is found not guilty and discharged.

3. The conviction of the third appellant, Mr Mawdsley, on count 2 is confirmed and on count 3 is set aside. He is sentenced to a caution and discharge.

Gubbay CJ: I agree.

Manyarara JA: I agree.

Kantor & Immerman, appellant's legal practitioners

MUNYAI v CHIKURIRA & ANOR 1992 (1) ZLR 145 (HC)

Court **High Court, Harare**

Hwacha AJ

Civil trial

8, 9, 10 & 11 July 1991 & 26 February 1992

Flynote

Wrongful arrest and detention - distinct from and having different requirements from malicious prosecution

Headnote

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The plaintiff was responsible for administering certain financial accounts. A shortfall was discovered in one of these accounts by the first defendant who was in charge of the plaintiff. Dissatisfied with the explanation given for the shortfall, the first defendant reported the matter to the police. The police advised that an audit should first be done. First respondent then called in the second defendant to carry out the audit. The second defendant reported that money had been stolen. His report was sent to the police. The police came and questioned the plaintiff and he was thereafter taken to the police station and held overnight in the cells. Neither the first nor the second defendant had instructed the police to arrest and hold the plaintiff. The decision to arrest and detain was solely that of the police.

The plaintiff claimed damages for unlawful arrest and imprisonment.

Held, wrongful arrest and imprisonment consisted of arresting and holding a person without legal justification. Where the person being sued did not effect the arrest himself, but it was done by the police, he would only be liable under this delict if it could be established that the police acted on his directions, orders or command. This was not the case here. But, in any event, the police in arresting the plaintiff had reasonable justification for so doing in the circumstances. If on the other hand the action had been brought under the different delict of malicious prosecution it would have had to have been proven that maliciously and without reasonable and

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probable cause the respondent instigated the police to institute criminal proceedings against the plaintiff.

Cases cited:

Thompson & Anor v Min of Police & Anor 1971 (1) SA 371 (E)

Feldman v Min of Home Affairs & Ors HB-23-91

Waterhouse v Shields 1924 CPD 155

Lederman v Moharal Invtms (Pty) Ltd 1969 (1) SA 190 (A)

C Dube for the plaintiff

D P Carter for the respondents

Judgment

Hwacha AJ: In this case, the plaintiff has brought two claims in one action. The first claim is against both defendants, the one paying the other to be absolved. It is a claim in the sum of $4 500 being damages for wrongful arrest and detention. In the second claim, which is against the first defendant alone, the plaintiff seeks damages in the sum of $5 500 for assault. He also claims interest and costs of suit.

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At the material time, the plaintiff was a civil servant employed as an Executive Officer (Finance) at the Bikita District Administration Office, Masvingo Province. The District Administrator for Bikita was one Stephen Chikasha. The first defendant was the Acting Provincial Administrator. Accordingly he was based at the Provincial Headquarters in Masvingo. The second defendant was also a civil servant employed as an Internal Auditor and was also based at the Provincial Headquarters.

I proceed now to deal with the plaintiff's first claim. As to the facts, it would seem to me to be necessary to set out only those facts and evidence which I consider necessary for the purposes of this judgment. As Executive Officer (Finance) the plaintiff ("Mr Munyai") was responsible for the administration of the Chief's Account from which the allowances of Chiefs and Headmen were paid and the Public Works Account and the Food for Work Programme Account out of which the various teams of personnel for the Food for Work Programme were paid.

In January 1988, the books for the Food for Work Programme reflected a shortfall of $1 000. The District Administrator ("Mr Chikasha"), requested Mr Munyai to make a report concerning the shortfall with which request Mr Munyai complied. In his hand-written report Mr Munyai stated that it seemed to him that "the money met a mystery". Unsatisfied with Mr Munyai's explanation as to

what had happened to the money, Mr Chikasha reported the matter to the Zimbabwe Republic Police, Bikita (Assistant Inspector Chigura) for the matter to be investigated. The reaction of the Police, however, was that it would not be easy, if not impossible, for them to investigate the matter in the absence of an audit report. Mr Chikasha also reported the shortfall and the reaction of the Police to the first respondent who was the then Acting Provincial Administrator ("Mr Chikurira"). Thereafter, Mr Chikurira sent Mr Simon Moyo, the second to respondent herein ("Mr Moyo") to Bikita with instructions for him to carry out an audit inspection of the Food for Work Programme Account.

Mr Moyo carried out his audit inspection on or about 5 February 1988. In doing his work Mr Moyo received all necessary assistance from Mr Munyai ie making available all relevant books and documents. Upon completing this audit inspection, Mr Moyo found that there was a shortage of $2 284. He advised Mr Munyai about the shortfall. As I understand the situation, Mr Munyai's explanation of the shortfall of $2 284 was that some time in January 1988 he had been short of the sum of $1 000 to pay allowances due to the Chiefs and Headmen and that faced with that situation he had borrowed that amount from the Food for Work Programme Account. In an effort to prove his point, he showed Mr Moyo a document, a Government Cash Requisition, to be precise, which showed that the amount had been drawn from the Food for Work Programme Account and paid to the Chiefs Account. According to Mr Munyai, therefore, there was no shortfall. Rather there was a transfer of funds from one account to the other.

Mr Moyo refused to accept Mr Munyai's explanation. According to Mr Moyo, Mr Munyai had no authority to transfer funds from one account to the other without Mr Moyo's permission. Furthermore, Mr Moyo refused to accept the Cash Requisition because according to him, Mr

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Munyai had given or shown that document to him after he had completed his audit inspection. Thus Mr Moyo insisted that there was a shortfall of $2 284 and believed that it was a proper case for the Police to investigate. Mr Moyo's stance was that Mr Munyai was guilty of theft of the money, failing which he was guilty of fraud.

As would be expected, a copy of Mr Moyo's audit inspection report was sent to the Police, Bikita. Armed with the audit report, the Police, Bikita (Asst Inspector Chigura) approached Mr Munyai on or about 9 February 1988 and took him to Masvingo for investigation by the Criminal Investigation Department. In Masvingo and in the afternoon of the same day, Mr Munyai was interviewed by Detective Sgt Chikata. After reading the report and looking through the relevant books and documents, Sgt Chikata came to the conclusion that there

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was no shortfall. Notwithstanding that, Mr Munyai was put in Police custody. Sgt Chikata who gave evidence for Mr Munyai, testified that his brief or part of it was to investigate a shortfall of $24 000. On the next day, 10 February 1988, Mr Munyai was taken before a magistrate in Masvingo and was granted free bail and remanded out of custody. It appears that this was a Friday. It appears too that on the next Monday, 13 February 1988, the matter was again discussed between Sgt Chikata and Mr Munyai but the outcome was inconclusive and Mr Munyai continued to be remanded out of custody. However, the upshot of it all was that sometime in March, 1988, a second audit inspection was conducted, this time by a different auditor and it revealed a shortfall of $1060 as opposed to $2 284. It also appears that following the release of the report of the second audit inspection, the charges against Mr Munyai were withdrawn before plea.

Much if not all of the foregoing is common cause or is not in serious dispute between the parties. In particular, it is common cause that acting on the audit inspection report prepared by Mr Moyo on 9 February 1988, Mr Munyai was interviewed by Sgt Chikata of CID Masvingo and was thereafter arrested and placed into Police cells until the next day.

This is a case for damages for wrongful arrest and wrongful imprisonment (detention) as opposed to one of damages for malicious arrest and detention (imprisonment) and malicious prosecution. The distinction between the two categories of proceedings comes out clearly in the case of *Thompson & Anor v Minister of Police & Anor* 1971 (1) SA 371, in which the headnote is in the following terms:

> "In a claim for damages for wrongful arrest, the delict is committed by the illegal arrest of the plaintiff without the due process of the law, ie the injury lies in the arrest without legal justification, and the cause of action arises as soon as that illegal arrest has been made. . .
>
> In an action for damages for malicious arrest and detention where a prosecution ensues on such arrest, however, as in the case of an action for damages for malicious prosecution, the proceedings from arrest to acquittal must be regarded as continuous and no action for personal injury to the accused person will arise until the prosecution has been determined by his discharge, whether by an initial acquittal or by his discharge after successful appeal from conviction."

In the same case, EKSTEEN J defines wrongful arrest and clarifies the position further. At p 373

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the learned judge says:

HWACHA AJ

> "It has been held that in the case of wrongful arrest - or false arrest, as it is sometimes called - the defendant is liable when he has restrained the liberty of the plaintiff without lawful justification, and that it is not necessary for the plaintiff to allege or prove malice or probable cause on the part of the defendant. . .
>
> In claims based on malicious arrest, malicious prosecution, or malicious execution, however, it has been held that it is essential for the plaintiff to allege and prove that the defendant acted maliciously and without reasonable and probable cause."

McKerron in his *Law of Delict*, 7 ed, makes the same distinction. At p 159 the learned author opens the section on False Imprisonment or Arrest by saying:

> "The wrong of false imprisonment or arrest consists in the unjustifiable infliction of restraint upon the personal liberty of another. . ."

and goes on to emphasize that the distinctive element or feature of the wrong of false imprisonment or arrest is the total depriving of another person of his liberty and that in order to succeed in an action for damages for false imprisonment or arrest was the "act of the defendant or his servant or agent". He goes further to say:

> "Where, therefore, the arrest or imprisonment was effected by a ministerial officer of the law, the plaintiff must prove that the defendant directed or authorised the officer to make the arrest and so constituted him his agent. The mere giving of information to an officer of the law upon which he acts at this own discretion will not render a person liable for false imprisonment."

See 1987 Vol 5 *Zimbabwe Law Review* and *Feldman v Minister of Home Affairs & Ors* HB-23-91 p 21. At p 259 and 260 McKerron makes the distinction even clearer. He says:

> "It is also an actionable wrong to procure the imprisonment or arrest of anyone by setting the law in motion against him maliciously and without reasonable cause. This species of wrong must be distinguished from that of false imprisonment or arrest. In false imprisonment the imprisonment is the act of the defendant or his agent. In malicious imprisonment the interposition of a judicial act between the act of the defendant and the imprisonment makes the imprisonment no longer the act of the defendant but the act of the law. . . The importance of the distinction is that in action

HWACHA AJ

> for false imprisonment neither malice nor reasonable and probable cause need be shown."

cf *Waterhouse v Shields* 1924 CPD 155, *Lederman v Moharal Invtms (Pty) Ltd* 1969 (1) SA 190.

It is necessary to reiterate that this is a case of wrongful arrest and false imprisonment, as opposed to one of malicious proceedings. It is so because the arrest of Mr Munyai, although it resulted in his being held in custody, did not result in his being prosecuted before a court of law and thereafter acquitted. The facts of this matter support this conclusion. The pleadings are also consistent with this conclusion. Mr *Dube* opened his address by recognising that his client was claiming damages for "false arrest and false imprisonment". The rest of his submissions on this

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aspect of the matter were to the effect that in this matter we are not dealing with a case of wrongful arrest and detention, but rather that we are dealing with a case of false arrest and detention-cum-malicious prosecution and that accordingly his client had proved malice. Unless I misunderstood him, in so arguing, Mr *Dube* ignored the law on the subject as laid down in the cases cited by himself and Mr *Carter* and allowed himself to g off the track. There is no half-way house between an action for false arrest and false imprisonment on the one hand and the various forms of malicious proceedings on the other.

Thus the issue falling for me to determine in this matter is not as to whether Mr Munyai stole any money or committed a fraud; nor is it whether or not in view of the fact that the charges against Mr Munyai were withdrawn before plea, his arrest and subsequent overnight detention in Police cells was illegal and wrongful. The crisp issue is whether or not when Sgt Chikata arrested and detained Mr Munyai, he did so on the direction, command or orders of the defendants or as their agent.

The tenor of Mr *Dube's* submissions with regard to the arrest of Munyai was that by giving the audit report to the Police, Bikita, the defendants, acting in concert or with a common purpose instigated criminal investigations against Mr Munyai - the word "instigated" being used here in the sense that the defendants brought about an "unadvisable action" upon Munyai and the unadvisable action being his arrest and being held in custody.

The *Feldman* case *supra* is, in essence, similar to the present case. Very briefly in that case, money went missing at a Bulawayo shop owned by Woolworths (Private) Limited. A Mr John Holland, the General Manager of the shop reported the matter to the Police. As a result of that report several ladies working

at the shop were taken to the Police Station where they were questioned and detained overnight. Charges were preferred against them but were later withdrawn. Mrs Feldman later brought an action for damages for "wrongful arrest, detention and imprisonment". In his evidence, Mr Holland denied that he had told the Police to arrest anyone, adding that he was not a policeman A Police witness denied that Mr Holland had at any time suggested to the Police that the ladies should be taken to the Police Station and that Holland had tried to influence his decision to take the ladies concerned to the Police Station and to hold them in custody overnight. MUCHECHETERE J accepted the evidence given on behalf of the defendants and furthermore found that the suspicion on the basis of which the Police arrested the ladies and detained them was reasonable in the circumstances. Accordingly he dismissed the plaintiff's claim with costs.

In considering whether or not the defendants instigated the institution of criminal investigations, it is necessary to consider at the same time the question of the suspicion on the basis of which it was made to see whether it was reasonable in the circumstances. As urged upon me by Mr *Carter*, I note that during cross-examination, Mr Munyai was referred to his hand-written report made before Mr Moyo conducted his audit inspection and asked to explain what he meant by saying therein that "the money met a mystery". He replied that he meant that "the money was

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missing"and that he could not account for it. Thus right from the word go, Mr Munyai himself admitted that there was some money missing. In the circumstances, the defendants were, in my view, justified first in approaching the Police and requesting them to investigate the matter, secondly and at the request of the Police, in sending Moyo to Bikita to do and carry out an audit inspection of the Public Works Food for Work Programme Account and thirdly in placing the audit report before the Police for them to investigate the matter. The results of the Police Investigation are immaterial, in my view. The issue is whether there was reasonable suspicion for the investigation. The answer is that there could have been no suspicion more reasonable than Mr Munyai's own admission that the money was missing.

More importantly, it will be noted that in initially reporting the matter to the Police for investigations, the defendants and Mr Chikasha, the District Administrator, acted in compliance with Treasury Instructions 2300 and 2301 with which Munyai admitted being familiar and which, among other things, require any deficiencies to be immediately reported to the Police. When he was still under cross-examination, Mr Munyai admitted that put in the position of Mr Chikasha he would have had no choice but to put the matter in the hands of the Police. Be that as it may, the law on the requisites for an action for false arrest

HWACHA AJ

and false imprisonment does not cover "instigating" criminal investigations against a person.

To revert to the question whether Munyai was arrested and detained on the direction of the defendants. As regards the first defendant, the evidence before me, is that he received a report from Mr Chikasha who had himself already reported the matter to Police, Bikita and Police, Bikita had said that they required an audit report before any criminal investigations could be undertaken. There is no evidence before me to establish that other than send Mr Moyo to Bikita to carry out the audit inspection, there is anything further which Mr Chikurira did or had to do with this matter, let alone, with the arrest and overnight detention of Mr Munyai. I would, therefore, agree with Mr *Carter* that Mr Munyai has no cause of action against Mr Chikurira. Mr *Dube* suggested that Mr Chikurira was liable because he recommended the referral of the matter to the Police. That is not a proper consideration in this matter. At the close of the plaintiff's case Mr *Carter* applied for both defendants to be absolved from the instance. I could have granted Mr *Carter's* application in respect of the first defendant but for the fact that I felt myself unable to appreciate the total situation without the benefit of the evidence of both defendants.

As it refers to the second defendant, Mr Munyai's evidence was that in Masvingo, Sgt Chikata carried out his investigations and came to the conclusion that there was no shortfall. His evidence was supported by Detective Sgt Chikata, the investigating officer who testified that after completing his investigations and coming to the conclusion that there was no evidence to support the allegation that there was a shortfall and that Mr Munyai had stolen any money, he telephoned Mr Moyo who was then at Chibi District Office to advise him the outcome of his investigations and that Mr Moyo had maintained that there was a shortfall and had promised to go to Masvingo on the same day to prove the allegation. Mr Moyo, however, failed to go to

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Masvingo on the same day and at the end of the day, he decided to place Munyai in cells.

Under cross-examination, Sgt Chikata admitted that in view of the large amount of money involved, he decided to place Munyai in Police cells to enable him to complete his investigations and that he had done so in consultation with his Officer-in-Charge. Furthermore, Sgt Chikata conceded that during the course of his telephone conversation with Mr Moyo, Mr Moyo had not ordered or directed him to "lock up" Munyai until his arrival back in Masvingo. It is thus clear that Sgt Chikata did not place Munyai in Police cells on the direction of

HWACHA AJ

Mr Moyo or as his agent. On his own admission he did so in consultation with or on the instructions of his Officer-in-Charge. Thus all Mr Moyo did was to prepare the audit report on the basis of which Mr Munyai was interviewed by the Police. The decision to arrest and detain was that of the Police: of the *Feldman* case *supra*. Thus there is no evidence on which Mr Munyai can succeed even against Mr Moyo.

I turn now to the second claim in which Mr Munyai is claiming against Mr Chikurira alone, damages for assault, the particulars of the assault being that:

"a) On the 27th August, 1988, at Bikita, first defendant wrongfully and unlawfully assaulted plaintiff by strangling him, knocking him down with his fists and by kicking him thereby inflicting severe injuries to plaintiff.

b) As a consequence of such assault, plaintiff received certain bodily injuries and in addition was greatly injured in his dignity and self-esteem and has sustained damages in the sum of $5500 which despite demand, first respondent refused to pay

c) As a further consequence of such assault, first respondent paid a deposit fine at Bikita Police Station on the 28th November, 1988."

It is a matter of common cause between the parties that on 28 August 1988 at about 20.00 hours Mr Munyai and Mr Chikurira were among some 15 or so patrons at the Bikita sports club, that an incident involving Mr Munyai and Mr Chikurira took place at the club as a result of which the two were taken to the Police Station by Inspector Chigura where each was required to write his own report of what had happened between them and that later Mr Chikurira paid a deposit fine of $30 for "breach of the peace". It also appears to be common cause that at the material time Mr Munyai had been placed on suspension by Mr Chikurira over the matter of the shortfall.

Mr Munyai's evidence was to this effect : Mr Chikurira arrived at the club at about 20.00 hours and found him already there. Soon, thereafter, Mr Chikurira started wrangling with a number of people including Mr Colet Siya (alias Sahai) with whom they pushed each other resulting in Inspector Chigura intervening and taking Mr Siya away. As Mr Chikurira and Mr Siya were pushing each other, Mr Chikurira pushed Mr Siya against him and after that Chigura took Mr Siya away. He (Mr Munyai) asked Mr Chikurira to stop pushing people around. Thereafter Mr Chikurira moved to where he was and started hitting him with fists and also strangling him. As Mr Munyai tried to push his assailant back, they grabbed each other, grappled with each other,

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fell on the floor, and Mr Chikurira

HWACHA AJ

got on top of him and continued to assault him. He tried hard to extricate himself but to no effect. Mr Munyai conceded under cross-examination by Mr *Carter* that he had forgotten to mention that Mr Chikurira had also kicked him.

Inspector Chigura gave evidence on behalf of Mr Munyai. His evidence was that he was also at the club in the evening of 28 August 1988; that Mr Siya and Mr Chikurira argued with each other and that in order to pre-empt a possible fight he took Mr Siya to a separate room on the premises; that upon coming back he found Mr Munyai and Mr Chikurira fighting and grappling with each other and rolling on the floor. After the fight had been stopped he took both 'belligerents' to the Police Station where he asked each of them to write a report as to what happened, why and how, and, thereafter, let them go. Later he sent the reports to Masvingo and the directive from Masvingo was a Mr Chikurira should pay a deposit fine of $30 which he did.

The second witness for Mr Munyai was Sgt Chisoro whose evidence was that Mr Chikurira picked up a quarrel with a man in a black suit (Siya) and thereafter with Munyai. The quarrel culminated into a fight and he actually saw Mr Chikurira push Mr Munyai to the floor and thereafter the two rolled on the floor. Inspector Chigura later instructed him to intervene which he did. Under cross-examination, Sgt Chisoro admitted that he "did not see anybody being strangled, kicked or knocked down".

Mr Chikurira gave evidence on his own behalf. He admitted arguing with Mr Siya but said he did not know why Inspector Chigura took Mr Siya away from the club. He further testified that shortly after his arrival at the club Mr Munyai started accusing him of having fired him. Thereafter Mr Munyai threatened to beat him up, adding that, in view of the fact that he had been suspended/discharged, he had nothing to lose if he beat him up. Mr Munyai then advanced towards him with a clenched fist which he then intercepted and grabbed and the two grabbed each other, grappled with each other and fell to the floor and rolled as each was trying to over-power or get on top of the other. He denied punching, kicking or strangling Mr Munyai. He however, admitted having paid the deposit fine for breach of the peace. He said Sgt Chisoro was lying when he said that he saw him push Mr Munyai. Mr Chikasha was called to give evidence on behalf of Mr Chikurira. He confirmed that Mr Munyai and Mr Chikurira had quarrelled an had exchanged loud words and that the two had also grappled with each other and that in the process both had fallen on the floor and had as it were wrestled with each other. He did not know who had started the quarrel but said that Mr Munyai had accused Mr Chikurira of suspending him. He had seen no blows, no kicks, no strangling and no pushing .

HWACHA AJ

An examination of the evidence of Mr Munyai himself and that of Inspector Chigura and Sgt Chisoro, especially taking into account the admissions made by them under cross-examination, does not, on a balance of probabilities satisfy me that Mr Chikurira strangled, knocked down

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and kicked Mr Munyai, let alone that the incident was caused by Mr Chikurira. What seems to emerge from the evidence before the court is that there was a fight between the two during which they grabbed each other, grappled with each other, fell and rolled on the floor each trying to get on top of the other. Mr *Dube* relied on the fact that Mr Chikurira had paid a deposit fine of $30. The evidence before the court and which has not been challenged is that the deposit fine was for breach of the peace-fighting in public. It was not a fine for having assaulted Mr Munyai. I, therefore, think that it would be unsafe to say that Mr Chikurira is liable merely on the basis that he paid a deposit fine. The crux of the matter is that Mr Munya must prove all the particulars on which he bases his claim. In my view, he has failed to discharge that onus. Accordingly, he cannot succeed in his claim.

In the result both of the plaintiff's claims are dismissed with costs.

Kantor & Immerman, plaintiff's legal practitioners

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

S v KUWIZHA 1992 (1) ZLR 156 (HC)

Court **High Court, Harare**

Mtambanengwe J

Criminal Review

26 February 1992

Flynote

Criminal law - rape - attempt - stage at which occurs - wrong charging of indecent assault

Headnote

Attempted rape occurs at the stage at which an assault takes place which is aimed at having sexual relations with a woman without her consent. This more serious crime should be charged in these circumstances instead of indecent assault.

Cases cited:

R v B 1958 (1) SA 199 (A)

S v Bonde HH-450-87 (unreported)

Judgment

Mtambanengwe J: The accused in this case was charged with the crime of indecent assault. He pleaded guilty, was convicted and sentenced to 12 months' imprisonment with labour of which 2 months' imprisonment with labour were suspended on conditions. The facts are stated

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in the Attorney-General's minute, to whom I referred the matter for comment as to the propriety of the conviction for the crime charged on the facts. The Attorney-General commented as follows:

> "The facts on which the State relied were that on the 17th June, 1991 the accused who had visited his parents at Edimonstane farm, met the complainant as she was walking along a path going towards the farm compound. The accused blocked her path and stated that he wished to have sexual intercourse with her. The accused grabbed her arm and dragged her into the bush, and pushed her to the ground. The complainant fell to the

> ground on her back and her dress moved up to her thighs. The accused then sat on the complainant's legs. The complainant bit the accused's thumb and he let her go. She thereafter made a report which led to the arrest of the accused.
>
> The Honourable Reviewing Judge has queried the propriety of the conviction and has sought the Attorney-General's views on whether or not the proper verdict should have been one of attempted rape.
>
> It is respectfully submitted that the Attorney-General is of the view that the facts clearly disclose a charge of attempted rape.
>
> In *R v B* 1958(1) SA 199 (A) SCHREINER JA defined what amounts to attempted rape in his judgment. At p 204C-D he said, 'In my view, which I believe accords with the general practice, the stage of attempted rape is reached as soon as the assault takes place and before any direct effort is made to effect penetration. Of course, if what the man did was through an assault, equivocal, it may not be possible to affirm beyond reasonable doubt that his purpose was to effect penetration. In such a case, the proper verdict may be one of indecent assault or common assault. But once the acts prove that the purpose was to achieve forcible intercourse, they constitute in my view an attempt to rape'.
>
> In this case the accused told the complainant what his intention was. Paragraph 4 of the State outline expressly states that accused said he wanted to have sexual intercourse with the complainant. It is apparent that his actions thereafter were a mere follow up of his expressed intention. Had it not been for the timely efforts by the complainant the accused would have raped her.
>
> It is respectfully submitted that justice was not done in this case as the accused got off with a conviction for a less serious offence.
>
> In *S v Bonde* HH-450-87 the accused was convicted of indecent assault when the facts clearly established attempted rape. The learned reviewing Judge refused to certify proceedings with being in accordance with real and substantial justice.
>
> It is submitted that as the situation is similar in this case the proceedings should not be certified as being in accordance with real and substantial justice."

I agree and accordingly decline to confirm the proceedings as being in accordance with real and substantial justice.

S v MOYO 1992 (1) ZLR 158 (HC)

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Court **High Court, Harare**

Adam J

Criminal review

26 February 1992

Flynote

Criminal procedure (sentence) - rape - of young step-daughter - duration of prison sentences for rape

Headnote

The magistrate had imposed a sentence of 7 years' imprisonment, of which 2 years was conditionally suspended, on a person found guilty of raping his own 7-year-old step-daughter. On review:

Held, that the approach adopted in certain Supreme Court cases in regard to the sentence to be imposed upon persons who rape young children was open to criticism.

Held, further, that there was now a very high incidence of rapes committed against young children and there was legislation in the pipeline where under the sentencing jurisdiction of regional magistrates would be increased to ten years to allow them to impose suitable sentences in rape cases.

Held, further, that an appropriate sentence for rape offences against 4 to 10 year-olds would be an effective prison sentence in the range of 8 to 10 years and, if there were aggravating features such as multiple rape and use of violence, an appropriate sentence would be an effective term of imprisonment in the range of 10 to 12 years.

Held, further, that in the present case a sentence of 11 years' imprisonment with 12 to 18 months suspended would have been appropriate.

Cases cited:

S v Mutume 1985 (2) ZLR 94 (S)

S v Dube S-39-86

S v Gwanzura S-66-91

ADAM J

S v Matawo HH-61-89

Judgment

Adam J: The accused, aged 50 years, was convicted of raping his 7-year-old step-daughter and the Regional Magistrate sentenced him to 7 years' imprisonment with labour of which 2

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years' imprisonment with labour was suspended for 3 years on appropriate conditions. In mitigation the accused said that it was a mistake, that he was married to the complainant's mother with whom he had one child and that he had been employed by the Army until he retired on 6 June 1991. The aggravating features found by the Regional Magistrate were that the complainant was a very young girl and that the accused was in *loco parentis* to her. He gave the accused the benefit of the doubt that he had taken some alcohol and that there was no gratuitous violence and because of this normally the offence would have merited the maximum term of his jurisdiction, he suspended 2 years.

In *S v Mutume* 1985 (2) ZLR 94 (S), where a 15-year-old daughter had been raped, the High Court's sentence of 15 years' imprisonment with labour was reduced by the Supreme Court to 8 years' imprisonment with labour of which 2 years was suspended for 3 years on appropriate conditions. McNALLY JA observed at p 96:

> "I have no doubt that the learned judge was right to take a serious view of the present case. I do not like to speak of 'ordinary rapes', and I do not intend by using that term to diminish in any way the repugnance with which the courts regard the crime. But it must be said that in the ordinary way these offenders come before Regional Magistrates and are sentenced to between three and five years' imprisonment. I accept that this is a case which warrants a more severe sentence. I cannot accept that 15 years, which even for murder with extenuating circumstances is a relatively severe sentence, is anywhere near appropriate."

In *S v Dube* S-39-86, where a seven years and eight months old child was raped, the Regional Magistrate's sentence of 5 years' imprisonment with labour was upheld by the Supreme Court with GUBBAY JA (as he then was) indicating that the sentence fell within the accepted range and was confirmed. In that case the child was a friend of the appellant's niece.

More recently, in *S v Gwanzura* S-66-91, where a 10-year-old child was raped, the Regional Magistrate's sentence of 6 years' imprisonment with labour of which 2 years was suspended against a 61-year-old was upheld by the Supreme Court. KORSAH JA observed at 12:

ADAM J

> "The length of the custodial sentence will, of course, depend on the circumstances of each case. Some of the aggravating features which may affect the severity of the sentences are (a) where the victim is either very old or very young; (b) where the accused has committed a series of rapes on the same victim; and (c) where the accused is in a position of trust or responsibility towards the victim."

In that case the accused was in a position of trust. In *S v Matawo* HH-61-89 a 32-year-old accused had raped a 10-year-old girl and had been sentenced to 5 years' imprisonment with labour of which 2 years' imprisonment with labour had been suspended for 4 years on appropriate conditions. On review I said that an appropriate sentence in the circumstances of that case (making reference to *S v Dube supra*) would be a term of imprisonment in the range of 6 to 8 years' effective imprisonment.

With the greatest of respect to KORSAH JA who relied on *S v Mutume supra* and *S v Dube supra*, in view of the very high incidence of rape of innocent young children and as this court has most recently had to consider the question of AIDS in such offences, McNALLY JA's false analogy with murder with extenuating circumstances, was and is, in my humble view, not only

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irrelevant, but also most misleading as a criterion for determining sentences for rape cases. With due respect to McNALLY JA that approach is not adopted for other crimes. Further, he would surely agree that it would be incorrect to make sentences in rape cases dependable on sentences handed down for the killing of a newly-born child, or infanticide, or for that matter for a serious fraud or theft involving extremely large sums of money.

Recent amendments, as outlined in the Criminal Law Amendment Bill, 1991, show that the limited jurisdiction of seven years' imprisonment for the Regional Magistrate's Court is regarded as no longer being sufficient since it is now proposed that it be increased to ten years imprisonment.

In light of the foregoing an appropriate sentence for rape offences against 4-to 10-year-old would be an effective imprisonment in the range of 8 to 10 years and if consideration were to be given to the particular aggravating features mentioned by KORSAH JA, together with cases involving violence, an appropriate sentence for rape offences against that same age group would be an effective term of imprisonment in the range of 10 to 12 years.

In the instant case, an adequate sentence, in view of the aggravating features that were present, would have been 11 years' imprisonment with labour of which 12

to 18 months' imprisonment with labour could be suspended for 5 years on appropriate conditions.

Accordingly I decline to certify the proceedings as being in accordance with real and substantial justice.

MUSHAYA v GLEN'S CORPORATION (PVT) LTD 1992 (1) ZLR 162 (HC)

Court **High Court, Bulawayo**

Cheda J

Civil trial

28 February 1992

Flynote

Wrongful dismissal - whether good grounds for dismissal - transport driver having accident - being made to drive when too little sleep

Headnote

A transport driver had fallen asleep whilst driving. The vehicle had left the road and had been

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damaged. The driver was dismissed because of this accident.

In an action for wrongful dismissal, the court found that the driver had been ordered by a superior to go on a long distance journey despite the fact that he protested that he was too tired to embark on this journey due to previous driving duties performed by him.

The court found that there had been wrongful dismissal because the plaintiff had been forced by the company to drive when he was not in a fit state to do so and had he not been so compelled the accident would not have occurred. The accident was thus the company's and not his fault. The fact that the plaintiff continued to drive after only taking a short sleep to rest during the journey could not be held against him as he had been told that it was urgent to deliver the goods he was carrying.

The court ordered the re-instatement of the plaintiff.

J Tshuma for the plaintiff

V Mashoko for the defendant

Judgment

Cheda J: The plaintiff in this case, a heavy-truck driver issued summons against Glens Corporation (Pvt) Ltd, his former employers, claiming:

(i) a declaration that he was wrongfully dismissed and is entitled to be re-instated in his employment by defendant;

CHEDA J

(ii) his salary and allowances in the sum of $555 *per mensem* from 18 January 1985 until he is re-instated;

(iii) costs of suit.

The defendant entered appearance to defend the action.

The background to the claim is that plaintiff says he was employed by defendant as a heavy transport driver since 1979 with a Class 2 Driver's Licence. He was also a member of the Workers' Committee. At the time of his dismissal he was earning $61,95 per week in 1985.

He said that on 5 December 1984 he started work at 7.30 am and finished at 13.00 hours.

On 6 December 1984 he had an hour's break for lunch after starting at 7.30 am and finishing at 2.30 pm the following day. He did a total of 19 hours then went to Harare.

On 7 December he started at 3 am and worked to 5 pm. He had only 30 minutes break. On Sunday he had a break and did not work.

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On Monday 10 December he set off to South Africa at 5 am. He was working for 15 hours.

On 11 December he set off on the return journey at 7.30 am for Beitbridge and Gwanda. He spent a very uncomfortable night in Gwanda and did not sleep well because of mosquitos. He set off from Gwanda at 5 am for Bulawayo and by 7.15 am on 12 December he was in Bulawayo.

When he stopped the vehicle, the then Manager, Mr Mutambirwa approached him and asked why he was there as he should have been at Beitbridge with another truck that was going to South Africa. He said he had not been advised of that arrangement and had not seen this truck. He was then instructed to leave his truck, take a small van and proceed to Beitbridge to go and take over the truck and go to South Africa.

He protested and advised how tired he was, that he needed a break and could not undertake such a long journey without rest as he had not had a proper sleep, but the Manager said there was no one else to go and plaintiff had to go. He approached the Traffic Controller and asked why he was being sent on the trip to South Africa when he had come from there and had had no rest. The controller

CHEDA J

said he had arranged for someone else to go but asked him to discuss the matter with the Manager.

The Manager insisted that plaintiff should go and no one else.

He even told plaintiff not to delay as the vehicle to South Africa had an important order from Supersonic.

The Manager also said any further delays by plaintiff, or if he continued to defy the instructions, would indicate he no longer wanted the job. He believed that if he refused to go he would be dismissed from work.

He proceeded to Beitbridge in a small van. After 100 km he felt sleepy and he stopped and slept for 20-30 minutes then he decided to proceed as he had to get to the border and clear the vehicle in time to cross.

When he was on the road again he must have fallen asleep suddenly, and woke up when the wheels ran on the gravel. He saw that he was heading for some big stones in front of him but there was no time to swerve to avoid them. He was involved in an accident in which the vehicle was damaged beyond repair. He confessed that the accident was caused by sleep.

On 29 January 1985 an enquiry was carried out and he later got a letter, Exhibit 1 advising him of the company's decision to dismiss him summarily.

Plaintiff gave evidence referring to the time sheets, indicating that he often worked more hours than those stipulated in the Regulations.

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Mr Bannard conceded that if the drivers worked up to 14 or 15 hours that would be flouting the regulations.

Bernard Mahuni gave evidence for plaintiff and said that he had been on standby to go to South Africa but was later told that he was no longer going and that plaintiff was to go on this trip.

Mahuni had all the travel papers and as he had been working for the company since 1964 he had been all over Southern Africa.

The then manager of Glens Bulawayo Depot, Christopher Mutambirwa, gave evidence for the defendant.

CHEDA J

He said the plaintiff did not report to him but to Collin Moyo the traffic controller who allocated duties to drivers and told each one where to go.

He denied sending the plaintiff to South Africa on this trip and did not discuss with the traffic controller anything concerning the plaintiff going on this trip. He said however that he was aware that plaintiff came at 7.30 am and left for Beitbridge and had an accident.

He said he asked plaintiff to give him a full report, on the accident for insurance purposes, but when he asked what had happened plaintiff said some donkeys had crossed his path.

It was clear that Mutambirwa was not being truthful because right from the start all correspondence on this matter show that plaintiff said he fell asleep, and that it was Mutambirwa who had insisted on plaintiff returning to Beitbridge on the day in question.

It was clear that he did not want to take responsibility for what happened despite the fact that both verbal and documentary evidence point at him as having sent the driver to Beitbridge to take over from another driver who had been sent to give him the truck if they met on the way.

The defendant suggested that the plaintiff caused the accident by his negligence in falling asleep while driving

It is clear that the plaintiff who is an employee was under obligation to take instructions from his superiors and having protested against the instructions to return to South Africa while still tired, his company insisted that he should go.

The company put the plaintiff into a situation where he had to undertake the journey while he was not in a proper and suitable state to do so.

The driver must have been suffering from fatigue at the time and was certainly not fit to undertake the journey.

If he had not been compelled to go on this journey the accident would not have occurred at all.

The fact that he continued the journey after a short sleep without full rest cannot be held against

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him as he had been advised by the Manager of the urgency of the orders he was to deliver.

CHEDA J

I therefore do not agree with the defendant's submissions that plaintiff contributed to what happened to the extent of having him share the blame.

I therefore find that in the circumstances the dismissal was wrongful and that plaintiff is entitled to an order as prayed for in the summons.

I therefore enter judgment for the plaintiff with costs except that the amount of claim is to be worked out as agreed between the parties.

Webb, Low & Barry, plaintiff's legal practitioners

Joel Pincus, Konson & Wolhuter, defendant's legal practitioners

MURISA NO v MURISA 1992 (1) ZLR 167 (SC)

Editor's Note:(2)

Court **Supreme Court, Harare**

Gubbay CJ & Korsah JA, Ebrahim JA

Civil appeal

3 March, 1992

Flynote

Succession - intestate succession - whether wife in customary law union has right to be appointed as heir to her late husband's estate - object of hearing to determine heirship in customary law

Headnote

Section 69 of the Administration of Estates Act [*Chapter 301*] lays down that the estate of an African who dies intestate shall be administered and distributed according to customary law.

Customary law does not recognise the right of a widow to be appointed heir to her deceased husband's *estate ab intestato*.

The judgment in *Chihowa v Mangwende* 1987 (1) ZLR 228 (S), whilst laying down that, as a result of the majority status conferred upon African women over 18 by the Legal Age of Majority Act, African women who were majors had the same rights to succession as men, did not go so far as to say that a widow could be appointed *ab intestato* to her deceased husband's estate.

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Therefore the magistrate had erred in deciding that the widow was the heir to her husband's *estate ab intestato*.

The object of the hearing to determine heirship at customary law, held compliant to s 69(2) of the Administration of Estates Act, is to ascertain from the parties what the true customary law position would be; it is not to decide who would be best suited to administer the estate on behalf of and for the benefit of the deceased's children.

EBRAHIM JA

Cases cited:

Chihowa v Mangwende 1987 (1) ZLR 228 (S)

Antonia v Antonia 1991 (2) ZLR 42 (S)

The appellant in person

The respondent in person

Judgment

Ebrahim JA: This is an appeal against the decision of the magistrates court sitting in Harare on 16 December 1987 appointing the widow of Josiah Tapfumaneyi Murisa as the heir to his estate.

The facts of this matter are as follows: Tapfumaneyi Murisa ("the deceased") died intestate on 18 May 1986, leaving an estate consisting of household property, pension benefits, an insurance policy and some cash.

The respondent, Priscilla Murisa, was married to the deceased in accordance with African Law and Custom. There were two minor children born of this union, namely Lloyd Nyasha (born on 21 January 1984) and Victor (born on 27 January 1986). The marriage between the two had not been solemnized or registered in terms of the African Marriages Act [*Chapter 238*].

The appellant alleged in the court below that the deceased had fathered another son with one Susan Nyabonda with whom he had an association prior to his union with the deceased's widow. This child, James Murisa, was born on 4 August 1976. If this is true then it would make James Murisa the deceased's eldest child.

From the evidence on record, it appears that following the traditional African custom of *kurova guva* (the cleansing ceremony), Lloyd Nyasha was appointed heir to his father's estate on 25 July 1987. However, prior to that, on 2 July 1987, the Presiding Officer Marondera, had appointed James as heir to the estate and issued a certificate declaring him to be the heir and Fanuel Murisa was appointed guardian.

Aggrieved by the determination of the Presiding Officer, the deceased's widow appealed to the

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District Court at Harare. The Provincial Magistrate who heard the matter overturned the decision of the Community Court and declared Priscilla Murisa, the widow of the deceased, as the heir to her late husband's estate

It is this decision which is the subject of the dispute of this appeal. The appellant,

EBRAHIM JA

dissatisfied with the decision of the Provincial Magistrate, and representing the three minor children of the deceased, brought an appeal to this court in terms of s 69(3) of the Administration of Estates Act [*Chapter 301*]. The grounds of appeal are as follows:

"1. The Provincial Magistrate misdirected herself in law in finding that the respondent was the heir to the estate of the said Josiah Tapfumaneyi Murisa.

2. There was no evidence as to marriage between the respondent and the appellant.

3. The Magistrate misinterpreted the provisions of customary law and hence led herself into error."

The question of law that arises can be formulated fairly simply in these terms: Does our customary law recognise the right of a widow to be appointed heir to her deceased husband's *estate ab intestato*?

In this regard, s 69 of the Administration of Estates Act [*Chapter 301*] is instructive. It provides as follows:

> "If any African who has contracted a marriage according to African law or custom . . . dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged."

In arriving at the conclusion that a widow could indeed inherit her deceased husband's estate the learned Provincial Magistrate may have misunderstood the decision of DUMBUTSHENA CJ *in Chihowa v Mangwende* 1987 (1) ZLR 228 (S). In that judgment, the then Chief Justice ruled that "since the Legal Age of Majority Act had conferred majority status on African women who had prior to that been perpetual minors under Customary Law, they had the same rights of succession as men." Whilst this was a progressive judgment, as far as it went, it did not go so far as to say that a widow could be appointed, heir *ab intestato* to her deceased husband's estate. This view is well supported by Julie Stewart and Alice Armstrong in their book *The Legal Situation of Women in Southern Africa* (UZP 1990) at p 187 where they observe:

> "The *Chihowa* case gave a right only to a female blood relative of a deceased African male to be appointed heir; it did not recognise the capacity of a wife to succeed to the estate of her husband . . ."

EBRAHIM JA

They go on to observe, more pertinently, that:

> "Customary law does not recognise a widow's right to inherit in a direct fashion from her deceased husband's

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> estate. She may be entitled to support from the estate but not to a share therein. In this context the Legal Age of Majority Act cannot be used to grant her a share in the estate".

It is, therefore, quite clear that the learned Provincial Magistrate misdirected herself in her interpretation of the provisions of customary law relating to intestate succession.

It should also be noted that the Provincial Magistrate failed to follow the provisions of s 69(2) of the Administration of Estates Act which required her to call and summon all parties concerned so that she could ascertain from them what the true customary law position would be. A reading of the record, and particularly of her comments in reference to the notice of appeal shows that she chose to conduct an examination of who would be "best suited to administer the estate on behalf of and for the benefit of the deceased's children . . ." This, well - intended as it might be, is unfortunately not the object of a hearing to determine heirship at customary law.

The record in its present state is inadequate. No serious effort seems to have been made to ascertain whether or not James is the oldest child or indeed the child of the deceased. There is nothing more than just a cursory reference to the payment of "damages" to Susan Nyabonda's parents by the appellant. The importance of this point, which should have been pursued, is underscored by Harold Child in his publication *The History and Extent of Recognition of Tribal Law in Rhodesia* atp 68 where he makes the salient observation that:

> "The rule is that a seducer has no right to his child born as a result of illicit intercourse with an unmarried girl, unless the father of the girl at his option, accepts (a) damages for the seduction plus (b) a payment of compensation acknowledging paternity . . . On payment of (b) the child is accepted as that of the seducer".

It is therefore, crucial that the true relationship between James' mother and the deceased be established. This can only be achieved by calling in Susan Nyabonda, the mother of James to testify.

Again it is rather telling that the respondent in this present appeal only got to know of the existence of James after the demise of her husband. The deceased

EBRAHIM JA

does not seem to have made any efforts to assimilate James into his family. However, a further investigation is clearly needed.

The appellant in this case is merely representing the minor children and does not himself seek to be appointed heir. The contest on who is to be appointed heir, therefore, really lies between James and Lloyd. The issue of guardianship is, in my view, largely dependant on who is ultimately appointed heir.

This matter has been in the courts for over four years now. It is unfortunate that it has taken so long to resolve. Regrettably the beneficiaries of the estate have suffered as a consequence because the Master of the High Court has stopped making disbursements towards their upkeep. In my view, the Master of the High Court should ensure that the proven beneficiaries, that is, Lloyd and Victor, receive financial assistance in matters such as food, school fees and clothing.

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Since this matter is still pending, any such expenditure should be kept to a minimum.

In order to enable the magistrate to attend to the points raised in this judgment the matter should appropriately be remitted to the magistrate's court for a hearing *de novo.* Both parties can call witnesses and give evidence themselves to assist the court in arriving at a conclusion on the status of James. In particular Susan Nyabonda should be called to give evidence. It may be instructive for the presiding magistrate to have sight of the judgment of this court in the matter of *Antonio v Antonio* 1991 (2) ZLR 42 (S).

Further, it is directed that the appellant make available to the respondent property pertaining to the matrimonial union which he is presently holding. This property consists of a kitchen unit and utensils, a bedroom suite, two beds, a radio, sofas and other household goods. I would indicate that the parties are agreed that these items are rightfully the property of the respondent and the appellant has no objection to her taking the property.

In the result, the appeal succeeds to the extent that the order of the Provincial Magistrate appointing Priscilla Murisa as the heir to the estate of the late Josiah Tapfumaneyi Murisa is set aside and the matter is remitted to the magistrate's court for a fresh hearing before a different magistrate. There will be no order as to costs as both parties were self actors.

Gubbay CJ: I agree

Korsah JA: I agree

STOCKIL v GRIFFITHS 1992 (1) ZLR 172 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & Korsah JA

Civil appeal

18 February & 5 March 1992

Flynote

Default judgment - rescission - factors taken into account - onus

Headnote

The onus is on the applicant for rescission to show that there was good and sufficient cause for granting the application.

The factors which are taken into account in deciding whether a default judgment should be rescinded are

(i) the reasonableness of the applicant's explanation for the default;

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(ii) the *bona fides* of the application to rescind the judgment; and

(iii) the *bona fides* of the defence on the merits of the case and whether that defence carries some prospect of succcess.

The present case turned upon the *bona fides* of the defence advanced. The trial court had misconstrued the defence put forward. Properly interpreted, the defence being advanced was that the agreement of sale, though signed by the parties, wrongly recorded their existing continuing common intention and was subject to rectification. There was no suspicion that this defence was contrived and it was not, therefore, necessary for the applicant to produce evidence that the probabilities actually favoured him.

Cases cited:

Barclays Bank of Zimbabwe Ltd v CC Intl (Pvt) Ltd S-16-86

Roland & Anor v McDonnell 1986 (2) ZLR 216 (S)

Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S)

Meyer v Merchants Trust Ltd 1942 AD 244

Benjamin v Gurewitz 1973 (1) SA 418 (A)

MJ Gillespie for the appellant

AJ Dyke for the respondent

GUBBAY CJ

Judgment

Gubbay CJ: The respondent issued a summons and declaration out of the High Court on 6 June 1990 claiming against the appellant (to whom I shall refer as "the applicant") (i) cancellation of the written agreement entered into with Esme Lily Fitzgerald on 30 December 1986 in respect of the sale to the applicant of certain immovable property, being Stand No 6679 Harare Township; (ii) an order that vacant possession of the said property be given; and (iii) costs of suit on the scale of legal practitioner and client.

On 9 June 1990 the summons and declaration were served at the *domicilium citandi et executandi* chosen by the applicant in clause 16 of the agreement of sale. No appearance to defend was entered and the *dies induciae* having expired, judgment by default was granted on 24 June 1990.

On 16 July 1990 an application for rescission of judgment was filed. It was opposed and in due course dismissed with costs by GIBSON J It is against that decision that this appeal now lies.

The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving "good and sufficient cause", as required to be

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shown by Rule 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd* S-16-86 (not reported); *Roland & Anor v McDonnell* 1986 (2) ZLR 216 (S) at 226E-H; *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 211C-F. They are: (i) the reasonableness of the applicant's explanation for the default; (ii) the *bona fides* of the application to rescind the judgment; and (iii) the *bona fides* of the defence on the merits of the case which carries some prospect of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole.

The respondent, to whom Mrs Fitzgerald has ceded all her rights of action under the agreement of sale, did not put in issue either in the court *a quo* or before this court, the professed reasonableness of the applicant's explanation for his default or the *bona fides* of his application to rescind the judgment. That approach is readily understandable and was entirely proper.

The applicant was residing in the Republic of South Africa at the date the process was served at the *domicilium citandi et executandi.* The occupant of the property, a Miss Wellen, did not inform the applicant or his legal practitioners of the service of the summons before the *dies induciae* for entry of appearance

to defend had expired. She only advised the legal practitioners on 21 June 1990. They immediately contacted the legal practitioners acting for the respondent and requested that the bar be uplifted - the applicant being out of time by six days. A refusal to do so was communicated the next day. Although the two firms of legal practitioners had been in correspondence concerning the dispute since 4 August 1989, no warning of the respondent's instruction to issue summons had been given.

In para 8 of his founding affidavit the applicant, after referring to the correspondence between the legal practitioners, went on to state:

> ". . . these letters canvass fully the basis of my defence to the action instituted by the respondent and I respectfully submit that the existence of this correspondence shows that this application is brought in good faith and that it is not brought simply for the purpose of delaying the inevitable."

Significantly, the respondent, in replying to these averments, simply denied that the applicant had a good defence. As already mentioned, the *bona fides* of the application to rescind was not disputed.

Against this background the learned judge *a quo* was correct in limiting the inquiry to the third factor - the *bona fides* of the applicant's defence on the merits.

The respondent based her claim for cancellation of the agreement of sale on three grounds. First, that the applicant was in breach of clause 5 of the agreement of sale in that he had omitted "within six months from the date of occupation (to) take all necessary and reasonable steps to obtain a loan on security of a first mortgage from a Building Society for an amount

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equal to the full balance of the purchase price with interest then outstanding". Second, and in the alternative, that the applicant had verbally undertaken to pay the outstanding balance of the purchase price by 31 August 1989, but had failed to do so. And third, in the further alternative, that in breach of clause 20 of the agreement of sale, the applicant had leased the property to one Gascoigne "without the prior "written consent of the seller".

Having found that the applicant had no valid defence in law to the first ground upon which cancellation was sought, the learned judge did not proceed to consider his position in respect of the second and third grounds.

GUBBAY CJ

Unfortunately both Her Ladyship and the respondent misunderstood the true nature of the applicant's first defence. He was not seeking to justify the non-application for a building society loan by relying upon an oral agreement which preceded the agreement of sale of 30 December 1986, and which conflicted, in particular, with clause 5 thereof. The defence raised was that the agreement of sale, though signed by the parties, wrongly recorded their existing continuing common intention. This was to the effect that the applicant would pay off the purchase price in monthly instalments of $400 until the balance thereon had been reduced to $26 000, at which stage he was to apply to a Building Society for a loan in the aforementioned amount. In other words, the applicant's contention was that the agreement of sale sued upon by the respondent was subject to rectification, thereby making evidence admissible to prove that both parties had a common intention which they intended to express in the written instrument but which, through a mistake, they failed to express. See *Meyer v Merchants* Trust Ltd 1942 AD 244 at 253; *Benjamin v Gurewitz* 1973 (1) SA 418 (A) at 426B-H; Joubert *General Principles of the Law of Contract* at p 162 et seq. Thus the requirements for success are proof that (a) the writing is incorrect, and (b) what the real consensus was.

While appreciating that the applicant was not obliged to claim formal rectification in order to raise the defence that clause 5 of the agreement of sale did not reflect what both parties had intended to set out therein, Mr *Dyke*, for the respondent, submitted that the facts alleged by the applicant in respect of this defence were so bald and general as to warrant a finding that the prospect of the defence succeeding was entirely remote.

I am unable to agree. The applicant deposed as follows:

> "I deny that clause 5 of the annexure 'A', save for the first sentence thereof, constitutes a term of the agreement concluded between me and the cedent of the Respondent's rights, Mrs B L Fitzgerald. I say this because annexure 'A' is in fact the second agreement signed by me and Mrs Fitzgerald. I annex hereto marked 'B' a copy of the first agreement signed by me and Mrs Fitzgerald. In terms of special condition 1 thereof, I applied for a loan for $31 000,00 from a registered building society, namely, Central Africa Building Society ('the Society'). This application was refused. I annex in this connection a copy of a letter dated 17th October 1986 marked 'C'. Informally, the Society advised me that I would only be granted a bond of $26 000,00 because of the opinion of the Society's valuer as to the value of the property. I told Mrs Fitzgerald this. She accepted this. Accordingly, she agreed to sell me her property on a 'deed of sale' basis, in terms of which

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GUBBAY J

> I would pay off the purchase price in monthly instalments of $400,00 until the balance of the purchase price was reduced to $26 000,00. At that stage, I was then to apply to the Society for a loan in this amount and thereby pay Mrs Fitzgerald in full. Annexure 'A' of the Respondent's Declaration does not reflect this agreement. Annexure 'A' is a standard 'deed of sale' contract as routinely prepared by Mrs Fitzgerald's estate agents, Ridgeway Grant Real Estate (Pvt) Ltd But I affirm that in the material respect described above regarding clause 5 of the annexure 'A', annexure 'A' does not correctly reflect the contract between Mrs Fitzgerald and I In the circumstances, I respectfully submit that my non-application for a building society loan is not a breach of the terms of my agreement with Mrs Fitzgerald."

In my view these factual allegations, if established at the trial, would entitle the applicant to the relief sought. This is not a case where there is any suspicion that the first defence is contrived. I do not, therefore, consider that it was incumbent upon the applicant to produce evidence that the probabilities actually favoured him. Certainly, such factors as the cancellation of the original agreement and the lengthy withholding of action by the respondent until June 1990 during which period the respondent accepted the monthly instalments of $400 tendered by the applicant, are not inconsistent with the defence raised.

It is unnecessary to canvass the second and third grounds relied upon by the respondent for Mr Dyke properly conceded that the applicant had made out a defence to each of them.

It necessarily follows that I am satisfied that the applicant discharged the onus of showing "good and sufficient cause" for the grant of the application and that the court *a quo* erred in dismissing it.

Counsel agreed to my suggestion that it would be appropriate to reserve the costs of the application for the decision of the trial court.

I would accordingly allow the appeal with costs and alter the order granted to read:

> "(1) The application is allowed.
>
> (2) The issue of costs is reserved for the determination of the trial court."

The applicant is to file his plea within twelve days of today's date.

MANYARARA JA

Manyarara JA: I agree

Korsah JA: I agree

Scanlen & Holderness, appellant's legal practitioners

DW Aitken & Co, respondent's legal practitioners

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S v MUVHAMI 1992 (1) ZLR 178 (HC)

Editor's Note:(3)

Court **High Court, Harare**

Robinson J

5 & 6 March 1992

Flynote

Evidence - accused acquitted because police witnesses found to have given perjured evidence

Police - police witnesses giving perjured evidence - judge recommending disciplinary action

Headnote

In acquitting the accused after the State withdrew the charge the judge pointed out that certain police witnesses had given perjured evidence against the accused and recommended that disciplinary action be taken against them.

J Chinyama for the State

J Mapfumo for the accused

Judgment

Robinson J: At the very least, it is evident that the two Chitungwiza police witnesses have given perjured testimony in relation to certain matters, such as the accused's failure to produce and show them his identification particulars, which in itself is a most serious state of affairs.

Accordingly, I would direct the Attorney-General to bring this matter to the immediate attention of the Commissioner of Police with a view to a full inquiry being held into the conduct of the two Chigungwiza Police witnesses and to appropriate action being taken against them if it be found that they have acted

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ROBINSON J

corruptly or dishonestly in any way. .For this purpose, the court will, of course, be only too ready to have the record of the proceedings in this case transcribed and placed at the disposal of the Police investigating authority.

At this juncture, I would recommend that if it be found that the two Chitungwiza Police witnesses did wrongfully and maliciously cause the unfortunate accused to be held in custody for close on five and one-half months, Government should consider the payment of compensation for the accused for the great injustice perpetrated against him without the accused's having to seek legal redress himself, which obviously he is ill-equipped to do seeing that he has been represented in these proceedings by counsel on a *pro deo* basis.

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Mapfumo & Associates, accused's legal practitioners

S v GAHAMADZE 1992 (1) ZLR 180 (SC)

Court **Supreme Court, Harare**

Korsah JA, McNally JA & Ebrahim JA

Criminal appeal

10 February & 9 March 1992

Flynote

Criminal procedure - appeal - noting appeal and giving grounds of appeal without seeing judgment or record - impermissible - proper procedure to follow

Headnote

It is impermissible for appellant's legal practitioner to note an appeal and set out grounds for appeal without first having had sight of the judgment or the record. It is only on the basis of the record that proper grounds of appeal can be composed. Noting of appeal without seeing the record should not be done in order to be able to note the appeal within the prescribed period. Instead, the procedures set out in Rule 3(1) of Order IV of the Magistrates Court Rules, RGN 871 of 1966 should be followed. This allows for the expeditious obtaining of the record by the convicted person making a request for a copy of the record within 48 hours of his being sentenced.

D Foroma for the appellant

S C Mavangira for the respondent

Judgment

Korsah JA: The appellant was unrepresented at his trial. He was sentenced on 15 January 1991. This appeal was noted on 16 January 1991, without the appellant's legal practitioner having had sight either of the judgment or record. The errors alleged in the grounds of appeal to have been committed by the trial magistrate must, therefore, have been imaginary. The noting of the appeal in this way was, no doubt, done in order to have the appeal noted within the prescribed period. But this is the wrong approach to the problem. The proper procedure is as stated hereunder.

KORSAH JA

By Rule 3 (1) of Order IV of the Magistrates Courts (Criminal) Rules, RGN 871 of 1966, any convicted person may, within forty-eight hours after being sentenced, make a request in writing

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to the clerk of the court for a copy of the judgment. The clerk of the court shall upon such request being made to him:

"(a) if a judgment was delivered in terms of rule 1 and recorded, within seven days furnish him with a copy of such judgment;

(b) if a judgment was not delivered or, if delivered, was not recorded, refer the request to the magistrate, who shall then within seven days prepare and lodge with the clerk of the court a statement giving his reasons for conviction and any special factors taken into account in assessing sentence."

If such a request is made by a convicted person, time for noting an appeal begins to run when the judgment stating the reasons for conviction have been furnished in terms of this rule. It is impermissible to note an appeal without sight of the judgment or record alleging grounds that do not exist and intimating that such grounds of appeal would be amended before hearing when sight has been had of the judgment and\or record.

Amendments to the grounds of appeal are governed by s 23(3) of the Appellate Division (Magistrates Court) Criminal Appeals Rules, SI 504 of 1979, which requires such amendments to be effected within seven days of the filing of the magistrate's comments on the Grounds of Appeal.

The magistrate's comments in the instant case was undated, but must have been filed prior to 24 September 1991, when the record was received by the Registrar of the Supreme Court. The notice of amendment of the grounds of appeal filed on 7 January 1992, was thus hopelessly out of time, but because we thought there was some merit in the appeal against sentence, which the State was conceding in any case, we condoned the noting of the amendment of the grounds outside the prescribed period.

[The remainder of the judgment is not material to this report - *Editor.*]

McNally JA: I agree

Ebrahim JA: I agree

Sawyer & Mkushi, appellant's legal practitioners

S v W (A JUVENILE) 1992 (1) ZLR 182 (SC)

Court **Supreme Court, Harare**

Korsah JA, McNally JA & Ebrahim JA

Criminal appeal

11 February & 9 March 1992

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Flynote

Criminal law - theft - "shoplifting" - stage at which crime committed

Headnote

The appellant and her friend went into a clothes shop. The appellant took two blouses to the changing room to try on. The friend took a third blouse from the hanger to the changing room. The first two blouses were returned. The girls walked out of the shop. It was discovered that the third blouse was missing. The appellant was asked to return to the shop and she was found to be wearing the third blouse under her brassiere and her jersey. She had no money on her person. Dismissing the appeal against conviction:

Held, that, although the appellant had had permission to try on the clothes, when she walked out of the shop wearing the blouse in a concealed fashion she had committed theft.

E W W Morris for the appellant

S C Mavangira for the respondent

Judgment

Korsah JA: On 10 July 1991, at the magistrates court in Harare, the appellant was convicted of theft by shop-lifting. Being a juvenile, passing of sentence was postponed for four years on condition that she does not within that period commit any offence involving theft. She appealed against her conviction.

The facts giving rise to her prosecution are relatively uncomplicated. At about 12.30 pm on 27 June 1991, the appellant, in the company of a female juvenile friend, entered Panache Boutique in Cabs Centre and asked for two blouses

to try on as she wanted a blouse to purchase. She was given the two blouses and she and her friend went into the changing room with them. While the appellant was in the changing room her friend took a third blouse from the hanger to give to the appellant. The appellant and her friend then emerged from the changing room holding only two blouses. They gave the two blouses to the shop assistant, Ruth Nyikayauramba, and Ruth went to the changing room to collect the third blouse only to find that the third blouse was not in the changing room. Upon Ruth's return from the changing room she noticed that the appellant and her friend had left. She immediately inquired from the manageress whether the two girls had paid for the third blouse and was informed that they had not. This much as common cause.

According to Ruth, when she was told the girls had not paid for the third blouse, she rushed out of the shop and called the girls, who were about eighty metres away from the shop, to return, which they did. The manageress corroborated Ruth's testimony that the girls had left the premises. According to the girls, they had not left the shop. The appellant had come out of the changing room to look for a matching skirt for the blouse and, for some reason that defies

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credulity and common sense, had walked to her bag to get her make-up kit so that she could use the mirror to put on her make-up.

It was common cause that when the appellant was apprehended she was wearing the third blouse, which was a close fitting boob-tube, over which she had her brassiere and her jersey. Thus the boob-tube was completely covered up when she walked past the Manageress, without paying for it. Indeed, she could not have paid for it because she had no money. She said her mother was going to give her money to pay for the purchase of clothes.

The offence of theft consists of four essential elements: (1) an unlawful (2) *contrectatio* (3) with intent to steal (4) a thing capable of being stolen. See Hunt *South African Criminal Law and Procedure* vol II 2 ed p 602. I do not think it would be over simplistic to translate "*contrectatio*" as "dealing"; so that theft means simply the unlawful dealing with a thing capable of being stolen with the intent permanently to deprive the owner thereof.

It is evident to me that if an honest customer walks into a boutique and is given clothing to try on in the changing room and comes out of the changing room wearing such clothing her dealing with such clothing is by the leave and licence of the management and is thus not unlawful. She may even walk to the check-point and pay for the item of clothing, in which case the property in the clothing passes to her and when she walks out of the shop in such clothing her dealing

KORSAH JA

with the clothing cannot be said to be unlawful. The property in the clothes pass to her after she has effected the correct payment therefor. It follows that if a customer walks out of a boutique, wearing the clothes she had been given to try on, without paying for them, her dealing with the clothes transcends the authority conferred on her by the owners and her dealing with the property in the clothes become unlawful.

If, on the testimonies of the manageress and Ruth, which were accepted by the trial court, the appellant was accosted eighty metres outside the boutique wearing apparel that she had been given to try on, and she had not paid for it, then her dealing in the property was unlawful and establishes an intention to deprive the owners of their rights in the property permanently. On this basis the appellant's conviction is unassailable.

Reverting to the appellant's version of events, she was accosted by Ruth when she and her friend had gone to the entrance of the boutique where the security guard was for the purpose of fetching her make-up kit. She does not deny that she had the boob-tube on, that her brassiere was on top of the boob-tube and that she had on top of that her jersey which concealed both the boob-tube and her brassiere. She had gone past the check-point and, in any case, she had no money to pay for the boob-tube.

It seems to me that the authority which the owners of the boutique had conferred on her was to try on the garment in the changing room and return it to them if she did not want it or, if she wanted it, to pay for it at the check point and walk out with it. She had no authority to conceal it under her clothing and walk past the check-point without paying. Such dealing with the garment transcends the authority granted her by the owners and is therefore unlawful. To my mind, it

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matters not where the unlawful dealing with the property takes place if the surrounding circumstances lead to the irresistible conclusion that the appellant had the intention of depriving the owner permanently of her rights in the property; though it is safer to conclude that such usurpation of the owner's rights has occurred when the customer is out of the shop.

The decision in each case must, of course, depend on its own peculiar facts. It is possible to imagine circumstances in which a customer in blissful absent-indedness walks past a check-point holding one item of clothing in her hand without paying for it, but they were not present here. Here, the boob-tube was worn by the appellant carefully concealed beneath her own apparel, she had no money to pay for it, and she was past the check-point together with her friend who had handed her the boob-tube. Did she need the assistance of her

friend to fetch her make-up kit? These coincidences lead to the irresistible and only valid inference that she intended to steal the boob-tube.

I am of the view that even on the appellant's own version of events, her dealing with the garment in the shop was unlawful and that all the surrounding circumstances led to the inevitable conclusion that she was guilty of theft by shop-lifting.

In the result the appeal is dismissed.

McNally JA: I agree

Ebrahim JA: I agree

D W Aitken & Co, appellant's legal practitioners

SCOTFIN LIMITED v FLAME LILY PANEL BEATERS (PVT) LTD 1992 (1) ZLR 186 (HC)

Editor's Note:(4)

Court **High Court, Harare**

Chidyausiku J

Civil trial

11 March, 1992

Flynote

Contract - depository for reward - negligent loss of vehicle being held in his custody

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Headnote

The plaintiff had taken its vehicle to the defendant garage so that repairs could be carried out on it. Whilst it was at the garage, pending repairs for reward, the garage was a depository for reward. By falsely holding out that the plaintiff had authorised him to collect the car, a thief had taken possession of the vehicle and the vehicle had not been recovered. The plaintiff claimed damages for the loss of its vehicle.

Held, that the plaintiff was entitled to succeed in its claim as the loss of the car had been due to the negligence of the garage. The employee of the garage had been negligent. A reasonably prudent person would not have delivered the vehicle to the thief on the basis of a note written on plain paper without first verifying with the owner that this person was authorised to take the car on his behalf. This is particularly so, given the prevalence of car thefts. The plaintiff was therefore entitled to damages reflecting the loss which it had suffered.

E W W Morris for the plaintiff

J Samukange for the defendant

Judgment

Chidyausiku J: The plaintiff in this case seeks damages from the defendant in the sum of $30226,20. The damages arise from the loss of the plaintiff's vehicle while it was in possession of the defendant.

1992 (1) ZLR p187

CHIDYAUSIKU J

The following facts appear to be common cause from the pleadings. On or about the 25 April 1989 the plaintiff delivered to the defendant a motor vehicle, a Nissan Pick-up truck, for the purpose of obtaining a quotation for carrying out certain repairs. The defendant supplied a quotation for an amount of $880,00 for the repairs, and the motor vehicle was returned to the plaintiff.

It is also common cause that on 27 April 1989 the plaintiff delivered and the defendant accepted delivery of the same vehicle for the purpose of carrying out the repairs. The repairs were, however, to commence only after the final authorization by the plaintiff's insurers.

It is the plaintiff's case that such authorisation was given by the insurers while the defendant denies that such authorisation was granted.

While the vehicle was in the custody of the defendant pending repairs a person, whom I shall refer to as the thief, purporting to be an agent of the plaintiff, asked for and was given the vehicle by the defendant. He disappeared with the vehicle. The vehicle has never been seen since then. The precise circumstances of the handing of the vehicle to the thief are at issue. The defendant maintains that the delivery of the vehicle to the thief was a *bona fide* mistake that is not in any way tainted with negligence. The plaintiff, on the other hand, contends that the defendant's delivery of the vehicle to the thief was negligent and the defendant is liable to it in

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damages.

Before I turn to what I have set out to be the issues in this case I would like to comment on the defence of the "owners risk" raised by the defendant on the pleadings. No evidence was led that the plaintiff left its vehicle with the defendant at his own risk. If anything there was some half-hearted attempt to lay a basis for this defence in cross-examination. No explanation was offered for this attitude. I will therefore treat this defence as having been abandoned. This in effect reduces the main issues that fall to be decided to three, namely:

(i) was the defendant a gratuitous depository or a depository for reward?

(ii) the degree of negligence, if any, of the defendant in delivering the plaintiff's vehicle to the thief;

(iii) the quantum of damages, if the defendant is liable to pay them.

The question of whether the defendant was a gratuitous depository or a depository for reward turns on whether it had received, at the time of the theft

of the vehicle, the instructions to carry out the repairs for which it obviously was going to be rewarded. In para 4 of the amended plea the defendant admits that it accepted the plaintiff's vehicle for repairs, subject to the final authorisation by the plaintiff's insurance company. The plea, rather surprisingly, does not state whether such authorisation was granted or not. The plaintiff led evidence that such authorisation was granted. The defendant led evidence that such authorisation was not granted. In order to resolve this issue I will now examine the evidence led by each of the parties on this issue.

In conclusion the court is satisfied that the following facts have been established on a balance of probabilities:

(a) the plaintiff delivered to defendant, for the purpose of repair, its Nissan pick-up truck on the morning of the 27 April 1989. The repairs were to be carried out upon confirmation by the insurance company;

(b) the insurance company, through Mr Kamucheka, authorised the defendant to repair the plaintiff's vehicle;

(c) after the authorisation for repairs, the defendant delivered the vehicle to a thief who purported to have been sent by the plaintiff to collect the vehicle;

(d) the thief brought with him a note, handwritten on a plain piece of paper, as his authorisation for delivery to him of the vehicle of the plaintiff;

(e) the handwritten note gave the make and registration number of the plaintiff's vehicle;

(f) Abreu delivered the plaintiff's vehicle to the thief on the strength of the above note

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without verifying with the plaintiff nor did he ascertain who he had spoken to over the phone prior to the thief coming to take delivery of the vehicle.

In my view a reasonable prudent man would not have delivered the vehicle to the thief in the above circumstances without verification. This is particularly so given the prevalence of car thefts which is a matter of common knowledge which the court can take judicial notice of. It is on this basis that I find that the defendant was negligent and is liable in damages to the plaintiff.

CHIDUYAUSIKU J

I now turn to the question of *quantum* of damages. I am satisfied that Mr Holton's evidence on *quantum* of damages is reliable. Mr Abreu's evidence on *quantum* borders on absurdity.

In the result judgment is entered for the plaintiff in the sum of $30 226,20 plus costs of suit.

Coghlan, Welsh & Guest, plaintiff's legal practitioners

Byron Venturas & Partners, defendant's legal practitioners

S v STANFORD 1992 (1) ZLR 190 (HC)

Court **High Court, Harare**

Robinson J

Referral to High Court for sentence

13 March 1992

Flynote

Criminal procedure (sentence) - sodomy - 60-year-old man with consenting youth aged 14 - seriousness of offence - accused with previous conviction for rape - need for deterrent sentence

Headnote

The accused, a man of 60 years of age, who was living in the same household as the complainant, a 14-year-old boy, engaged in sodomy with the boy with his consent. The accused had a previous conviction for rape. The court sentenced him to 2 years' imprisonment. It said that the accused was a sexual menace and particularly the youth must be protected against the evil unnatural tendencies of people like the accused. Thus a deterrent prison sentence was called for.

Cases cited:

S v Dube HB-94-87

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R v Gough & Anor 1926 CPD 159

S v Henriques A-94-71 S v Meager 1977 (2) RLR 327 (A)

R v Stephen 1966 RLR 271

I Houston for the State

Judgment

Robinson J: This is a case which came before this court for sentence to be passed on the accused at the direction of the Attorney-General in terms of s 212(b)(i) of the Criminal Procedure and Evidence Act [*Chapter 59*].

ROBINSON J

After confirming that the accused had been duly convicted by the magistrate in the court below, in terms of his plea of guilty, of the crime of having sexual intercourse *per anum* with the complainant, otherwise described as the crime of sodomy, and after informing the accused of the factors which the magistrate had recorded as those submitted to him by the accused in mitigation of sentence and after noting the accused's further submission that the act of sodomy had been committed allegedly with the complainant's consent, the court gave its reasons briefly for sentencing the accused to two years' imprisonment and said that it would give its reasons in full in a written judgment, as it now does.

The material facts of the case are as follows.

(a) The accused, who is 60 years of age, and the parents of the 14-year-old complainant resided together in a house in Mufakose Township, Harare, the complainant's parents being lodgers of the accused's uncle.

(b) On 10 September, 1991 the accused and the complainant shared the same room in the house in question, each having his own blankets when they retired to sleep, seemingly on the floor.

(c) At about 11 o'clock at night the accused awoke and enveloped himself in the complainant's blankets and snuggled up to the complainant.

(d) While thus snuggled up to the complainant, the accused, to adopt the words used in the statement of agreed facts, "put his penis to the anus of the complainant and started to do movements until he released and produced sperms".

As already mentioned, at his trial before the magistrate, the accused pleaded guilty to the charge of, "against the order of nature", having "sexual intercourse *per anum*" with the complainant. When asked by the magistrate why he had done this, the accused replied - "I did it in 1990", whatever that was supposed to mean.

The accused contended, in mitigation, that the homosexual act had occurred with the

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complainant's consent although, if this is true, one wonders how it was that an act of which only the accused and the complainant had knowledge at the time came to be reported to the Police so that the accused ended up in court three days after the offence was committed. It is quite possible that at the time of the offence the complainant remained silent out of fear for the accused. However, as the charge sheet is worded in such a way as to indicate that the act took place

ROBINSON J

between consenting parties and this aspect was not canvassed at the trial in the court below, I shall, for purposes of sentence, assume in the accused's favour that the accused did not "sodomise" the complainant against his will, as happened on the horrifying facts described in the case of *S v Dube* HB-94-87 involving a 16-year-old schoolboy complainant.

Nevertheless, the fact remains that the accused in this case took advantage of the situation in which he found himself to resort to a despicable and abhorrent unnatural act with a youth only 14 years' old, which is quite unforgivable from the law's standpoint, if not from God's.

In view of the so-called sexually enlightened times in which we are told we live, when the prohibitions against promiscuous and unnatural sexual behaviour are increasingly frowned upon, it is of interest to take stock of the following passage from the judgment of GARDINER J in the case of *R v Gough & Anor* 1926 CPD 159 at 161 and 162:

> "It seems to me clear, from the text writers I have referred to, that the acts set forth in the charge sheet would have constituted a crime under the old Roman-Dutch law. Any gratification of sexual lust in a manner contrary to the order of nature was a crime. Some of the writers classified all forms of unnatural lust under the title of 'sodomy'. Thus Von Quistorp *Grundzätze des deutch peinl Rechts* (para 496), says: 'Although the expression sodomy can be explained in different ways, yet it really signifies unchastity against nature, or that kind of lewdness, whereby one seeks to satisfy his unclean inclinations and desires in another mode and way, than it ought to happen according to the ordained order of nature, either through carnal connection or through some other punishable misuse of the organs of procreation.' Others, such as Carpzovius *Practicae Novae Rerum Criminalium* (Quaest 76 para 11) confined sodomy to cases where coition had taken place. But even where the act was not sodomy in this sense, it was nevertheless punishable - see Carpzovius (Quaest 76 para 12). The *Criminal Ordinance* of the Emperor Charles V (art 116), is in the widest terms - 'If a human being behaves unchastely (unheusch treiben) with an animal, or male with male, or woman with woman, they have forfeited their lives, and they shall, according to the usual custom, be condemned to be burned to death.'"

One of the mitigatory factors put forward by the accused was that, at the time of the offence, he was separated from his wife. To the extent that the accused intended to rely upon this fact as an excuse for his inability to control his

ROBINSON J

unnatural behaviour, the short answer is that the law cannot countenance such an excuse. In this connection, it is perhaps apposite to quote the following remarks made by MACDONALD JP (as he then was) in the case of *S v Henriques* A-94-71 at p 2 :

> "It is often suggested in cases such as this that one is dealing with a person who is more to be pitied than

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> punished, and that this is so because persons with these tendencies are unable to control themselves. The law requires that persons with unnatural sexual desires, no less than persons with natural sexual desires, must control themselves and not offend against the criminal law. The idea that persons with unnatural sexual desires are unable or less able than persons with natural sexual desires to control themselves is not an established fact, nor is there any scientific evidence to support it. See in this connection the judgment in *R v Stephen* 1966 RLR 271. There is no evidence that an unnatural sexual 'drive' is any stronger than a natural sexual 'drive'. Since society strongly condemns unnatural offences, there is every reason to suppose that the pressure of public opinion makes it easier, and not more difficult, for persons who have these unfortunate tendencies to control them and conform with the law."

However, in the last sentence of this passage I would prefer to substitute the words "the law" for the word "society" and the words "public opinion".

Apart from the youthfulness of the complainant, another aggravating feature in this case is that in December 1985 the accused was convicted of rape, for which he was sentenced to a term of five years' imprisonment, thereby pointing to the conclusion that he is what can only be described as a sexual menace.

In *S v Meager* 1977 (2) RLR 327 at 334B MACDONALD CJ said that, for the reasons given in the case of *R v Stephen* 1966 RLR 271, in a case where an accused has been convicted of an offence involving an unnatural sexual act, a sentence is called for which will deter other like-minded persons from behaving in the same way.

It follows that where one is dealing with a person who has shown himself, as the accused has, to be a sexual menace, against whom the public must be defended, particularly the youthful who must at all costs be protected from the evil unnatural tendencies of people like the accused, a deterrent prison sentence is certainly called for and justified.

ROBINSON J

Accordingly, in the circumstances of this case, I saw fit to sentence the accused to a period of two years' imprisonment.

In concluding, I would like to appeal to our Legislature to consider changing our laws to enable a person who has been convicted of rape or of an unnatural offence (including the case of a victim who is a minor and who has been a willing participant in an unnatural act with an adult) to be compelled to undergo a blood test to ascertain whether the convicted person is HIV positive or suffering from some other incurable sexually transmissible disease. The purpose of this appeal is twofold.

Firstly, the law should provide that the result of the blood test, if adverse, be made known and fully explained by a Government medical officer, in the presence of two witnesses, to the convicted person, who would then sign an acknowledgment that this had been done (if the convicted person refuses to sign such an acknowledgment, then there could be legal provision for an appropriately worded certificate to be signed by the Government medical officer and two witnesses), with a view to the result of the blood test and the acknowledgment (or certificate) being filed with the record of the convicted person's previous conviction/s. Consequently, if, thereafter, the Police have occasion to cause the same convicted person to be prosecuted

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again for committing a sexual offence, the fact that the blood test showed, for example, that he was HIV positive, could be taken into account, if not at his previous trial, then at least when next charging or sentencing him.

Secondly, in the event of the result of the blood test being adverse, then should the victim or, if the victim is a minor, the victim's guardian wish to know, the result of the blood test can be made known to the victim or the victim's guardian, as the case may be.

To those who scream that it offends against the dignity of a person to subject a convicted person to a blood test without his consent, I would merely retort that it hardly lies in the mouth of such a person or that it is hardly fitting for others on his behalf to raise such an objection where that person has violated not only the dignity of his victim in a most outrageous manner but also the norms of society by indulging in sexual intercourse or an unnatural act with the victim against the victim's will or, if the victim is a minor who has consented to an unnatural act with an adult, by having taken advantage of the victim's youthfulness.

IN RE HOGGART 1992 (1) ZLR 195 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Opinion in terms of the Immigration Act

3 & 19 March 1992

Flynote

Immigration - permanent resident status - whether person still domiciled in Zimbabwe and entitled to permanent residence status.

Headnote

Under s 3 of the Immigration Act 1979, if a person takes up residence outside Zimbabwe, this is taken as *prima facie* evidence of his intention of making his home outside Zimbabwe and the onus of proving otherwise then rests on the person claiming to be domiciled in Zimbabwe. The making of any statement to the effect that he is no longer resident in Zimbabwe is also *prima facie* proof that he has lost his domicile in Zimbabwe.

On the facts of this case it was decided that the cumulative effect of the various features was sufficiently weighty to rebut the statutory presumption that Hoggart intended to make his permanent home outside Zimbabwe, which presumption had arisen because he had lived outside Zimbabwe and, when re-entering Zimbabwe, he had put down that he was doing so as a visitor and not as a permanent resident. The court was satisfied that Hoggart had proved that he never intended to abandon his domicile of choice in Zimbabwe.

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Cases cited:

Baxter v Chief Immigration Officer 1989 (2) ZLR 320 (S)

J B Wood for the propositus

No appearance for the Chief Immigration Officer

Judgment

Gubbay CJ: Gary Stephen Hoggart, hereinafter referred to as "Gary", was born in Zambia on 5 February 1966. He remained living there until 9 May 1973,

GUBBAY CJ

when his parents, Robert Alan and Christine Elizabeth Hoggart, both British nationals, immigrated to this country on the issue of Residence Permit No. ISB 40383/72. Included on the permit were the two minor children, Linda Denise and Gary.

The family appear to have settled in Mutare. Gary attended a local school and completed his secondary education at the end of 1985.

On 30 March 1986 Gary left Zimbabwe to attend the University of Natal, at Pietermaritzberg, South Africa. He was granted a temporary residence permit for educational purposes by the South African authorities. He was then, and remains today, the holder of a British passport and so is not a Zimbabwean citizen.

Gary continued his studies at university until the end of 1987. In both years he returned to Zimbabwe during two of the university vacations. On each of these four occasions he was admitted as a returning resident and his passport was stamped by the immigration authorities to that effect.

On 10 January 1988 Gary left Zimbabwe for South Africa in order to seek experience in the managerial field. He obtained a temporary residence and work permit, valid until 30 September 1988, and secured employment with a company in Johannesburg known as Sun Couriers. His permit was extended to 30 March 1989.

Wishing to spend a few days in Zimbabwe, Gary drove to Beit Bridge on 26 December 1988. As in the past he joined the queue for returning residents. He was informed by the immigration officer, to whom he presented his British passport, that as he was born in Zambia and was working in South Africa, he could not be classified as a returning resident and was obliged to complete an entry form for visitors. To this direction he complied. His passport was stamped to reflect his status as a visitor. He returned to South Africa on 2 January 1989.

On 11 January 1989 and 2 December 1989 Gary returned to Zimbabwe. In the light of prior experience, and to avoid further difficulties, he completed the form required of visitors and was allowed entry. On the latter occasion he was granted visiting rights until 2 February 1990. He had by that stage resigned his employment in South Africa (having not applied to renew his

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temporary work permit beyond 30 March 1989) and it was his intention to take up employment in Zimbabwe and be near his mother and father who continued to reside in Mutare.

GUBBAY CJ

In early December 1989 Gary approached the immigration authorities in Mutare. He was advised to complete an application for a residence permit and to submit it to the Immigration Office, Harare. This he did. Upon receipt of his application he was informed that it would not be considered until he had departed from the country. A letter was then written by his legal practitioners to the Minister of Home Affairs. It set out Gary's history, much as I have outlined it, in support of the contention that Gary had not lost his domicile of choice, being Zimbabwe, and cited as support the opinion of this court in the matter of *Baxter v The Chief Immigration Officer* 1989 (2) ZLR 320 (S). It also, somewhat illogically, requested the Minister "to give his consent to consideration by the Chief Immigration Officer of his application for the issue of a residence permit". The letter was not answered, but by notice dated 10 April 1990 the Chief Immigration Officer communicated his refusal to allow Gary to remain in Zimbabwe.

On 4 May 1990, an appeal was noted to the magistrate's court, Mutare, against the decision of the Chief Immigration Officer. Annexed to the notice of appeal was an affidavit deposed to by Gary repeating the facts and contentions set out in the earlier letter to the Minister of Home Affairs, and seeking in terms of a draft order: (i) a declaration that Gary continues to be a person with permanent residence in Zimbabwe; and, (ii) that his passport be endorsed with a certificate to that effect by the Department of Immigration.

The magistrate did not determine the appeal but acting in terms of s 21 (3) of the Immigration Act reserved for the decision of this court, as a question of law, the issue of Gary's domicile.

At the hearing before us, Mrs *Wood* represented Gary but there was no appearance for, or on behalf of, the Chief Immigration Officer, notwithstanding service of a notice of set down.

Section 3 of the Immigration Act refers specifically to domicile. Subsection (1) provides that:

> "a person shall be regarded for the purposes of this Act as being domiciled in a country if
>
> (a) he resides permanently in that country; or
>
> (b) that country is the country to which he returns as a permanent resident".

Subsection (3) declares that no person shall have a domicile in Zimbabwe unless he has lawfully ordinarily resided therein for a continuous period of two years.

GUBBAY J

And subsection (4), where material, reads:

> "(a) a person shall, for the purposes of this Act, lose his domicile in Zimbabwe if he

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(i) has voluntarily departed from and resides outside Zimbabwe with the intention of making his home outside Zimbabwe; or

(ii) is absent from Zimbabwe for a continuous period of seven years or such longer period as the Minister may at his request fix before the expiration of that period; . . .

(b) the fact that a person has taken up residence outside Zimbabwe shall be *prima facie* evidence of his intention of making his home outside Zimbabwe and the onus of proving otherwise shall be on the person whose status is in question;

(c) the fact that a person who was domiciled in Zimbabwe has made any statement, whether for the purposes of this Act or any other enactment or otherwise, to the effect that he is no longer a resident or no longer regards himself as a resident of Zimbabwe shall be prima facie evidence that he has lost his domicile in Zimbabwe."

It is beyond doubt that Gary resided permanently in Zimbabwe from 9 May 1973 to 10 January 1988 when he left to secure employment in South Africa. He had acquired a domicile of choice in Zimbabwe, in his own right, upon attaining majority on 5 February 1984. Zimbabwe was the country to which he returned as a permanent resident during the two years spent in South Africa while persuing his tertiary education. The crisp point, therefore, is whether he abandoned his domicile of choice by leaving the country to work in South Africa.

Although only granted a temporary work permit, it can be said that Gary took up residence in South Africa during the period 10 January 1988 to 2 December 1989. In the premises such residence amounts to prima facie evidence of an intention to make his home outside Zimbabwe. See s 3(4)(b). Additionally, his entries into this country as a visitor, and not as a returning permanent resident, on 26 December 1988, 11 January 1989 and 2 December 1989, as well as his application for a residence permit, amount to prima facie evidence of the loss of domicile in Zimbabwe. See s 3(4)(c). Has he discharged the *onus* cast upon him by these provisions of the Act? What is to be proved, in essence, is that while living voluntarily in South Africa, Gary never entertained the intention of making his home outside Zimbabwe.

GUBBAY CJ

Viewed against the adverse presumptions aforementioned, the facts and circumstances relevant to the issue of proof, are as follows:

In the first place, Gary ordinarily resided in Zimbabwe for fourteen-and-a-half years before he left to work in South Africa. His parents have lived in this country since their arrival in 1973 and have made their home here. It was in that home that Gary spent his formative years. The presence of parents, for a man of Gary's years, is also a factor which would count, at least to some slight extent, against a decision to make a home for himself in another country.

Secondly, Gary's purpose in going to South Africa was to obtain managerial experience. He applied for a temporary work permit. No application for a permanent residence permit was made and the temporary work permit was deliberately allowed to lapse. During the two years he

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remained living and working in South Africa he returned to Zimbabwe on no fewer than three occasions.

Thirdly, in seeking to enter Zimbabwe on 12 December 1988, Gary considered himself to be a returning resident. It was the queue for that class of persons that he joined. Upon being instructed that he had to complete a visitors entry form, Gary had no viable option but to comply. To have stood his ground would have resulted in the immigration officer refusing to admit him into the country at a time when his presence was expected by the family. Much the same dilemma was suffered by Baxter in the judgment referred to.

Fourthly, the subsequent occasions on which Gary classified himself as a visitor to the country are to be regarded, as was contended, in the light of his previous experience. He believed, on reasonable grounds, that any protest that he was a permanent resident and not a visitor would have fallen upon deaf ears - especially as his passport now bore the endorsement "visitor".

Fifthly, the application in early December 1989 for a residence permit was made by Gary on the advice of the immigration authorities in Mutare. The advice was contrary to Gary's best interests. In his own mind Zimbabwe was his permanent home. He had at this stage left South Africa for good and intended to take up employment in Zimbabwe and be near his family. What Gary ought to have done was to have made representations to the Chief Immigration Officer to that effect. Such representations were made later to the Minister of Home Affairs.

In my opinion the cumulative effect of these features is sufficiently weighty to rebut the statutory presumptions that Gary intended to make his home outside

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GUBBAY CJ

Zimbabwe. I am satisfied that on balance Gary has proved that he never intended to abandon his domicile of choice in Zimbabwe.

However, I hasten to point out that this opinion is given solely on the facts deposed to by Gary in his affidavit of 17 January 1990. Whether over the ensuing two years Gary has continued to retain his domicile in Zimbabwe is a matter upon which this court is not in a position to determine and is not asked to do so. It is for this reason, inter alia, that the request that this court order Gary's passport to be endorsed to the effect that he is domiciled in Zimbabwe, must be refused.

In the result, the Magistrate, Mutare, is advised that as at 17 January 1990, or at the date of his subsequent departure (whichever was the later), Gary Stephen Hoggart was a permanent resident of Zimbabwe.

Korsah JA: I agree

Ebrahim JA: I agree

Gargan Brothers & Chadder, appellant's legal practitioners

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RUZARIO v MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS & ANOR 1992 (1) ZLR 201 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Criminal appeal

5 & 19 March 1992

Flynote

Amnesty - meaning of phrase "in good faith" - whether action covered by amnesty

Headnote

In terms of a general amnesty contained in Clemency Order No. 1 of 1990 and published under General Notice 424A of 1990 the President proclaimed a pardon for members of the Security Forces in respect of any offence committed by them during anti-dissident operations, if the offence was committed in good faith for the purpose of or in connexion with the restoration or maintenance of good order and public safety in Zimbabwe or any part thereof.

The appellant who was at that time attached to a police unit which was carrying out anti-dissident operations, had been driving a police vehicle late at night in a dissident affected area when he had collided with another vehicle. Three passengers in the police vehicle were killed as a result of the collision. The appellant was convicted of culpable homicide arising out of these fatalities.

He sought a declaratory order that he was covered by the terms of the general amnesty and was therefore entitled to a free pardon.

The journey in the police vehicle may well have been carried out for entirely personal purposes, but the Supreme Court was prepared to approach the issue of whether the general amnesty applied to his case on the basis that the purpose of the journey was to investigate the whereabouts of a dissident.

Held, the words "in good faith" in the amnesty merely accentuate the need for honesty and lack of an ulterior motive on the part of the person committing

GUBBAY CJ

the offence. If the predominant motive is a genuine desire to restore or maintain good order and public safety, he would be covered by the amnesty. But he would not if his predominant motive was to satisfy a personal grudge, even though the offence may have had the effect of restoring

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or maintaining good order and public safety.

Held, further, the onus was on the appellant to prove on a balance of probabilities that his state of mind was that the negligent manner in which he drove was genuinely done predominantly for the purpose of or in connexion with the restoration or maintenance of good order and public safety.

Held, on the facts, the actual offence itself was motiveless and in committing it he did not have the motive of restoring or maintaining good order and public safety. Additionally there was no causal connection between the offence and the restoration of good order and public safety.

Held, therefore, that the appellant was not entitled to a free pardon.

Cases cited:

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

S v Gwevera & Ors 1978 RLR 466 (G)

R v Nyakuwa & Anor 1980 ZLR 19 (A)

S v Tekere & Ors (2) 1980 ZLR 489 (G)

D P Carter for the appellant

B Q P Simelane for the respondents

Judgment

Gubbay CJ: On 6 June 1988 the appellant, then a section officer in the Zimbabwe Republic Police, was convicted in the magistrate's court of the offence of culpable homicide. He was sentenced to undergo four months' imprisonment with labour and in addition was prohibited from driving all classes of motor vehicle for a period of six months. An appeal, noted against both conviction and sentence, was dismissed by this court on 25 June 1990. See *S v Ruzario* 1990 (1) ZLR 359 (S).

The conviction of the appellant arose out of a violent collision, which occurred half-an-hour before midnight on 11 February 1984, between a Police Toyota Land Cruiser, driven by the appellant in a northerly direction along the Beit Bridge-Masvingo national road, and a Scania truck and trailer driven in the opposite direction by one Mahlangu. He was being closely followed by a similar vehicle driven by his brother. These two persons were resident in South Africa and in the employ of a road haulage company.

In consequence of the collision three front seat passengers in the Land Cruiser,

being a police constable and two civilians, were killed instantly. The appellant and a third civilian, who was seated behind the cab, were injured. Both vehicles were extensively damaged,

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the Land Cruiser virtually beyond recognition.

On 27 July 1990 Clemency Order No. 1 of 1990, "General Amnesty", was published in the Government Gazette under General Notice 424A of 1990. It was enacted by His Excellency the President to mark Zimbabwe's Tenth Anniversary of Independence. The relevant portion of the Order read:

> "Pardon for members and former members of Security Forces
>
> 5. (1) A free pardon is hereby granted to every member or former member of the Security Forces in respect of any offence committed by him during anti-dissident operations by the Security Forces, if that offence was committed in good faith for the purpose of or in connexion with the restoration or maintenance of good order and public safety in Zimbabwe or any part thereof.
>
> (2) For the purposes of subparagraph (1), the expression 'Security Forces' refers to the Defence Forces of Zimbabwe, the Zimbabwe Republic Police, the Central Intelligence Organization and any other force or organization employed by the Government on anti-dissident operations."

Contending that the offence of which he had been convicted was committed in circumstances entitling him to a free pardon in terms of para 5(1) of the Clemency Order, the appellant, on 26 September 1990, instituted motion proceedings before the High Court claiming a *declaratur* to that effect. As he was at that date still serving the sentence, he sought, in addition, an order directing his immediate release from prison.

The application, which was opposed by both the Minister of Justice, Legal and Parliamentary Affairs and the Director of Prisons, was dismissed with costs. In the opinion of the learned presiding judge the appellant had failed to discharge the onus of proving that at the time of committing the offence of culpable homicide he was engaged on anti-dissident activity - especially in the face of cogent evidence that the journey in the Land Cruiser was undertaken entirely for personal reasons. It was by virtue of this factual determination that the learned judge held that the appellant was not covered by para 5(1) of the Clemency Order.

It was not in dispute that during the month of February 1984 the appellant was a member of the Security Forces serving with Quebec Troop of the Support Unit of the Zimbabwe Republic Police, and that the troop was based at Ngundu Halt,

in Masvingo, for the purpose of carrying out anti-dissident operations and for the maintenance of good order and public safety.

Although inclined to the view that the conclusion reached by the learned Judge was correct, I am prepared to approach the issue of whether the appellant qualified for a free pardon on an acceptance of his averments that:

> ". . . the purpose of the journey . . . was to investigate the whereabouts of a dissident known as Lunga and the

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> civilians in my company were assisting me with information in that regard. It was during the course of this activity that the collision occurred, giving rise to my conviction for the crime of culpable homicide".

But in order to qualify for a free pardon, two remaining criteria had to be met. The appellant had to show on a balance of probability that the offence of culpable homicide was committed (i) in good faith; and (ii) for the purpose of or in connection with the restoration or maintenance of good order and public safety in Zimbabwe or any part thereof.

The words "in good faith" merely accentuate the need for honesty and a lack of an ulterior motive on the part of the person committing the offence. See *S v Gwevera & Ors* 1978 RLR 466 (G) at 467G-H and 468A; *R v Nyakuwa & Anor* 1980 ZLR 19 (A) at 22H. I would emphasise, however, as did Pittman J in *S v Tekere & Ors* (2) 1980 ZLR 489 (G) at 500D, that, in the context of para 5(1) of the Clemency Order, a member of the Security Forces with more than one motive would not lose his entitlement to a free pardon provided his predominant motive had been the genuine desire to restore or maintain good order and public safety. I agree entirely with the *dictum* of PITTMAN J at 500C that: -

> "Persons often perform acts with a variety of motives and it would be very unfair if an accused could only claim protection if he had to deny absolutely the existence of any secondary motive."

On the other hand, even though the offence may have had the effect of restoring or maintaining good order and public safety, this would not assist the perpetrator if his predominant motive was the satisfaction of a personal grudge.

It necessarily follows that the appellant had to prove on a balance of probability that at the critical time his state of mind was that the negligent manner in which he was driving the Land Cruiser (which conduct constituted the offence with

which he was later charged and convicted) was genuinely done predominantly for the purpose of or in connection with the restoration or maintenance of good order and public safety.

One need only state the proposition to perceive the fallacy of the appellant's argument, when it is appreciated that he was simply going in search of Lunga. The position may have been different had he been driving the Land Cruiser in pursuit of a vehicle driven or occupied by Lunga. The particular nature of the offence, therefore, precluded completely the existence of any motive for its commission, let alone the predominant one of carrying out the purpose specified in para 5(1) of the Clemency Order. In short, the conduct of the appellant was motiveless.

The same conclusion is reached by posing the question whether there exists a causal *nexus* between this offence of the appellant and the purpose of or in connection with the restoration or maintenance of good order and public safety. I would say not. For by driving negligently the appellant was not consciously and deliberately seeking to link such conduct with the requisite purpose.

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For the aforegoing reasons I have no doubt that the appeal must be dismissed with costs.

Korsah JA: I agree

Ebrahim JA: I agree

Winterton, Holmes & Hill, appellant's legal practitioners

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

S v MBOMA 1992 (1) ZLR 206 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Ebrahim JA

Criminal appeal

24 February & 23 March 1992

Flynote

Evidence - theft - general deficiency

Headnote

The appellant, who was the Honorary Treasurer for a football association, was charged with theft on the basis of a general deficiency of a substantial sum of money from the association's account of which he was in charge.

Held, that although the appellant had been convicted on the basis of a series of specific dishonest transactions (in effect on a number of specific counts of theft) rather than on the basis of a general deficiency as alleged in the charge, this did not amount to a procedural irregularity going to the root of the trial such as to warrant an acquittal. The particulars of the State case were given in detail in the State outline; the individual dishonest transactions were fully examined by the magistrate; in any instance where the State had established a *prima facie* case in respect of an individual transaction but the appellant was able to give an explanation showing his innocence which might reasonably be true he was acquitted. The magistrate had not cast the onus on the appellant to prove his innocence; the appellant was merely called upon to discharge the ordinary evidential onus of explaining transactions which were shown to be *prima facie* dishonest.

Case cited:

R v Tomlin [1954] 2 All ER 272 (CCA)

A P de Bourbon SC for the appellant

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R H Goba for the respondent

Judgment

McNally JA: In this case the appellant, who was at all material times the Honorary Treasurer of the Zimbabwe Football Association, was charged before the Regional Magistrate for the Eastern Division with the crime of theft (general deficiency) which was particularised as follows:

> "In that (1) at all times relevant to the charge the accused was the Treasurer of the Zimbabwe Football Association (ZIFA) (hereinafter referred to as the Association) and in such capacity was authorised to receive and take into his custody on behalf of the Association any monies paid to the Association, and to issue out cheques and make any payments necessary for the Association's business.
>
> (2) Of the money the accused received or had custody of, there was a general deficiency of sixty three thousand six hundred and forty two dollars and ninety cents ($63 642,90).
>
> (3) The accused during the period extending between the 5/3/86 and 26/6/86 and at Harare did unlawfully and with intent to steal convert this money, the property of the Association to his own use".

In the outline of the State case, which was read out and produced at the commencement of the proceedings, it was made clear that the State was relying on an audit report which, while stating that there was a general deficiency, set out numerous particulars of individual transactions. The outline stated "in proof of its allegations the State will rely on the following facts uncovered by the auditors". It then set out details of a large number of individual transactions, all of which were alleged to be *prima facie* dishonest transactions by the appellant.

The evidence, as Mr *de Bourbon* for the defendant correctly pointed out, proceeded to elaborate on these individual allegations. Almost 1000 pages of evidence were recorded. But at the end there was not really established what one would normally describe as a general deficiency. What was established was a series of dishonest transactions by which the appellant enriched himself at the expense of ZIFA.

I put the matter in that way because Mr *de Bourbon* did not challenge the evidence on the individual transactions. He did not challenge the evidence of the Questioned Documents Examiner. His whole argument was based on the contention that the appellant had been convicted in effect of a number of counts of theft, and that was not the offence with which he was charged.

McNALLY JA

I think it appropriate also to say that Mr *de Bourbon* was entirely justified in not challenging the magistrate's findings on the individual "counts" as the magistrate himself described them. In a meticulous and thorough examination of all the allegations in turn, the magistrate gave the appellant the benefit of the doubt in numerous instances. In the end he concluded that the State had proved theft by the appellant of a total sum of $37 243,43. He convicted him of theft of that amount. In fact, as Mr *de Bourbon* showed, that figure was arithmetically incorrect. The calculation was based on an incorrect starting figure produced by the prosecution. The correct

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figure should have been $34 138,45.

It must be accepted that Mr *de Bourbon* is right to this extent. The State should have charged a series of separate counts of theft, save perhaps in relation to the $26 500 missing from Savings Account 02027821, in respect of which a general deficiency charge might have been in order.

The real question is whether this procedural irregularity goes to the root of the trial so as to warrant an acquittal.

The charging of theft on the basis of a general deficiency is authorised by the provisions of s 135 of the Criminal Procedure and Evidence Act. The object of the section is clearly to make things easier for the State when it does not know what has happened to the money. All it knows is that there is less money in the account than there should be, and that the accused was in charge of the account.

Section 135 reads as follows:

> "In an indictment, summons or charge in respect of the theft of money, or in respect of the theft of any property by a person entrusted with the custody or care of such property, the accused may be charged and proceeded against for the amount of a general deficiency, notwithstanding that such general deficiency is made up of any number of specific sums of money or of any number of specific articles or of a sum of money representing the value of specific articles, the taking of which extended over any space of time."

The section must be read with s 286(2), which reads as follows:

> "(2) On the trial of a person charged with any such offence i.e. the offence of theft while a clerk, servant or agent of money or any other property which belonged to his employer or principal, it shall not be necessary to prove the theft by the accused of any specific sum of money or specific goods or articles if, on the examination of the books of account

McNALLY JA

> or entries kept or made by him, or kept or made in, under or subject to his charge or supervision, or by any other evidence, there is proof of a general deficiency and if the court is satisfied that the accused stole the deficient money or any part of it, or the deficient goods or articles or any part thereof."

It will be seen that these sections are permissive. "The accused may be charged . . . for the amount of a general deficiency notwithstanding that such general deficiency is made up of any number of specific sums" (s 135). "It shall not be necessary to prove the theft . . . of any specific sum . . ." (s 286 (2)).

In this case in fact it was not necessary for the State to rely on the provisions of these sections. Indeed, as Mr *de Bourbon* again rightly pointed out, the State was unable to establish an opening balance and a closing balance. What the State did was to prove a series of dishonest transactions.

There is no particular magic, as Mr Goba for the State submitted, in the use of the words "general deficiency". The use of the words enables the State to avoid the necessity of identifying particular dishonest transactions. In this case, despite the use of the words, the State did not

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avail itself of that facility.

Instead it proceeded to prove a series of dishonest transactions.

The only problem that might arise is that the accused might, in a particular case, be prejudiced by the lack of particularity inherent in a charge alleging merely a general deficiency. But in this case the particulars were given in detail in the State outline.

There was no prejudice.

Mr *de Bourbon* claimed that the State was inefficient in its handling of the mass of documents involved. But here again the magistrate bent over backwards in giving the appellant the benefit of the doubt wherever there was such confusion. He convicted the appellant only in respect of sums which the appellant was shown clearly to have misappropriated. No onus was cast on the appellant, save the ordinary evidential onus of explaining a transaction which was shown to be *prima facie* dishonest. Where he gave an explanation which might reasonably possibly have been true he was acquitted in relation to the amount concerned.

In my view, at the end of the State case, there was *prima facie* evidence that the appellant had stolen numerous amounts of money from ZIFA. The application

for a discharge was properly refused. The State had not proved a general deficiency in the sense of an opening and closing balance and an unexplained deficiency. It had proved more than that - a series of *prima facie* thefts.

At the end of the trial the appellant was shown to have been unable to proffer an exculpatory explanation in respect of allegations totalling $34 138,45 (wrongly calculated as $37 243,43).

Mr *de Bourbon* referred the court to the case of *R v Tomlin* [1954] 2 All ER 272 (CCA) at 274A in relation to the impropriety of charging a general deficiency. It is true that in the judgment of HALLET J, concurred in by PEARSON J (who read the judgment of the court) and by GODDARD CJ, it was said:

> "Where separate offences can be charged in separate counts, the court regards as improper an 'omnibus' count in an indictment charging an aggregate of offences over a long period."

But, significantly, the judgment ended with these words at p 275D:

> "We desire to make it plain in conclusion, agreeing therein with LYNSKEY J, that, in the ordinary case, where it is possible to trace the individual items and to prove a conversion of individual property or money, it is undesirable to include them all in a count alleging general deficiency. What we are not willing to do is to elevate a rule of practice, applicable to circumstances where it may be required in order to avoid injustice, into a rule of law applicable to circumstances where it will defeat justice."

I respectfully associate myself with that final sentence.

I indicated earlier that Mr *de Bourbon* did not attack the findings of the court *a quo* on the specific allegations of theft. Those findings were unimpeachable. The Regional Magistrate, who

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has since retired, has in his habitually meticulous way, saved this court from having to examine the details of the conviction. It is enough to say that I agree with his conclusions, subject to the arithmetical variation to which I have referred.

As far as sentence is concerned, the variation of the amount is of no consequence. The contention was that the sentence was manifestly excessive. No misdirection was alleged or proved. I am not persuaded that the sentence was manifestly excessive.

McNALLY JA

The sentence is amended by the substitution of $34 138, 45 for the figure of $37 242, 93 as the amount to be repaid if the appellant is to be allowed the benefit of the suspension of two years of his sentence. The date by which such repayment is to be made is altered to 31 January 1993. For the rest, the appeal is dismissed.

Manyarara JA: I agree

Ebrahim JA: I agree

Stumbles & Rowe, appellant's legal practitioners

GOBA v MURADZIKWA 1992 (1) ZLR 212 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & Korsah JA

Civil appeal

24 March 1992

Flynote

Family law - custody of minor females - presumption that mother should be given custody - children born of customary union - paramount interests of children determining factor

Headnote

Some time after the dissolution of an unregistered customary law marriage, the ex-husband had sought to obtain custody of the two young girls born of that union.

The Supreme Court pointed out that since the passing of the Customary Law and Primary Courts Act, 1981 the determining factor in a custody dispute was the same for both common law and customary unions, namely, the paramount interests of the children.

There is a presumption that the interests of female children are better served by placing them in

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the custody of their mother. This presumption was not rebutted in the present case and it was in the best interests of the children that the mother should have custody of both children.

Case cited:

Dunsterville v Dunsterville 1946 NPD 594

The appellant in person The respondent in default

Judgment

Gubbay CJ: At the conclusion of the hearing of this appeal, at which the respondent was in default of appearance, we ordered as follows:

GUBBAY CJ

1. The appeal is allowed.

2. The order of the District Court is substituted by the following:

"The custody of the two minor children of the parties, namely, Rosemary and Nyasha, is awarded to their mother, Elinah Goba".

These are the reasons for our decision:

The appellant and the respondent were married in March 1977 in accordance with customary law. Two female children were born of the marriage, which was not registered, Rosemary on 31 December 1983, and Nyasha on 25 November 1986. Over the years the relationship between the parties soured, with complaints and misunderstandings on both sides. Ultimately, on 18 April 1989, the customary union was dissolved, with the respondent returning the appellant and the children to the rural home of her parents at Manica Bridge.

On 19 July 1989 the respondent instituted proceedings in the Community Court, Mutare, in which he sought the custody of both children. Notwithstanding the appellant's insistence that these two young girls should be left in her care, the presiding officer ordered that the custody of Rosemary should be awarded to the respondent with effect from 27 November 1989; she was to live with the respondent and his new wife, whom he had married in 1988. The appellant was to retain the custody of Nyasha as the child was in poor health.

This decision, the effect of which was to separate the two little girls, was disturbing to both parents and resulted in the noting of an appeal and a cross-appeal to the District Court.

The appeals were heard by a provincial magistrate on 15 February 1991. Until then both the children had remained in the physical custody of the appellant, who in September 1989 had brought them to live with her at her sister's house in the high density suburb of Sakubva,

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Mutare. Rosemary was attending the Dangare Primary School and Nyasha a day creche.

The provincial magistrate correctly expressed the view that it was contrary to the best interests of the children to have them living apart from one another. But I cannot subscribe to his assessment, which was not convincingly supported by the evidence adduced before the Community Court, that on balance they would be materially better off living with the respondent than with the appellant, and that "on the educational, moral and social aspects, there were certain averments by the respondent against the (appellant) which were not at all or not seriously refuted". Accordingly he dismissed the appeal and allowed the cross-appeal.

GUBBAY CJ

Since the passing of the Customary Law and Primary Courts Act on 22 May 1981, the position of children born of a customary union has been the same as that under the common law, it being specifically provided in s 3(4) that:

> ". . . in any case relating to the custody of children the interests of the children shall be the paramount consideration, irrespective of which law or principle is applied."

In this case I am satisfied that the presumption that the interests of female children of tender years are better served in the custody of their mother, was not rebutted by the respondent. I need only refer to the sagacious words of BROOME J (as he then was) in the celebrated case of *Dunsterville v Dunsterville* 1946 NPD 594 at 597:

> ". . . it is often said that the best person to look after young children is their mother. So far as mere physical well-being is concerned, I do not think this is a matter of any importance. Few mothers are capable of attending to the bodily needs of their offspring as efficiently as an institution-trained nurse. But that is not the end of the matter. Experience goes to show that a child needs both a father and a mother, and that, if he grows up without either, he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child's life than the paternal, and if not forged early may never be forged at all. The psychological need of a father, on the other hand, only arises later. It seems to me that if the father is awarded the custody of these young children they will in all probability, notwithstanding the loving care which they will undoubtedly receive from their paternal grandmother, grow up as motherless children, with all the attendant psychological disadvantages. If, on the other hand, the mother is awarded their custody, at any rate during their years of infancy, they will not necessarily grow up as fatherless children, for the relationship between a father and his young children is never one of continuous intimacy, but is necessarily intermittent. The children will realise that they have a father, notwithstanding that they do not see him every day. And when they reach the age at which a father becomes an important factor in their lives, there will be nothing to hinder the forging of the paternal link."

There are other relevant considerations. I agree with the Community Court that it would be detrimental to Nyasha's interests, since she is a sickly child, to deprive her of the care and attention of her mother, who has looked after her since birth. Once this situation is acknowledged, at any rate for the present time, it necessarily follows, in my opinion, that the custody of Rosemary should

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GUBBAY CJ

likewise be exercised by the appellant. It would be stressful, if not harmful, to these children if

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their daily and mutual companionship were interfered with.

Furthermore, it must not be overlooked that Rosemary appears to have developed a fear of her father. Since the break-up of the matrimonial home his presence has caused her to run away and hide.

The appellant, who argued her cause with skill, forcefully made the point that the children are settled and happy living with her; and that a change of environment is to be deprecated, especially where it will involve an interruption of intimate personal relationships. I agree. If these children are now to be removed from their present environment, they would reap no benefit which would adequately compensate the harm they might suffer. They have a sense of security living with their mother.

The appellant further maintained that the respondent's motive in seeking custody was to avoid liability to pay her maintenance for the children. There is some basis for this criticism. The respondent has not assisted with the maintenance of the children during the period of one year pending the outcome of this appeal, and his non-appearance before us is indicative of a lack of genuine concern about their welfare.

These then are the considerations which persuaded us to overrule the decision of the District Court.

Manyarara JA: I agree.

Korsah JA: I agree.

PARISH v KING 1992 (1) ZLR 216 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

11 February & March 26 1992

Flynote

Delict - wrongful deprivation of ownership of immovable property after contract complete - damages claimable in delict and not in contract - damages to be calculated as at date of delict

Headnote

The respondent had sold a house to the appellant. The price had been paid and transfer had been effected. The respondent, however, had maintained that the full purchase price had not been paid by the appellant as well as other amounts owing to him by her. He then obtained a default judgment against the appellant in which the sale of the house was cancelled and the

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property was transferred back to him. After the retransfer to him, he sold the house to a third party. By the time the appellant obtained a rescission of the default judgment the house had already been transferred into the name of the third party to whom it had been sold. As this third party was an innocent purchaser his real right to the property could not subsequently be disturbed.

Held, that as the deprivation of ownership occurred after the contract was complete, the wrong had nothing to do with contract. Instead, it was a delictual wrong and damages were claimable in delict.

Held, further, that in a claim in delict for wrongful deprivation of ownership of immovable property, delictual damages are to be calculated as at the date of the delict. It is not equitable for a plaintiff to delay the institution of proceedings and then seek to benefit from the fact that the value of the disputed property has been considerably enhanced by the passage of time. In the present case there had been an inordinate delay in institution of the claim, resulting in excessive inflation of the claim to the detriment of the respondent. On the other hand, in a claim for loss of earnings damages do not always have to be assessed as at the date of the delict.

MCNALLY JA

Cases cited:

Phillip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd 1975 (2) SA 420 (A)

Sachs v Miklos & Ors [1948] 1 All ER 67 (CA)

The Playa Larga [1983] 2 Lloyds Rep 171

General Accident Ins Co v Summers/Nhlumayo 1987 (3) SA 577 (A)

Rhodesia Fertilizer Corp v P & G Farming (Pvt) Ltd 1977 (2) RLR 192

S Moyo for the appellant

D P Carter for the respondent

Judgment

McNally JA: The parties, whom I will call Mrs Parish and Mr King, first met each other in August 1984. He was an elderly man and she was a young woman of some twenty-three years of age.

On 10 August, very soon after they met, he sold her the house in which he was living, No. 682 Marlborough Township Extension 3 of Subdivision A of Strathmore, along with some furniture and a motor vehicle.

A dispute then arose, of a rather unusual nature. An agreement of sale in respect of the house at a price of $14 500 was drawn up in writing by a legal practitioner and signed by the parties. Payment of the purchase price of the house in terms of the agreement was made by Mrs Parish

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to the legal practitioner on 19 November 1984 in Mr King's presence. Transfer was duly effected in the Deeds Registry. All this was common cause.

But Mr *King* contended that the written agreement did not reflect the true state of affairs. On 18 September 1985 he issued a summons and declaration against Mrs Parish. These documents were confused and self-contradictory. They were supported in due course, as we shall see, by some confused and self-contradictory evidence from Mr King.

In his summons Mr King made the following claims:

"a) An order cancelling the agreements of sale between the parties set out in Plaintiff's Declaration.

b) An order requiring the Defendant to take all steps necessary to transfer back into his name the immovable property situate at Stand 682 Marlborough Township Extension 5 of Sub-division A of Strathmore. Alternatively, and in the event of the Defendant failing to transfer such property to the Plaintiff, an order authorising the Deputy Sheriff of this

McNALLY JA

Honourable Court to sign all documents necessary to enable the said property to be transferred back into the name of the Plaintiff;

c) Alternatively, payment of the sum of $24 652.

d) Alternatively, interest on the sum of $24 652 at the rate of 8% per annum from the date of service of summons in this matter to the date of payment; and

e) Costs of suit."

It would seem from the claims that Mr King was seeking the return of his immovable property, or failing that, payment of the purchase price of the immovable (and perhaps also the movable) property. The prayer numbered d) should obviously not begin with the word "alternatively". Prayers c) and d) together were (on the face of it) meant to be alternative to prayers a) and b).

The declaration, which should have clarified and expanded on the allegations in the summons read, in its relevant paragraphs, as follows:

"3. In terms of an agreement between the parties concluded in August 1984, the Plaintiff sold the following property to the Defendant:

a) immovable property situate at Stand 682 Marlborough Township Extension 5 of Sub-Division A of Strathmore, measuring 4505 square metres, together with improvements thereon, hereinafter referred to as the property, for a price of $24 500,00

b) furniture situated at the property for the sum of $4 185,00

c) a Mercedes Benz 220 motor vehicle for the sum of $1 200,00.

4. Despite demand, the Defendant has failed to pay the said sum of $29 885 to the Plaintiff in respect of the

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said purchases.

5. The Defendant has taken transfer of the property in terms of Deed of Transfer 6659/84.

6. The Plaintiff hereby elects to cancel the said agreements and seeks an order requiring the Plaintiff to transfer back to him the property.

7. On the 2nd November, 1984 the Plaintiff loaned and advanced to the Defendant the sum of $15 000, which sum was repayable after the expiry of 3 months, alternatively on demand after reasonable notice.

8. In February 1985, the Plaintiff loaned and advanced to the Defendant the sum of $9 652, no period being stipulated for the repayment of the said amount, and which said amount was accordingly repayable on reasonable notice.

9. The Defendant, despite demand, has failed to repay the said sums of $24 652,00 to the Plaintiff."

McNALLY JA

This put his claim in a different light. It was now apparent that the claimed $24 652 was not the purchase price of the property (whether immovable only or immovable plus movable was still not clear). It was apparently money lent and advanced by Mr King to Mrs Parish on two separate occasions. So it appeared from the declaration that he was seeking relief under two separate heads:

1. The return of his "property" (the word was used in para 5 to mean immovable property, whereas in para 6 the plural "agreements" suggests it meant both movable and immovable property).

2. The return of his loans.

Yet when one looks at the prayer at the end of the declaration, confusion returns. The prayer sought the following relief:

1. Cancellation of the agreements (plural) of sale.

2. Re-transfer of the immovable property.

3. Alternatively (!) payment of $24 652,00.

4. Alternatively (!) payment of interest thereon.

I do not know what one is to make of such pleadings. But worse was to follow.

The summons and declaration were served on a young domestic worker at Mrs Parish's house. There was a subsequent dispute about this but I am satisfied on the evidence that it was served on her, and that that was proper service in terms of the Rules. However it seems clear that she did not pass the papers to Mrs Parish, who would undoubtedly have taken vigorous action to defend herself had she been aware of the proceedings.

In the absence of an appearance to defend the plaintiff sought and was granted default judgment on 4 October 1985. Because of the use of the word "alternatively," the default judgment was granted only in respect of the cancellation of the agreements of sale and the re-transferring of the property (i.e. the immovable property) to Mr King. This was duly effected,

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and on 2 April 1986 Mr King resold the immovable property to a Mr Harding. It was transferred into Mr Harding's name and it seems to be common cause that his real right as an innocent purchaser cannot be disturbed.

McNALLY JA

All this took place without Mrs Parish's knowledge because Mr King had stayed on in the disputed house after he sold it to her. She still held the title deeds to the property and it seems strange that the Deeds Office did not attempt to notify her that she was no longer the owner.

The default judgment was later rescinded by consent, but by then of course the immovable property belonged to Mr Harding.

Thus it was that in February 1988 Mrs Parish filed her plea and counter-claim. The plea was a simple one. She admitted purchasing the immovable property, the furniture and the vehicle. She denied the prices alleged for the immovable property and the furniture. She said she bought them for $14 500 and $2 900 respectively and that she had paid for them and for the car. She denied that any demand was made on her for $29 885. She denied the alleged loans, and denied that any demand for repayment of loans had ever been made.

In her counter-claim she alleged that she had bought and paid for the immovable property and that it had wrongfully and intentionally been taken back by Mr King and resold. She claimed:

1. $80 000 (later amended to $145 000) as damages, being "the present value of the property".
2. $450 per month from 13 December 1984, being "the rentals the plaintiff would have claimed in respect of the property" to the date of payment of the $145 000.
3. Interest and costs.

In his plea to this counter-claim, and inexplicably, Mr King admitted para 2 of the counter-claim. This was an admission of the agreement of sale at the price of $14 500. However, he denied she had paid that price, and said the money she paid on 19 November 1984 was repayment of a sum previously borrowed. No attempt was made to reconcile this admission with the original claim in the declaration that the sale of the house was at a price of $24 500.

He then proceeded to give evidence. He said he was not actually the owner of the house when he sold it to Mrs Parish. He was buying it on a deed of sale from a Mr Peach.

He admitted that he could not dispute that the selling price of the house was $14 500, but then said that he had agreed the price with Mrs Parish at $24 000

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(presumably he meant $24 500), the furniture at $4 700 (the declaration said $4 185) and the car at $1 200. He went on to attempt to explain the difference between the $14 500 and the $24 000 ($24 500?) as follows. He said Mrs Parish had told him that her funds were in England and

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the lawyer in England had refused to allow her to pay more than $14 500 for the house, but he had said he was not interested in the amount of furniture she bought for the house. Therefore (if I understand his evidence correctly) they agreed to treat the extra $10 000 as being part of the price for the furniture.

If that were the case, it is impossible to understand why he did not allege that the price for the furniture was $4 185 plus $10 000 ie $14 185.

The story so far is amazing enough, but worse was to follow.

He conceded that in his presence Mrs Parish handed over to Mr Granger, the legal practitioner, the sum of $15 000 being $14 500 for the house and $500 for transfer costs. But this, he said, was not her money. She borrowed it from him just before they went into Mr Granger's office. In order to lend it to her, he had borrowed it from a Mr Martin Griffiths, since deceased. He had repaid Mr Griffiths, but had no documentary proof of either transaction.

One's first reaction is that this is an extraordinary way to do business. It would have been far simpler to sell it to her on credit, with him advancing only Mr Granger's fees and disbursements. Had the matter been dealt with in that way, Mr Granger would have been a witness to the fact that the purchase price had not actually been paid.

But quite apart from this, the evidence is totally at variance with his plea to the counter-claim. In para 2.1 of that document he averred that the money paid by her on 19 November 1984 was repayment of an amount she had previously borrowed from him.

In the result his pleadings are utterly confused and self-contradictory, and his evidence is equally contradictory, quite apart from being wildly improbable.

One can however go further than that. On his own evidence, he conceded two points which completely destroyed his claim for cancellation of the sale of the immovable property and return of the property to him.

First, he admitted that the sale price of the immovable property was $14 500. Whether or not they "loaded" the price of the furniture by an extra $10 000 is

McNALLY JA

neither here nor there. The fact is he sold her the house for $14 500, and he has not claimed an extra $10 000 for the furniture.

Second, even on his own improbable version, she paid that $14 500 to Mr Granger. Whether or not she borrowed the money from him is immaterial. If she did, then she owes him $15 000. But it does not affect her ownership. To put it differently, even if she did borrow the $15 000 and did fail to repay it, that failure is a breach of their loan agreement. It is not a breach of the sale agreement.

If Mr King's instructions to his legal practitioner were as vague and confusing as his evidence, one might understand why his pleadings were so bad. Whatever the reason, I am satisfied, on

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his own case, that he at no stage had any grounds for seeking cancellation of the sale agreement in respect of the immovable property. It is unnecessary to consider Mrs Parish's case. It is unnecessary to consider credibility.

The learned judge in the court a quo decided the case in favour of Mr King on the basis of "the credibility of the parties and the probabilities". He found that Mr King "had difficulty in remembering dates and the sequence of events". He said he "was obviously confused but a constant recurring theme in his evidence was that he had not got a penny from the defendant". The learned judge concluded that Mr King was "a gullible foolish old man who was honestly trying to remember things which had happened almost five years earlier". He accepted that Mr King "was obviously prepared to be dishonest with regard to some of his dealings" but nonetheless he believed his evidence. He found Mrs Parish to be evasive and not worthy of belief.

While one can sympathise with the conclusion that Mr King appeared to be suffering from a genuine sense of grievance, the first requirement, before any question of credibility arises, is that he should make out a case for relief. As I have indicated, he has totally failed to do so in respect of the sale of the immovable property. He never had a right, even on his own version, to cancel that sale.

That part of his claim had, however, become irrelevant because of the default judgment and the subsequent sale and transfer of the property to Mr Harding. I turn therefore to consider his claim for payment of the sum of $24 652 with interest. At the trial he was allowed to amend the prayer in his declaration by deleting the word "Alternatively" in para c, and para d.

McNALLY JA

The $24 652 was made up of two amounts allegedly loaned to Mrs Parish. He claimed to have lent her $15 000 on 2 November 1984 and $9 652 in February 1985.

There is absolutely no written evidence to support either claim. As far as the $15 000 is concerned his evidence contradicted his declaration. In his evidence he said that he lent her the money in cash outside Mr Granger's office on 19 November, not 2 November. He was unable to explain the conflict. I have already indicated that there is a further conflict. He said in his plea to the counter-claim that the $15 000 she paid to Mr Granger was the repayment of an amount she had previously borrowed from him.

As far as the $9 652 is concerned, his evidence was that he had lent her money for her mining ventures. He had lent her money on various occasions, perhaps six or eight times in all. Some of the loans had been between $2 000 and $4 000 and on one occasion it was $9 000. He had not asked for receipts. He said on one occasion she had asked for $15 000 but he could raise only $9 000 of that figure. He was asked:

"Q. Now is that 9, is that the figure in paragraph 8 of your declaration, 9 652?

A That is it.

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Q That was in February 1985?

A That is right".

Only by such leading questions was the figure of $9 652 and the date, February 1985, established.

This evidence is, quite frankly, hopeless. At best one can say for Mr King that he genuinely believes that Mrs Parish owes him money, but he has no idea how much. A court cannot grant him relief on that basis, however much it may sympathise with him. His confusion is illustrated by a further passage from his evidence-in-chief as follows:

"Q. So in fact then in your prayer in the declaration when you were looking for $24 652, that is the sum of those two figures?

A That is right.

Q The $15 000 for the house?

A And $9 000.

Q And $9 652?

A Yes."

McNALLY JA

To add to the confusion it seems he issued a further summons, which was never served, in which he claimed $9 652 loaned in February 1985 and a further $16 600 loaned later.

In my view, his evidence failed to establish that he lent Mrs Parish any money, and if he did lend her money the amount of the loan or loans has not been established. She should have been granted absolution from the instance on these claims.

I turn next to deal with her claims.

Her first claim is for damages arising out of the events which led to the cancellation of the agreement of sale and the transfer of the immovable property back to Mr King and subsequently to Mr Harding. Originally her claim was based in delict, but at the hearing, Mr *Moyo*, who appeared for her, applied successfully to introduce an alternative claim based on damages for breach of contract.

It is unnecessary to repeat what I have already said. In summary, the one fact which has emerged with complete clarity from the evidence is that the immovable property in question was sold by Mr King to Mrs Parish in terms of a written agreement for $14 500 and that sum was paid by Mrs Parish to Mr King's legal practitioner, who received it on behalf of Mr King and duly effected transfer of the property to Mrs Parish.

Given those facts, there was no basis in law for the cancellation of the agreement. That cancellation, and the subsequent re-transfer of the property to Mr King and then to Mr Harding, caused her material loss. She undoubtedly suffered damages as a result of those actions by Mr

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King which were, as alleged, both wrongful and intentional.

The fact that Mr King, acting on legal advice, may have subjectively considered that his actions were justified, is of no relevance. Objectively, he had no right to do what he did.

She has been deprived, wrongfully, of the ownership of the immovable property. The question then arises as to the measure of her damages. The first consideration is whether they are to be founded in delict or contract.

Mr *Moyo* has argued that damages should be assessed on the basis of breach of contract. There was a wrongful repudiation of the contract. Put differently

McNALLY JA

there was a breach of the seller's warranty against eviction. See MacKeurtan *Sale of Goods in South Africa* 5 ed at 164 et seq; Kerr *The Law of Sale and Lease* at 110 *et seq*.

I am not convinced that this is so. Repudiation of a contract means that one or other party refuses to carry out his obligations under the contract. Here the contract was fully performed. Payment had been made. Transfer had been effected. The contract was complete.

The wrongful act of Mr King followed later. He deprived Mrs Parish of her property. He had no right to do so. She would normally be entitled to have her property back. In this case that remedy is impossible. So she claims damages in lieu.

One can put the same point in different words. The contract of sale had been completed. By Mr King's wrongful action, Mrs Parish had been deprived, not of her rights under the contract, but of her right of ownership. The wrong done to her had nothing to do with the contract. It was a delictual wrong.

I therefore turn to the law of delict to determine the yardstick by which her damages are to be assessed.

Clearly, since she cannot have the property back, she is entitled to its value. But at what date? At the date on which the wrong was committed, the evidence is scanty, but we know the house was sold to Mr Harding for $49 000. At the date of institution of proceedings it was alleged and proved that it was worth $80 000. At the date of the hearing it was alleged and proved that it was worth $145 000.

In logic one might think that it is the date of the hearing (or more correctly, the date of judgment) which is the appropriate one on the facts of this case. I say this because what Mrs Parish has really lost is her immovable property. If Mr King had not disposed of it irrevocably, she would undoubtedly have been entitled to the return of her property. Had it been restored to her she would have re-acquired a property worth $145 000. Why should she be awarded some lesser figure?

On the other hand, the starting point of our law of delict seems to be that delictual damage is calculated as at the date of the delict. In *Philip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd*

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1975 (2) SA 420 (A) at 428F-G HOLMES JA said:

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> "The time at which to measure the delictual damage is ordinarily the date of the delict, because that is when the owner's patrimony is reduced."

However, subsequently, at 429F, the learned Judge of Appeal went on:

> "I would add that the present case is distinguishable from a vindicatory action claiming restoration or value where the defendant is in possession or can acquire possession. In such actions the value is determined as at the date of trial or judgment."

This is similar (if I understand the English law terminology correctly) to the distinction drawn in the English courts between damages for conversion (assessed on the basis of the value at the date of conversion) and damages for detinue (assessed on the basis of the value at the date of judgment). The common law rules in England have, however, been overtaken by legislation. But even the principle as I have stated it above - as to which see *Winfield and Jolowicz* on Tort 12 ed at 500-502; *McGregor on Damages* 15 ed at 403 and *Clerk and Lindsell on Torts* 16 ed at para 22-91 - has been qualified by the decision in *Sachs v Miklos* [1948] 1 All ER 67 (CA) at 69H where GODDARD CJ suggested that, where the defendant had wrongfully disposed of the plaintiff's goods, the time to assess the value of the loss was not the time of the conversion but the time when the plaintiff became aware of the conversion. See also *The Playa Larga* [1983] 2 Lloyds Rep 171 at 181-2 and *Salmond and Heuston on Torts* 19 ed at 627-8.

I turn to the Roman-Dutch law. I think it can be said that the rule I have cited from the *Philip Robinson Motors* case *supra* is not an inflexible one.

The headnote in *General Accident Insurance Co v Summers/Nhlumayo* 1987 (3) SA 577 (A) reads in part as follows (I cite the English version, the judgment itself being in Afrikaans):

> "It has often been emphasised in decisions of our courts that a court, in awarding damages, should try to assess an amount which is fair to the plaintiff and to the defendant, and further, that in the assessment of the amount in question, a court is not obliged to follow one or another method of calculation. There is no authority stating that compensation for loss of earnings (loss of earning capacity) should always or necessarily be assessed as on the date of the delict."

However, we are not dealing here with loss of earning capacity, but with a set

McNALLY JA

of facts not unlike those in the *Philip Robinson* case *, supra*,. Mr King has disposed of the property, so we are not concerned with a vindicatory action. Therefore *prima facie* the level of damages should be related to the time of the delict.

The only relevant case cited by counsel is *Rhodesia Fertilizer Corp v P & G Farming (Pvt) Ltd* 1977 (2) RLR 192 and that case is distinguishable in that it was based on *dolus*. I do not think one can say of Mr King that he intended harm. Thus I am not persuaded that this is an

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appropriate case for the application of the most rigorous measure of damages, which would involve the use of the value as at the date of judgment. Nor do I think it would be appropriate to assess damages in any lesser sum than the figure of $49 000 at which Mr King sold the property. To do so would be to allow him to make a profit from his wrong doing.

The English cases have made the point that it is not equitable for a plaintiff to delay the institution of proceedings and then seek to benefit from the fact that the value of the disputed property has been considerably enhanced by the passage of time. In this case it seems that Mrs Parish first learnt of Mr Harding's claim to ownership in May 1986. Yet her claim for damages in the sum of $80 000 was filed only in February 1988, and was based on a valuation as at 15 February 1988. Following the principle in *Sachs* case *supra*, I would consider that there has been an inordinate delay in instituting proceedings, resulting in the excessive inflation of the claim to the disadvantage of Mr King.

The assessment of damages is always a difficult matter, and I have indicated that the law in relation to delictual damages was hardly debated before us. Nor was it extensively considered in the court *a quo* because of the findings made by the learned judge.

I note that in very general terms the estate agent who gave evidence said the property would have been worth $50 000-$55 000 in 1986. In the circumstances, since it was sold in late 1985 for $49 000, I would award that sum by way of damages to Mrs Parish.

Finally it is necessary to deal with Mrs Parish's claim for rental.

The claim is based on the flimsiest of foundations. No averment is made in her counter-claim of any agreement about rent. She simply claims "$450 per month calculated from the 13th December 1984 being the rentals the plaintiff would have claimed in respect of the property."

McNALLY JA

In her evidence she said she allowed him to stay on in the house while his caravan was being built. She says she asked him to pay rent of $450 per month and he agreed. But he never paid it.

There is no evidence at all that she ever demanded rent, apart from her evidence. He denies it.

There is no letter of demand. There is no evidence of rental value except the vaguest of guesses from Mr Chapfika, the estate agent, who was called to give evidence as to sale value rather than rental value.

Bearing in mind the trial judge's assessment of her credibility, I do not think it can be said that she has proved damages under the head.

In the final analysis therefore the appeal is allowed with costs. The order of the High Court dated 13 March 1991 is set aside and in its place the following order is made:

1. The plaintiff's claims are dismissed.

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2. The plaintiff is ordered to pay to the defendant the sum of $49 000 by way of damages.

3. The plaintiff is ordered to pay to the defendant interest a *tempore morae*, from the date of judgment to date of payment, on the said sum of $49 000.

4. The defendant's claim for rentals is dismissed.

5. The plaintiff is to pay the defendant's costs both in respect of the claim and in respect of the counter-claim.

Korsah JA: I agree.

Ebrahim JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Nicholas Collins & Associates, respondent's legal practitioners

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KANYANDA v MAZHAWIDZA & ORS 1992 (1) ZLR 229 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Ebrahim JA

Civil appeal

25 February & 26 March 1992

Flynote

Civil procedure - execution - presumption of regularity in carrying out execution - presumption rebuttable

Headnote

Appellant argued that, as there was nothing to show that the Messenger of Court had attempted to execute against appellant's movable property first as required by s 22(1) of the Magistrates Court Act [*Chapter 18*], the sale of the appellant's immovable property in execution was illegal. If that had been the case the appellant would have been entitled to have the sale set aside.

The Supreme Court decided that this point had not been raised in the initial proceedings and the Messenger was given no opportunity to rebut it. The appellant could not be allowed to raise this point for the first time on appeal.

In any event, there is a presumption of regularity in such matters and factual evidence had to be placed before the court to rebut it and not mere hypothetical submissions.

The person upon whom the writ was served was best placed to adduce evidence of defects in the process and this had not been done in the present case.

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Cases cited:

Dorasamy v Messenger of the Court, Pinetown & Anor 1956 (4) SA 286 (D)

Gundani v Kanyemba 1988 (1) ZLR 226 (S)

H Simpson for the appellant

E W W Morris for the respondent

McNALLY JA

Judgment

McNally JA: This is an appeal against a decision of REYNOLDS J. The parties directly involved are the appellant and the fourth respondent, although in the hearing before us Mr *Chilimbe* held a watching brief for the first respondent.

What happened was this. The appellant owed $1 702,20 to the first respondent who obtained judgment for that amount and sued out a writ of execution against the appellant's property. The appellant was in the process of purchasing a house from the Municipality (he was not the owner, as stated throughout the papers, but had an interest in the property as a lessee-to-buy). He was advised by the Messenger of Court, in writing, that his immovable property (*sic*) was to be sold in execution. The Messenger undertook to hold the matter over for ten days to enable him to reach a settlement, failing which he would advertise the property for sale by public auction.

On receipt of this warning the appellant went to see the first respondent's lawyer. He says he reached a certain agreement. The lawyer denied it. In the event the property (ie his interest in the property) was sold by public auction to the fourth respondent on 9 August 1989.

In his founding affidavit the appellant relied squarely and solely on the alleged agreement with the first respondent's lawyer. He said he had agreed with the lawyer (who was a Mr Sithole, apparently an unqualified legal assistant with Mugabe, Mutezo and Partners) "that he would finish off the balance on or before the 15th of August 1989". He had already paid over $1 000. Significantly, he did not say he had the balance ready and available to pay on 15 August. He simply said that he "has since paid the balance" to his own legal practitioners.

Mr Sithole in an answering affidavit categorically denied this allegation. He said that he declined to stop the sale, but agreed that he would do so if the balance was paid by 8 August. He says he knew the sale was to take place on 9 August, and therefore could not have agreed to payment on any date later than that.

In reply to this the appellant filed a further affidavit in which he averred, in support of his contention, that he actually had an appointment with Mr Sithole at 11 am on 15 August. He went to Mr Sithole's office (he did not say he had the money with him) to keep that appointment (which he says was "diarised"). Moreover he was accompanied by his legal practitioner, Mr Madembo, and, he says, "Mr Sithole actually indicated to my said legal practitioner that he had

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an appointment with me on that date at 11 am". No supporting affidavit from Mr Madembo was filed.

McNALLY JA

Had Mr Madembo been able to support that allegation it is inconceivable that he would not have done so. I may add that Mr Madembo argued the matter before REYNOLDS J, so there is no question as to his availability.

The learned judge, in a brief judgment, did not deal with this point at all, although it was raised in the appellant's heads of argument. He dealt simply with the status of the fourth respondent as an innocent purchaser.

That status was also attacked in the appellant's heads of argument in the High Court. Indeed Mr Madembo, quite improperly, introduced new evidence in his heads of argument, alleging the fourth respondent already had a house, and that the government and City of Harare had a policy of "one person one house". There was not a shred of evidence to support these allegations and the learned judge properly ignored them. They should never have been made except by way of affidavit.

On the facts the learned judge found:

a) that the sale had been properly conducted;

b) that the fourth respondent was an innocent purchaser.

Accordingly, he dismissed the application with costs.

The notice of appeal took two points:

1. The learned judge erred by holding that the sale in execution had been properly conducted in the light of the evidence before him.

2. The learned judge misdirected himself in holding that the sale in execution should not be set aside.

The first point is in principle and in general terms, a reasonable one to take, even though, as I will show, it is without substance.

The second point is ridiculous. It is not a ground of appeal at all. All it effectively says is "The learned judge was wrong". It does not specify on what ground he is alleged to have been wrong. That is why I say it is not a ground of appeal.

Mr *Simpson* appeared before us for the appellant. In support of the first ground of appeal he submitted that there was nothing to show that the Messenger of Court had attempted to execute first against the appellant's movable property

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McNALLY JA

as he is required to do in terms of s 22 (1) of the Magistrates Court Act [*Chapter 18*]. An investigation might have revealed that in fact the Messenger failed to attempt to execute against the appellant's movable property, and that therefore the execution against the immovable property was illegal. In that event the appellant would be entitled to have the sale set aside - see *Dorasamy v Messenger of the Court, Pinetown & Anor* 1956 (4) SA 286 (D), a reference helpfully supplied to us by Mr *Morris*.

This point was never made in the proceedings. Therefore the Messenger (who was the third respondent) was never given an opportunity to rebut it. The appellant cannot be allowed to raise the point on appeal for the first time .

There is a presumption of regularity in such matters, which is rebuttable. See the judgment of GUBBAY JA (as he then was) in *Gundani v Kanyemba* 1988 (1) ZLR 226 (S). It is rebuttable where factual evidence is placed before the court, not on the basis of hypothetical submissions that "if investigated it might turn out that he did something wrong".

In any event, if he had done something wrong, the appellant was the person best placed to adduce evidence of that wrong. The writ of execution was served on him. It is for him to produce it and point to its defects.

No other valid ground of appeal was noted. Mr *Simpson* did not seek to argue that if indeed there was an agreement with Mr Sithole then the judicial sale lacked a justa causa. It was Mr *Morris* who fairly drew our attention to the law on that subject.

It is certainly true that if the appellant's averments about his agreement with Mr Sithole are true he would have an argument that the sale should be set aside. It is also arguable that, however improbable his contentions may be, and however suspicious his failure to lodge a supporting affidavit from his lawyer may be, the only way to resolve the issue would be to send the matter to trial.

However, there is one final fact which persuades me that the appellant does not merit the indulgence of the court in allowing him to succeed on a point which he did not raise.

This is a point, arising out of the papers, which was not developed in argument. The Messenger, in a letter to the appellant's then legal practitioners dated 28 September 1989, told them that the appellant was wrong when he said that he did not know of the sale date until 14 August 1989. He said the following:

> "I would refer you to photocopy of a letter which I myself forwarded to Messrs Mugabe Mutezo & Partners dated 12 June 1989, stating 'Before proceeding would you please confirm in writing that you have served copies of the Conditions of Sale on the defendant and local authority so that I can make it part of the court record'. I would then refer you to their letter (photocopy enclosed) of 14th June 1989, which, as you will see, advised that conditions of sale in respect of this property had been duly served on the defendant as well as the local authority." (Note: These photocopies were not before us).

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This is a clear assertion, albeit based on hearsay evidence, that the appellant knew of the date of the sale in June 1989. The Messenger makes it clear earlier in the letter that the Conditions of Sale mention the date of the sale. The assertion is made in a letter to the appellant's own legal advisers. Yet the appellant never disputed or even referred to that allegation. He could have done so because he filed a further affidavit on 9 November 1989. Finally I may add that it is quite clear that the Municipality, the owner of the house and the second respondent, knew about the date of sale. They said so in an undated letter to the Messenger, referring to his letter of 5 July 1989.

Of course it may be said with equal validity that if Mr Sithole had advised the appellant in writing in June 1989 that the sale was set down for 9 August, it is astonishing that he did not make that averment in his affidavit. The incompetence of both sets of legal practitioners is remarkable.

Nonetheless, it is the appellant who must make out a case for relief. He has not taken on appeal the only point on which he might have had some chance of success. Even that point, as I have endeavoured to show, has such glaring weaknesses that this court is not prepared to extend to him an indulgence which otherwise it might have done. Whether he has a case in negligence against one or other or more of the legal practitioners involved is another matter.

I would dismiss the appeal with costs.

Manyarara JA: I agree

Ebrahim JA: I agree

Chirunda, Chihambakwe & Chikumbirike, appellant's legal practitioners

Coghlan, Welsh & Guest, respondents' legal practitioners

S v DUBE 1992 (1) ZLR 234 (SC)

Court **Supreme Court, Bulawayo**

Gubbay CJ, Korsah JA & Ebrahim JA

Criminal appeal

30 March 1992

Flynote

Evidence - confession - whether court can convict on basis of confession where there is evidence aliunde of commission of crime

Sentence - murder - multiple counts - whether court can impose blanket sentence of death

Headnote

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In terms of s 255B of the Criminal Procedure and Evidence Act [*Chapter 59*], where there is evidence (other than that of a confession) that proves that the crime was committed, a court can convict an accused on the basis of his confession, even though there is no other evidence confirming the confession. Before convicting the accused, however, the court should satisfy itself that the confession was genuine. Cogent evidence of the genuineness of the confession can come from the accused mentioning facts which he could only have known if he had taken part in the crime.

In the present case there was evidence *aliunde* that the five murders to which the appellant confessed had been committed and the confessions contained details which proved that they were genuine. Therefore the appellant had properly been convicted of five counts of murder.

As regards sentence, the court must not impose a "blanket" sentence of death in respect of multiple counts of murder.

If the court intends to impose a sentence of death on each of the counts, that sentence must be imposed separately on each count. Unless this is done complications would arise if the accused successfully appeals against one or more of the counts.

Cases cited:

S v Nhari & Ors S-9-87

EBRAHIM JA

S v Ndlovu 1983 (4) SA 507 (ZS)

S v Ndlovu 1988 (2) ZLR 465 (S)

R v Taputsa & Ors 1966 RLR 662 (A)

R v Sambo 1964 RLR 565

R v Fuwane 1956 R&N 563 (FS)

R v Mandyedzo & Anor 1964 RLR 336 (A)

R v Sykes 8 Crim App R 233

T A Cherry for the appellant

M Majuru for the respondent

Judgment

Ebrahim JA: The appellant was charged with five counts of murder and was convicted of all five counts. He was sentenced to death.

At the conclusion of the hearing of this appeal we dismissed the appeal both against conviction

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and sentence. These are our reasons.

The facts in this case are as follows. The appellant, in respect of each of the five counts he was charged with, told his victims that he was in a position to obtain employment for them outside Bulawayo. On a date arranged he set off with each of his victims telling them he was taking them to the place where they would be given employment. In each instance he took the deceased through the Rangemore area where he prepared a concoction which he said they should drink. This he said would result in them cleansing themselves of any ill luck. Having imbibed of this liquid the deceased became drowsy or intoxicated whereupon the appellant struck them in the vicinity of the head with a stone thereby causing their death. He then stole their valuables.

In respect of all five counts the appellant made a statement to the police after he had been warned and cautioned. In each case he responded by making a confession admitting the killing. These statements were placed before a magistrate and were confirmed by him in terms of s 105C of the Criminal Procedure and Evidence Act [*Chapter 59*]. At the appellant's trial these confirmed statements were produced in evidence in terms of s 242(1a) of the Act.

The appellant chose to challenge the admissibility of these statements but failed to convince the trial court that there was merit in his challenge. I can find no fault with this finding. In terms of the provisions of s 242(1a) of the Code the onus was on the appellant to prove, on a balance of probabilities, that his confessions were not freely and voluntarily made. See *S v Nhari & Ors* S-9-87; *S v Ndlovu* 1983 (4) SA 507 (ZS) at 510D-G and *S v Ndlovu* 1988 (2) ZLR 465 (S).

EBRAHIM JA

Mr *Cherry*, who represented the appellant both at his trial and in this appeal, pointed to some features which he submitted might justify a finding that the statements were improperly admitted by the trial judge, but he fairly conceded that these features were of a trivial nature and consequently he had difficulty in submitting with any conviction that there was a sound basis for rejecting the statements accepted by the trial court. I am satisfied that there is no valid basis for excluding these statements.

Section 255B of the Criminal Procedure and Evidence Act [*Chapter 59*] provides as follows:

> "Any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of a confession of that offence proved to have been made by him, although the confession is not confirmed by other evidence:
>
> Provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed."

It is apparent from this provision that an accused person can be convicted of an offence with which he is charged if he has confessed to having committed that offence provided that the offence has been proved to have been actually committed.

The approach which the court must adopt is conveniently set out in the case of *R v Taputsa &*

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Ors 1966 RLR 662 (A) at 667E.

The passage in the judgment of LEWIS JA reads as follows:

> "The effect of s 301(2) seems to be that, where there is evidence *aliunde* proving that the offence has actually been committed the court may satisfy itself of the genuineness of the confession by the accused that he committed it or took part in it from the nature of the confession itself; where, however, there is no evidence *aliunde* proving that the offence itself has been committed, the court must, in addition, go outside the confession and be satisfied that it is confirmed by other evidence. In the leading case of *R v Blythe* 1940 AD 354, TINDALL JA delivering the judgment of the Full Bench of the Appellete Division, laid down that the confirming evidence required by the statute must be such as to corroborate the confession 'in a material respect', although it need not directly implicate the accused in the offence, and that the statutory requirement, in this regard, was similar to that in respect of an accomplice, as explained by SOLOMON ACJ in *R v Lakatula*

EBRAHIM JA

> 1919 AD 362. In *Lakatula's* case, it was said that here should be corroboration in some material respect, 'in order that the jury may be satisfied that the accomplice is a reliable witness upon whose evidence they may safely act.' (see also *R v Troskie* 1920 AD 466 at 468, per INNES CJ).
>
> Applying this test to confessions, it seems that the confirming evidence need not amount to evidence directly confirming that part of the confession in which the accused actually implicates himself in the commission of the offence; it need only be evidence which is sufficiently corroborative of a material part or parts of the confession to satisfy the court that it can safely rely on the confession as a whole in convicting the accused."

It seems to me that on the evidence adduced before the trial court in this case there was ample evidence to show that the nature of the confessions made by the appellant were genuine. Before I outline the aspects of evidence which lead me to this conclusion I make reference to the case of *R v Sambo* 1964 RLR 565 at 572A-C where BEADLE CJ said:

> "If the accused mentions facts in his confession, the knowledge of which he could only have come by by being connected with the crime, the mentioning of such facts will, of course, be most cogent evidence to show that the confession is genuine. But even if the accused may have been questioned by the police on these very facts, their mention still has considerable probative value. If an accused freely makes a long statement and all the known facts fit in their proper sequence into this statement, this may often be sufficient on which to base a conclusion that the confession is genuine, even if the police may previously have questioned the accused on these facts, because unless the police put the actual words of the statement into the accused's mouth, if his only knowledge of the true facts has come from police questioning, he is hardly likely to present a coherent and convincing story into which all the known facts dovetail perfectly. A confession of such a type will often, therefore, itself prove its genuineness."

See also the case of *R v Fuwane* 1956 R & N 563 (GS) at 567F and *R v Mandyedzo & Anor* 1964 RLR 336 (A) at 340H-I. In the case of *R v Sykes* 3 Crim App R 233 at 236 RIDLEY J discussed the test to be applied to a confession. He expressed himself as follows:

> ". . . the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we can test them true? Was

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> the prisoner a man who had the opportunity of committing the murder? Is his confession possible? Is it consistent

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with other facts, which have been ascertained and which have been, as in this case, proved before us."

It is on the basis of these principles that I turn now to consider the appellant's confessions. In respect of each of the five counts of murder the appellant admitted that he had perpetrated the murders in the Rangemore Area. In each case the body of the deceased was found in the Rangemore Area, as confessed to by the appellant. In respect of each of the deceased, the appellant stated that he had struck the deceased in the vicinity of the head with a large stone. The post mortem of the deceased on count one revealed that he had died as a result of multiple skull fractures and brain compression, which is consistent with him having been struck with a stone in the vicinity of his skull. The post mortem reports on the deceased on counts four and five also revealed that they had died as a result of an assault on the head. The bodies in respect of the deceased relating to counts two and three were too decomposed for the medical officers to conclude whether they had died of head injuries. Be that as it may, the confessions of the appellant were corroborated in a material respect by the fact that the deceaseds' bodies in respect of these two counts were recovered from the very area where he said he had killed them. This to my mind amounts to significant corroboration. In respect of counts three, four and five, stones were also found in close proximity of the bodies of the deceased. The appellant in his confessions stated that he used stones to inflict the fatal injuries to the deceased. Here again, therefore, there is material corroboration of the appellant's confessions.

In respect of counts one and two, the deceased persons were seen in the company of the appellant prior to them meeting their death. The property of the deceased on count one, shoes and a wrist watch, was also subsequently found in the possession of the appellant. In respect of count two, the State called a witness who was with the appellant and the deceased relating to this count, and he deposed to how the deceased and he had been lured into the Rangemore Area, and given a certain liquid to drink which caused him to get drowsy. He managed to escape before he could be harmed. The body of his deceased friend was subsequently found in the area. On these two counts, therefore, there is direct evidence implicating the appellant.

In respect of each of the five counts, however, it seems to me that there was evidence *aliunde* proving that the offence had been committed. Five bodies were discovered, three of them exhibited signs of having been battered in the vicinity of the head. Three of them had large stones lying nearby. All of them

were found in the Rangemore Area. They had all met their death between the period extending from February 1987 to January 1988. The conclusion, to my mind, is inevitable that they met their death by foul means. The appellant confessed that it was he who caused their deaths by these means.

Consequently the trial court's verdict that he was guilty of murder in respect of each count is unassailable, whether on the basis that there is evidence *aliunde* establishing the commission of the offence supported by confessions or on the basis that his confessions are corroborated in material respects leading to the conclusion that they are genuine confessions.

Looking at the statements themselves, they are fairly detailed statements told in a proper

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sequence. They contain matters which it is unlikely the police could have known for themselves.

Accordingly we were satisfied that the convictions were in order and dismissed the appeal against conviction.

Mr *Cherry* found himself unable to make any submissions on sentence on behalf of the appellant. This is perfectly understandable, as these were brutal killings callously perpetrated in the pursuance of the appellant stealing from his victims.

The learned trial judge pronounced sentence in the following terms:

> "The sentence of the court is that you be returned to custody and that the sentence of death be executed upon you according to law."

This is an improper method of sentencing an offender where he is charged with multiple counts of murder and the sentence of death is to be imposed. A complication would arise where an accused person is successful in his appeal in respect of one or more of the counts he has been convicted of and where a "blanket sentence" of death has been imposed. The proper approach is, where it is intended to impose the death penalty on each of a number of counts, to do so separately on each count. No difficulty, however, arises in the present matter in view of the appellant's failure in his appeal in respect of each of the counts he was convicted of.

Gubbay CJ: I agree

Korsah JA: I agree

Pro Deo

1992 (1) ZLR p240

SUMBERERU v CHIRUNDA 1992 (1) ZLR 240 (HC)

Court **High Court, Harare**

Annotations Link to Case Annotations

Smith J

Civil application

25 February & 1 April 1992

Flynote

Civil procedure - claims in reconvention - no provision for such claims when application on notice of motion - departure from rules - condonation - discovery - of wide range of documents - whether necessary for documents to be discovered

Headnote

Order 32 of the High Court Rules 1971, which deals with applications on notice of motion, does

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not provide for claims in reconvention, as is provided for in the case of trials in Order 18. Rule 123, which provides that a claim in reconvention may be proceeded with even though the plaintiff's action is stayed or discontinued, applies only to trials and not to applications.

In notice of motion proceedings the respondent should, according to the Rules of Court, confine his opposition to a defence; he should not, in the opposing affidavit, launch an attack on the applicant and make a claim in reconvention.

In the light of the attitude of the parties to the proceedings and the fact that heavy costs had already been incurred in litigation over the matter, the court was prepared to invoke its powers in Rule 4C of the High Court Rules 1971 to condone the departure from the Rules in order to prevent the applicant having to start from scratch and make a fresh application.

The respondent was disputing the claim for increased maintenance on the basis that the claim was exorbitant; he was not saying that he was financially incapable of paying the increased amount. The applicant had applied for discovery of a wide range of documents in connection with respondent's financial affairs. The court dismissed the application for discovery, holding that if the applicant had been claiming a division of matrimonial assets there would have been a need for discovery of the documents in question.

SMITH J

However, as she was merely claiming an increase of maintenance by $250 for the children, the life styles of the parties was not a relevant issue. The applicant had failed to establish the need for discovery of the documents in question.

J Colegrave for the applicant

G Chikumbirike for the respondent

Judgment

Smith J: The parties were at one time married to each other. They were divorced on 23 July 1986. There are three children of the marriage. In terms of the consent paper, custody of the children was awarded to the mother (the applicant) and the respondent undertook to pay maintenance for the three children in the sum of $500 a month. The maintenance was subject to review every two years. No maintenance was payable in respect of the mother. In 1989 the respondent instituted an action seeking variation of the custody and maintenance provisions referred to above-case no. HC 1551/89. He claimed the custody of the three children with the consequent stoppage of the maintenance. The applicant opposed the said application and requested that the maintenance be increased to $750 a month for her and the children. On 8 January 1990 a pre-trial conference was held in connection with the said application, as it was apparently agreed that the issues could not be settled on the papers. It was agreed that there wrens 5 issues. The first two issues related to the custody of the children and, if it was varied, the maintenance. The third issue was, if custody was not varied, should the maintenance be reduced or increased. It specifically referred to maintenance in respect of the minor children. There was no reference to maintenance for the mother. At the pre-trial conference the applicant

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(respondent in those proceedings) indicated that she would be calling for fuller discovery by the respondent. The applicant's legal practitioners wrote to the respondent's legal practitioners asking for discovery of a wide range of documents which were said to be relevant to the question of custody or maintenance. They called for a response within 6 days. After the expiry of that period they applied to a judge in chambers for an order in terms of rule 165 directing that the documents be made available for inspection. The order was granted on 2 April 1990. On that same date the respondent's legal practitioners responded to the letters from the applicant's legal practitioners saying that the documents listed for discovery were not relevant to the issues agreed at the pre-trial conference. They queried in particular the necessity to discover such things as the respondent's income tax returns, bank statements, title deeds of immovable property registered in his name or in the name of any trust or company in which he held direct or indirect control, the partnership accounts of his firm

and documents relating to any motor vehicle owned by him or his firm. The order issued on 2 April 1990 was served on the respondent's legal practitioners. Subsequently there was a further application to the High Court and an appeal to the Supreme Court. Eventually the parties settled on the basis that the orders obtained and the appeal were abandoned and the applicant would commence proceedings afresh for extended discovery. Hence the present application with which I am seized.

This application was made on notice of motion in order to enable the respondent to argue the question of the relevance of the documents whose disclosure and production for inspection is sought by the applicant. The papers were filed on 22 April 1991. On 10 May the legal practitioners received notice from the respondent's legal practitioners that the respondent was withdrawing his application to vary custody - case no. HC 1551/89 - and tendering costs. The respondent's legal practitioners contended that as the respondent's application in case no. HC 1551/89 had been withdrawn the present application automatically fell away and therefore there was no need for them to file a notice of opposition or answering affidavit.

The first issue to be decided is whether or not the withdrawal of the respondent's application in case no. HC 1551/89 has extinguished the present application for disclosure and production for inspection. Order 32 of the High Court Rules, 1971, which deals with applications on notice of motion, does not provide for claims in reconvention as is provided for in the case of trials - see Order 18. The fact that oral evidence was to be heard and a "pre-trial conference" held would not have had the effect of converting this notice of motion application into a trial. Therefore rule 123, which provides that a claim in reconvention may be proceeded with even though the plaintiff's action is stayed or discontinued, is not applicable. That rule applies in relation to trials and not to applications. Mr *Colegrave* has urged this court not to rely on technicalities in the rules and to permit the applicant's claim for an increase in maintenance in case no. HC 1551/89 to continue to be proceeded with. Mr *Chikumbirike*, on the other hand, has argued that the respondent's opposition to an application on notice of motion is a shield, not a sword, and if the application is withdrawn then the opposition falls away .

I agree with Mr *Chikumbirike's* submission that in notice of motion proceedings the respondent

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should, according to the Rules of Court, confine his opposition to a defence. He or she should not, in the opposing affidavit, launch an attack on the applicant and make a claim in reconvention. Accordingly, in case no. HC 1551/89, the applicant in that case should have

SMITH J

replied to the opposing affidavit objecting to the inclusion of the application for increased maintenance for the respondent and the children. He did not do so. Accordingly, when it was decided that the matter should be set down for trial, the parties agreed that one of the issues to be determined was whether or not the maintenance for the children should be increased. In the light of this attitude taken by both parties, it seems to me that justice requires that the powers conferred by Rule 4C of the High Court Rules, 1971 should be exercised and the departure from the provisions laid down in Order 32 of the said rules should be condoned. If that were not done, it would mean that the applicant would have to start from scratch and make a fresh application for an increase in maintenance. That would add to the very heavy costs which the parties have already incurred in litigation over their matrimonial problems and would of course result in additional delays. I consider that the courts have a duty to administer justice as expeditiously as possible and at the least possible cost to the parties. In case no. HC 1551/89 the parties were prepared to argue both cases - custody and maintenance. The fact that the applicant has withdrawn his application and therefore the custody issue has fallen away should not result in the respondent having to start all over again. The matter has already dragged on for more than two years. Any further unnecessary delays can only cause injustice. I accept that, strictly speaking, I am not seized with case no. HC 1551/89 and therefore, technically, I cannot decide whether or not that case should continue on the basis that the respondent's (in this case the applicant) claim in reconvention for increased maintenance for the children should be continued. For the reasons set out above, however, I consider it probable that the court will condone the departure from the rules and will allow the claim in reconvention to be heard. On that basis I consider that the applicant is entitled to call for the discovery and production of documents which are necessary and relevant to her claim in reconvention.

That brings me to the second issue that has to be determined. Is the applicant entitled to the full discovery she is claiming? Mr *Colegrave* has baldly asserted that the applicant is entitled to full discovery of all matters which relate to the question of maintenance and, in this regard, it is important to ascertain the extent to which the respondent is able to contribute financially to the support of his children. Mr *Chikumbirike* has submitted that the documents which the applicant wants discovered are irrelevant. The respondent has not said that he is unable to pay the increased maintenance claimed by the appellant; his contention is that the amount claimed is exorbitant having regard to the needs of the children.

It seems to me that the respondent's submissions are well-founded. If the applicant were claiming a division of the matrimonial assets one could understand

SMITH J

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her need to have sight of such documents as the partnership accounts, title deeds to immovable property and registration books of motor vehicles. In case no. HC 1551/89, however, the applicant is merely claiming an increase in maintenance for the children from $500 to $750 a month. She is not claiming maintenance for herself and therefore the life-styles of the parties are not strictly relevant. In my view, the applicant has not established a need for the discovery and production for inspection of the papers referred to in the draft order submitted with her application. Accordingly the application must be dismissed.

Ordinarily, where an application is dismissed, the applicant is ordered to pay the respondent's costs. In this case, however, the application was not dealt with solely on its merits. The respondent raised the issue of whether or not case no. HC 1551/89 had fallen away with the withdrawal by the respondent of his application for variation of custody. On that issue, the respondent was not successful, the applicant was. In the circumstances, it seems to me that it would be just if each party was left to pay its own costs in connection with this application.

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

Coghlan, Welsh & Guest, applicant's legal practitioners

Chirunda, Chihambakwe & Chikumbirike, respondent's legal practitioners

S v MAMBO 1992 (1) ZLR 245 (HC)

Court **High Court, Harare**

Chidyausiku J

Criminal application

25 March & 1 April, 1992

Flynote

Criminal procedure - bail conditions - alteration - ss 106(1)(a) and 114(1) of Criminal Procedure and Evidence Act [Chapter 59]

Headnote

Section 106(1)(a) of the Criminal Procedure and Evidence Act empowers a judge to alter the conditions of bail at any time before sentence. The power to alter bail conditions under this section seems to be unlimited but, as the court will not express judgment on the same matter more than once, the court would be functus officio if the application was based on the same facts. Where the case is based on facts mistakenly not placed before the judge who set bail previously (although the facts existed at the time of the previous application) the same judge can deal with the new application.

The judge had originally assessed the level of bail on the basis of that certain companies

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owned by the applicant were viable and that the applicant derived a considerable income from them. In his later application before the same judge, the judge scaled down the bail because it was established that the companies were in fact not viable and the applicant derived hardly any income from them.

Whilst leaving entirely open the question of the proper interpretation of s 114(1) of the Criminal Procedure and Evidence Act, the court expressed the *obiter* view that this section is an alternative section in terms of which a judge or magistrate can alter bail conditions, subject to the specific requirement that there must be facts which were not before the court earlier. The wording of this section seemed, however, to require that the accused must have previously entered into the recognisance before he

CHIDYAUSIKU J

can apply for an alteration of his conditions which could lead to an absurd result in cases like the present one where the new fact is that the accused is unable to pay bail in the amount initially set.

S Chihambakwe for the applicant

R Goba for the respondent

Case cited:

S v Mambo HH-47-92

Judgment

Chidyausiku J: The applicant in this case is facing charges involving the theft of $1.7 million. The facts of this case are set out in my judgment on the initial bail application: vide *S v Mambo* HH-47-92. There is no need to restate these facts in this case. In that case I granted bail of $250 000 cash, surety in the sum of $250 000 and some reporting conditions. I assessed the quantum of bail on the basis that the applicant was the proprietor of 3 viable companies employing over 300 people and owner of three homesteads in the northern suburbs.

Mr *Chihambakwe*, in his application for alterations for condition of bail, submitted a detailed account of the appellant's means. The clear picture that emerges from the details is that the three companies owned by the applicant are on the verge of bankruptcy and will certainly go under if applicant is not released on bail. If the applicant is released on bail, it was argued he might turn things around and restore viability to the companies. The State's position, as I understand it, is that the State does not dispute that the appellant's companies are on the verge of bankruptcy and that this is relevant to the applicant's means. It is also common cause that the near bankrupt state of the appellant's companies was not placed before the court when bail was initially applied for and the level of bail was assessed on the basis that appellant was deriving a considerable income from his companies. The State takes its stand on the provisions of s 114(1) of the Criminal Procedure and Evidence Act [*Chapter 59*]. Mr G*oba* submitted that this court was *functus officio* in this matter. He further submitted that the court has no review

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jurisdiction in terms of s 114(1) of the Act. He argued that only when the applicant has entered into the conditions of the recognisance does the court have jurisdiction. In other words, this court will only have jurisdiction to review bail in this case when the applicant has paid $250 000 cash for bail, provided surety in the same amount and was abiding by the reporting conditions. Mr *Chihambakwe* submitted that the court had jurisdiction to review bail in this case under its inherent jurisdiction or in terms of s 106 or 114(1) of the Act.

CHIDYAUSIKU J

I would like to deal with Mr *Goba's* submission that this court is *functus officio* and that the applicant should appeal against the level of bail if he felt it was excessive. Mr *Chihambakwe's* reply to that argument was that the factors upon which he bases his argument that the bail was excessive were not placed before the court when it previously assessed bail. In his view the best course to follow was to apply for review to the same court that considered the bail.

The question that follows is, does this court have jurisdiction to review its own decision in a bail application? In my view the answer to that question is 'yes', both in terms of s 106 and 114(1) of the Criminal Procedure and Evidence Act [*Chapter 59*].

In terms of s 106(1)(1)(a) of the Act the power to alter bail conditions seems to be unlimited.

Section 106(1)(a) of the Act reads as follows -

> "Subject to the provisions of this section, a person may be admitted to bail or have his conditions of bail altered -
>
> (a) in respect of any offence, by a judge of the High Court at any time after he has appeared in court on a charge and before sentence is imposed" (emphasis added).

It is apparent from the above provisions that this court can alter conditions of bail at any time after admission to bail. Where, however, the application for alteration of bail conditions is based on the same facts as those previously submitted the court would be *functus officio*. No court can express judgment on the same matter more than once. In such a case the proper course open to the applicant is to appeal. In the present case the applicant is seeking to have his conditions of bail altered on the basis of facts not placed before the court when the original bail application was heard. For this reason I am satisfied that this court is not *functus officio*.

As far as s 114(1) of the Act is concerned, there is a lot of force in Mr *Goba's* argument that on the simple reading of that section the applicant's entering into the conditions of the recognizance is a condition precedent to the court assuming jurisdiction to review bail conditions. The relevant section reads as follows:

> "114 (1) Any judge or magistrate who has granted bail to a person in terms of this Part may, if he is of the opinion that it is necessary or advisable in the interests of justice that the conditions of a recognizance entered into by

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> that person should be amended or added to or that that person should be committed to prison, order that the said

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conditions be amended or added to or commit the person to prison, as the case may be:

Provided that -

(i) if the judge or magistrate who granted bail is not available, any other judge or magistrate, as the case may be, may act in terms of this subsection;

(ii) a judge or magistrate shall not act in terms of this subsection unless facts which were not before the judge or magistrate who granted bail are brought to his attention."

As I said, Mr *Goba's* submission has cogency, but its application could lead to absurdity and unjust conclusions. The present case is a good example of how such an interpretation can be absurd. The applicant is saying "My real means were not placed before the court and as a result bail was assessed at an amount I cannot afford". It would be absurd for the court to take the view that until the applicant has paid the bail which the court now realizes he cannot pay it will not review or alter the conditions of bail for lack of jurisdiction. I am however leaving the question of the proper interpretation of s 114(1) of the Act entirely open. I have assumed my jurisdiction from s 106 of the Act.

Turning to the facts of this case, I did assess the level of bail on the basis that the applicant's companies were viable and that he derived a considerable income from them. It is now established that the companies are not viable and the applicant hardly derives any income from them. I am satisfied the cash bail I imposed has to be scaled down. In doing this, I still have to bear in mind that the applicant is facing a very serious charge and any bail must be such as would induce him to stand trial. Indeed, to set the bail at $10 000 as submitted by applicant's counsel, would be to trivialize a very serious offence. Taking into account all the factors of this case the bail conditions are altered by the deletion of $250 000 cash deposit and the substitution of $150 000 cash deposit. The rest of the conditions of bail remain the same.

Chirunda, Chihambakwe & Chikumbirike, applicant's legal practitioners *Attorney-General's Office*, the State's legal practitioners

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1992 (1) ZLR p249

AITKEN & ANOR v ATTORNEY-GENERAL 1992 (1) ZLR 249 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, McNally JA & Korsah JA

Criminal appeal

3 & 6 April 1992

Flynote

Criminal procedure - bail - bail refused in magistrates court and appeal to High Court dismissed - further appeal to Supreme Court against refusal of bail - limited grounds upon which Supreme Court can interfere - onus of proof in bail application - criteria taken into account

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Headnote

The appellants were charged with extremely serious offences involving substantial sums of money. The charges relating to unlawfully dealing in foreign currency in contravention of the Exchange Control Act 1977 and of money laundering in contravention of the Serious Offences (Confiscation of Profits) Act 1990. They unsuccessfully applied for bail in the magistrates court and an appeal to the High Court against the refusal by the magistrate to grant bail was also unsuccessful. The High Court judge held that, given the seriousness of the alleged offences and the severity of the punishment that they would receive if convicted, there was a reasonable possibility they would abscond or interfere with the investigation of the case against them. The appellants then appealed to the Supreme Court against the High Court decision.

The Supreme Court held that whereas the High Court judge was entitled to substitute his own discretion for that of the magistrate, the Supreme Court had only limited powers to interfere with the High Court decision. The Supreme Court could only interfere if there had been a misdirection or irregularity in the High Court or if the judge had exercised his discretion in a manner which was so unreasonable as to vitiate the decision reached.

1992 (1) ZLR p250

Held, further, that when dealing with the matter of bail the court had to strike a balance between the liberty of the accused and the State's need to ensure that the person stood trial and did not interfere with the course of justice.

Held, further, that the onus is on the accused to show on a balance of probabilities why it was in the interests of justice that he should be freed on bail, but that the amount of evidence necessary for him to discharge this onus would vary according to the circumstances of each case.

Held, further, that in judging the risk that an accused person would abscond the court the court would be guided by the following factors:

- the nature of the charges and the severity of the punishment likely to be imposed for them upon conviction;
- the apparent strength or weakness of the State case;
- the accused's ability to reach another country and the absence of extradition facilities from that country;
- the accused's previous behaviour when previously released on bail; and
- the credibility of the accused's own assurance of his intention and motivation to remain and stand trial.

Held, further, that the High Court judge had properly exercised his discretion in deciding that even if the appellants were admitted to bail on the most stringent conditions, there was a real risk that they would abscond. The Supreme Court could thus not interfere with his proper exercise of discretion.

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Held, further, that where it is alleged that there was a risk of interference with investigations if an accused were to be released on bail, there must be more than a mere suspicion that the accused would so interfere. In such cases the State must show a well-grounded apprehension that he will so interfere; it was insufficient to make an unsubstantiated allegation that he would tamper with documentary evidence or improperly influence witnesses. The risk of interference had not been established in this case.

Cases cited:

S v Barber 1979 (4) SA 218 (D)

S v Chikumbirike 1986 (2) ZLR 145 (S)

Lobel & Anor v Claassen NO 1956 (1) SA 531 (W)

S v Essack 1965 (2) SA 161 (D)

S v Bennett 1976 (3) SA 652 (C)

S v Chiadzwa 1988 (2) ZLR 19 (S)

S v Mataboge & Ors 1991 (1) SARC 539 (B)

S v Fourie 1973 (1) SA 100 (D)

GUBBAY CJ

A-G, Zimbabwe v Phiri 1987 (2) ZLR 33 (H); 1988 (2) SA 696 (ZH)

De Jager v A-G, Natal & Anor 1967 (4) SA 143 (D)

S v Lulane & Ors 1976 (2) SA 204 (N)

S v Price 1973 (2) PH H92 (C)

S v Nichas & Anor 1977 (1) SA 257 (C)

S v Hudson 1980 (4) SA 145 (D)

S v Hussey 1991 (2) ZLR 187 (S)

S v Hartman 1968 (1) SA 278 (T)

S v Mhlawli 1963 (3) SA 795 (C)

S v Kathrada 1961 (3) SA 593 (T)

S v Lukas & Ors 1991 (2) SACR 429 (E)

Ex parte *Qutani* 1946 EDL 173

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Maserow v A-G & Anor 1994 WLD 43

S v Hlongwa 1979 (4) SA 112 (D)

R v Phasoane 1933 TPD 406

Ex parte *Nkete* 1937 EDL 231

S v Berg 1962 (4) SA 111 (O)

A P de Bourbon SC for the appellants

R H Goba for the respondent

Judgment

Gubbay CJ: The first appellant is a legal practitioner of twenty years standing. He is forty-eight years old, married with several dependant children. Although not born in Zimbabwe he has lived here for the better part of thirty years. The second appellant is a prominent businessman, aged forty-two. He is the managing director of S & T Import and Export (Private) Limited ("S & T") and a director of several other locally registered companies. He, too, has resided permanently in Zimbabwe for close on thirty years, but was not born in this country.

On 11 March 1992 a search warrant was issued by a judge pursuant to the provisions of s 55(1) of the Serious Offences (Confiscation of Profits) Act 1990. Acting under this authority, Superintendent Solomon Ncube, a senior investigating officer, together with other members of the Zimbabwe Republic Police Fraud Squad, entered the law offices of DW Aitken and Company, the residential premises of the first and second appellants and the business premises of certain of the companies under the control of the second appellant, and seized and removed therefrom a substantial number of ledgers, cash books, files of correspondence, bank statements, cheque books, cheque-stubs and other documents. The two appellants were placed under arrest.

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Five days later the appellants, both of whom were represented by counsel, appeared before a magistrate on charges of contravening s 3(1)(a) of the Exchange Control Regulations 1977 (unlawfully dealing in foreign currency) and s 63 of the Serious Offences (Confiscation of Profits) Act 1990 (money-laundering). An application for bail presented on their behalf was refused by the magistrate, who ordered that they be remanded in custody.

Aggrieved by this decision, the appellants jointly noted an appeal to a judge of the High Court in terms of s 111(1) of the Criminal Procedure and Evidence Act [*Chapter 59*]. A statement in compliance with Rule 6(1) of the High Court of Zimbabwe (Bail) Rules 1991, was filed with the Registrar. A statement in response was filed by the Attorney-General together with an affidavit from Superintendent Ncube. This was met by a lengthy answering statement from each appellant.

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The appeal was heard by the JUDGE PRESIDENT in Chambers on 25 March 1992. In a rather cursory *ex tempore* judgment he dismissed it. He held that, in view of the seriousness and magnitude of the offences alleged against the appellants and the severity of the punishment they would receive if convicted, there existed a reasonable possibility that if set at liberty they would abscond or interfere with the investigation of the case against them. His decision is now the subject of this appeal which, notwithstanding the repeal of s 44(1) of the High Court of Zimbabwe Act 1981 and the insertion of subs (5a), somewhat anomalously lies, without the grant of leave, as of right to the Supreme Court.

While the JUDGE PRESIDENT, in considering the appeal, was at liberty to substitute his own discretion for that of the magistrate on facts placed before the latter, the present appeal is one in the narrow sense. The powers of this court are, therefore, largely limited. In the absence of an irregularity or misdirection, this court has to be persuaded that the manner in which the JUDGE PRESIDENT exercised his discretion was so unreasonable as to vitiate the decision reached. See *S v Barber* 1979 (4) SA 218 (D) at 220E-G; *S v Chikumbirike* 1986 (2) ZLR 145 (S) at 146F-G.

The basic purpose from society's point of view of the procedure known as "bail" is to strike a balance between two competing interests - the liberty of the accused, and the requirement of the State that he stand trial to be judged and that the administration of justice be safeguarded from interference or frustration. This proposition is amply supported by authority. See, for instance, *Lobel & Anor v Claassen* NO 1956 (1) SA 531 (W) at 532 in fine - 533A; *S v Essack* 1965 (2) SA 161 (D) at 162C-H; *S v Bennett* 1976 (3) SA 652 (C) at 654G-H; *S* v

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Chiadzwa 1988 (2) ZLR 19 (S) at 20D; *S v Mataboge & Ors* 1991 (1) SACR 539 (B) at 542d-f. The system allows advantages to both the accused and the State. The accused is permitted to keep the fabric of his life intact, to continue with his employment or occupation, to support his dependants, and be accorded the fullest opportunity of preparing his defence free from restraint. It spares his family the hardship and indignity of enforced separation and, perhaps, reliance upon welfare. The State, on the other hand, secures the attendance of the accused at the trial without the cost of having to maintain him in prison.

The notion that an accused is presumed innocent until proven guilty is the cornerstone in an application for bail. Consequently, it is the tradition of our courts to lean in favour of and not against the liberty of the subject, and to grant bail where possible. But though the presumption of innocence operates in favour of an accused even where the case against him appears strong, too much emphasis should not be placed upon it. The ends of justice would not be served if there were some "cognizable indications" that the accused would not abide by the conditions of the bail recognisance. See *S v Fourie* 1973 (1) SA 100 (D) at 101G; *A-G, Zimbabwe v Phiri* 1987 (2) ZLR 33 (H) at 38; 1988 (2) SA 696 (ZH) at 700B.

The onus is upon the accused to show on a balance of probabilities why it is in the interests of justice that he should be freed on bail. See *De Jager v A-G, Natal & Anor* 1967 (4) SA 143 (D) at 149G-H; *S v Chiadzwa supra* at 21F. This is the all embracing issue the court is enjoined to

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address. Simultaneously it has to determine whether any objection to bail can be obviated by the imposition of appropriate conditions pertaining to release. See *S v Bennett supra* at 656D-E.

The quantum of evidence necessary for an accused to discharge the onus upon him will vary according to the circumstances of each case. Where, for instance, the State does not oppose the grant of bail, little persuasion is required. At the other end of the scale, the accused may have to point to special facts and circumstances if the Attorney-General, in the light of his experience and with his knowledge, deems it necessary to oppose the application for bail. The court is bound to place reliance and trust upon the opinion of the Attorney-General. See *S v Chikumbirike supra* at 147C-D. Yet that is not the only factor the court must take into account. See *S v Lulane & Ors* 1976 (2) SA 204 (N) at 211F-G; *S v Bennett supra* at 654H-655A.

These, then, are the general principles which govern the court in its endeavour to strike a delicate balance between the two conflicting interests.

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The specific and paramount considerations to be determined, as stated in section 106(3) of the Criminal Procedure and Evidence Act, are:

(a) whether the accused will appear to stand trial (or receive sentence) in due course;

(b) whether the accused will interfere with the investigation of the case against him or tamper with prosecution witnesses;

(c) whether the accused will commit offences while on bail (this was not relied on by the JUDGE PRESIDENT).

There are, of course, other factors which may influence the court in coming to a decision, such as, the gravity or multiplicity or nature of the accused's previous convictions, and evidence that he contemplates suicide or the commission of an offence. None of these are relevant to this appeal.

I turn now to the two particular grounds which influenced the JUDGE PRESIDENT to confirm the decision of the magistrate.

THE RISK OF ABSCONDMENT

In judging this risk the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if convicted; the strength of the State case; the ability to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial.

It is apparent that the more serious the charge and the heavier the sentence is expected to be, the greater will be the temptation to flee. See *S v Price* 1973 (2) PH H92 (C); *S v Nichas & Anor* 1977 (1) SA 257 (C) at 263H; *S v Hudson* 1980 (4) SA 145 (D) at 146H. But this is not a conclusive factor. It must be looked at in conjunction with others. See *S v Hussey* 1991 (2) ZLR

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187 (S) at 191. On the other hand, the likelihood of being convicted of an offence that usually merits only a fine, very much reduces the risk of the accused failing to stand trial.

There is no doubt that the charges facing the appellants are very serious. The allegations are that from January 1983 to the date of arrest, the appellants were engaged in the unlawful buying and selling of foreign currency; and that since September 1990 the first appellant, through the trust accounts of his practice, laundered money, the proceeds of a crime, to the extent of $24 million. Of this amount, $2 million was laundered on behalf of the second appellant and $13

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million and $3 million, respectively, for the accomplices, Tommy Howlin and Peter Smith. The second appellant is also alleged to have failed to repatriate monies earned outside the country.

The maximum penalties provided by the Legislature under s 5 of the Exchange Control Act [*Chapter 167*] and s 63(2) of the Serious Offences (Confiscation of Profits) Act are extremely severe. In the event of the appellants being convicted, even in lesser yet nonetheless substantial amounts, the probability is that they will undergo long terms of imprisonment coupled with heavy fines. Forfeiture and confiscation orders are also likely.

It follows that the grave personal consequences which may eventuate from the State's allegations were rightly held by the JUDGE PRESIDENT to be a material consideration.

Secondly, the court must assess as best it can on the information placed before it, the relative strength of the State case and, therefore, the probability of a conviction. See *S v Hartman* 1968 (1) SA 278 (T) at 281E; *S v Lulane & Ors supra* at 213D.

The allegations of the Attorney-General and Superintendent Ncube are fairly broad and not very detailed. This is not altogether surprising having regard to the early stage of the investigation into the suspected offences, involving as it does a series of transactions spanning almost a decade, its complexity and the necessity that it be undertaken both in and outside the country.

The gist of the State case is that, fearing arrest, Howlin, Mike Cox and Eugene Cox, all said to be accomplices, left Zimbabwe soon after the first search of the offices of the first appellant. They, as well as others, including the second appellant and Peter Smith, had placed with the first appellant considerable sums of money to be deposited into his trust accounts, and payments had been made therefrom to them or their nominees. Documents seized from the first appellant's possession, in the opinion of the Attorney-General, tended to show that he had knowingly participated in the laundering of such monies. With regard to Peter Smith, the first appellant had used fictitious names to conceal tainted monies. Other documents, according to the Attorney-General, tended to show that both the appellants had been buying and selling foreign currency. In addition, the first appellant was found in possession of foreign currency equivalent to Z$18 200, as well as cheque books and bank cards, reflecting the operation of bank accounts in South Africa and the United Kingdom. Recovered from the second appellant was a written agreement in terms of

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which he undertook to pay Howlin US$130 000 out of the country. Still to be substantiated was information that the second appellant had failed to repatriate to Zimbabwe foreign currency amounting possibly to more than Z$10 million.

For the most part any form of wrongdoing was emphatically denied by the appellants.

In particular, the first appellant denied knowledge that any of the monies paid into his trust accounts were "the proceeds of crime" and that documents exist which support either that allegation or the other, that he had engaged in illegal foreign currency dealings. He claimed that much of the foreign currency found in his possession was demonstrably the property of a third party, as were the cheque books issued by foreign banks.

The second appellant disputed the allegation that either he or S & T had paid monies, "the proceeds of crime", to the first appellant to be held in trust. He stated that between 8 February and 30 August 1991 $1,4 million had been advanced to S & T by Howlin, the loans being paid by way of cheques drawn by DW Aitken and Company. He further denied unlawfully dealing in foreign currency with anyone and failing to repatriate foreign currency earned in business transactions outside Zimbabwe. The written agreement entered into with Howlin was explained on the basis that the reference to United States dollars was merely to establish the rate against which the equivalent amount in Zimbabwe dollars was to be paid by him.

The JUDGE PRESIDENT did not comment on the strength or otherwise of the State case. A finding by him would have been of assistance to this court. Notwithstanding, I do not deem it advisable at this stage of the proceedings to embark upon an analysis of the allegations made by the Attorney-General and the denials and explanations advanced by the appellants. Reposing a degree of confidence in the Attorney-General's evaluation of the documents in the State's possession, I am unable to say more than that on the outline of the facts given by him, the case against the appellants is neither obviously strong nor obviously weak. This, of course, is not a finding of fact but merely an opinion as to the apparent strength of the State case.

The third factor which had to be weighed in the balance was the potential ability of the appellants to cross the border into a country where no extradition treaty with Zimbabwe exists, despite their passports being impounded by the police. See *S v Mhlawli & Ors* 1963 (3) SA 795 (C) at 796E; *S v Nichas & Anor supra* at 263 in fine - 264H.

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The appellants are multi-millionaires. The first appellant has put the value of his local assets at $3 million and the second appellant at between $10 and $14 million. More significantly, neither of them countered the belief expressed by the Attorney-General that they possess substantial wealth outside the country. The implications from this are that the appellants could reward most handsomely, in local and foreign currency, any party willing to undertake or assist in their illicit

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removal, and that both would be able to live fairly comfortably outside Zimbabwe.

South Africa would be the most obvious choice of refuge because of proximity and the absence of an extradition treaty. This is the country in which Howlin and the two Coxs' sought sanctuary. It cannot be gainsaid that it is relatively easy for any person, determined enough, to unlawfully cross the border into South Africa, Botswana or Zambia.

The second appellant has many international connections. Howlin was a close business associate of his. S & T engages in road haulage and has vehicles which regularly travel to countries within the sub-region. Another company, of which he is a director, is the owner of a Piper Aztec aeroplane. Access to means of travel was, therefore, more open to him than to the first appellant.

In sum, the potential ability of the appellants to flee the jurisdiction constituted a real risk.

Fourthly, it is recognised that the court must pay regard to the past response of an accused to being released on bail. It should count in his favour if he had faithfully observed his bail conditions. See *S v Kathrada* 1961 (3) SA 593 (T) at 596F. Per contra, if he had absconded on a previous occasion. See *S v Berg* 1962 (4) SA 111 (O) at 114H.

The past response of both the appellants to prosecution for Exchange Control transactions carried slight weight in their favour. The first appellant stood trial and was acquitted. The second appellant likewise stood trial but was convicted. However, in each case, the charges proffered were such that the appellants must have been confident that if convicted, imprisonment was an entirely remote punishment.

Some emphasis was placed by counsel upon the fact that during the period between the initial search of his offices and his arrest, the first appellant had not taken the same evasive action as Howlin and the Coxs'. He remained in the country. This is true, but at that time the first appellant had been advised by the

police that he was not regarded as a suspect. So there was little inducement to flee.

Finally, the appellants have strongly disclaimed an intention to abscond and avoid the trial. They are domiciled in Zimbabwe, having lived here for the greater part of their lives. They own immovable property and much wealth; their respective empires have been built and flourish here. Much ties them to the country.

Although the court is obliged to heed an averment by an accused that he will remain to stand trial, as pointed out by THIRION J in *S v Hudson supra* at 148E, since an accused who harbours an intention to abscond is hardly likely to admit it, implicit reliance cannot be placed on his mere say-so. By the same token, the court should not blindly accept the contrary assertion by the Attorney-General. See *S v Lukas & Ors* 1991 (2) SACR 429 (E) at 437c.

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Upon a conspectus of all these factors I am not persuaded that the JUDGE PRESIDENT erred in his discretional assessment that the risk of the appellants absconding, even if admitted to bail on the most stringent conditions, was real. On this ground alone I would dismiss the appeal.

THE RISK OF INTERFERENCE WITH THE INVESTIGATION OF THE CASE OF STATE WITNESSES

In *S v Bennett supra* at 655G-H, VOS J formulated the following test of which I respectfully approve:

> "It appears to me that, as applicant has thus far not interfered with the investigation, the proper approach should be that, unless the State can say that there is a real risk that he will, not merely may, interfere, there does not appear to me to be a reasonable possibility of such interference."

In the absence, then, of actual interference to stifle the investigation of the pending case (as to which see, *S v Chiadzwa , supra*, at 22H-23A) a well grounded apprehension will suffice. See *Ex parte Qutani* 1946 EDL 173 at 177; *Maserow v A-G & Anor* 1941 WLD 43 at 47; *S v Hlongwa* 1979 (4) SA 112 (D) at 113H. A mere suspicion that the accused will interfere is insufficient. See *S v Barber , supra*, at 220D-E.

The JUDGE PRESIDENT would seem to have founded his view, that there existed a reasonable possibility that the appellants will interfere, upon the early stage of the investigation, its complexity and the necessity that it be undertaken locally and externally. These were the objective factors stressed by the Attorney-

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General. Apart from alluding to the influential positions enjoyed by both the appellants, he provided no additional information for this ground of opposition. The first appellant, on the other hand, pointed to the fact that subsequent to the first search of his offices and the seizure of various documents, it was not alleged that he had sought to remove or alter any of the documents which had been returned to him. Of the second appellant, nothing was said about a fear of his having access to documents which could be removed or destroyed.

At best, there was no more than a suspicion that the appellants might interfere with the investigation insofar as the documentary evidence is concerned.

The assertion by the Attorney-General of the existence of a real risk that the appellants, if released, will interfere with prosecution witnesses, was bald and unsubstantiated by evidence of prior misconduct. Actual or attempted tampering at any time was not suggested. Compare, *S* v C*hiadzwa , supra*, at 22H; *R v Phasoane* 1933 TPD 406-407; Ex parte *Nkete* 1937 EDL 231 at 233.

I do not consider that, because some of the witnesses the State intends to call at the trial may be the friends, associates or employees of the appellants, (no one was identified by name or status), there was a likelihood of the appellants attempting to influence the content of their evidence or persuading them not to testify. In short, it is my view that it was unfair to permit of the possibility that the appellants would bring or endeavour to bring grossly improper influences

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to bear with the object of disturbing the due course of justice.

If this had been the only ground raised by the Attorney-General in his opposition, and that upon which the JUDGE PRESIDENT had ruled against the appellants, I would have been disposed to set aside the decision and grant bail. But, as already mentioned, I cannot hold that the JUDGE PRESIDENT had misused his discretion in concluding that neither appellant had established on a balance of probabilities the likelihood that he will stand trial and not abscond, if released on bail.

This judgment confirms the order made soon after the conclusion of argument that the joint appeal of David William Aitken and John Stouyannides be dismissed.

McNally JA: I agree.

Korsah JA: I agree.

Atherstone & Cook, appellants' legal practitioners

MLAUZI v ATTORNEY-GENERAL 1992 (1) ZLR 260 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Application on notice of motion

9 March & 16 April, 1992

Flynote

Constitution - s 18(2) - right to trial within reasonable period of time - whether right violated - s 18(6) - forbidding trying person again for offence for which previously convicted - exceptions

Jurisdiction - appeal to Supreme Court pending - whether High Court had jurisdiction to quash convictions because records had gone missing

Headnote

After the applicant had been convicted of theft of two cars, he was in the process of appealing against these convictions when the High Court quashed the convictions on the grounds that the records of the trial proceedings had gone missing. The State then re-indicted him for these offences.

On appeal, it was argued that the constitutional right of the applicant in terms of s 18(2) of the Constitution to be brought for trial within a reasonable period of time had been violated. It was also argued that the right of the applicant in terms of s 18(6) of the Constitution not to be tried again for an offence for which he had previously been convicted had been violated.

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Held, that the High Court did not have the jurisdiction to quash these convictions in the circumstances but, instead, it should have left this matter to be dealt with by the Supreme Court on appeal.

Held, further, that the delay in the case had not been unreasonable or prejudicial to the applicant and it had not been established that the delay in the case was the fault of the State. Therefore no violation of s 18(2) had been established.

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Held, further, that s 18(6) of the Constitution lays down that no person may be tried again for the same offence of which he was previously convicted. However, this section provided certain exceptions to this rule. The present case fell with proviso (a) to that section in that the convictions had been set aside "on the ground of any other irregularity or defect in the procedure". This proviso was intended to cover irregularities and defects arising subsequent to conviction and sentence. Thus it was open to the Attorney-General to institute a fresh prosecution for the offences for which the appellant had been convicted after these convictions had been quashed on the grounds of irregularities subsequent to the original trial.

Cases cited:

S v Manera 1989 (3) ZLR 92 (S)

S v Besser 1968 (1) SA 377 (SWA)

S v Quali 1989 (2) SA 581 (E)

Fikilini v A-G 1990 (1) ZLR 105 (S)

S v Marais 1966 (2) SA 514 (T)

S v Shezi 1984 (2) SA 577 (N)

Ex parte Millsite Invtm Co (Pty) Ltd 1965 (2) SA 582 (T)

In re Mlambo 1991 (2) ZLR 339 (S)

S Moyo for the appellant

A V M Chikumira for the respondent

Judgment

McNally JA: The applicant applied to this court on notice of motion for an order in the following terms:

> "1. That the respondent be and he is hereby ordered to desist from instituting and/or pursuing fresh proceedings arising from the alleged theft of a Datsun Pulsar motor vehicle and a Bluebird motor vehicle, in respect of which the applicant was tried, convicted and sentenced by the Harare Regional Magistrates

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Court;

2 . That the respondent pays the costs of this application."

The history of the two matters is as follows:

1) January 1985 - First car stolen;

2) March 1985 - Second car stolen;

3) 5 March 1985 - applicant arrested;

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4) Applicant in custody for approximately one month before bail granted;

5) November 1986 - trials set down but postponed;

6) 14 July 1988 - convicted and sentenced on first count - five years' imprisonment with labour, one-and-a-half suspended - bail granted pending appeal;

7) 29 July 1988 - appeal noted;

8) 9 October 1989 - convicted (of receiving) and sentenced on second count - four years' imprisonment with labour, one-and-a-half suspended - bail granted pending appeal;

9) No notice of appeal on record, but it is common cause he appealed;

10) 10 December 1990 - ADAM J quashed conviction and sentence on first count on the grounds that the record was lost. Action taken at request of Attorney-General without notice to the applicant;

11) 7 August 1991 - ADAM J quashed conviction and sentence on second count on same grounds and again the applicant was not advised either of the application or of the result;

12) November 1991 - applicant recharged in Harare Regional Court, where he learned for the first time that his convictions had been quashed;

13) 12 November 1991 - applicant brought notice of motion proceedings for the relief set out above.

The first question which concerned this court, although it was not raised by either party, was whether the High Court had jurisdiction to intervene in the matters, given that appeals had been noted in this court, which was thus *prima facie* seized of both matters. It is to be noted that by common consent this court would have had no option, had the appeals been pursued, but to do what the High Court did. Major parts of the records have disappeared. They cannot be reconstructed. Compare *S v Manera* 1989 (3) ZLR 92 (S), where this court left it open to the Attorney-General to decide whether to prosecute the accused afresh.

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The Attorney-General, in supporting the authority of the High Court to intervene, relied on the following decisions: *S v Besser* 1968 (1) SA 377 (SWA) at 379E; *S v Quali* 1989 (2) SA 581 (E) at 583F; *S v Manera supra*.

But in none of these cases did the question of conflict of jurisdiction arise. In *Besser's* case *supra* the proceedings had not been recorded owing to a failure

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of the mechanical recording equipment. Sentence had not been passed. The South West Africa division of the Supreme Court had a clear statutory review jurisdiction.

In *Quali's* case *supra* the record was lost before the magistrate had sentenced the accused. The presiding magistrate was not available by the time the accused re-appeared, and the magistrate before whom he appeared for sentence had no means of making a proper assessment of sentence. He therefore submitted the matter for review to a provincial division of the Supreme Court, which again had clear statutory jurisdiction to review.

In *Manera's* case *supra* the matter was properly before this court by way of appeal and thus no conflict of jurisdiction arose.

The High Court's powers of review are both statutory and inherent. Its statutory powers are contained in ss 27 to 29 of the High Court of Zimbabwe Act 29 of 1981. Its inherent powers are referred to in section 26 of the same Act - see *Fikilini v Attorney-General* 1990 (1) ZLR 105 (S) at 109B.

I must say that I find it impossible to accept that the High Court in this case was exercising a statutory power of review. The three grounds for statutory review, as set out in s 27 are as follows:

a) absence of jurisdiction on the part of the court, tribunal or authority concerned;

b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;

c) gross irregularity in the proceedings or the decision.

It is clear that neither of the first two grounds arise here. As far as the third ground is concerned, it seems clear to me, on the plain meaning of the words, that "gross irregularity in the proceedings" must mean gross irregularity in the proceedings before the court, tribunal or authority concerned.

It has not been suggested that there was any irregularity in the proceedings before the magistrate in this case. The subsequent and (it is common cause) irreversible loss of the records after conviction and sentence is not a gross irregularity in the proceedings before the magistrate. That can be demonstrated by asking what would have happened if the appellant

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had not appealed. The

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answer is clear. The appellant would have served his sentence. No question of irregularity would have arisen. There would have been no irregularity.

The fact is that the irreversible loss of the record is a gross irregularity in the proceedings before the court in which the appeal was noted, namely this court. That is why this court was and is the appropriate court to deal with the problem arising out of the loss of the record.

I am satisfied therefore that the High Court had no jurisdiction to act in terms of its statutory powers of review in this matter.

The next question is whether it could act in terms of its inherent powers of review. I hesitate, particularly in the absence of argument on the point, to seek to define what are the powers of review inherent in the High Court. Generally, it may act to prevent a failure of justice. - See *S v Marais* 1966 (2) SA 514 (T) at 517A-B; *S v Shezi* 1984 (2) SA 577 (N) at 579 in fine; and the words of VIEYRA J in Ex parte *Millsite Investment Co (Pvt) Ltd* 1965 (2) SA 582 (T) at 585F-H.

I rely in particular on the words with which that passage ends. They are these:

> "The inherent power claimed is not merely one derived from the need to make the court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation."

Judged by that standard I can see no reason for the High Court to exercise an intervening jurisdiction. The matter was on appeal to the Supreme Court. The Supreme Court was capable of dealing with the matter. It had dealt with a similar situation in *Manera supra* on 24 October 1989, over a year before the first of His Lordship's two decisions. His intervention was not necessary to prevent an injustice. I do not think, therefore, and with respect, that it was a proper case for the exercise of the learned judge's inherent jurisdiction. I appreciate that the intention of the Attorney-General was to save time and trouble, but I do not consider that the procedure was appropriate. In addition, it must be said that it was seriously improper not to advise the convicted person either that the application was being made, or, subsequently, that his convictions and sentences had been quashed and his appeals rendered nugatory.

It is after all not inconceivable that the appellant might have decided to withdraw his appeals. It would have been ridiculous had he attempted to do so, only to be met with the information that he had already succeeded.

McNALLY JA

The simple and proper course, it seems to me, would have been for the Attorney-General to have advised this court and the appellant that vital parts of the record had been lost, that there was no possibility of reconstructing them, and that accordingly it sought an order as in *Manera's*

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case *supra*.

That, however, is not the end of the matter. To say that the High Court should not have exercised its inherent jurisdiction is not necessarily to deny that jurisdiction. In the present matter neither party wishes to challenge the decision of His Lordship. It would seem pointless and petty to intervene simply so that this court may exercise its jurisdiction and come to the same decision. It is clear that the applicant intends to continue to assert his innocence, and it is clear that major portions of the record are missing and cannot be reconstructed.

In the circumstances I propose to leave matters as they are.

This is not to be interpreted as a finding that the High Court had jurisdiction. It is no more than a finding that if it had such jurisdiction it should not have exercised it, coupled with an acceptance, in the particular circumstances and at the request of both parties, of the effect of that decision.

I turn then to consider the points made by the applicant.

Mr *Moyo* has submitted that his client was interrogated and assaulted by the police, that he lost large sums of money as a result of having to travel frequently to Bulawayo for remands, that he was humiliated by having his name called out constantly in the Magistrates Court building. All this, and the delays involved, amount to a violation of his constitutional rights under s 18(2) of the Constitution.

The way in which this court approaches the application of the provisions of that section has been exhaustively set out in the case of In re *Mlambo* 1991 (2) ZLR 339 (S). Each case must obviously depend largely on its own facts. The facts in the present case are very different from those in *Mlambo*.

The following relevant facts have been asserted in reply to the notice of motion and have not been conclusively answered:

1. One of the cars was stolen in Bulawayo and the other in Harare, and thus some inconvenience was inevitable;

2. The Bulawayo trial was moved to Harare for the convenience of the applicant;

3. The two trials were set down for dates in November 1986 and postponements thereafter were at the request of the defence, who did not complain about the delay;

4. The applicant changed his legal practitioners during the course of the trials and postponements were made necessary because the new legal practitioners wanted

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transcripts of the evidence, which were supplied;

5. The circumstances in which the records of the two trials disappeared on two separate occasions were extremely suspicious and suggest, although nothing can be proved, that "the system was interfered with". The record covers and inconsequential documents remained, but the important contents were removed;

6. It seems strange that the applicant no longer has access to the transcripts which were provided to his legal practitioners;

7. The State evidence consists of the uncontested evidence of loss by the two complainants, and evidence from two police witnesses, who, it is alleged, can give their evidence again. As far as the defence is concerned, the State alleges that those who were called are available, and their statements are available since they were at one stage State witnesses. The applicant's own evidence was transcribed for the use of his legal practitioners, and some 112 pages of his evidence in the one case (cross-examination and re-examination) are available, together with the whole of his evidence in the other matter.

In the result, I am not satisfied that the delay in this case was unreasonable, or prejudicial to the applicant, nor that it has been shown to be the fault of the State. The applicant did not seek to assert his rights until he was re-indicted. Nor am I satisfied that the delay in processing his appeals, and the subsequent impossibility in proceeding with the appeals, were the fault of the State. In the premises I do not consider that an infringement of the applicant's right under s 18(2) of the Constitution has been established.

The next point taken is that the applicant's rights under s 18(6) of the Constitution have been infringed by his being re-indicted in respect of two matters on which he has already been convicted.

Now, there can be no doubt that he is covered by the provisions of s 18(6). The only question is whether one or other of the two provisos applies. The section reads:

McNALLY JA

"(6) No person who shows that he has been tried by a competent court for a criminal offence upon a good indictment, summons or charge upon which a valid judgment could be entered and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save -

(a) where a conviction and sentence of the High Court or of a court subordinate to the High Court are set aside on appeal or review on the ground that evidence was admitted which should not have been admitted, or that evidence was rejected which should have been admitted, or on the ground of any other irregularity or defect in the procedure; or

(b) otherwise upon the order of the High Court in the course of appeal or review proceedings relating to the conviction or acquittal."

It is apparent that proviso (b) does not arise here since the High Court did not order a re-trial. I

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should add that although I am not aware of any amendment to s 18(6)(b) of the Constitution, the words "High Court" must obviously be interpreted to read "Supreme Court or High Court ".

So we are concerned with proviso (a). Mr *Moyo's* argument is that there was no irregularity or defect in the procedure before the magistrate and thus the proviso does not apply.

I do not agree with that reasoning: I begin by pointing to the considerable difference in wording between the quoted provisions of proviso (a) and the earlier quoted extract from s 27 of the High Court of Zimbabwe Act. I have said already that the phrase in the Act, "gross irregularity in the proceedings or the decision", clearly relates to the proceedings before, or the decision of, the magistrate. But the wording in the Constitution is entirely different. There are at least four major differences, as follows:

1. The phrase "on the ground that" is repeated, indicating a disjunction between the two sets of grounds involved. The first set of grounds relates to the proceedings before the lower court; the second ground does not necessarily do so. The *ejusdem generis* rule does not apply.

2. The words "any other" connote a wider meaning.

3. The word "defect" introduces an additional dimension.

4. The word "procedure" is different from the word "proceedings", and has a wider meaning. It encompasses not only the proceedings of the trial but also those things which are required to be done outside the court room, for

example the preparation, preservation and presentation to the appeal court of the record of the proceedings.

In the present instance the convictions and sentences of the courts subordinate to the High Court were set aside because of a defect in the (post-trial, pre-appeal) procedure, ie the loss of the records of the proceedings. Accordingly the exception provided for in proviso (a) to s 18(6) of the Constitution is applicable. The submission must fail.

As Mr *Moyo* recognised, this conclusion is consistent with the decision of this court in Manera , *supra*,. In that matter the CHIEF JUSTICE, with the concurrence of two other members of the court, did not order that the matter be remitted. He agreed with the reasoning of MULLINS J in *S v Quali , supra*, that "the proper course was simply to set aside the proceedings, leaving it open to the Attorney-General to decide whether to prosecute the accused afresh."

The application is dismissed with costs.

Manyarara JA: I agree

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Korsah JA: I agree

Scanlen & Holderness, appellant's legal practitioners

MDOKWANI v SHONIWA 1992 (1) ZLR 269 (SC)

Court **Supreme Court, Harare**

Ebrahim JA, Gubbay JA & McNally JA

Civil appeal

19 March & 16 April 1992

Flynote

Civil procedure - default judgment - rescission - factors taken into account

Headnote

It is incumbent on the appellant to satisfy the court that he was not in wilful default in the sense that knowing of the set down and of the risks attendant on his default, he deliberately refrained from appearing. He had to show that there was an acceptable reason for the late filing of his appearance to defend and that he had a bona fide defence to the respondent's action.

Cases cited:

GD Haulage (Pvt) Ltd v Mumurgwi Bus Svcs (Pvt) Ltd 1979 RLR 447 (A)

Neuman (Pvt) Ltd v Marks 1960 (2) SA 170 (SR)

Simba v Simba S-164-90 (unreported)

Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S)

Salooje & Anor v Min of Community Development 1965 (2) SA 135 (A)

S v McNab 1986 (2) ZLR 280 (S)

Mvaami (Pvt) Ltd v Standard Finance Ltd 1976 (2) RLR 257 (G)

DP Carter for the appellant

Judgment

Ebrahim JA: In this matter the appellant appealed against a decision of the Magistrate, Mutare, following the dismissal of his application for rescission of a judgment granted against the appellant on 20 August 1990.

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The facts are that the respondent instituted an action against the appellant claiming the return of an engine or $4 000, being the value of the engine. She

EBRAHIM JA

also claimed costs of suit. The summons was served on the appellant on 7 August 1990 and he forwarded this to his legal practitioner on 15 August 1990. His legal practitioner caused an appearance to defend to be entered on 31 August 1990 but by that time the respondent had already obtained a default judgment on 20 August 1990.

The factors to be taken into account by a court in an application for rescission of judgment were stated as follows by DAVIES JA in *G D Haulage (Pvt) Ltd v Mumurgwi Bus Services (Pvt) Ltd* 1979 RLR 447 (A) at 455B-G:

> "In *du Preez v Hughes* NO 1957 R & N 706 (SR), according to the headnote of that case, it was decided that although there are no precise rules limiting or regulating what matters the court may take into account in deciding whether a defendant who seeks to set aside a default judgment has shown the existence for such relief of 'good and sufficient cause' in terms of Rule 63, the court will normally take into account (a) the applicant's explanation of his default, (b) the *bona fides* of the application to rescind the judgment, and (c) the *bona fides* of the applicant's defence on the merits of the case, and the court will normally consider these matters in conjunction with each other and cumulatively. The headnote is misleading since it appears from the body of the judgment of BEADLE J, as he then was, that careful consideration was also given to the prospects of success.
>
> The matter was also dealt with by this court in the case of *Arab v Arab* 1976 (2) RLR 166 (A). That was an appeal against a refusal of the General Division to grant rescission of a default judgment, and the effect of the court's decision is adequately set out in the headnote in the following terms: '
>
> ' There is no "rule of thumb" to be applied where an applicant seeks rescission of a judgment in terms of Rule 63 of the High Court (General Division) Rules, 1971. All that can be said is that the applicant must show something which entitles him to ask for the indulgence of the court (dicta per COTTON LJ in In re *Manchester Economic Society*, 24 ChD at p 498 applied). Such indulgence will, however, not be granted where the default of the applicant may be classed as wilful (*Du Preez v Hughes* NO 1957 R & N, followed).
>
> It is a fundamental principle, dictated by public policy, that, as far as possible, there should be finality in litigation. That is one of the reasons why, in terms of Rule 63, rescission will not be granted unless the applicant shows 'good and sufficient cause', the *onus* being on him.'"

EBRAHIM JA

Clearly it was incumbent upon the appellant at the hearing before the magistrate to satisfy the court that he was not in wilful default. He had to show that there was an acceptable reason for the late filing of the appearance to defend and that he has a *bona fide* defence to the respondent's action.

The meaning of "wilful default" was aptly put by MURRAY CJ in the case of *Neuman (Pvt) Ltd v Marks* 1960 (2) SA 170 (SR) at 173A-D, where he stated the principle as follows:

> "The true test, to my mind, is whether the default is a deliberate one - ie when a defendant with full knowledge of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing. I can do no better than quote the following passage from the judgment of Bowen LJ, in the case of In re *Young and*

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Harston's Contract LR 31 Ch Division at pp 174, 195, a passage approved by GARDINER JP in *Hendriks v Allen* 1928 CPD 519:

> 'The other word which it is sought to define is "wilful". That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent. Now, if that is all you can get out of the analysis of these words, it becomes plain that to endeavour to classify every conceivable contingency with a view of defining what will be and what will not be wilful default, would be idle. You cannot define the words "wilful default" more than I have defined them. And I only use the definition for the purpose of showing that the term is a simple one and not technical at all.'

In the concurring judgment of FRY LJ at p 176 the party's default was described as:

> 'a spontaneous act of default on his part and consequently the act was wilful'."

See also *Simba v Simba* S-164-90.

The appellant's default in this case arose partly through his own fault (he forwarded the summons served on him to his legal practitioner on 15 August 1990, which was one day after an entry of appearance to defend should have

EBRAHIM JA

been filed) and also from the failure of the appellant's legal practitioner to enter an appearance earlier than he did. Their explanation for this failure therefore needs to be examined. In the case of *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 211E MCNALLY JA stated:

> "While the courts are inclined to frown on plaintiffs who 'snatch at their judgments' the impression must not be gained that the Rules may be flouted with impunity and that as long as you are only a day or two late rescission will be granted on request. A reason for the delay must be given and it must be an acceptable reason. A defendant who admits that he was negligent in his tardiness may nonetheless be found to merit rescission if he shows *bona fides.* But one who puts forward a 'reason' which is an insult to the intelligence of the court may have more difficulty in satisfying the court of his good faith."

I also have regard to the case of *Saloojee & Anor v Minister of Community Development* 1965 (2) SA 135 (A) at 141C-E, where STEYN CJ stated:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

See also *S v McNab* 1986 (2) ZLR 280 (S).

Mr *Carter*, representing the appellant in this court, submitted that an acceptable explanation has been tendered and that the appellant's default was not wilful and should be condoned. He has

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also submitted that this is not a case where the fault of the legal practitioner should be visited upon the appellant.

I turn now to analyse the facts in this case.

The appellant states that he received a letter from the plaintiff's legal practitioner dated 17 July 1990, indicating her claim against him. On 25 July 1990 the

EBRAHIM JA

appellant met with his legal practitioner and outlined to him his version of the events. On 30 July 1990 he forwarded the plaintiff's letter to his legal practitioner who in turn on 10 August 1990 responded to that letter to the plaintiff's legal practitioner. In the meantime, on 7 August 1990, the appellant received a summons relating to the dispute between the parties and he forwarded it to his legal practitioner on 15 August 1990. He was a day late for his entry of appearance to have been filed, which should have been effected by 14 August 1990. 11 and 12 August 1990 were public holidays and this may have contributed to the late submission of the summons to his legal practitioner. On 3 September 1990 he was approached by the messenger of the court with a writ of execution who then attached his property.

Mr *Henning,* the appellant's legal practitioner, confirmed his dealings with the appellant and stated in his affidavit that on 10 August 1990 he wrote to the respondent's legal practitioner and, in anticipation of a reply from him, diarised forward the file relating to the matter. He concedes that the appellant did deliver the summons to his office but this was not brought to his attention by his secretarial staff, who placed the document in the file. On 31 August 1990, when he next attended to the file, he discovered the summons therein and he immediately directed his secretary to file an appearance to defend. This was, however, returned by the court with the information that default judgment had already been taken on 20 August 1990.

Against the background of these events, it seems to me to be unduly harsh to hold that there was an element of deliberateness on the part of the appellant. There is nothing in his conduct to suggest that he, "with the full knowledge of the set down and of the risks attendant on his default", freely took the decision to refrain from appearing. In fact, his conduct indicates the contrary view. He appears to have been in constant contact with his legal practitioner, who in turn had communicated with the respondent's legal practitioner. In my view, there is nothing on the papers to show any degree of wilfulness on his part. There may have been a degree of laxity on his part in not forwarding the summons to his practitioner sooner but the two-day intervening holiday falling within the period he received the summons, to the time he forwarded it to him, to my mind, mitigates his laxity in this regard.

For his part, the appellant's legal practitioner appears to have acted sensibly in the circumstances. He wrote to the respondent's legal practitioner on being consulted by the appellant and was awaiting a reply. He diarised forward his file in anticipation of a reply. No reply was received but a summons was brought in by the appellant. He acted on it as soon as he became aware of it by filing a

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EBRAHIM JA

notice of appearance to defend, only to discover that the respondent's legal practitioner had secured a default judgment on 20 August 1990, only ten days after the appellant's legal practitioner had written to him. No communication was received by him that the respondent would pursue this course without notifying him. It seems to me that even if it can be said that the appellant's legal practitioner was somewhat lax in his dealings with this matter his failings in this regard should not be held to be fatal to the appellant's case. See *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1976 (2) RLR 257(G)*; Neuman (Pvt) Ltd v Marks , supra*,.

I have no doubt that the appellant is *bona fide* in his application to rescind the judgment and that he has provided at the very least an understandable explanation for his default. There is insufficient information on the papers to comment fully on the appellant's prospects of success but suffice it to say that he has tendered a defence which on the face of it cannot be rejected out of hand and warrants investigation.

It is for these reasons that the appeal must be allowed. On the issue of costs, the appellant has succeeded in his appeal and is therefore entitled to his costs of the appeal. The position regarding costs in the lower court is somewhat different. There was some laxity on both the part of the appellant and his legal practitioner. Nevertheless there had been communication between the appellant's legal practitioner and the respondent's legal practitioner but despite this he rather hastily took judgment within a matter of days without notifying the appellant's legal practitioner of his intention to do so. In my view, this is a case where the application for rescission should have been consented to, as it cannot be said that the appellant had been wilful in his default. It is for these reasons that I am of the view that the applicant, whilst having to bear the costs of his application in the lower court, should be required to do so on an uncontested basis.

Accordingly the following order is made:

1. The appeal is allowed with costs.
2. The judgment of the lower court is set aside and substituted by the following:

"(a) The application for rescission of the default judgment is granted;

(b) The applicant is to pay the costs of the application on an uncontested basis."

EBRAHIM JA

Gubbay CJ: I agree.

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McNally JA: I agree.

Gargan Bros & Chadder, appellant's legal practitioners

MARISA v MADONDO 1992 (1) ZLR 276 (SC)

Court **Supreme Court, Harare**

Korsah JA, McNally JA & Manyarara JA

Civil appeal

12 March & 16 April, 1992

Flynote

Contract - time stipulated for performance - when amounts to essential term

Headnote

Where a time for performance is fixed, the nature of the contract and the surrounding circumstances must be looked at to determine whether the time stipulation is an essential term, breach of which entitles the other party to cancel the contract. The question is whether, by express agreement or by necessary implication, strict observance of the stipulated time for performance was of the essence of the particular contract.

Case cited:

Costain & Partners v Godden NO & Anor 1960 R & N 658

R M Fitches for the appellant

E Chatikobo for the respondent

Judgment

Korsah JA: The appellant is aggrieved and dissatisfied with the decision of the High Court, Harare, made on 4 June 1991, declaring the contract entered into between Stanley Marisa and Stephen Purity Madondo on 21 February 1989, to be valid and in existence, and consequently directing her to sign all documents necessary to effect transfer of the property, the subject matter of that contract, to the said Steven Purity Madondo.

The appellant is the executrix of the estate of Stanley Marisa (deceased). The respondent and the late Stanley Marisa entered into an agreement of sale on 21 February 1989, whereby Stanley Marisa was to sell his house, No. 4 Peall

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KORSAH JA

Avenue at Southerton, to the respondent for the sum of $40 000. The agreement was made subject to the condition that the respondent either secured sufficient funds before 31 April in full satisfaction of the purchase price, or be seen to be able to raise an amount agreeable to Stanley Marisa.

A firm of lawyers, acting for the respondent, was appointed for the purposes of drawing up a deed of transfer. To Linet Musanhi, who was their conveyancing secretary, fell the task of dealing with the matter. She deposed to an affidavit that she received instructions early in April 1989 that Beverley Building Society had approved of a loan of $35 422 to the respondent. This meant that the appellant was to raise the sum of $4 578 to meet the full purchase price for the house. It would appear that none of this was communicated to Stanley Marisa by 30 April, or 1 May 1989, for his consideration as will shortly be evident.

Linet Musanhi averred that she telephoned Stanley Marisa at his residence in Chiredzi on the morning of 3 May 1989 to inform him of the approval of the loan by Beverley Building Society to the respondent. She understood Stanley Marisa to have instructed her to tell the respondent to pay $2 000 of the outstanding amount of $4 578 as soon as possible and that he was going to arrange with the respondent how the remainder of the $2 578 was to be paid. Linet Musanhi averred that Stanley Marisa informed her that he was leaving on a business trip to Bulawayo, and that she conveyed Stanley Marisa's proposals to the respondent who accepted them.

In the respondent's founding affidavit he says:

> "To me and to my legal practitioners the deceased confirmed that he would come and sign all the transfer documents on his return from a trip."

Linet Musanhi, who actually spoke to Stanley Marisa on the telephone, does not go so far as to say that the deceased intimated that he was going to sign any transfer documents on his return from the trip to Bulawayo, only that she was asked to convey certain proposals to the respondent for his consideration.

In the afternoon of 3 May 1989, the very day on which Linet Musanhi spoke to Stanley Marisa on the telephone, she received a telegram from Stanley Marisa, the relevant part of which reads:

> "To date I have received no monies from Mr S Madondo. The sum being $40 000. This sum being the consideration of the purchase of the above-mentioned house. This agreement was made between your Mr S Madondo

KORSAH JA

> and myself. Our agreement clearly states that the sum of $40 000 should be paid before or on 30th April 1989. I have not received such payment. I am therefore extending this offer another seven working days. If I do not hear from your client within the stipulated extension time I will have no option but to withdraw the offer. I have sent a copy of this telex by post to Mr Madondo."

This telegram was sent at 13.39 hours on 3 May 1989. Its contents are directly opposed to what

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Linet Musanhi avers that she discussed with Stanley Marisa. It is eloquent testimony that Linet Musanhi and Stanley Marisa had misunderstood each other, and that their minds were not *ad idem* regarding the conditions of the contract.

I say so because, as Stanley Marisa clearly states in his telegram, by 30 April 1989 he had not been informed that the respondent had been successful in obtaining the purchase price of $40 000 or been able to raise an amount agreeable to him. It was of no use to Stanley Marisa that Beverley Building Society had agreed, as early as March 1989, to grant the respondent a loan facility of $35 422, with the property as security if the offer of the loan was not transmitted to him for his consideration before 30 April 1989.

Although contractual stipulations as to time do not necessarily make time of the essence of the contract, it may be concluded from the nature of the contract and the surrounding circumstances that time is of the essence. As Professor Christie puts it in the second edition of his work *The Law of Contract in South Africa* at p 601:

> "When a time for performance is fixed, however, the debtor's failure to perform by that time is a breach, and no demand is necessary to make it so. It then becomes necessary to decide whether time is of the essence of the contract because, if it is, the breach is of sufficient magnitude to justify the creditor in cancelling, also without prior demand, because the remedy of cancellation follows as of right from the serious breach."

This is to say that the strict observance of the stipulated time for performance must be a matter of express agreement or of necessary implication.

While I am inclined to the view that the failure to communicate to Stanley Marisa on or before 30 April 1989 that Beverley Building Society had granted to the respondent a bond on the property was a serious breach which would have entitled Stanley Marisa to a cancellation of the agreement, because this is a

commercial transaction involving the sale of property whose value on the market fluctuates, the extension of time granted by Stanley Marisa in his telegram of 3 May 1989 militates against an intention to cancel the agreement for breach as of 30 April 1989. This is not to say that time was not of the essence of the agreement.

Regrettably, Stanley Marisa died in a traffic accident on the same day that he despatched the telegram in which he complained that the respondent had failed to comply with the conditions of the agreement between them and gave him an extension of seven days within which to perform. If, as they say, dead men tell no tales, then the contents of that telegram provide cogent evidence that up to the time of his death Stanley Marisa had not been apprised either of the fact that the respondent had secured enough funds for the full purchase price of $40 000, or had been able to raise an amount agreeable to Stanley Marisa.

Now, the nature of the agreement between the respondent and Stanley Marisa, as I perceive it, is that Stanley Marisa offered to sell his property, No. 4 Peall Avenue, Southerton, to the respondent; if the respondent had by 30 April 1989 found the full purchase price of $40 000, or had been able to raise a portion of the purchase price agreeable to him (Stanley Marisa). It was

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necessary for the compliance with either of the stipulated conditions that Stanley Marisa be personally satisfied that the respondent had the full purchase price or that he had raised an amount approved of by Stanley Marisa. It was only upon knowledge by Stanley Marisa within the stipulated or extended period that the respondent had complied with either of those conditions that Stanley Marisa would have been obliged to effect transfer to the respondent. It is of no use if the respondent's ability to perform was not communicated to Stanley Marisa within the stipulated period.

From the papers before the court, it would appear, contrary to the averments contained in the respondent's founding affidavit and Linet Musanhi's supporting affidavit, that death intervened before Stanley Marisa could be informed of the respondent's attempted compliance with the second condition for him to approve. This is made clear by the contents of the telegram which Stanley Marisa despatched to the respondent before his death. What, then, is the effect of the death of the offeror on the contract?

DJ Joubert, in his work *General Principles of the Law of Contract*, has this to say at p 41 para 6.2.2.:

> "The offer is also terminated by the death of the offeror or offeree. As a

KORSAH JA

> reason for this phenomenon we may advance the argument that the offer only creates the opportunity for completing a contract and that on the death of the offeror there is no duty which can pass to his estate and that on the death of the offeree there is no right which can pass to his estate. Support for this approach is to be found in the fact that an offer cannot be transferred inter vivos and that the offer must be exercised by the offeree personally and not by his estate or heir. The position will be otherwise when the offer is in itself capable of transfer, as in the case of an option, or when the offer is intended to be exercised only after the death of the offeror."

Professor Christie at p 52 of his work above-mentioned expresses a view not dissimilar to that of Joubert. Accepting the general principle that an offer terminates with the death of the offeror before acceptance, he poses the question:

> "Why should an offer not be made in terms which, expressly or impliedly, permit its acceptance by the executor of the offeree or to the executor of the offeror?".

See *Costain and Partners v Godden NO & Anor* 1960 R & N 658.

There is no reason why this cannot be done. The construction to be given to the intention of the parties will depend on the facts and circumstances surrounding the particular contract.

It seems to me that since the deceased made the second condition of the performance by the offeree personal to his (the deceased's) satisfaction, the offeree was bound to comply with the conditions of the agreement within the life-time of the deceased and not after his death. The contract was thus not such as was intended to be binding on the executrix of the offeror if performance on the part of the offeree was not communicated to the offeror within his life-time. The only logical inference to be drawn from the contents of the telegram sent by Stanley Marisa before his death was that he was unaware of the loan facility which Beverley Building Society

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had made available to the respondent. In the event, the conditions of the agreement were not fulfilled by the respondent in the life-time of the deceased so as to make it obligatory for his executrix to transfer the property to the respondent upon the demise of Stanley Marisa.

Consequently, the appeal is allowed with costs. The order of the High Court is set aside and in its place is substituted the following:

KORSAH JA

"(1) The application is dismissed with costs."

McNally JA: I agree.

Manyarara JA: I agree.

Surgey, Pittman & Kerswell, appellant's legal practitioners

Chirunda, Chihambakwe & Chikumbirike, respondent's legal practitioners

MAZARIRE v MAGORONGA 1992 (1) ZLR 282 (SC)

Court **Supreme Court, Harare**

Manyarara JA, Gubbay CJ & Korsah JA

Civil appeal

24 March & 16 April 1992

Flynote

Delict - breach of promise and seduction actions under customary law - present position relating to breach of promise action - whether requirement that aunt of woman must have been informed of promise to marry

Headnote

Under customary law the marriage contract was concluded between the woman's guardian and the representatives of the man's family. Any promise to marry was not binding until the marriage partners had received the approval of their respective families. Traditionally the woman advised her family of any serious relationship with a man by informing her aunt. There was thus no claim under customary law for breach of promise as there is now. There was only a claim for seduction damages where a man solicited a single woman and then refused to marry her.

However, the current position is that any man and woman of full legal capacity can enter into a binding agreement to get married. It is not now a legal requirement that the families of the parties must be informed before there can be a binding contract to marry. Therefore a claim for

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breach of promise by a woman will not be disallowed simply because the woman has not informed her aunt of the promise which has been made to marry her.

Cases cited:

Katekwe v Muchabaiwa 1984 (2) ZLR 112 (S)

Appellant in person

Respondent in person

MANYARARA JA

Judgment

Manyarara JA: The respondent sued the appellant in the magistrate's court. She claimed damages for seduction and breach of promise to marry plus her costs of suit. The claim for seduction was allowed and that for breach of promise failed. She recovered her costs. He has appealed against the judgment on the seduction claim but she has not cross-appealed against the decision to disallow her claim for breach of promise damages.

I propose to demonstrate that the reasons given by the magistrate for his decision are self-contradictory, without pronouncing judgment thereon as there is no cross-appeal. The fault lies with the respondent's legal representative in the trial who practically conceded a point he should have disputed fiercely. This was that the claim for breach of promise should be disallowed because the respondent had not communicated the promise to her aunt. I suggest that this is not the correct law.

The declaration filed on the respondent's behalf set out the two claims as follows:

> "1. Plaintiff is Julia Magoronga, a major spinster, whose address of service is care of that of her legal practitioners of record.
>
> 2 . Defendant is Frederick Mazarire, a schoolteacher of Gutu High School, PO Box 901 GUTU.
>
> 3. In or about June the defendant seduced and had sexual intercourse with the plaintiff, a major spinster, as a consequence whereof the plaintiff became pregnant.
>
> 4. As a consequence of such seduction the plaintiff sustained damages in an amount of $1 500.
>
> 5. In or about June 1989 the plaintiff and the defendant orally agreed to marry each other.
>
> 6. In or about November 1989 (the) defendant orally repudiated his obligation to marry the plaintiff and the plaintiff has consequently sustained damages in an amount of $(1) 500."

The plea filed by the appellant denied the allegations and issue was joined thereon. The seduction claim fell to be determined on the law set out in various authorities on this delict. It suffices to quote the summary in Ncube *Family law in Zimbabwe* p 27, which reads as follows:

> "In order to succeed a woman who sues for seduction damages must prove,

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MANYARARA JA

> on a balance of probabilities, that she and the defendant had sexual intercourse. Upon proof of sexual intercourse, two presumptions immediately arise in her favour. She is presumed to have been seduced and to have been a virgin until the time of seduction. Once the presumptions arise the onus shifts to the defendant to rebut the presumptions of seduction and/or virginity. If he fails to rebut either or both of the presumptions, he is liable in seduction damages to the woman."

See also McKerron *The Law of Delict* 7 ed pp 162-166. The existing texts on the subject of African law and custom are therefore out of date in certain respects, as will be indicated in my judgment.

There can be no doubt that the appellant seduced the respondent and I need not deal with the evidence at any great length. It suffices to set out the facts which the magistrate found proved, quite correctly in my view, and these inevitably include the facts relating to the alleged breach of promise to marry which was disallowed. They are as follows.

In January 1989 the appellant and the respondent met at a bar in Gutu where she was employed as a barmaid. He was aged about twenty-four years and single and she about eighteen-and-a-half years and also single. He proposed love, she accepted and before the relationship broke up in about September of that year they had had sexual intercourse.

The respondent said that he began propositioning her in January; that she fell in love with him in March; that the first act of sexual intercourse took place in the bush during the month of June and the second in July; that she was a virgin; and that he promised to marry her but broke his promise when she became pregnant. She gave birth on 16 March 1990.

He disputed the allegations. According to him, sexual intercourse took place "more than five times" in a room at the back of the business premises; she was not a virgin and had other boyfriends beside himself; he had never promised marriage; and the intercourse stopped at about the end of March or early April.

On the appellant's version, he could not possibly have been the father of the child born to the respondent, as the date of the birth was well outside the gestation period.

The magistrate concluded that the appellant had failed to rebut the presumptions raised by his admitted sexual intercourse with the respondent and he allowed the

MANYARARA JA

claim for seduction. I agree with the decision, supported as it is by the record. The respondent's evidence reads extremely well. By contrast, the quality of the appellant's evidence is shocking, to say the least.

The appellant was young and single. The respondent was only a few years younger than he and also single. He was well educated, the holder of a bachelor's degree from the University of Zimbabwe. She was not uneducated herself, as she had completed four years of secondary

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school education. He was an almost daily patron of the bar where she worked, yet he was unable to call a single credible witness to support his suggestion that she was no different from a common prostitute. There can be no doubt as to where the balance of probabilities lay. It lay with the respondent.

I proceed to consider the claim for breach of promise which failed, although there is no cross-appeal. I have already given my reasons for adopting this unusual course.

It is common cause that when the respondent discovered that she had become pregnant, she went to the appellant's house intending to live with him as his wife, but he threw her out with the assistance of a girl named Joana. According to the respondent, what she had attempted to achieve was to enforce his promise to marry her. As I have said, he denied ever having made such a promise.

The magistrate dismissed the claim without deciding the first point, **whether or not it was possible or probable that the promise had been made** to the respondent as she alleged. He adopted without question the defence submission that the fact that the respondent, on her admission, had not told her aunt of the promise proved that it had not been made.

With respect, this was a serious misdirection which must have been attributable to a gross misunderstanding of the issues.

The essential elements of breach of promise to marry are these:

(a) that the defendant made a promise to marry the plaintiff;

(b) that the plaintiff accepted the promise and communicated his or her acceptance to the defendant; and

(c) that the defendant has broken his or her promise without just cause.

MANYARARA JA

See Hahlo *The SA Law of Husband and Wife* 5 ed, Chapter 3; and Ncube *op cit* pp 35-39.

These are the only issues which the magistrate was called upon to decide. He was put on the wrong scent by both legal practitioners who represented the parties in the trial. I believe that some of the pitfalls which should have been avoided were connected with certain misconceptions of the law relating to marriage contracts. These must be explained.

There was only one "marriage contract" under customary law. This was concluded between the father or guardian of the woman and representatives of the man's family. The rights and obligations arising therefrom went to or were imposed on them alone. Therefore there could be no binding promise between a man and a woman that they would marry each other unless such a promise had the approval of their respective families.

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The position today is that any man or woman of full legal capacity may freely enter into a binding agreement to get married, and the general rules of the law of contract apply to the agreement.

The closest which customary law came to the present day breach of promise was where the man had sexual intercourse with a single woman at his solicitation and then refused to "marry" her. However, the cause of action which arose was seduction, the "plaintiff" being the woman's father or guardian. The rationale behind the action was that the seducer had diminished the *lobola* which the "plaintiff" could expect to get on the woman's marriage. If the seducer decided to marry the same woman himself, the seduction damages did not form part of the *lobolo*.

It is these considerations which obliged a woman to inform her father or guardian of any serious love relationship which was developing between herself and the man courting her. The traditional channel of communicating such information was the woman's aunt.

I would respectfully add that existing texts on customary law marriages, other than Ncube's *Family Law in Zimbabwe,* first published in 1989, should now be consulted with these matters in mind. The same applies to judgments handed down prior to the landmark decision of this court in *Katekwe v Muchabaiwa* 1984 (2) ZLR 112.

As far as the *quantum* of the damages awarded for seduction in this case is

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MANYARARA JA

concerned, I can see no reason for interference. There was *contumelia* in the delict and the appellant's suggestion that the respondent was, to him, no different from a common prostitute is most insulting. He certainly did not convey that impression to her when she parted with her virtue at his solicitation. I would allow the award to stand.

Therefore, the appeal is dismissed. There will be no order for costs as both parties appeared in person.

Gubbay CJ: I agree.

Korsah JA: I agree.

NDEBELE v NCUBE 1992 (1) ZLR 288 (SC)

Court **Supreme Court, Bulawayo**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

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31 March & 16 April 1992

Flynote

Civil procedure - default judgment - rescission - warning to legal practitioners

Headnote

It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. In recent years applications for rescission, for condonation, for leave to appeal out of time, and other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. The Supreme Court is bombarded with excuses for failure to act. The Supreme Court is beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute.

The time had come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* - roughly translated, the law will help the vigilant but not the sluggard. In the present case the appeal against the decision refusing rescission was unsuccessful. Although there was an arguable case for the defence, there had been an unreasonable delay in applying for rescission and there was no reasonable excuse for the delay, such as some reasonable incapacity to act in time or some understandable oversight.

J Moyo for the appellant

D Coltart for the respondent

Judgment

McNally JA: This is an appeal against the refusal by the High Court (MUCHECHETERE J) to grant rescission of judgment.

McNALLY JA

The judgment was a judgment in the sum of $7 660 and costs. Mr Ncube's allegation was that in 1984 he had lent Mr Ndebele the sum of $6 000 and, later the same day, $1 000. At the same time he had handed Mr Ndebele $660 worth of old "spoilt" notes and asked him to exchange them at the bank for new ones.

Despite frequent requests for repayment, nothing had been repaid. Eventually Mr Ncube consulted Messrs Webb, Low and Barry. They wrote a letter of demand on 6 December 1988. Mr Ndebele came to see them on 19 December 1988. He admitted a debt of $3 660, but not the balance of $4 000. After taking further instructions Webb, Low and Barry issued summons on 6 January 1989. It was served on 18 January 1989. It demanded the full $7 660. Again Mr Ndebele called to see them. This was on 25 January 1989. He was unable to pay. There is some dispute about what was said. However, he does not claim that any promises were made to him. In fact he said "He (the lawyer) told me to pay the admitted amount and then we would discuss the balance of the claim. I told him I could not afford to pay the admitted amount and he

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told me that he was not prepared to discuss the matter until it was paid".

Mr Ndebele did not enter an appearance to defend. He says he did not realise he could do so in respect of part of the claim only. He continued to make irregular monthly payments in respect of the admitted portion of the debt. On 23 May 1989 he was served with a writ of execution in terms of a default judgment obtained on 1 March 1989. His rights in his immovable property were attached.

At this stage Mr Ndebele consulted Advocate Sibanda. He was advised to raise the money to pay the admitted liability, after which he could apply for rescission. On 23 June Advocate Sibanda wrote to Webb, Low and Barry to this effect. The letter ended" May you kindly hold over until we revert".

In July 1989 Mr Ndebele was advised that his property was to be sold in execution on 21 July. Advocate Sibanda was away. Mr Ndebele was still unable to pay what he admitted owing. So he did nothing. The property was sold on 25 August 1989. He was evicted on 1 October 1989. He consulted new lawyers (Calderwood, Bryce-Hendrie and Partners) on 4 October 1989. He instructed them to apply for rescission. They asked Advocate Sibanda for his file. Apparently he was again away for the month of October. The file reached his new lawyers on 2 November 1989. The application for rescission was lodged on 1 December 1989. By that time Mr Ncube had been paid $4 850,62 out of the proceeds of the sale of the right in the immovable property.

Apart from these facts which are common cause there are other allegations

McNALLY JA

which are disputed. Mr Ndebele says there was an agreement to pay the debt in instalments. This is denied. In any event he was not able to pay the instalments regularly. Mr Ncube's lawyer says there was a meeting on 30 May 1989 at which it was made clear to Mr Ndebele that proceedings in relation to the disputed debt would continue. This assertion is not answered.

The criteria for rescission are well known. The learned judge was aware of them, and of the relevant cases. Mr *Coltart* who appeared for the respondent conceded that there was an arguable case for the defence. It was one man's word against another's as to what was owing. He based his case on the unreasonableness of the delay.

It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute.

The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* - roughly translated, the law will help the vigilant but not the

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sluggard.

There will always be cases where the delay is due to some reasonable incapacity to act in time, or to some understandable oversight such as the misfiling, or misplacing of a document. This is not such a case. Mr *Moyo*, who appeared for the appellant took us painstakingly through the facts, offering an excuse here, an explanation there, and an appeal *ad misericordiam* elsewhere. But taking all the factors in combination, we cannot fault the learned judge's decision. The time had come to call a halt to the throwing of good money after bad.

The appeal is dismissed with costs.

Korsah JA: I agree.

Ebrahim JA: I agree.

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

Webb, Low & Barry, respondent's legal practitioners

MISHO v SITHOLE 1992 (1) ZLR 291 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Manyarara JA

Civil appeal

23 March & 16 April 1992

Flynote

Damages - adultery - heads under which claim can be made

Delict - adultery - whether can still claim damages if condonation of adultery of spouse - whether adulterer must be aware that partner married when had sexual intercourse

Headnote

A party who has condoned the adultery of a spouse is still entitled to claim damages from the adulterer. An adulterer is only liable for adultery damages if she knew at the time of sexual intercourse that her sexual partner was married. A claimant is entitled to claim damages under two heads namely:

1. Loss of *consortium*. This claim could include loss of love, companionship, sexual privileges and assistance in good and bad times which a spouse is entitled to expect and consequent mental distress.

2. *Contumelia*. This claim is for infringement of privacy, dignity and reputation.

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Any claim for damages for mental breakdown arising out of the adultery must be supported by medical evidence.

Loss of *consortium* is the main element in the estimation of damages. The loss will be less where the respondent has condoned the adultery and the the marriage still subsists. It will also be less where to the knowledge of the other spouse the offending spouse has been previously been unfaithful with various women and thus the possibility of the adultery occurring is not unexpected and the distress caused by the adultery is not so severe as it otherwise have been.

KORSAH JA

Another salient factor in assessing damages is whether the person being sued for adultery instigated the adultery.

Cases cited:

Viviers v Kilian 1927 AD 449

Faulds v Smith 1950 (1) SA 1 (A)

Forrester v Forrester 1963 SC 662

Heggie v Heggie 1917 2 SLT 246

Bruwer v Joubert 1966 (3) SA 334 (A)

Biccard v Biccard & Anor 9 SC 473

Diemer v Solomon 1982 (4) SA 13 (C)

Katsumbe v Bunyanga 1991 (2) ZLR 256 (H)

Reith v Antao 1991 (2) ZLR 317 (S)

AJ Dyke for the appellant

No appearance for the respondent

Judgment

Korsah JA: This is an appeal from the judgment of the Magistrate's Court, sitting at Marondera on 18 June 1991, awarding the respondent the sum of $3 000 damages for adultery committed by the appellant with the husband of the respondent, and dismissing the appellant's claim in reconvention for damages for assault.

The respondent was married to Dumisani Sithole in 1983. The marriage was registered under the Marriage Act [*Chapter 37*] and still subsists. The appellant admitted that consensual intercourse between herself and the respondent's husband commenced in October 1986 and that relationship persisted until 1989. The respondent, however, testified that the adulterous relationship between the appellant and her (the respondent's) husband extended beyond 1989

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up to 19 January 1991. It is common cause that out of this adulterous union was born an issue on 26 August 1988.

The appellant's defence to the action was that during the period extending from 1986 to 1989, when consensual intercourse was taking place between herself and the respondent's husband, she was ignorant of the marital status of the respondent's husband. She said she was deceived and misled by the respondent's husband into accepting that he was an unmarried father, who wanted a woman to take care of his children.

It is accepted that a party who has condoned the adultery of a spouse is at liberty to institute proceedings for damages against the adulterer: *Viviers v Kilian* 1927

KORSAH JA

AD 449; *Faulds v Smith* 1950 (1) SA 1 (A). It was conceded that the adulterer was liable to pay damages only if he or she knew, at the time of the intercourse, of the marital status of his or her partner. See *Forrester v Forrester* 1963 SC 662 wherein LORD JOHNSTON in his opinion approved of the following passage by LORD ALDERSON in *Heggie v Heggie* [1917] 2 SLT 246:

> "I think it is essential that before a co-defender can be penalised . . . in expenses . . . it must be established that he was aware when he misconducted himself with the woman that she was a married woman. The underlying principle whereby the court penalises a co-defender . . . is just this - that he knew when he was having connexion with the woman that he was probably wronging a husband. . ."

The same applies to a woman who had knowledge at the time she was having intercourse with a man that she was probably wronging a wife.

The narrow issues in this case are therefore: (1) whether the appellant was cognisant of the marital status of Dumisani Sithole at any time during the course of their adulterous relationship; and (2) the *quantum* of damages, if any.

At the relevant period the respondent's husband was the Inspector-in-Charge of Wedza Police Station. Wedza, as a growth point, had a small community. In a small community, such as Wedza was, it was well-nigh impossible for the inhabitants not to know much about each other and who was married to whom. Besides, the housing policy for the police at Wedza was to allocate married quarters to couples who had valid marriage certificates and single quarters to those members who were unmarried. The respondent and her husband resided in married quarters. Their matrimonial home was no more than two hundred metres from the Police Station.

From 1983 to 1984 the respondent was a teacher at Chemhanze School. She transferred to Maruta School from January 1985 to March 1986. Both schools were within walking distance of the matrimonial home and her children attended these schools. She left in April 1986 to train as a nurse at St. Mary's Hospital, leaving behind her three children, the youngest of whom was one-and-a-half years old, with a maid in the matrimonial home. During her training as a nurse she was entitled to one-and-a-half days off every week, during which period she returned to the matrimonial home to spend it with the children. On some occasions when she was on duty the hospital vehicle in which she was a passenger would refuel at the Police Station. She took the

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opportunity at such times to visit her husband.

KORSAH JA

In September 1986 the appellant, a woman constable, was transferred from Beatrice Police Station to Wedza. On the instructions of the respondent's husband, the appellant was allocated single quarters inside the Police Camp and moved from the District Administration Camp, where she was staying, to occupy the allocated quarters in the Police Camp. She testified that after a stay of about two months at the Police Camp the respondent's husband started making love overtures to her, intimating that he wanted to marry her so as to have someone to look after his children. In the end she consented to the Inspector's proposals and she commenced a love affair with him in ignorance of the marital status of the Inspector; and that in December 1986 she moved to live with the Inspector in his house, but left all of her belongings in the single quarters allocated to her. She terminated her residence at the Inspector's house in December 1987, because of persistent pestering by the various girlfriends of the Inspector.

The respondent, meanwhile, was, during December 1986 to December 1987, still returning to the matrimonial home on her days off and, on the occasions when she was on duty and the Hospital vehicle refuelled at Wedza Police Station, visited her husband at his office and saw the appellant at the Station. On those visits the appellant saw the respondent with her husband. The respondent further testified that her husband had bought a trench coat for her from the appellant; and that in December 1986 she boarded a bus together with the appellant at Wedza Police Camp bus stop. The bus was full and, in accord with disciplinary practice in the Police Force, the appellant offered her seat to the respondent, as her senior officer's wife, addressing the respondent as Mrs Sithole. This the appellant denies.

The respondent's mother, Phillis Siwela, elaborated on the bus ride during which the appellant offered her seat to the respondent. She said the appellant initially took a zhanje fruit which she offered to the respondent's daughter, commenting that similar fruit from her area were much sweeter. She said when they boarded the bus she heard the appellant say: "Mrs Sithole, come and sit on this seat", and that they could not sit whilst in uniform.

Phillis Siwela testified that on one occasion, as she was approaching the respondent's matrimonial home, she saw the appellant clambering over the fence, wearing a wrap-over and holding a white paper bag, and that the appellant had removed some of the respondent's underwear from the house. Until this incident she did not know what was happening in the matrimonial home during the absence of her daughter. It is, to say the least, odd for the appellant, who had claimed to be living in the home of the Inspector for about a year, to make her

KORSAH JA

exit from the premises by climbing over the fence instead of using the gate. Why resort to this furtive manner of egress unless there existed the knowledge that the Inspector was forbidden

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fruit?

It seems to me that if the appellant genuinely believed Inspector Sithole was unmarried when she alleges she was cohabitating with him from December 1986 to December 1987, she would have moved her possessions, or some of them, from the single quarters she occupied into the Inspector's residence. The very fact that the respondent returned to the matrimonial home on her days off to see her children, but discovered no evidence of the appellant's sojourn in the matrimonial home during those visits over a period of one year, suggests that the love affair between the appellant and the Inspector was of a clandestine nature. The first reason which springs to mind as to why two adults of independent means should carry on such a clandestine love affair is that the parties must know that one is, or both of them are, married.

In any case, there were other police officers who were working with the respondent's husband before the appellant was transferred to Wedza Police Station. Some were senior to the appellant and others were junior to her. The Inspector was occupying married quarters and had a maid and three children staying in his house. This should have put any ordinary woman, let alone a policewoman, on her inquiry. Had the appellant been minded to ascertain the true marital status of the Inspector-in-Charge of Wedza Police Station, there were sources both within the Station and without from which such information could have been gleaned in her two months at the Station before the commencement of the adulterous relationship. Her story that she carried on a love affair with the Inspector-in-Charge of Wedza Police Station, under whom she served, for a whole year, in such a small community, and remained oblivious of his marital status during the whole of that period, is highly improbable and not susceptible of belief. Regard being had to the evidence and all the circumstances, she must have known when she was having connexion with the Inspector-in-Charge of Wedza Police Station that she was probably wronging a wife.

The appellant's own witness, Sergeant Chikadayo, who was stationed at Wedza Police Station from 1982 to 1989, testified that, like the appellant, he occupied bachelor's quarters at the Station and that the appellant's residence was a mere one hundred metres from his. He did not know that there was a love affair between the appellant and the Inspector-in-Charge and was unaware that the appellant at any time left her premises to reside at the house of the Inspector-in-Charge. He also said that from 1986 to 1989 he used to see the respondent at

Wedza on the occasions that she came to visit her husband. This evidence is confirmatory of the clandestine nature of the relationship between the appellant and the respondent's husband, and supportive of the inference that the appellant was mindful of the marital status of the respondent's husband when she had connexion with him.

Three other incidents are illustrative of the appellant's knowledge of the marital status of the respondent's husband and her intention to break up the marriage at all costs:

The first is that at about 2 am, on a date not specified in 1988, the appellant entered the residence of the respondent and invaded the privacy of the bedroom in which the respondent

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and her husband were sleeping. She told the respondent to get out of the house and that she was going to sleep on the bed herself. In the morning, the respondent's husband expelled the appellant from the room and dispossessed her of the bedroom key which the appellant had seized. Even if, as she believed, the respondent and her husband were estranged, they were still married and that was no excuse to invade the matrimonial home and attempt to oust the respondent therefrom.

On another occasion the appellant pulled the respondent out of a Police vehicle which she had boarded with her husband and prevented the respondent from travelling on the vehicle because, she said, the vehicle belonged to the Ministry of Home Affairs and not the Ministry of Health and the respondent was not entitled to ride in it.

On yet another night, the appellant went to the matrimonial home of the respondent, broke several windows and forced her way into the house. She had with her a trunk. She removed the blankets covering the respondent and threw them outside.

The evidence is overwhelming that the appellant knew of the marital status of the respondent's husband and still persisted in having an adulterous association with him in spite of such knowledge.

As regards the appellant's claim in reconvention, both the respondent and her mother denied laying a finger on the appellant at Wedza Police Station. The respondent pointed to the many occasions when she had, in spite of extreme provocation from the appellant, desisted from assaulting her as evidence of the improbability of such behaviour on her (the respondent's) part in the absence of any provocation. Sergeant Chikadayo, whom the appellant called as a

witness to the alleged assault, said he did not see either the respondent or her mother assaulting the appellant. He only saw her crying. Neither the Inspector-in-Charge of Wedza, in whose office and presence the assault was alleged to have taken place, nor Inspector Gumbo, who was said to be present at the material time, were called to support the allegation of assault against the respondent. It seems to me that, in the circumstances, the inference by the learned trial magistrate that the appellant was more upset by Mr Sithole siding with his wife against her, more especially in her late stage of pregnancy, that made the appellant break down and cry is the proper one to draw.

The damages which the respondent claimed were in respect of loss of *consortium*, and *contumelia*. The loss of consortium is in respect of the "love, companionship, sexual privileges and assistance in good and evil days which spouses are entitled to expect from each other" - see Hahlo *The South African Law of Husband and Wife* 5 ed at p 145. And *contumelia* refers to the infringement of the respondent's right to privacy, dignity and reputation.

While it is accepted that any intentional assault on *consortium* may entitle the injured spouse to a claim for damages, the question will always remain - if the spouse is so entitled: how much?

In the present case, the appellant's attack on the *consortium* is alleged to have resulted in

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emotional distress. There is no reason to doubt that the appellant's adulterous association with the respondent's husband caused her great emotional distress. However, the allegation that it also resulted in the respondent suffering a mental break-down is unsupported by medical proof and should have been ignored by the trial court in its assessment of damages, which it does not appear to have done.

Another consideration which the trial court appears to have overlooked in its assessment of the damages awarded is that, as the respondent condoned her husband's adultery, there was no great loss of consortium. See *Bruwer v Joubert* 1966 (3) SA 334 (A). Loss of consortium being the main element in the estimation of damages - see *Biccard v Biccard & Anor* 9 SC 473 at p 476 - the *quantum* of damages in such cases must be commensurate with the measure of that loss. There was also unrebutted evidence that the respondent's husband was in the habit of indulging himself with various women before and around the same time that his adulterous association with the appellant was in progress. It could not be claimed that in such circumstance he was a great prize either as a consort or companion: *Diemer v Solomon* 1982 (4) SA 13 (C) at 15E-F.

KORSAH JA

I accept that the appellant by her actions infringed the respondent's right to privacy, dignity and reputation. But, in my view, the trial court misdirected itself in its assessment of damages by overlooking the all important fact that the marriage still subsists, and that the appellant's intrusion was not an unusual and disturbing element to the stability of the union between the respondent and her husband. This court is, therefore, at large to consider the question of damages afresh, taking into account the factors considered above. Thus viewed, there remains only the claim for sentimental damages due to the injury or *contumelia* inflicted upon the respondent by the appellant. Having regard to the known proclivity of the respondent's husband to indulge in extra-marital intercourse, her emotional distress resulting from her husband's and the appellant's behaviour, though severe, was not entirely unexpected.

The present case is, to my mind, clearly distinguishable from the case of *Katsumbe v Buyanga* 1991 (2) ZLR 256 (H). Generally speaking, there was in the instant case none of the pathos attendant to the circumstances in the *Katsumbe case , supra*,. There was none of the abuse of position, friendship and trust, with an admixture of deception, lies and threats from the appellant, which constituted such telling aggravating features in the *Katsumbe* case *supra*.

A closer examination of the facts of the two cases shows that in the *Katsumbe case , supra*, the defendant initiated the adulterous relationship. He did so by coercion, lies and threats. He shamelessly abused the friendship and trust of the plaintiff. In the instant case, the appellant, who was the defendant in the court below, did not initiate the adulterous relationship - the instigator was the respondent's husband. The appellant did not have to tell lies or abuse her position or coerce the respondent's husband into commencing an adulterous association with her. Vile as the adulterous relationship was to the respondent, judging by the husband's track record, the possibility of it occurring could not have been wholly unexpected, and the trauma from knowledge of the affair was thus not so severe. While I am of the view that the award of damages of $3 000 for adultery by ROBINSON J in the *Katsumbe case , supra*, cannot be

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faulted, the facts of the present case do not permit of the appellant being penalised in damages of an equal amount, for the reasons already stated.

Reith v Antao 1991 (2) ZLR 317 (S), where McNALLY JA reduced an award of $10 000 damages for adultery to a mere $700, can also be distinguished from the present case. In that case, the marriage had for all practical purposes irretrievably broken down and the parties had, for that reason, been separated for some time before the adulterous union commenced. In the present appeal, the marriage still subsists and the respondent and her husband were living

together as man and wife. The danger was imminent that the assault on the consortium would result in an irreparable break-down of the marriage. The appellant, despite knowledge of the fact that the respondent and her husband lived together as man and wife, laid siege to the matrimonial home. The facts of this case make the injury to the respondent fall somewhere between the *Katsumbe* case *supra* and the *Antao* case *supra*. In my view, the assessment of damages for adultery must depend upon the peculiar facts of each case, and sums awarded in other cases must only be considered as guides to the assessment of damages in other cases, and not to be followed blindly whatever the circumstances. In my view, no more than $1 500 should have been awarded as damages for adultery in the instant case.

In the result, while upholding the decision of the trial court in all other respects, I would amend the order awarding damages to the respondent by the substitution of the figure of $1 500 for the figure of $3 000.

To that extent, the appeal is allowed with costs.

Gubbay CJ: I agree.

Manyarara JA: I agree.

Mugabe, Mutezo & Partners, appellant's legal practitioners

IN RE E T & ORS 1992 (1) ZLR 300 (HC)

Court **High Court, Harare**

Adam J

Review

6 May 1992

Flynote

Family law - child in need of care - Children's Protection and Adoption Act [Chapter 33] - placement of child -

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record of proceedings

Headnote

When a court finds that a child is in need of care, it may proceed in terms of para (i) or (ii) of s 21(1) of the Children's Protection and Adoption Act. Under (i) it places the child in a certified institution and must first consult the Director of Social Welfare and must establish that the institution will accept him. Under (ii) it places the child in the care of a named person in her capacity as head of an institution, but it must first establish that she is suitable, and if the named official resigns or dies, another person will then have to be appointed by the court.

In terms of s 28 of the Children's Protection and Adoption Act a proper record of the proceedings of this enquiry must be forwarded to the High Court. A record of proceedings has the same meaning as in s 63 of the Magistrates Court Act [*Chapter 18*], namely a transcript of shorthand notes or mechanical recording or the magistrate's manuscript notes of the proceedings. A synopsis of the notes is insufficient.

Case cited:

In re *Orders Made By the Juvenile Court Under Part II of the Children's Protection and Adoption Act* HH-224-91

Judgment

Adam J: The Provincial Magistrate in terms of s 28 of the Children's Protection and Adoption Act has forwarded certain documents which also included an Order dated 2 August 1991 to the effect that he "was satisfied that

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ADAM J

E T is a child in need of care and that E T be placed in the care and custody of Ms Stella Marere in her capacity as Matron of Chinyaradzo Children's Home, Harare in accordance with the provisions of section 21(1)(a)(ii) of that Act." Also amongst those documents submitted is, in the words of the Provincial Magistrate "a synopsis of the notes at the inquiry" and which is as follows:

"In the Juvenile Court - Mashonaland East

Held at Marondera

In the matter of:

* Inquiry to determine whether a minor child is in need of care

* Review of order

(* Delete inapplicable)

Name of Minor Child ET

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Before Provincial Magistrate

Probation Officer W Shamuyarira

Other interested person Nil

Probation Officers Report : Exhibit 1

By Court

Order in terms of the draft recommendations in the report, Exhibit 1

Magistrate _____ Date 7/10/91"

In that Act s 28(1) is as follows:

> "(1) Whenever a juvenile court makes an order in terms of subsection (1), (2) or (3) of section *twenty-one* or subsection (3) of section *twenty-six,* the officer who presided over such court shall cause to be forwarded to the registrar of the High Court not later than seven days after making of such order, the record of proceedings in the matter together with such report, if any, as he may wish to append."

With those documents a report was attached by the Provincial Magistrate.

Now in the matter of In re *Orders Made By The Juvenile Court Under Part II of The Children's Protection and Adoption Act* HH-224-91 ROBINSON J considered the provisions of s 21 of the Act. I agree with him that when a juvenile court is making an order under s 21(a)(i) - as opposed to making an order under s 21(a)(ii) - before it does so, the court (after holding an inquiry in terms of s 20) must be satisfied, as the particular words of s 21(1)(a)(i) requires, that the certified institution will accept the child or young person. As pointed out by ROBINSON J this usually (when provisions of s 24 are taken into account) takes the form of a written authority from a deputy appointed by the

ADAM J

Director of Social Affairs, Youth and Rehabilitation. It is clear from s 24 that its provisions relate to a placement in a certified institution or training institute and in specific terms provides that the juvenile court which makes an order under s 21(1)(a)(i) or s 21(1)(a)(vi) shall order that a child or young person shall be placed in the specific certified institution or training institute selected by the juvenile court after consulting the Director of Social Affairs, Youth and Rehabilitation or such person appointed as his deputy.

On the other hand an order made in terms of s 21(1)(a)(ii) merely provides that a child or young person shall be placed in, returned to or remain in the custody of any suitable person named in the order. This means, as ROBINSON J correctly observed, that it is essential that the presiding officer determine that the person with whom the child or young person is being placed be suitable. Under s 21(1)(a)(ii) it is suitability of the person that is at issue. It follows, therefore, in my view, that this does not preclude a juvenile court making an order in the form that the child, under s 21(1)(a)(ii), be placed in, returned to, or remain in the custody of "the Director" of such and such Children's Home or of "Ms Stella Marere in her capacity as Matron of Chinyaradzo Children's Home", as long as the presiding officer has properly determined that the

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person who happens to be "the Director" of that Children's Home or is "the Matron of Chinyaradzo Children's Home" is a suitable person. If orders are made in that form it must be realised that when "the Director" or "the Matron" retires, resigns, dies or is otherwise indisposed, another suitable person has to be appointed.

In the present matter the probation officer's report recommends that ET be found to be a child in need of care and that he be placed in the care and custody of Ms Marere in her capacity as Matron of Chinyaradzo Children's Home in terms of s 21(1)(a)(ii). This meant that when the order was made by the juvenile court it had determined that Ms Stella Marere in her capacity as Matron of Chinyaradzo Children's Home was a suitable person. Further, it is abundantly clear that ET was not being placed in a certified institution under s 21(1)(a)(i). This appears from the fact that there was nothing before that court to disclose that the juvenile court consulted the Director of Social Affairs, Youth and Rehabilitation or a deputy appointed by him. Also, there was no written authority that a certified institution had accepted E T's placement. In addition there was nothing in the papers before this court that Chinyaradzo Children's Home is a certified institution in terms of s 31(1) of the Act.

Reverting to the papers submitted to this court, s 28 requires the record of the proceedings to be forwarded and this pertains to the inquiry under s 20 and the

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ADAM J

determination and exercise of the juvenile court's powers under s 21. On this question consideration should be given to the requirements under s 63 of the Magistrates Court Act which mandates that when the magistrates court sentences any person to imprisonment exceeding 6 months or to pay a fine exceeding $500 the clerk of the court must forward to the registrar of the High Court not later than one week the record of the proceedings, with the proviso that where any evidence has been taken in shorthand writing or recorded by mechanical means, the manuscript notes of the proceedings made by the magistrate would constitute sufficient compliance.

From the foregoing the so-called "synopsis of the notes at the inquiry" which incidentally does not even record when the inquiry was held under s 20, cannot by any stretch of imagination be regarded as a record of proceedings.

Accordingly, in terms of s 28(2) of the Children's Protection and Adoption Act, the proceedings in all these matters before the Provincial Magistrate are set aside and remitted to him so that he may carry out an inquiry in terms of s 20, exercise his powers under s 21 and in due course forward a proper record of proceedings of such inquiry in terms of s 28 of the Act.

CHAIRMAN OF THE PUBLIC SERVICE COMMISSION & ANOR v MARUMAHOKO 1992 (1) ZLR 304 (SC)

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Editor's Note:(5)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

McNally JA, Manyarara JA & Ebrahim JA

Civil appeal

27 February & 12 May 1992

Flynote

Constitutional Law - Public Services (Officers) (Misconduct and Discharge) Regulations 1986 - whether constitutional right to legal representation exists and whether prohibition of such right in regulations unconstitutional - whether regulations prohibiting the making of representations about the penalty constitutional

Administrative Law - Public Services (Officers) (Misconduct and Discharge) Regulations - proper formulation of charge - when real dispute of fact requiring an enquiry - whether oral hearing of witnesses a requirement of fair hearing - whether tribunal under obligation to give reasons

Headnote

The respondent, a senior officer in the Central Mechanical Equipment Department, had acquired a vehicle directly from the factory and had resold it for a substantial profit. At the time he did this this sale at a profit was not illegal due to a loophole in the law. The officer was charged with misconduct arising out of this transaction. It was not made clear to him that the more serious aspect of the complaint against him was the possible abuse of authority in acquiring the vehicle, rather than the sale at a profit.

In misconduct proceedings, care must be taken in formulating the charge so that the officer is properly informed as to the nature and extent of the offence with which he is being charged. A disciplinary tribunal does not have to possess the same legal skills as a court of law, but the charge must be sufficiently clear to enable the officer to know the charge against him and to make a meaningful reply thereto. The charge must not mislead him as

to what is considered the misconduct. As the charge had not been clearly formulated in the present case, and this lack of clarity had led the disciplinary tribunal to take its decision on an irrational basis, the case was remitted for the charge to be reworded and put afresh and the disciplinary tribunal to proceed to determine the issue in the light of the officer's written reply to it.

On the aspect of sentence in disciplinary cases conducted by the Public Service Commission the appeal court pointed out:

1. The abolition in the disciplinary regulations governing such cases of an officer's right to make representations in mitigation ruled out further evidence and made it difficult for the disciplinary tribunal to be fair in sentencing an officer. Where the tribunal was satisfied about the guilt of an officer without the need for an enquiry, it may still be

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forced to hold an enquiry to determine the extent of guilt and thus the appropriate penalty. If sentence was imposed without holding such an enquiry, the sentence imposed might be open to attack on the basis of irrationality because of its failure to hear evidence in mitigation.

2. A person's state of mind is a question of fact and where his state of mind is material to the question of punishment, any real dispute on it requires an enquiry. The Public Service Commission may, however, properly decline to hold such an enquiry where any dispute is illusory as, for example, where the evidence is so clear that nothing the officer can say will change its view.

With reference to the judgment of the court a *quo* reported as *Marumahoko v Chairman, Public Service Commission & Anor* 1991 (1) ZLR 27 (H) the appeal court made these comments:

1. Whether there is a constitutional right to legal representation has still to be ruled on in a relevant case after argument. However, in the light of the observations made in various judgments, it would be advisable for the Public Service Commission to seek legal advice whether the prohibition in the regulations of legal representation is ultra vires the Constitution.

2. It was not necessary to rule on the constitutionality of the provision in the regulations prohibiting an officer from making representations concerning the penalty to be imposed.

3. The Supreme Court had ruled in other cases that an oral hearing of witnesses is not always required for a fair hearing. The dicta in the court below in this case regarding the need for an oral hearing in the present case should not be taken as laying down a new law conflicting with the ruling of the Supreme Court.

4. Regarding whether a tribunal has to give reasons for its decision the

McNALLY JA

Supreme Court approved the decisions on this question in *Public Services Board of New South Wales v Osmond* [1987] LRC (Const) 681 and *Berlin Motors v Kotze NO* 1992 (1) SA 505 (W)

Cases cited:

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

PSC & Anor v Tsomondo 1988 (1) ZLR 427 (S)

Chrmn, PSC & Anor v Gwisai S-188-91 (unreported)

PSC & Anor v Mutsonziwa S-40-89 (unreported)

Zimbabwe Bonded Fibreglass v Peech 1987 (2) ZLR 338 (S)

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Sec for Tpt & Anor v Makwavarara 1991 (1) ZLR 18 (S)

R v Deputy Industrial Injuries Comr, Ex p Moore [1965] 1 All ER 81 (CA)

Sec of State for Education & Science v Metropolitan Borough of Tameside [1976] 3 All ER 665 (CA)

Chrmn, PSC & Ors v Hall S-49-89 (unreported)

Metsola v Chrmn, PSC & Anor 1989 (3) ZLR 147 (S)

Sibanda v Law Soc of Zimbabwe S-162-91 (unreported)

Davies v Chrmn, Cttee of the Johannesburg Stock Exchange 1991 (4) SA 43 (W)

PSB of New South Wales v O*smond* [1987] LRC (Const) 681

Berlin Motors v Kotze NO & Anor 1992 (1) SA 505 (W)

Min of Labour & Ors v PEN Tpt (Pvt) Ltd 1989 (1) ZLR 293 (S)

Rimayi v Min of National Supplies & Anor S-86-90 (unreported)

A P de Bourbon SC for the first appellant

B Q P Simelane for the second appellant

E Chatikobo for the respondent

Judgment

McNally JA: This is a case arising out of the investigations of the Sandura Commission of Enquiry. The principal parties are the first appellant, to whom I will refer as "the Commission", and the respondent, whom I will call "the officer".

The officer was employed as a Senior Administrative Officer in the Central Mechanical Equipment Department (CMED) which is part of the Ministry for which the second appellant is responsible. In the light of the report of the

McNALLY JA

Sandura Commission, the Commission instituted disciplinary proceedings against the officer in terms of the relevant regulations to be found in SIs 161/86 and 111/88 (now repealed by SI 65/92).

The charge was that the officer had contravened paras 7 and 24 of the First Schedule to the Regulations. The charge, dated 5 October 1989, was particularised as follows:

> ". . . in that being a Senior Administrative Officer in the Central Mechanical Equipment Department, you acquired directly from Leyland (Zimbabwe) a vehicle being a Nissan P G 720 Pick-Up Truck for $22 087,20 and resold it at

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a much higher profit of $55 000".

It is perhaps relevant to say that there are twenty-five paragraphs in the First Schedule to the Regulations which set out various forms of conduct which are characterised as "Acts of Misconduct". Paragraph 7 reads:

"Unbecoming or indecorous behaviour, including the consumption of intoxicating liquor or drugs to excess, at any time or place in any manner or circumstances likely to bring the Public Service or any part thereof into disrespect or disrepute."

Paragraph 24 reads:

"Any act or omission which is inconsistent with or prejudicial to the discharge of official duties, including the abuse of authority. "

The officer was invited to reply to the charge and to scrutinize the evidence that would be used to substantiate the charge. It is not apparent whether he used the opportunity to scrutinize the evidence, but he did lodge a statement in reply to the charge. He admitted buying the vehicle at the price alleged and selling it for $50 000. The difference of $5 000 is not significant. His defence was:

a. That he did not buy it for the purpose of resale;

b. That the resale was not unlawful because the price was uncontrolled.

The Commission without further ado found him guilty, and forthwith sentenced him to be discharged from the Service without pay or allowance for the period he had been suspended.

1992 (1) ZLR p308

McNALLY JA

The officer took this order on review before the High Court and on 19 December 1990 he succeeded. The Commission's finding and its order were set aside. The Commission and the Minister now appeal.

The initial notice of appeal contained invalid grounds of appeal, but no objection has been taken to the amended grounds of appeal lodged on 25 January 1991.

However before dealing with the grounds of appeal it is necessary to look at the charge as particularised. It seems to me that it is misleading and flawed in several respects. In fact it seems clear that the officer was completely misled by it, so much so that he did not deal in his submissions to the High Court and to this court, with a major, if not the major aspect of the charge against him.

This is precisely the point made by LORD DENNING in *Kanda v Government of Malaya* [1962] AC 322 where he said:

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

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I would elaborate the deficiencies in the charge as follows:

1. It is not made clear whether the first part of the charge is regarded as constituting in itself an act of misconduct, or whether that first part is merely introductory to the charge of what one might call profiteering.

   In other words, is it alleged to have been an act of misconduct (abuse of authority under para 24?) that he used his position in the Service to acquire a vehicle direct from Leyland (Zimbabwe) irrespective of whether or not he resold it? If so, should the word "wrongfully" not have been used before "acquired" in the charge?

2. Is it alleged that he purchased the vehicle with the intention of reselling it at a profit, or is it to be understood that, whatever his intention, the mere fact of selling it at a large profit was an act of misconduct (unbecoming behaviour likely to bring the Public Service into disrespect or disrepute under para 7?)

McNALLY JA

It is clear from the affidavit of the Chairman of the Commission that the acquiring of the vehicle was in itself regarded as an act of misconduct. That being so, my third criticism would be:

3. The particulars of the charges should have been more clearly related to the paragraphs allegedly contravened. Thus it would have made the nature of the accusations clearer if it had been alleged, for example, that the officer was guilty of "abuse of authority in contravention of para 24 alternatively behaviour likely to bring the Public Service into disrespect in contravention of para 7 in that he wrongfully (or in contravention of written/tacit instructions) used his position as Senior Administrative Officer in the CMED to acquire direct . . ." The next charge would then be that he was guilty of "unbecoming behaviour in contravention of para 7 in that having acquired the vehicle aforesaid at a price of $22 087,20 he resold it at a price of $55 000".

I do not want it to be thought that I am proposing the above formulation of the charge. That is not my function. What I am saying is that a charge so formulated would have been clearer. I have made the point before (*Public Service Commission & Another v Tsomondo* 1988 (1) ZLR 427 (S) at 440F) that:

> ". . . if an officer is given a right to reply to an allegation of misconduct . . .he is entitled to be informed of the allegation against him in a fashion sufficiently detailed to enable him to make a meaningful reply."

In this case the officer did not make any reply at all to the allegation (if that was the allegation) that he (wrongfully) acquired the vehicle. Indeed he did not seem to appreciate that that was part of the charge, because he blithely stated that he had done the same thing several times before, and he admitted doing so on this occasion. However, he did not admit that he had abused his authority in so doing.

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It is significant also that the findings of the Sandura Commission, as relied upon by the Commission, do not deal at all with the question whether or not it was wrong for the officer to purchase the vehicle They are concerned with the rights and wrongs of his selling of the vehicle. So, as far as one can judge from the record, none of the evidence proffered by the Commission dealt with the wrongfulness of purchasing the vehicle. This could only have the effect of strengthening the belief of the officer that he had to defend himself against charge of selling the vehicle at a profit.

McNALLY JA

Where is the evidence that he had no right to purchase a vehicle direct from Leyland (Zimbabwe)?

Had the officer understood that he was being accused of abuse of his position in wrongfully **purchasing** the vehicle, he might (I do not know) have been able to point to departmental instructions governing the practice, or to a course of conduct by his superiors or colleagues which led him to believe that such conduct was acceptable. However, in the event, his defence was summarised by him in the following terms:

> "In the light of the above I do not believe there is sufficient evidence to show that I purchased the vehicle for resale at a profit, such alleged conduct forming the basis of the charge against me".

Now, the fact is that the Commission did not believe him when he said he did not buy the vehicle for the purpose of resale at a profit. This raises the issue whether they were entitled to disbelieve him without allowing him a hearing. But before that issue even arises, we must determine whether or not the obscurity of the charge was a fatal defect.

I would have thought that the more serious aspect of this charge was the buying of the vehicle rather than the selling of it. It is in the buying that abuse of authority would seem to arise. Once he has misused his position to acquire a valuable asset, then the speed at which he sells it is a matter more of mitigation or aggravation than anything else. For all I know it may be permitted (or tacitly condoned) that officers in his position may purchase vehicles for themselves in this way provided they undertake to retain the vehicle for a certain period. It might be surprising if that were the position, but there is simply no evidence on the point. The officer did not deal with this aspect, and his failure to do so arises directly from the Commission's failure to make it clear what he was being charged with. Moreover, the Commission failed to lead evidence that the purchase of cars direct from Leyland (Zimbabwe) by public servants is prohibited.

If this were a criminal matter the court would simply set aside the conviction and leave it to the Attorney-General to decide whether to re-indict on a properly worded charge. But the court does not expect the same legal skills of a disciplinary tribunal that it demands of a court of law. The overriding criterion is fairness.

It seems to me that the criterion of fairness can be met in this case by giving the

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McNALLY JA

Commission an opportunity to produce evidence and by giving the officer a proper opportunity to reply to the charge that his action in purchasing the vehicle direct from Leyland (Zimbabwe) was in itself a wrongful act amounting to abuse of authority. In the light of his reply on that aspect of the charge the Commission should proceed afresh to determine whether he is guilty or not guilty of the charge, or whether an inquiry should be held.

Before remitting the matter it is perhaps desirable to set out certain guidelines for the Commission. I will deal with three matters.

1. Particularity of the Charge

It will be apparent from what has been said in this judgment that more care should be taken in the formulation of charges. This case is a good example of a situation where the officer understandably did not seem to realise the extent of the offence with which he was charged. As a result he defended himself only against one aspect of the charge and was misled into ignoring the other (and probably more important) aspect.

2. Mitigation and Penalty

The amendment of s 19(3) of the Regulations by s 5 of SI 111 of 1988 has made it difficult for the Commission to be fair to an officer who has been found guilty of misconduct. Previously there was a right to make representations in mitigation. Now that has been abolished. (It apparently remains abolished in the new regulations, SI 65/92).

The difficulty created is this. The Commission may correctly decide that the guilt of the officer is clearly established without the need for an inquiry. In many cases, however, of which *Chairman, Public Service Commission & Anor v Gwisai* S-188-91 is an example, the extent of that guilt may be impossible to determine without further evidence or an inquiry. Therefore it will be impossible to determine what penalty is appropriate, without further information. Since the amended s 19(3)(a) seems to be intended to rule out further evidence or representations, the Commission may be forced to hold an inquiry, even when the guilt of the officer is established, in order to determine the extent of that guilt and thus to assess the appropriate penalty. Otherwise it runs the risk of imposing an irrational penalty.

For the avoidance of confusion I should add that I am aware that *Gwisai, supra*, was a case in which the guilt of the officer was not established. But the point was made that even if guilt had been established, the seriousness of the offence would have been impossible to establish without inquiry.

McNALLY JA

3. What is a material dispute of fact for the purposes of s 7 of the Regulations?

This court has already attempted to provide guidelines - see *Public Service Commission & Anor v Tsomondo , supra*, at 441D-E and the elaboration thereon in

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Public Service Commission & Anor v Mutsonziwa S-40-89 at p 8. Both cases follow the general criteria laid down in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) at pp 339-340.

In the light of the events in the present case it is as well to add that a man's state of mind is a question of fact. Where it is material, either to the question of guilt or to the question of punishment, to determine the state of his mind, then the state of his mind is a material question of fact. And where that state of mind is in dispute (real and not illusory or fanciful dispute) then an inquiry is necessary.

In the present case the officer has contended that his state of mind (ie the intent with which he bought the vehicle) was material and in dispute. I must say that I am not convinced of the validity of either contention.

As to materiality, if on consideration of his further submissions it transpires that the real *gravamen* of his offence is the abuse of authority in **purchasing** the vehicle, then that offence is serious, and is aggravated by his selling it at an enormous profit. Whether he bought it deliberately in order to make a profit, or whether his attitude was "if it is not suitable I will sell it at an enormous profit and apply for another Sunny" (which he did), makes to my mind very little difference.

If, on the other hand, his further submissions establish that it was, either expressly or by tacit consent, accepted practice that officers in his situation were permitted to purchase vehicles direct from Leyland (Zimbabwe), then the seriousness of the offence is very considerably reduced. If there is no misconduct in purchasing the vehicle, it is hard to see what was wrong in selling it at what was, no doubt because of an oversight in the Regulation, a lawful price. So again his state of mind is not material.

Whether or not there is a real, as opposed to an illusory, dispute of fact is another and more difficult question. The officer contends that he did not buy the vehicle for the purpose of resale at a profit. The Commission says he did.

On the face of it there is a dispute. The Commission says in effect it is an illusory dispute. Its contention is that all the circumstantial evidence supports its

conclusion. In addition it points to the Sandura Commission report. That body had before it all the witnesses involved in the officer's purchase and sale of the pick-up truck, including the officer himself. He was found by the Commission to be a liar. The factual basis for this finding was given. He said he had kept the vehicle for several weeks, and was unable to explain the discrepancy when he was shown that the cheque he was paid was dated six days after he had taken delivery of the vehicle. The Commission was relying, therefore, not simply on the opinion of the Sandura Commission, but on the facts found by that Commission on which it based its opinion.

As KORSAH JA said in Secretary for *Transport & Anor v Makwavarara* 1991 (1) ZLR 18 (S) at

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23B:

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

See also the passage he cites from the judgment of DIPLOCK LJ in *R v Deputy Industrial Injuries Commissioner,* Ex p *Moore* [1965] 1 All ER 81 (CA) at 94E-G. I would hesitate, therefore, to say that the Commission was wrong in deciding, on all that evidence, that it was satisfied that nothing the officer could say could change their view that his intention was at all times to resell the vehicle at a profit. It has in effect categorised the dispute as an illusory one, and I would not be prepared to say that that approach was unreasonable. See *Secretary of State for Education & Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 (CA) at 671e-h.

In short, it seems to me that the proceedings in this matter have been distorted by the failure of the parties to address the real issues. The Commission framed the charge badly and failed to adduce evidence on the purchase aspect; the officer misunderstood the charge and addressed his submissions to only part of the accusation against him; and the Commission then failed to direct his attention to the aspect he overlooked and to invite him to deal with that aspect in a supplementary submission.

The approach adopted by this court has pre-empted consideration of the judgment in the High Court. That judgment ranged widely over constitutional matters and it is necessary to make some observations by way of a brief digression.

McNALLY JA

First, it must be pointed out that the right to legal representation did not arise as an issue in this case, because there was no inquiry. Section 17(2) of the regulations prohibits legal representation at an inquiry. Whether that section is *ultra vires* the Constitution is a matter as to which the Commission may wish to seek legal advice - indeed it would be surprising if it has not already done so in the light of my remarks in *Chairman, Public Service Commission & Others v Hall* S-49-89 at p 7 and subsequently the CHIEF JUSTICE'S remarks in *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at 157-158. A ruling on the matter will not be given in proceedings in which the question does not arise.

Secondly, in regard to the absence of an oral hearing, I did not understand His Lordship below to mean that he was laying down new law in this matter. But insofar as his *dicta* are in conflict with the decisions of this court in *Metsola v Chairman, Public Service Commission, supra*; *Secretary for Transport & Anor* v *Makwavarara supra*; and *Sibanda* v *Law Society of Zimbabwe* S-162-91, then those decisions of the Supreme Court must prevail. See also *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W) at 46-48.

Thirdly, in relation to the need to give reasons, counsel were agreed that the reasoning of the learned judges of the High Court of Australia in *Public Service Board of New South Wales v Osmond* [1987] LRC (Const) 681 was both sound and compelling. See also *Berlin Motors v*

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Kotze NO & Anor 1992 (1) SA 505 (W) at 508H. In any event, as *Mr Chatikobo* properly conceded, the respondent's case was not based on an allegation of prejudice arising from a failure to give reasons. No more, therefore, need be said on the subject.

Fourthly, and finally, in regard to His Lordship's suggestion that ss 91(3) and 20(1) of the Regulations are unconstitutional because they do not permit representations before a finding of guilt and the imposition of a penalty, I would refer to my comments earlier in this judgment about the problem created for the Commission by the rescinding of the provision allowing an officer an opportunity to make representations in relation to the penalty to be imposed. It seems to me, as I said, that the Commission will have to be careful if it is to avoid the allegation that its penalty is irrational in a particular case because of its failure to hear evidence in mitigation. Again, it is not necessary to go further because Mr *Chatikobo* did not support the generalised allegation of unconstitutionality.

In the result, therefore, this case has been decided on a view of the facts not previously considered. Counsel have been invited to submit written

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McNALLY JA

representations and have done so. Mr *de Bourbon* has submitted forcefully that the respondent failed to take this point as one of his grounds of review. Therefore it cannot be considered.

The need for compliance with Rule 257 has been stressed time and again. Mr *de Bourbon* pointed to decisions such as *Minister of Labour, Manpower Planning and Social Welfare & Ors v PEN Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S) and *Rimayi v Minister of National Supplies & Anor* S-86-90 at p 5. To allow the point now to be considered would, he submitted, be to reverse a line of decisions previously made, and to throw the law into confusion.

Mr *Chatikobo's* reply is that even if this court has taken a different view of the facts, its line of reasoning is entirely in accord with the grounds of review, which were based on "irrationality".

The correctness of this submission is borne out by Mr *de Bourbon's* own heads of argument. At paras 4 and 5 Mr *de Bourbon* defined his opponent's approach in the following terms:

> "What was being brought on review in the present matter was the decision finding the respondent guilty of misconduct, on the grounds that there was no evidence on a balance of probabilities to show that he was guilty as charged. And against the penalty of discharge on the ground that the misconduct was of a minor and insubstantial nature so as to not warrant the severity of the penalty imposed. It is contended that these allegations were based on the concept of unreasonableness . . .
>
> It is respectfully submitted that clearly the review was brought under the heading of 'irrationality'."

That is precisely what this court has found. There was no evidence that the purchasing of a vehicle by an official direct from Leyland (Zimbabwe) was an abuse of authority or, alternatively, unbecoming behaviour. And if there was nothing wrong with buying it, what was so wrong with selling it?

What we have done is to take the matter one crucial step further. We have identified the reason

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for the confusion. The reason lies in the lack of clarity in the charge.

Neither party addressed its mind properly to the essential question "What if anything was wrong about the purchasing of the vehicle? Was the purchase of the vehicle an act of misconduct under s 7 or s 24 or both?"

McNALLY JA

If those questions are answered negatively, then there is force in the officer's contention that his subsequent re-sale of the vehicle was not misconduct, or was minor misconduct. If these questions are answered affirmatively, then there is force in the Commission's contention that the offence is a serious one, aggravated by the re-sale. But these questions must be answered before a rational verdict can be given.

It is on this basis that we consider that the right point was taken on review and that the learned judge *a quo* came to the right conclusion insofar as he overturned the Commission's decision. However, because we have come to the same conclusion for entirely different reasons, we consider that the relief granted should be different. We consider that the proceedings and the judgment of the Commission should be set aside, but that the matter should be remitted to the Commission for further consideration. The Commission should be given leave to amend the allegation of misconduct against the officer as it sees fit and the officer should be given a further opportunity to reply in writing. Thereafter matters should proceed in terms of the regulations.

The officer was entitled to his costs in the High Court, but as far as proceedings in this court are concerned both parties have been partially successful. The Commission has achieved "another bite at the cherry" and the officer has confirmed that he was unfairly treated because the obscure wording of the misconduct allegation directed his mind away from those aspects of the allegation upon which the Commission relied in convicting and sentencing him. It will be equitable to make no order as to the costs of appeal.

Accordingly the appeal is allowed, with no order as to the costs of appeal, to the extent that the order of the High Court dated 19 December 1990 is set aside and replaced with the following order:

1. The proceedings in relation to the charge of misconduct brought against Reuben Marumahoko on 5 October 1989 are set aside.

2. Leave is given to the Chairman of the Public Service Commission and/or to the Secretary of the Ministry of the Public Service to amend the wording of the charge of misconduct, and to put the charge afresh to Reuben Marumahoko. This is to be done within two months of the date of this order.

3. Leave is given to Reuben Marumahoko to reply afresh to the said charge within the period allowed by the regulations or such longer period as may be granted him.

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McNALLY JA

4. The matter is then to proceed in terms of the regulations.

5. The costs of this application are to be borne by the Public Service Commission.

Manyarara JA: I agree

Ebrahim JA: I agree

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

Coghlan, Welsh & Guest, respondent's legal practitioners

S v MAKAHAMADZE 1992 (1) ZLR 318 (HC)

Court **High Court, Harare**

Mtambanengwe J

Criminal review

20 May 1992

Flynote

Criminal law - defeating or obstructing course of justice - when completed crime and when attempt

Headnote

An unlicensed driver was stopped by the police. He gave the particulars of his friend, the accused, as if they were his own. The police required him to produce his licence within seven days. The accused, knowing that his friend had no licence, then went to the police station and produced his own licence as if it was the licence which the police had required be produced. The police discovered the falsehood.

Held, that the accused had properly been convicted of obstructing the course of justice, rather than attempt to defeat or obstruct the course of justice. Police investigations are obstructed if they are delayed or disturbed and this had happened in the present case.

Cases cited:

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

S v Greenstein 1977 (3) SA 220 (RA)

Judgment

Mtambanengwe J: The accused was charged with the crime of "defeating or obstructing the course of justice". The facts were that on 18 October 1991 a friend of the accused was stopped by the police and found to be driving a motor vehicle without a licence and was issued with a ticket requiring him to produce his licence within 7 days. The friend, knowing that he had no driving licence, supplied the police with accused's particulars as if they pertained to himself. The accused later proceeded to St Mary's Police Station and produced his

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MTAMBANENGWE J

licence as if he was the one against whom the notice to produce the licence had been issued, but the falsehood was discovered and the accused was accordingly charged.

The accused pleaded guilty and was dealt with in terms of s 255(2)(b) of the Code. He was convicted and fined $400 or, in default of payment, 3 months' imprisonment with labour.

The propriety of the conviction for defeating or obstructing the course of justice was queried by the scrutinising regional magistrate in the following terms:

> "As accused's pretence was discovered and as there is no reason why his friend Wellington should not be prosecuted, should the charge not be attempting to defeat or obstruct the course of justice?"

The trial magistrate, in reply to the above minute, stated that from the admitted facts he was satisfied that the accused was correctly charged. A second scrutinising magistrate has sent the record for review with the following comments:

> "In this matter the accused's conduct amounts to an attempt to defeat or obstruct the course of justice. He was charged and convicted of defeating or obstructing the course of justice. My learned brother regional magistrate, who has since retired from the service, queried the propriety of the conviction.
>
> The trial magistrate is still of the view that the accused is guilty as charged. I do not agree with him because the *actus reus* element is missing. The accused merely attempted to defeat the course of justice. He did not defeat the course of justice. For authority I refer to the cases of
>
> (1) *S v Burger* 1975(2) SA 601 (C) and
>
> (2) *S v Greenstein* 1977(3) SA 220 (RA).
>
> I am therefore of the view that the accused should have been found guilty of attempting to defeat or obstruct the course of justice."

The charge reads:

> "Defeating or obstructing the course of justice:
>
> In that on the 18th October 1991 and at Harare, Wellington Dzumbunu was arrested for driving a motor vehicle

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without a driving licence and was issued with a ticket to produce his driving licence to the police within 7 days.

MTAMBANENGWE J

Joseph Makahamadze well knowing that Wellington Dzumbunu was not a holder of a driving licence and that Wellington Dzumbunu had falsely supplied Joseph Makahamadze's particulars to the Police as his own, unlawfully and with intent to defeat or obstruct the course of justice and to prevent Wellington Dzumbuni from being dealt with according to the law proceeded to St Mary's Police Station and produced his driver's licence as if he was the one against whom the ticket had been issued in consequence of which Wellington Dzumbunu was not prosecuted for driving a vehicle without a licence."

The accused was asked the following specific question by the Magistrate canvassing the essential elements of the offence:

"You know that you were cheating thereby hindering the admin(istration) of justice";

and his reply was "yes".

The first of the two cases relied on by the scrutinising regional magistrate who sent the matter up for review was referred to by MACDONALD CJ, in *Greenstein's* case. At pp 225B the learned CHIEF JUSTICE agreed with the view expressed by BAKER J where, in that case, the latter said:

"What is of importance are the principles enumerated in the cases, not the specific instances of the offence of defeating or obstructing the course of justice which I have mentioned. The law grows and develops as time passes; it does not stand still. Since the time of the Roman-Dutch writers great developments have taken place in the field of criminal law. One of the most important of these is that we today have appointed civil servants whose duty it is to investigate alleged offences; and to see to it that they are properly tried in public. The police investigate alleged offences; the docket is submitted to the Attorney-General; he decides whether or not a prosecution should be instituted. It is as equally serious to prevent an investigation from taking place as it is to attempt to influence the investigation after it has commenced, or to attempt to influence the course of a trial in order to obtain the accused's acquittal. **All three types of conduct materially amount to the undermining of the course of justice. The first - mentioned conduct, the prevention of a police investigation, amounts to a defeat of the course of justice *ab initio***. Should it transpire that an attempt at preventing the investigation of an offence has been made, the courts will not sit by idly. It is in the public interest that all suspected offences should immediately be investigated; and any person who tries

MTAMBANENGWE J

to prevent such investigation is guilty of attempting to defeat or obstruct the course of justice."

The learned CHIEF JUSTICE went on to say at 225E:

"But I would emphasize that it is not only the prevention of investigations to which the principles underlying the offence should logically apply. These should also apply to the obstruction of such investigation. As was said by BAKER J, in an earlier passage of his judgment at p 612: '

> 'Obstructing' has a less drastic meaning than 'defeating'; **and criminal proceedings are 'obstructed' if either the investigation by the police or the court proceedings themselves are prolonged or otherwise delayed or disturbed** (Hunt, *ibid*, para(a)).'"

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On the same page at 612H in *Burger's* case, BAKER J, was more specific when he stated:

> "SMITH JP concurred, *Neethling's* case is therefore authority for the proposition that if someone has reason to believe that he has committed an offence and he realizes that judicial proceedings will in the normal course of events probably, or even only possibly, be instituted against him, and he realizes that the police will open a routine investigation in order to bring the unidentified offender to justice, and he intentionally does something so as to defeat or obstruct the said investigation, then he is guilty of attempting to defeat or obstruct the course of justice - **or, as De Wet and Swanepoel put it, of obstructing the administration of justice** (*op cit* pp580-581)" (my emphasis).

I think the doubt expressed by the two regional magistrates in the present case arises from the fact that the discussion in the two cases referred to is in the context of the lesser offence of attempting to defeat or obstruct the course of justice. But the passages to which I have referred are, in my view, clear authority for the view taken by the trial magistrate that the conduct of the accused in this case amounted to an obstruction of the course of justice. In the result, I do not think the conviction should be altered. Both the conviction and sentence are accordingly confirmed.

CHIVORE v VAINONA PRIMARY SCHOOL PARENTS ASSOCIATION 1992 (1) ZLR 322 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

19 & 28 May 1992

Flynote

Statutory interpretation - effect of non-inclusion in new Act of provision contained in old Act that new Act had replaced - effect of s 15(1)(c) of Interpretation Act [Chapter 1]

Headnote

The 1979 Education Act provided for a parent body to enter into an agreement with the Minister. In terms of such an agreement the respondent had raised a levy which appellant declined to pay. That 1979 Act had been repealed by the Education Act, 1987, and the provision allowing the Minister to make such agreements was not repeated.

Held, that the Legislature had not intended to eliminate the power to raise a levy by not re-enacting the provision in the old Act because -

1. the provision to impose a levy in the old Act was superfluous, as the Minister had the power to make any arrangements regarding the control of schools not restricted by law; and
2. in terms of s 15(1)(c) of the Interpretation Act [*Chapter 1*] the repeal of any enactment

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does not affect any right already acquired or accrued under it.

Cases cited:

Hamilton Gell v White [1922] 2 KB 422 (CA)

*Browne v Inc Law Soc of Nata*l 1968 (3) SA 535 (N)

M Baera for the appellant

T Biti for the respondent

GUBBAY CJ

Gubbay CJ: The respondent, the Vainona Primary School Parents' Association, which I shall refer to as "the Association", came into existence on 28 March 1983 when, at a meeting of parents and legal guardians of pupils attending Vainona Primary Government School, a proposed written constitution was approved. In terms thereof, any parent or legal guardian of a child admitted and enrolled as a pupil of the School becomes a member of the Association, with the affairs of the Association being managed by an Executive Council consisting of twelve elected members.

Clause 8(a) of the Constitution, the content of which is relevant to this appeal, states:

> "The Association may from time to time impose levies upon its members for the purpose of providing funds to meet the reasonably anticipated commitments of the Association. The amounts of such levies shall be based on a budget presented to members and shall be approved by a two-thirds majority of members by circulated ballot. Such levy shall be payable by such members on the due date for payment and the Association may sue for and recover from any defaulting member the amount of such levy which remains unpaid after the due date."

The authority to impose levies had been granted to the Association by virtue of a written agreement entered into, in accordance with s 9A of the Education Act 1979, on 18 July 1983. The parties thereto were the Minister of Education, representing the Government of Zimbabwe, and two Executive Councillors, who had signed on behalf of the Association. It was specifically provided in Clause 5(a) that:

> "The Association shall have full power and authority:
>
> > with the approval of the majority of parents or legal guardians of pupils of the School to fix and impose levies on a per capita basis and to conclude agreements with such persons regarding the payment of such levies which will enable the Association to augment Government allocations and to meet the reasonably anticipated commitments of the Association arising out of the expenses, costs and charges likely to be incurred in giving effect to and implementing this agreement; . . ."

In conformity with its professed power the Association imposed a levy of $42 per pupil for the second and third school terms of 1987. It was this levy that the appellant, who at the time had three children attending Vainona Primary School, adamantly refused to pay He protested that the power of the

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GUBBAY CJ

Association to exact a levy had ceased on 8 June 1987 with the repeal of the Education Act 1979 by the Education Act 1987. His contention failed to impress the Association and was rejected by the magistrates court in proceedings instituted by the Association to enforce payment of the levies amounting in total to $246.

Undaunted, the appellant now comes before this court. Simply put, the argument advanced is that, as s 9A in the Education Act 1979 was not one of the sections re-enacted in the Education Act 1987 and as the current Act makes no provision for a body representing parents of pupils at a Government school to raise levies, the law-maker must have intended to invalidate the continued exercise of that right.

Section 9A reads:

> "The Minister may enter into an agreement with an association or body representing parents of pupils at any Government school providing for the respective rights, obligations, functions and duties of that association or body and of the Ministry in regard to the administration and control of that school."

I think it important to have regard to the context in which s 9A was inserted into the Education Act 1979 by the Education Amendment Act 1981. It was this latter Act which abolished community schools and made provision for such schools to revert to Government, except where the premises had already been transferred to Boards of Governors. It seems to me, therefore, that the purpose of enacting s 9A was to reassure the parents of pupils at former community schools, who had been responsible for their management and control, that they would not lose their powers completely. I say this because s 3(1) of the Education Act 1979 had previously vested power in the Minister to establish and maintain Government schools. Subject to any constraints imposed upon him by that Act or any other law (and there were none), any arrangement he made in the exercise of that power was purely a matter of policy. He was at liberty to enter into a "management agreement" with an association or body representing parents of pupils, provided by so doing he was acting within the ambit of his statutory power. Consequently, s 9A did not confer any additional powers on the Minister in relation to Government schools.

Since s 12(1) of the Education Act 1987 retains in the Minister the power to establish and maintain Government schools, it is of no significance that s 9A was not re-enacted. The Minister may continue to enter into agreements similar in

nature and scope to that concluded with the Association. If this is so, as I perceive it to be, the Legislature could not have intended that the right to impose levies, granted to a school parents' association by virtue of the Minister having acted pursuant to s 9A, would lapse with the repeal of the Education Act 1979.

But if I am wrong in the view I take of the effect of s 3(1) and its successor s 12(1), I am certain, nonetheless, that the Association may continue to raise levies under the agreement entered into

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on 18 July 1983 by dint of s 15(1)(c) of the Interpretation Act [*Chapter 1*]. The sub-section provides, *inter alia,* that the repeal of an enactment shall not affect **any right acquired or accrued** under the enactment so repealed.

It is pointed out in *Craies on Statute Law* 17 ed at p 415, that:

> "If a right has once been acquired by virtue of some statute, it will not be taken away by the repeal of the statute under which it was acquired. 'The law itself', says Pupendorf, in his *Law of Nature and Nations*, Bk 1, c 6, s 6, 'may be disannulled by the author, but the right acquired by virtue of that law whilst in force must still remain; for, together with a law, to take away all its precedent effects would be a high piece of injustice.'"

If the right has become vested by the date of the repeal, it is safeguarded. See *Hamilton Gell v White* [1922] 2 KB 422 (CA) at 431; *Browne v Incorporated Law Society of Natal* 1968 (3) SA 535 (N) at 537 G-H.

In my opinion, the agreement, which resulted from the exercise by the Minister of the power assigned to him by s 9A, vested in the Association a right to fix and impose levies upon its parent members. That right remains validly exercisable at the will and discretion of the Association until the agreement with the Minister is terminated "at the end of any calendar year . . . by not less than one month's prior notice given by either party to the other."

For these reasons I would dismiss the appeal with costs.

Judgment

Korsah J A: I agree.

Ebrahim JA: I agree.

Sawyer & Mkushi, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

MAKOVA v URBAN DEVELOPMENT CORPORATION 1992 (1) ZLR 326 (HC)

Court **High Court, Harare**

Gibson J

Civil Application

12 February & 29 May 1992

Flynote

Employment - suspension of employees - whether with or without pay

Headnote

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At common law the employer had a right to suspend an employee but only on full pay, unless the conditions of service provided for suspension without pay. The Labour Relations (General Conditions of Employment) Regulations 1985 changed the common law by giving the employer the right to choose whether the suspension was to be with or without pay. The election whether to suspend with or without pay must, however, be made by the employer at the time of the suspension and the employee must be notified of the decision. If an employee is not told of the decision to withhold pay during suspension, he is entitled to receive his pay and other benefits.

Cases cited:

Zimbabwe Sun Hotels (Pvt) Ltd v Lawn 1988 (1) ZLR 143 (S)

Myers v SA R & H 1924 AD 85

AJ Dyke for the applicant

R Fitches for the respondent

Judgment

Gibson J: The applicant was employed by the respondent, a creature of statute, as a senior administrative and personnel officer, when, on 1 March 1991, he received a letter from the respondent. The letter informed the applicant that he was suspended with immediate effect pending approval for summary discharge for refusal to obey instructions to transfer to Bulawayo: see Annexure A to the founding affidavit. The applicant attaches another

GIBSON J

letter, Annexure B, by which the respondent sought to dismiss him. This letter informed the applicant that:

> "Following your appeal to the (respondent's) board against the suspension . . . the Full . . . Board at its 33rd Ordinary Meeting . . . resolved that: '(the applicant) be dismissed from the Corporation for refusing to obey a lawful instruction from Management'."

The letter concludes with the information that the applicant is dismissed from the Corporation.

The applicant avers that he has not received any salary or remuneration of any kind since 1 March 1991. Annexure "C" to the founding affidavit is a letter written by the applicant's legal practitioners to the respondent, stating, among other things, that:

> "Our client instructs us that he has received no salary since the date of his purported suspension on 1st March, 1991. The letter purporting to suspend our client did not state that he was suspended without pay. This situation is catered for by Section 25 of your conditions of service and, again, this makes no provision for suspension without pay . . "

The applicant avers that the suspension and subsequent dismissal was contrary to law and contrary to the internal domestic regulations of the respondent.

The respondent does not deny the narration of the events that culminated in this application.

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The respondent adds only that on 3 September 1991 it wrote a letter through its legal practitioners to the labour relations officer and sought permission to dismiss the applicant: see Annexure F to the opposing affidavit. In that letter the respondent sought permission to dismiss the applicant. The response from the labour relations officer was a notification of the hearing date on 1 October 1991: see Annexure G As a result, the respondent avers, the matter is *lis pendens*, therefore this application is premature. The respondent concedes that under its conditions of service there is no power to suspend without pay but argues that it has power to do so under the Labour Relations (General) (Conditions of Employment) (Termination of Employment) Regulations 1985. The respondent avers that it still relies on the suspension of 1 March 1991 and now seeks permission to determine the contract in terms of the legal provisions that apply.

It is common cause that the respondent suspended the applicant on 1 March and,

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5 months later, on 5 August, 1991 purported to dismiss him. Subsequently, on 3 September 1991 the respondent then approached the labour relations officer for permission to do so in terms of the law.

The applicant's submission is that the respondent's purported dismissal of applicant and his previous suspension were unlawful in that s 3 of the Regulations requires an employer to make application immediately for the dismissal of a suspended employee to a labour relations officer.

The applicant further submitted that whilst respondent eventually made application for the applicant's dismissal in the proper manner the application did not change the terms of suspension to a suspension without pay. It was argued that the suspension is still with pay.

Section 3 of the Labour Relations (Termination of Employment) Regulations SI 371/85 deals with the employer's power to suspend an employee summarily without pay. It provides:

> "Where an employer has good cause to believe that an employee is guilty of [misconduct] the employer may suspend such employee without pay and other benefits and shall forthwith apply to a labour relations officer for an order or determination terminating the contract of employment."

I think it must be conceded without much debate from the respondent's side that an application to the labour relations officer 5 months after the purported suspension was far from "forthwith" - an expression that has been interpreted by the courts to mean within a reasonable time. The respondent's contention that it applied as soon as it reasonably could after the applicant's resort to the internal procedures for redress had been exhausted is not an excuse. It was up to the respondent to ensure that any resort to the domestic measures for redress was exhausted before taking steps to suspend and dismiss the applicant.

As to the question whether the suspension was without pay, the applicant's contention is that the respondent did not purport to suspend the applicant without pay, that the applicant is thus entitled to his remuneration until he is dismissed.

It is useful to look at the position under the common law and to examine the reasons given for

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the approach of the courts before the statutory intervention to appreciate the extent of the changes. At common law the employer enjoyed the power to dismiss an employee or to suspend him, but the right to suspend was

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only on full pay: see *Zimbabwe Sun Hotels (Pvt) Ltd v Law* 1988 (1) ZLR 143 (S) which refers with approval to the cases of *Myers v SA Railways and Harbours* 1924 AD 85. At p 90 SOLOMON JA in the *Myers* case rationalises the common law position and the power to suspend a worker and says:

> ". . . the general principle underlying a contract of service is that the hire is to be paid in return for services rendered, so that *prima facie*, if the services have not been rendered - the servant would not be entitled to be paid for that period. And accordingly . . . if an unforeseen misfortune, such as sickness, befalls the person who has left his services and renders him incapable of performing them for the whole of the period of his engagement, he can only claim wages or salary for the time during which he has actually served. If, however, it was due to his employer that he had been unable to perform his work, then he would be entitled to be paid, notwithstanding that no service had been rendered by him."

Section 3 of the Labour Relations Regulations changed the common law in one limited respect: it gave the employer a right to choose whether or not the suspension is to be with pay or without pay. That election, in my view, has to be made at the time of suspension, so that the worker who has not yet been found guilty of misconduct and is available to carry on his duties knows what of his rights or other benefits are affected by the decision to suspend him from work. It would be unjust and contrary to the purposes of the statute and the Regulations to expect an employee, suspended say at the end of the month, to wait until the end of the following month to find out the full terms of the suspension. The objectives of the statute (the Labour Relations Act 16 of 1985) which are defined in the preamble as "to declare and define the rights of employees" among others, would be stultified, in my opinion, if the employer were to be allowed to leave the employee in the dark about his changed status.

It does seem unjust and unfair to leave it to the suspended worker to deduce his rights from his employer's future behaviour. Besides, there may be any number of reasons why a cheque duly posted may not reach its destination. Besides this, the Labour Relations Act and its Regulations sets out to prescribe a course of conduct to be followed by an employer seeking to dismiss his employee. For that reason, if the employer wishes to invoke his rights under the statute he is duty bound to follow the steps prescribed in the statute to give validity to his actions. In conclusion I hold that once the employer decides to suspend his employee he has to go further and consider whether such suspension is to be with or without pay, and having made the decision the employer must communicate his decision to the employee. The

GIBSON J

failure to communicate the decision to withhold pay during suspension entitles the employee to expect that he will continue to receive his pay during that suspension.

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The respondent has not sought to suspend the applicant afresh but has averred that it relies on the original suspension. It is entitled to do so and the suspension itself remains good and valid as a basis for the disciplinary proceedings. The question of whether or not the respondent is entitled to dismiss the applicant has not been raised before me. The reason for that is clear in the next few lines.

The respondent complains that the applicant is in breach of s 140 of the Labour Relations Act in his failure to disclose that there were already proceedings pending before the labour relations officer at the time he launched this application. The respondent argues that the applicant was under a duty to disclose the other proceedings before the labour relations officer before launching this application and for his failure to do so he should be penalised in costs. The respondent also urges that I should exercise my discretion to refuse to entertain this application. I will not grant the last prayer because such a decision will add further to the delays in finalising this matter as well as costs.

Section 140 provides:

> "(1) Where any proceedings in respect of any matter have been instituted, completed or determined in terms of this Act, no person who is aware thereof shall institute or cause to be instituted, or shall continue any other proceedings, in respect of the same or any related matter, without first, advising the authority, court or tribunal which is responsible for or concerned with the second-mentioned proceedings of the fact of the earlier proceedings.
>
> (2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable to a fine not exceeding two thousand dollars or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

The object of this section, under the force of the criminal sanction, is undoubtedly to prevent a multiplicity of proceedings over the same parties and the same subject matter. As regards the institution of these proceedings, a perusal of the respondent's affidavit makes it clear that this was more a case where both parties acted simultaneously in the different courts to enforce their rights. Paragraph 4.3 of the opposing affidavit states:

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> "Although Annexure 'G' ie Notice of date of hearing may have been served on the Applicant's Legal Practitioners after the filing of the Notice of Motion papers in this matter, a copy of Annexure 'F', the letter by the respondent to the Labour Relations Officer, must have been received by the Applicant's Legal Practitioners long before such filing."

Annexure "G" is dated 23 September 1991. This date is to be compared with the date of issue of the notice of motion on 19 September 1991. Strictly speaking therefore it could not be said there were proceedings pending in another court at the time of issue of these proceedings. As for the intimation that permission for dismissal was sought in Annexure "F", dated 3 September 1991, the applicant could not be criticised for acting immediately. It had taken the respondent 5 months to get to that position.

Further, and in any event, the relief sought before me is different, in that it is limited to an order concerning the applicant's pay during the period of suspension. The question of dismissal is not

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raised. It remains for determination before the labour relations officer.

It is declared that the applicant is entitled to be paid his salary and other benefits from the date of suspension, ie 1 March 1991 to the date of dismissal or reinstatement which ever occurs.

It is ordered that the respondent pay the applicant his full pay and benefits from the date of suspension, ie 1 March 1991 to the date of dismissal or reinstatement, whichever occurs following the determination of the labour relations officer.

It is ordered that the respondent pay the applicant's costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

LINDSAY v LINDSAY 1992 (1) ZLR 332 (HC)

Court **High Court, Harare**

Smith J

Civil application

24 March & 3 June 1992

Flynote

Family law - maintenance pendente lite - factors to be considered - applicant putting forward entirely inflated claim

Costs - of application for maintenance pendente lite where applicant claims a completely extravagant amount

Headnote

The factors to be taken into account in a claim for maintenance *pendente lite* are well settled. They are the position of the parties prior to the separation, the current financial position of each and the needs of each between the date of the application and the hearing of the divorce action. The decision on the amount involves a value judgment. The court is concerned solely with maintenance *pendente lite* and not a division of the matrimonial assets. The court must be informed about the applicant's needs, not her grossly overstated expectations. Claims must be genuine, realistic and substantiated.

Where an applicant grossly inflates her claim for maintenance, the court may be left without reliable information upon which it can assess what she requires. If the amount that the court finally awards in these circumstances is insufficient to cover her needs, the applicant has only herself and her legal practitioner to blame.

Where an applicant makes a completely extravagant claim, the court may order the applicant to

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pay both parties' costs.

Case cited:

Mutenure v Mutenure HH-300-90

SMITH J

J B Colegrave for the applicant

A P de Bourbon SC for the respondent

Judgment

Smith J: The applicant is claiming maintenance *pendente lite* in the sum of $9 500 per month in respect of herself with effect from 30 September 1991 and a contribution towards the costs of her divorce action in the sum of $10 000. The legal principles applicable to an application such as this are well settled. The court must have regard to the position of the parties prior to the separation, the current financial position of each party and the needs of each party between the date of the application and the hearing of the divorce action and must make a value judgment. As is usual in cases of this nature, the applicant has endeavoured to persuade the court that the respondent is a wealthy man, well able to support her needs, whilst she is indigent and requires substantial financial support. On the other hand the respondent has done his best to establish that he is not as wealthy as the applicant would have the court believe and that her claims are exorbitant.

As is so often the case, the applicant has overplayed her hand. Mr *Colegrave* was constrained to admit that there is a "certain unrestrained exuberance" about her claim. A masterpiece of understatement. He conceded that both the claim for maintenance and the claim for a contribution towards costs were too high. He submitted, however, that the respondent was likewise straining the truth when he pleaded poverty, on the basis that he had divested himself of most of his former assets. Whilst he accepted that the respondent may well have divested himself of the ownership of his former assets, he argued that the respondent still controlled them and was able to live comfortably on the fruits thereof. Whilst he did not suggest a figure for maintenance, Mr *Colegrave* suggested that an amount of $4 000 would be appropriate for the contribution towards costs.

Mr *de Bourbon* submitted that any person was entitled to regulate his business affairs to his best advantage. The respondent started divesting himself of his assets some seven years ago in order to avoid payment of estate duty. It was not done to prejudice the applicant. The respondent was not able, at this stage, to meet the demands of the applicant which were truly exorbitant and lacking in *bona fides*. To support his submissions concerning the genuineness of the applicant's claims he pointed to the following factors. Her claim for monthly expenses included $4 000 for rent, $200 for a maid and $177 for a gardener, $200 for food for 5 pets (2 dogs and 3 cats) and $75 for veterinary expenses, $250 for clothing, $100 for cosmetic requirements, $120 for a hairstylist and $500 for provision for a holiday. She also claimed

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SMITH J

$500 for legal expenses in addition to the claim for $10 000 contribution towards costs. As Mr *de Bourbon* said, in the absence of any reasonable figures from the applicant as to her needs(as opposed to her grossly overstated expectations) this court is placed in a difficult position in trying to assess what she requires for maintenance. She is currently living with her daughter, who is supporting her. However she does not wish to continue imposing on her daughter. She wants to lease a house for herself and, as she put it, "live a comfortable existence while the divorce is pending" and be put in a position "to enjoy a full and happy social life".

There is no doubt that the applicant is entitled to look to the respondent for maintenance *pendente lite*. This case, however, is solely concerned with maintenance *pendente lite* and not a division of the matrimonial assets. There is also no doubt that the amount the applicant is claiming is extravagant. It cannot be supported even by her counsel. Although the respondent has apparently divested himself of the assets formerly owned by him, it is apparent that he still maintains a measure of control and is able to enjoy the benefits, or at least some of the benefits, flowing from ownership of the assets. Accordingly I consider that the respondent would be able to pay a reasonable amount for maintenance and a reasonable contribution towards costs.

As I have endeavoured to point out, this court has been placed in a very difficult position because of the applicant's exorbitant claim for maintenance. In her founding affidavit she has itemised her living expenses, some of the more extravagant of which I have referred to earlier, and they total $9 202 per month and then she claims $9 500. No reason is given why she feels the additional $298 is justified. She says that she initially requested maintenance in the sum of $7 500 per month "but I believe that in fact I will require more". She then claims maintenance with effect from 30 September 1991 although she has not rented a home because she has not, so she alleges, been able to do so. Thus she is claiming $4 000 a month for renting a house but admits that she has not been renting one for the months of October and November and presumably she has not rented a house since then.

I consider that an amount of $2 000 a month would be adequate to meet the applicant's needs. If that is not sufficient she has only herself and her legal adviser to blame. I also consider that the respondent could afford to pay that amount. With regard to the contribution towards the applicant's costs, Mr *Colegrave* submitted that $4000 would be more appropriate and Mr *de Bourbon* agreed with that figure.

SMITH J

As regards costs, in *Mutenure v Mutenure* HH-300-90 at pp 6 and 7 of the cyclostyled judgment I said:

> "Although the applicant has been successful to some slight extent in her application, in view of her completely extravagant claims for maintenance and a contribution towards costs I do not intend to make any order of costs

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against the respondent. In fact, I was tempted to order that she pay the respondent's costs as a mark of displeasure at her attitude. It seems to me that she is attempting to use her legal rights as a basis for extorting money from the respondent. There is no explanation as to why the original request for $1 500 per month should be increased to $1 700. It appears as though the applicant has anticipated that the court would reduce her claim and so she has inflated it in order to ensure that she is awarded the amount she originally wanted. It must be made clear to litigants that court proceedings are not a game where one inflates one's claim in order to allow for an element of reduction. Claims must be genuine, realistic and substantiated in order that the court can make a proper assessment on the claim and counter claim, if any."

The sentiments expressed above apply to an even greater degree in this case. The claims by the applicant could not even be supported by her counsel. I would have been greatly surprised if he had attempted to do so. As a mark of displeasure I intend to order that the applicant pay the respondent's costs. The outrageous demands she made compelled the respondent to come to court. There was obviously no chance of agreement being reached on a reasonable amount for maintenance.

It is ordered -

1) that the respondent pay to the applicant maintenance pendente lite in the sum of $2 000 per month, with effect from 1 April 1992; thus he shall pay the applicant $6 000 before 10 June 1992 and thereafter $2 000 before the first day of each succeeding month *pendente lite*;

2) that the respondent pay to the applicant $4 000 in respect of the costs of the action for divorce;

3) that the applicant pay the respondent's costs.

V H Fitzpatrick, applicant's legal practitioner

Gill, Godlonton & Gerrans, respondent's legal practitioners

S v MATANHIRE 1992 (1) ZLR 336 (SC)

Court **Supreme Court, Harare**

Manyarara JA, McNally JA & Korsah JA

Criminal appeal

4 June 1992

Flynote

Criminal procedure - change of plea on appeal - when will be allowed - complainant offering to withdraw complaint at time of trial

Headnote

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The appellant pleaded guilty to a charge of rape and was found guilty and sentenced to a term of imprisonment. When he pleaded guilty, he erroneously thought that the State had intended to withdraw the charge after plea because the complainant had offered on compassionate grounds to withdraw her complaint. Nonetheless the appellant had freely admitted that he had committed the crime and had also admitted to the facts and the essential elements of the crime.

On appeal the appellant had applied to change his plea to one of not guilty.

The application to change the plea was dismissed. The appellant had voluntarily, understandingly and correctly admitted to the charge and there was no sufficient basis for the application to change the plea. To allow a change of plea in these circumstances would be to defeat justice.

The complainant's forgiveness affected only the sentence.

Cases cited:

S v Maseko 1986 (2) ZLR 52 (S)

S v Zvidza S-1-90 (unreported)

R M Fitches for the appellant

L R Goredema for the respondent

MANYARARA JA

Judgment

Manyarara JA: The appellant pleaded guilty to rape and was sentenced to five years' imprisonment with labour, of which two years' imprisonment was conditionally suspended. His application to change his plea to one of not guilty on appeal was refused and the appeal was dismissed in its entirety.

The application was based on the grounds of appeal. These alleged that prior to the trial "the appellant was informed by the complainant that she intended withdrawing her complaint of rape . . . and that she would advise the prosecutor accordingly". It was further alleged that the prosecutor informed both the regional magistrate and the appellant at the commencement of the trial that the State "intended to withdraw charges after plea" and the appellant understood this to mean that he must first plead guilty before he could be acquitted and discharged.

A copy of a document purportedly authored by the complainant in support of her intention to withdraw the charge is annexed to the notice of appeal. There is no indication that the appellant produced the document at any stage of the proceedings. However, the prosecutor advised the court before sentence was passed that the complainant had asked to withdraw the charge on the ground of compassion. It is important to note that she did not withdraw her allegations. She simply took pity on him because of what he had told her about his family responsibilities.

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The record of the proceedings in the court below is precise and clear. The appellant was asked if he understood the charge put to him and he said he did. He was asked how he pleaded. He replied that he admitted the charge and his plea was recorded. An agreed statement of facts was produced and he was asked if he understood it. He said that he did, that the facts were correct and that he had nothing to add as "the contents of all reflect what actually happened". He was taken through the elements of the offence and was then asked specifically if he had any excuse to give for his crime. He said: "I took it (her willingness?) for granted". Yet earlier he agreed she had not consented.

What the appellant is really saying is that, thanks to the kind-heartedness of the complainant, he had an opportunity to escape justice, and he missed that opportunity because of his ignorance of court procedure.

It is the function of this court to dispense justice, not to dispense good luck. It is no doubt true that if the appellant had entered a plea of not guilty the prosecutor might have had to withdraw if the complainant had declined to

give evidence. The appellant would then have been acquitted. He would have been acquitted for lack of evidence, not because he was not guilty.

In the circumstances, the application for a change of plea has no basis in justice, no *justa causa.* He knew he had committed a crime and he freely admitted it. To allow a change of plea would be to defeat justice, not to achieve it. The appellant pleaded voluntarily, understandingly and correctly. See *S v Maseko* 1986 (2) ZLR 52 (S); and *S v Zvidza* S-1-90 (not reported).

The sentence imposed by the magistrate was a relatively lenient one. It is clear that in deciding upon it he took account of the forgiving attitude of the complainant. There can be no basis for interference.

McNally JA: I agree.

Korsah JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

HOLME EDEN (PVT) LTD v WYCHWOOD (PVT) LTD 1992 (1) ZLR 339 (HC)

Court **High Court, Harare**

Smith J

Civil action

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12 May & 10 June 1992

Flynote

Property - mortgage bond - bond containing clause inconsistent with that in sale agreement - whether clause in bond binding on mortgagor

Headnote

An agreement of sale provided for the purchaser to be given fourteen days' notice to remedy any breach of the agreement before the seller could enforce or cancel the agreement. The sale agreement provided that a portion of purchase price was to be secured by a mortgage bond. In the mortgage bond it was provided that if any amount due by the mortgagee was not paid on due date the full amount would become immediately payable, omitting any notice and any period of grace. The agent of the defendant had signed the bond without realising that there was this conflict between the sale agreement and the mortgage bond and his lawyer had not drawn this conflict to his attention.

The court held that it was clear from the sale agreement that the bond was only an ancillary contract intended to give effect to the provisions of the contract of sale. It was not intended to alter any of the terms of the sale agreement. It could contain new provisions which were reasonably incidental to the sale agreement but it could not contain provisions which were inconsistent with the sale agreement.

The plaintiff was not entitled to take advantage of the inadvertent signing of the mortgage bond after the defendant's lawyer had failed to draw attention to the inconsistency. The provision in the bond which was inconsistent with the provision in the sale agreement was therefore not binding on the defendant.

1992 (1) ZLR p340

SMITH J

Case cited:

Grobler v Scholtz 1953 (3) SA 175 (T)

E W W Morris for the plaintiff

R Y Phillips for the defendant

Judgment

Smith J: The defendant's farms in Matabeleland were expropriated by Government. It decided to translocate its farming enterprises to Mashonaland. Mr Cumming, who owned the defendant company, negotiated with Mr Bennett, who represented the plaintiff, to purchase three properties (hereinafter referred to as "the Farm"). On 19 October 1988 an agreement of sale (hereinafter referred to as "the Sale Agreement") was entered into in terms of which the defendant agreed to pay $700 000 for the Farm and some movable assets on the Farm. Of the purchase price $200 000 was payable on the signing of the Sale Agreement, $300 000 was

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payable on registration of the transfer of the Farm and $200 000 was to be secured by means of a mortgage bond over the Farm. Clause 1.1.3 of the Sale Agreement provided that the bond "shall incorporate *inter alia*" a provision that the interest rate would be a specified amount, interest would be paid biannually in arrears on 31 March and 30 September each year, and that the capital would be repayable in four equal annual instalments of $50 000. The Sale Agreement provided that transfer of the Farm and the registration of the bond would be effected by the plaintiff's lawyers. Clause 7 of the Sale Agreement provided that if the defendant committed a breach of any of the terms and conditions of the agreement and failed to remedy the breach within fourteen days after receipt of written notice from the plaintiff or its agents, the plaintiff had the right to claim specific performance or to cancel summarily the agreement.

Transfer of the Farm to the defendant was duly effected and a mortgage bond, as required by the Sale Agreement, was registered. The bond was in a standard printed form with blank spaces where details of the particular transaction could be typed or written. In this case, in clause A of the bond the names of the parties and the amount secured had been typed in, in clause C the rate and payment of interest and repayment of the capital had been typed in as required by the Sale Agreement, in clause D particulars of the Farm had been typed in and in Clause E a new para 18 had been typed in. The new para 18 provides that the mortgagor (the defendant) is obliged to conduct all farming operations on the Farm in accordance with the best approved methods of husbandry. Clause E contains, as part of the standard printed conditions, para 2, which provides that if the mortgagor (the defendant) fails to pay the interest, instalments of capital (if any), premiums of insurance or other sums due in accordance with the terms and

conditions of the bond promptly and on due date or fails to carry out any of the terms and conditions of the bond, the capital and interest would immediately be considered as claimed and due, without notice.

The defendant failed to pay on due date the first instalment of interest which fell due on 31 March 1989. On 14 April the plaintiff's lawyers received a banker's cheque in the sum of $8 821,92 from the defendant's lawyers drawn in favour of the plaintiff, which cheque was accepted as payment on account of an admitted liability. On 10 May 1989 the plaintiff issued summons claiming $200 000 plus $800,96 interest plus interest on that amount and costs of suit on a legal practitioner and client scale, including collection commission, in terms of clause E 1(ii) of the bond. The defendant opposed the claim. It admitted that it had agreed to pay interest as claimed but said that its liability to pay the interest arose by virtue of the Sale Agreement and not the mortgage bond. It submitted that it was not bound by clause E 2 of the mortgage bond because that paragraph was wrongly incorporated in the bond due to error on the part of the plaintiff's lawyer. Defendant was bound to the plaintiff in terms of the Sale Agreement and, in particular, by clause 7 thereof which provided that, in the event of any breach of the agreement, the defendant would receive written notice thereof and have fourteen days in which to remedy the breach. The defendant admitted liability in the sum of $800,96.

Mr Cumming gave evidence on behalf of the defendant. He said that he had been involved in the negotiations leading up to the conclusion of the Sale Agreement and had been authorized,

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as a director, to sign the agreement on behalf of the defendant, which he had done on 19 October 1988. The negotiations had started in early August and he had read and understood the terms of the Sale Agreement, including clause 7 thereof, before he had signed. He had taken occupation of the Farm on 22 October. Early in November he had received a letter from the plaintiff's lawyer with a copy of the bond that was required in terms of the Sale Agreement. He then sent the bond to his lawyer in Bulawayo for perusal. The lawyer returned it to him saying that it was a standard bond form. He himself, when he received the bond, had merely checked that the names of the parties were correctly inserted and the details about repayment of the $200 000 capital and the payment of interest. Mr Bennett and his brother had visited the Farm early in April 1989 to collect some birds from an aviary and mentioned that he was late with his payment of the interest. He had asked them to come to the office so that he could make out a cheque but Mr Bennett had refused, saying he could deal with the plaintiff's lawyer. On 10 April 1989 he received a letter dated 6 April from the plaintiff's lawyer, saying that, because the defendant had breached clause E 2 of the bond, the outstanding capital and interest were due

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and payable. He then went to tell the manager at the Bank with which he dealt of the problem and sought a lawyer to advise him. It was only in April 1989 that he became aware of clause E 2 of the bond and its implications. Neither his lawyer in Bulawayo who had studied the bond nor Mr Bennett had advised him that the bond contained such a provision which differed so materially from the corresponding provision in the Sale Agreement.

Mr Cumming was subjected to a searching cross-examination. He admitted that he had not read all the provisions of the bond before signing the power of attorney authorizing the registration of the bond. His lawyer in Bulawayo had read it, having previously read the Sale Agreement, and said Mr Cumming would sign it. He had read para 18 which had been inserted in clause E of the bond and it had worried him but he had not objected to it. Mr *Morris* pointed to para 1(ii) of clause E of the bond in which the defendant agreed to pay costs on a legal practitioner and client scale and collection charges in certain circumstances and asked whether Mr Cumming had been aware of that provision in the bond. Mr Cumming said he had not. He also did not realise that there was a provision in clause E 3 requiring him to insure the buildings on the Farm. Mr *Morris* went on to point out other features that appeared in the bond but were not in the Sale Agreement. Mr Cumming agreed that they all effected changes in the agreement between the parties because they inserted obligations on the defendant which were not provided for in the Sale Agreement. He said, however, that he objected to clause E 2 because it changed a provision which had been specifically agreed on by the parties and inserted in the Sale Agreement. When he agreed to the bond and signed it he was not aware of the change introduced by clause E 2. He signed because his lawyer in Bulawayo had said that it was alright for him to do so.

The defendant called the lawyer who had drawn up the mortgage bond. He said that para 2 of clause E of the mortgage bond had not been inserted in error. Clause 7 of the Sale Agreement was intended to cover any breach prior to the transfer of the Farm and para 2 of Clause E of the bond was to cover any breach after the transfer. When he was instructed to arrange for the

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transfer of the Farm he had sent the necessary documents, including the bond, to Mr Cumming for perusal and signature and subsequently he had received a telephone call from the defendant's lawyer in Bulawayo to query para 18 which had been inserted in clause E of the bond and also the allocation of the purchase price between the properties which comprised the Farm. When he received the papers duly signed on behalf of the defendant he believed that the conditions set out in the bond had been accepted. He agreed that he had not pointed out to Mr Cumming the difference between clause 7 of the Sale

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Agreement and clause E 2 of the bond. He had left it for Mr Cumming or the lawyer in Bulawayo to notice the difference.

In *Grobler v Scholtz* 1953 (3) SA 175 (T) the court had to deal with the case where there was a conflict between a deed of sale and a bond as to the right of the seller to foreclose. The facts were similar to those in the present case. Clause 9 of the deed of sale provided, *inter alia*, that if the purchaser failed to make any payment of capital or interest on due date or within 30 days thereafter the seller could cancel the sale. The bond which was passed to secure the balance of the purchase price had, on a printed form, the provision that on failure to pay instalments of capital or interest strictly on due date the whole capital with interest thereon would immediately and without notice become payable. The plaintiff sued for provisional sentence on the bond which had become due and payable by reason of non-payment of interest on due date. The defence was that owing to a mutual mistake the provision as to the days of grace was not inserted in the bond. The court held that, on a balance of probabilities, the parties had intended clause 9 of the deed of sale to deal not only with the question of forfeiture but also with the right to foreclose on the bond. It held, further, that the bond was not intended to alter any of the terms of the deed of sale and that the plaintiff was not entitled to take advantage of the mistake made by the defendant in inadvertently signing the power which did not reflect the true position. At p 178-179 MURRAY J (as he then was) said:

> "As the balance and interest were - *ex facie* the terms of the deed - payable by means of a bond, the particular bond passed should *prima facie* have accurately reflected the terms of the deed of sale by including the essentials of clause 9. It did not do so. Instead the conveyancer made use of printed words importing the provision (even assuming it to be a customary provision and one which in the absence of contrary stipulation in the contract it was permissible for him to include) that the whole balance plus interest could be claimed from the mortgager on the mortgagee's failure to pay interest on due date. In my view the defendant is correct in maintaining that on a balance of probabilities the parties intended clause 9 to deal not only with the question of forfeiture, but also with the right to foreclose on the bond.
>
> Plaintiff's counsel, however, contended that the court was bound by the terms of the bond irrespective of those of the earlier deed of sale. But the position is clear. The bond is only an ancillary contract (whether unilateral or not), intended to give effect to the provisions of the deed of sale. On the papers before me it is extremely improbable that the parties intended by the

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> bond to alter any of the terms of the deed of sale: it would require specific evidence to justify this view and to treat

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the bond as anything but the expression of the parties' intention to carry out the terms of the deed of sale.

As I have said, the strong probability is that both parties intended the bond to do no more than carry into effect the payment provisions of the deed of sale. The duty of passing the bond was entrusted to the plaintiff's conveyancer, and it is his insertion in the power of attorney and in the bond of a term in conflict with the true agreement which was not noticed by the defendant as purchaser and mortgager and on which plaintiff now attempts to rely. The plaintiff has, as far as can be gathered, without query accepted the bond as being in performance of the deed of sale, which in truth it is not."

Mr *Morris* argued strenuously that the reasoning of the learned judge in *Grobler's* case*, supra*, was not applicable to the present circumstances for two reasons. Firstly, clause 7 of the Sale Agreement provided for an option that was applicable only prior to the transfer of the Farm. Once transfer had been effected, a claim for specific performance or cancellation of the contract was not an appropriate remedy for a breach of the Sale Agreement. Secondly, the insertion of clause E 2 in the bond amounted to a novation of the conditions relating to breach. It was not due to a mutual mistake on the part of the parties. The plaintiff's lawyer intended to insert that provision and if there was any mistake it was unilateral on the part of the defendant. Its lawyer had advised Mr Cumming that he could sign the bond and he had done so without bothering to read the printed conditions.

As was to be expected, Mr *Phillips* argued that *Grobler's* case, *supra*, the authority of which had not been questioned or overruled in any reported decision in the last thirty-six years, was good law and directly in point.

In giving evidence Mr Cumming said that the provisions of the Sale Agreement were negotiated over a period of some weeks. It is obvious that each term or condition had received the special attention of Messrs Cumming and Bennett, who acted for the parties. A provision particularly favourable to the defendant (viz placing *in mora* and fourteen days' grace) was inserted in the Sale Agreement. Mr Cumming said that the omission of that provision from the bond was inadvertent. Mr Bennett was not called to say what his attitude was. The plaintiff's lawyer said that he had deliberately inserted a different provision in the bond but he did not draw Mr Cumming's attention to the fact that a different provision had been inserted. Moreover, the fact that the different provision - clause E 2 - was printed (as were most of the provisions of the bond) and not specially typed in, as were the details of the amount secured by the bond and of

the property mortgaged, meant that Mr Cumming was not put on his guard that para 2 of clause E was a provision specially inserted to meet the needs or requirements of the parties.

It seems to me to be clear from the Sale Agreement that the bond was only an ancillary contract intended to give effect to the provisions of the Sale Agreement. It was not intended to alter any of the terms of the Sale Agreement. Clause 1.1.3 of the Sale Agreement, which requires the mortgage bond, does specify certain provisions which must be included, *inter alia*. It is clear, therefore, that the bond would incorporate other provisions but those would be ones that were not inconsistent with the Sale Agreement. Thus the new para 18 in clause E of the bond had never been discussed by the parties but it was not inconsistent with the Sale Agreement and, as Mr Cumming signed the bond, the defendant would be bound thereby. Likewise the other

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provisions in the bond, namely paras 1(ii) and 3 of clause E which Mr *Morris* referred to in his cross-examination of Mr Cumming, were binding on the defendant, whether Mr Cumming accepted or liked them or not, because they were not inconsistent with the provisions of the Sale Agreement. I do not agree with Mr *Morris* that clause 7 of the Sale Agreement was intended to apply only to the "short term obligations", that is the payments due prior to the transfer of the Farm and that it was intended that the bond itself would deal with any breach of the "long term obligations". The Sale Agreement sets out the terms of payment of the purchase price and stipulates what shall be inserted in the bond to cover the payment of the balance of $200 000 and the interest thereon. Clause 7 thereof then refers to a breach of **any of the terms and conditions** of the Sale Agreement.

For the reasons set out above, I am of the view that the parties intended clause 7 of the Sale Agreement to deal with any breach of the terms and conditions of the Sale Agreement, including the condition in clause 1.1.3 that interest was to be paid biannually in arrears on 31 March and 30 September in each year. I am also of the view that the bond was not intended to alter any of the terms of the Sale Agreement, although it could introduce new provisions which were reasonably incidental to the Sale Agreement. Further, I consider that the plaintiff is not entitled to take advantage of the mistake made by the defendant in inadvertently signing the bond which did not reflect the true position.

As the defendant has been successful, he is entitled to his costs, which would include his costs of defending the application for summary judgment.

The application is dismissed with costs.

Atherstone & Cook, plaintiff's legal practitioners

Scanlen & Holderness, defendant's legal practitioners

HIPPO VALLEY ESTATES LTD v CHISI 1992 (1) ZLR 346 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Civil appeal

1 & 16 June 1992

Flynote

Employment - Labour Relations Act 1985 - s 111(3) - registration of order for enforcement through court - must be registrable order by determining authority and certified copy of such order

Costs - whether costs may be awarded against unsuccessful pauper

Headnote

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In terms of s 111(3) of the Labour Relations Act a party in whose favour an order by a determining authority is made may apply to the High Court for the registration of the order so that the order can be enforced through the High Court.

Respondent was dismissed by appellant with the authority of the Ministry of Labour, Manpower Planning and Social Welfare. The Ministry then apparently changed its mind and instructed that the appellant be reinstated. This instruction was contained in a letter addressed to the employee. The High Court allowed an application to register under s 111(3) the instruction contained in the letter from the Ministry. On appeal,

Held, that the High Court should have refused to hear the application because the Ministry's instruction was not an order by a determining authority and the letter was not a copy of an order made by the determining authority.

Held, further, that there was no rule that costs may not be awarded against an unsuccessful party who was suing as a pauper.

Cases cited:

Bonne v Bonne 1964 (1) SA 291 (SR)

Vergottini v Johannesburg Municipality 1927 TPD 68

McNALLY JA

S Moyo for the appellant

C M Jakachira for the respondent

Judgment

McNally JA: There is some dispute about whether Mr Chisi was an employee of the appellant (Hippo) or whether he had "entered into a contract of learnership" with Hippo. In any event on or about 30 January 1984 the company discharged him on the grounds that his performance under training had been inadequate. We will assume that he was an employee.

Mr Chisi did not accept his dismissal and approached the Labour Department. All that we have before us are some conflicting documents.

The first is a standard form letter signed on behalf of the Minister of Labour, Manpower Planning and Social Welfare addressed to Hippo and dated 30 November 1984. It informs the recipient that the Minister "has agreed to accede to your request to dismiss Davies Piniel Chisi".

The second is exactly the same standard form letter differently filled in. It is dated 30 October 1985. The operative part informs the same recipient that the Minister "instead recommends that you reinstate Chisi and give him (a) chance to complete his course."

How these two conflicting orders (if indeed the second document is an order, which is

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debatable) came to be made, or could lawfully be made, was not explained.

The third document was a letter dated 25 March 1991 from the Acting Chief Labour Relations Officer of the Ministry to the Personnel Manager of Hippo. Under the heading "Re: Mr PD Chisi" the letter reads as follows:

> "Subsequent to our meeting on 22 March, 1991 I would like to reiterate the conclusion that the directive in Chisi's case is the Ministerial directive communicated to you dated 30 October, 1985 in which you are being asked to reinstate Mr Chisi. By way of that directive Mr Chisi is employed by you as from 30 October, 1985 to date.
>
> Bacing (*sic*) on the 30 October, 1985 directive Chisi has informed us that you have refused to effect the above said Ministerial directive. My meeting with you on 22 March, 1991 made it abundantly clear that Mr Chisi should be reinstated. Mr Chisi has been informed to report for work by 1st April 1991."

McNALLY JA

I will assume that "Mr PD Chisi" is the same person as the appellant, Mr DP Chisi.

Armed presumably with these documents, Mr Chisi then applied to the High Court through the Chamber Book in terms of s 111(3) of the Labour Relations Act.

This section provides:

> "Any party to whom an order made in terms of subsection (1) relates (ie a party in whose favour an order has been made by a determining authority) may submit for registration copies thereof, duly certified by the determining authority or presiding officer thereof, to whichever court would have had jurisdiction to make the order had the matter been determined by it".

On 22 July 1991 the High Court (CHAMBAKARE J) made an order in the following terms:

> "That the labour relations determination made on the 22nd March 1991 be and is hereby registered as a Court Order."

The appellant, which had not been advised of the application, appealed against the order once its attention was drawn to it.

We asked the parties, before the hearing, to advise us what documents were before the High Court when the order was made. We are advised that there was an affidavit by Mr Chisi, annexing the second and third of the three documents mentioned earlier. We allowed Mr *Jakachira*, who appeared *in forma pauperis* on behalf of Mr Chisi to place further documents before us, without objection by Mr *Moyo* who appeared for Hippo. These documents, however, took the matter no further.

It is quite apparent that none of these documents amounts to a copy of a determination duly certified by the determining authority or presiding officer thereof, as required by the section. No "determination" was made by any "determining authority" on 22 March 1991. All we can deduce is that on that date a meeting took place between the acting Chief Labour Relations Officer and Hippo's personnel manager. At that meeting it seems certain statements were made by the former. But those statements were not "a determination" or more correctly "an order made by a

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determining authority". The letter of 25 March 1991 is not a copy of an order made by a determining authority.

McNALLY JA

The papers before us are inadequate for the purpose of deciding the fundamental merits or demerits of Mr Chisi's dismissal. But it is quite evident that the High Court order should never have been made on the papers before it. The application should have been dismissed. The appeal must succeed.

Mr *Moyo* asked for the costs of appeal. Mr *Jakachira* suggested that since he was acting *in forma pauperis* no order as to the costs of appeal should be made.

I note that, with the repeal of the old Rule 395, a legal practitioner is no longer required to certify *probabilis causa* although he is, in terms of Rule 393(3), required to "inquire into the merits of his cause". I note further that in terms of Rule 396 the appellant could have applied to debar him from continuing *in forma pauperis*. Such an application could be based, I presume, on the lack of any prospect of success, as well as on the issue of his financial means.

This appeal was bound to succeed on the fourth and fifth grounds of appeal, namely that there was no registrable order by a determining authority and no certified copy of such an order. There is no rule that costs may not be awarded against an unsuccessful pauper - see *Bonne v Bonne* 1964 (1) SA 291 (SR) at 294. (The aspect of costs is not dealt with in the local report in 1963 R & N 865). See also *Vergottini v Johannesburg Municipality* 1927 TPD 68. I see no reason here to depart from the normal rule.

Accordingly the appeal is allowed with costs and the order of the High Court in case HC 2321/91 is altered to read "The application is dismissed".

Manyarara JA: I agree.

Korsah JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Gutu & Jakachira, in forma pauperis, respondent's legal practitioners

NYEREYEGONA v MARUME 1992 (1) ZLR 350 (SC)

Court **Supreme Court, Harare**

McNally JA, Korsah JA & Ebrahim JA

Civil appeal

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16 June 1992

Flynote

Family law - maintenance - noting of appeal - payment not automatically suspended - must be application for stay of execution

Headnote

Magistrates should as standard practice advise anyone ordered to pay maintenance that:

- the noting of an appeal does not automatically relieve him of the obligation to pay the maintenance pending the appeal;
- the party ordered to pay maintenance has a right under s 27(4) of the Maintenance Act [*Chapter 35*] to apply for a complete or partial stay of execution; and
- the Supreme Court will not normally hear any appeal unless maintenance payments are up to date.

These points should be specifically included in future in every judgment awarding maintenance in the magistrates courts.

Cases cited:

Sidindi v Chekure S-213-91 (unreported)

Mazarura v Phiri S-43-92 (unreported)

C Madawu for the respondent

Judgment

McNally JA: This was an appeal against an award of maintenance made in the Maintenance Court. The mother of the child concerned had died and the respondent (claimant) was the grandfather who was the custodian.

McNALLY JA

We ascertained at the hearing that the appellant had never paid any maintenance for the child, despite the fact that the order was made as long ago as 16 December 1991. Accordingly and in accordance with this court's established policy and practice (see *Sidindi v Chekure* S-213-91 and *Mazarura v Phiri* S-43-92), we struck the matter from the Roll. In addition we ordered the appellant to pay the costs of the respondent, who was represented.

Magistrates should, as a matter of standard routine, advise persons against whom an order of maintenance is made, of the somewhat unusual provisions of the new subs (4) of s 27 of the Act introduced by s 5 of Act 2 of 1989.

Such persons should be told that an appeal does not automatically relieve them, as it does in

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other types of case, of the obligation to pay the maintenance pending the outcome of the appeal. It is also important that such persons be told of their right to apply in terms of that subsection for a complete or partial stay of execution.

Finally, it is very important that such persons should be told that the Supreme Court will not normally be willing even to hear their appeals unless their maintenance payments are up to date.

The Chief Magistrate, to whom a copy of this judgment is to be sent, is asked to take steps to ensure that these points are included in every judgment handed down in maintenance matters where an award of maintenance is made.

Korsah JA: I agree.

Ebrahim JA: I agree.

Guni, Wabatagore & Co, respondent's legal practitioners

BEVCORP (PVT) LTD v NYONI & ORS 1992 (1) ZLR 352 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Korsah JA & Ebrahim JA

Civil appeal

21 May & 18 June 1992

Flynote

Civil procedure - application on notice of motion - when appropriate procedure - when court will order that matter proceed to trial - application proceedings preventing respondent from pressing counter - claim or set off

Employment - term of contract allowing deductions from salary ultra vires employment regulations

Headnote

An action was originally brought on notice of motion proceedings in the High Court. The applicant's claim against the respondent was not capable of easy and speedy proof. The respondent had a genuine counter-claim in the form of set-off. The amount of the counter-claim was disputed and was incapable of resolution on the papers. On appeal,

Held, that the use of motion proceedings had prevented the respondent from proving his counter-claim.

Held, further, that although it may be permissible to proceed by way of application by notice of motion in respect of money claims, the court will order that the matter be dealt with in trial

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proceedings where there is a real dispute of fact between the parties and where the respondent would be prejudiced by the matter being dealt with in application proceedings, for example by not being able to press his counter-claim.

Held, further, that sloppy presentation of founding papers with their annexures may make an application so incomprehensible to warrant the dismissal of an application on that ground alone.

Held, further, that a term in an employment contract purporting to allow the

KORSAH JA

employer to make deductions from the salaries of his employees was void and of no legal effect because it was in violation of the regulations governing that type of employment, namely it violated s 10(1) of the Brewing Industry Employment Regulations SI 215 of 1984.

Cases cited:

Tierfontein Boerdery (Edms) Bpk v Weber 1974 (3) SA 445 (C)

Hanak v Green [1958] 2 QB 9

Williams v Tunstall 1949 (3) SA 835

Arnold v Viljoen 1954 (3) SA 322 (C)

Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech 1987 (2) ZLR 338 (S)

PSC & Anor v Tsomondo 1988 (1) ZLR 427 (S)

Miller v Roussot 1975 (1) RLR 324

A P de Bourbon SC for the appellant

J B Colegrave for the respondents

Judgment

Korsah JA: This is an appeal from the decision of the High Court, Harare, refusing to dismiss the respondents' claim on notice of motion proceedings and disallowing the appellant's claim to set off an amount alleged to be due and owing by the respondents to the appellant, on the ground that such set-off was not capable of speedy and easy proof. The precise orders against which the appeal is levelled are:

1. A *declaratur* "that clause 8 of the Contract of Employment entered into between the respondent (now the appellant) and Wilson Mahachi is invalid and of no force or effect"; and

2. "That the respondent (now the appellant) refund and pay forthwith to the applicants (now the respondents) with interest at the rate of 10% per annum, all deductions made from the bonuses payable to the applicants, which deductions were made in respect of alleged beer losses".

The background to this matter is that the appellant company carries on business through one of

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its divisions as Chibuku Breweries . It employs the respondents, who originally numbered twenty-four, as drivers/salesmen on conditions recorded and agreed upon by the parties in a standard employment contract. The duties of the respondents included driving tankers containing opaque beer and delivering the beer at designated sales outlets, the delivery of packed beer, the soliciting *en route* of orders, the collecting of money from sales, and the assessment of sales potential.

KORSAH JA

Clause 6 of the employment contract provided that the employee should be responsible for any distribution losses incurred by the Company arising from the employee's duties as driver/salesman over and above the maximum distribution losses allowed by the Company, save those caused by unforeseen circumstances beyond the control of the employee. This clause is self-explanatory: that each driver/salesman would assume liability for any shortfalls attributable to him.

Clause 8 of the employment contract empowers the Company to deduct the aggregate amount of unaccountable losses payable by the employee in any one month in terms of this agreement from the wages payable to the employee by the company at the end of each month. This clause purports to authorise the deduction of losses from wages of the driver/salesman.

During the first half of 1989 it became evident to the appellant that it was suffering substantial losses of beer whilst it was being distributed. For example, it was alleged that during June of that year the appellant sustained, in respect of its Harare Depot alone, a loss amounting to $10 906.44. The appellant was of the belief that such staggering losses arose through theft or negligence of the drivers/salesmen. Consequently, in June 1989, the appellant decided to deduct from the remuneration of its drivers/salesmen the current selling price of beer which each such driver/salesman was unable satisfactorily to account for after delivery. These beer losses were termed as either "distribution losses" or "under-banking", and there is a formula for calculating them. The appellant commenced making deductions from the remunerations of drivers/salesmen who incurred unaccountable distribution losses as of June 1989.

On 30 October 1989 the legal practitioners for the respondents addressed a communication to the appellant, objecting to the deductions made from the remunerations of the respondents by the appellant. In that letter it was alleged that the distribution losses were due to various extraneous causes such as the frequent malfunctioning of the equipment which measures the receipt and delivery of the beer and leaking pipes and pumps, apart from spillage and evaporation. An immediate refund to the respondents of all deductions made from their remuneration in respect of unaccountable losses for distribution of beer was demanded. They made great play of the provision in s 10(1) of the Brewing Industry Employment Regulations, SI 215 of 1984, which stipulates that:

> "No deduction or set-off of any description shall be made or allowed from any remuneration, other than bonus, due to an employee, except ..."

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KORSAH JA

The exceptions do not here concern us.

After some exchange of correspondence between the legal practitioners of the parties, on 25 January 1990 the appellant's legal practitioners wrote to the respondents' legal practitioners, conceding that deductions from the wages of the respondents for unaccountable beer losses was impermissible, but maintaining that such deductions **from bonuses** were allowable by the same section of the Statutory Instrument upon which the respondents rely. It was intimated in the said letter that the appellant was prepared to refund to each respondent all such sums deducted from his remuneration in excess of bonuses. The relevant paragraph reads:

> "We return the schedule with your letter of 11 January. Our client has endorsed on the schedule in the column headed 'Bonus Payment' those amounts which were deducted from the bonus payments to the employees listed in the schedule. The figures shown in the far right hand column of the schedule show the amounts which our client has established were deducted from the wages. These amounts totalling $8 017.22 our client is prepared to repay to the various employees."

In spite of this admission, through some administrative error or oversight, an amount, a little over $500.00, arising from distribution losses was deducted from the wages of some respondents in January 1990.

It seems to me that at this stage the battle lines between the parties were clearly drawn. With the admission by the appellant that it had no legal right to make any deductions from the remuneration of its employees, other than bonuses, it conceded that para 8 of its contract of employment, purporting to imbue it with authority to deduct distribution losses from the wages of its employees, was null and void and of no legal effect. There was thus no necessity to seek a declaratur to that effect.

The only issues for determination between the parties were whether or not the distribution losses incurred by the appellant arose from the use of faulty equipment, spillage and evaporation, or whether such losses stemmed from theft and/or negligence by the respondents. It seems to me that these issues, requiring as they do evidence of calibration and methods by which beer losses were calculated, do not lend themselves to resolution without the adduction of oral evidence, and so motion proceedings are not the appropriate means by which to seek redress.

KORSAH JA

As Mr *de Bourbon* urged before us, the founding papers were prepared in May 1990. Most of the supporting affidavits were signed in the middle of May 1990. Proceedings only commenced on 19 June 1990. By that time all the refunds promised had already been made, and only the deductions made against bonuses remained the bone of contention between the parties. Nonetheless, the respondents persisted with their claims for the full amounts originally demanded without any adjustments to reflect the payments made to them by the appellant. To proceed by way of motion without making full disclosures of the payments was an abuse of the court's process.

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Mr *de Bourbon* castigated, with justification, the respondents' legal practitioners for the manner in which the founding papers were drawn. There were no supporting affidavits from the eighth and sixteenth applicants, but there was a supporting affidavit from a Gilbert Gondo who was not a party to the action. Although the fifth applicant had no deductions made from his salary, he deposed to a supporting affidavit in which he expressed himself as having an interest similar to that of the first applicant, which was that the appellant retained monies unlawfully deducted from his salary for which he seeks relief. The supporting affidavits of the respondents were not filed in the sequence that their names appear. It was only at the last moment that the fifth applicant withdrew his non-existent claim, and the claims of the eighth and sixteenth applicants were withdrawn after judgment had been pronounced and an appeal had been noted. Mr *de Bourbon* submitted that the sloppy and poor representation of the founding papers alone justified the dismissal of the application.

While I agree that the founding papers were in a confused mess, I prefer to leave the matter open as to whether that alone was enough to justify the dismissal of the instant application by way of motion proceedings. I accept, unreservedly, that there may be cases where the founding papers are so incomprehensible as to warrant dismissal of the application.

In their founding affidavits, the respondents reiterated the allegation that they were being held responsible for distribution losses. They denied responsibility for such losses and attributed the losses to frequent malfunctioning of equipment. In support of this allegation was an affidavit from one Mashford Chanakira who was, until September 1989, employed as a field representative by the appellant, to the effect that during his employment by the appellant his duties involved checking the accuracy of the measuring devices of the beer storage tanks at various outlets supplied with beer by the appellant, and that between June and August 1989 he discovered many of these devices to be inaccurately calibrated, with the result that more beer was actually delivered by the appellant's drivers

than was indicated by these devices. Four copied examples of his reports to the appellant regarding these discrepancies were annexed to his affidavit. He averred that to the best of his knowledge the inaccuracies in calibraion are yet to be rectified.

In response to these allegations the appellant stated that any faults detected by Mashford Chanakira were rectified within twenty-four hours of the report.

It also stated that although reports had been made from time to time by drivers/salesmen very few had been justified and that recalibration, where necessary, is carried out within twenty-four hours of a report by a driver/salesman. This was not denied by the respondents, except that the respondents alleged that they were not in a position to state for how long prior to discovery the defective equipment caused over-delivery of beer.

The appellant, however, averred that if a defect is reported the driver is not burdened with the over-delivery. If, therefore, there is an over-delivery, for which the driver is not responsible, the driver must attribute such shortfall to a defect immediately and report it. In this case the

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equipment would be checked within twenty-four hours and the defect, if any, corrected. The suggestion that losses could occur through evaporation or spillage was discounted by the appellant.

Each driver/salesman had his loss carefully calculated, with any allowance for spillage being granted. Each driver/salesman signed the daily route return reflecting the "distribution loss" or "under-banking", thus admitting its accuracy unless he raised a reasonable excuse. Where defective equipment was found, the driver/salesman was not burdened with the loss. By clause 6 of the contract of employment each driver/salesman undertook to be responsible for any distribution losses incurred by the company arising from the employee's duty as driver/salesman over and above the maximum distribution losses allowed by the company.

The appellant, in its opposing affidavit, sought to set off the losses it alleged had incurred, through deliveries effected by such of the respondents as it held responsible for them, against their bonuses. There is no question that set-off can occur where there is an admission as to liability - *Tierfontein Boerdery (Edms) Bpk v Weber* 1974 (3) SA 445 (C) at 452F. It is true that a defence of set-off should state with particularity the debt or other matter sought to be set off and that it must be of easy and speedy proof. But the requisite degree of particularity cannot be readily defined and must depend on the circumstances.

KORSAH JA

It is said that one of the four conditions for set-off to operate is that there must be a liquidated claim. But, as is pointed out in Wille's *Principles of South African Law* 7 ed at p 368:

> "A debt is liquidated when its exact money value is certain, or when the amount is admitted by the debtor, or even if the claim be disputed by the debtor, it is of such a nature that the accuracy of the amount can be clearly and promptly established by proof in court; for example an amount due under a judgment, or a taxed bill of costs, or a liquid document signed by the debtor, or a claim for goods sold and delivered, or for salary, or for commission for an agreed amount, or upon an agreed basis."

It may be that the claim by the appellant against the respondents was not capable of easy and speedy proof, and was thus not a claim that lends itself to being set off against that of the respondent. But that was not the point in issue. The issue for determination was whether or not, on the papers, there was a genuine dispute of fact. The nature of the dispute was irrelevant if it was genuine. What was germane to a resolution of the application was whether or not on the papers there was a genuine dispute of fact between the parties. I subscribe to the view expressed by MORRIS LJ in *Hanak v Green* [1958] 2 QB 9 at p 26D that:

> "The question as to what is a set-off is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings."

What was established by the appellant, both through the exchange of correspondence before commencement of proceedings and on the papers before the trial court, was that there was a known dispute of fact between the parties regarding the liability of the respondents for the losses incurred by the appellant. That claim had been clearly formulated in the appellant's opposing affidavit. It was not of the nature of a fanciful counter-claim, but one requiring investigation and proof. The method of proof suggested by the appellant was not such as could

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be dismissed out of hand. The learned trial Judge himself admitted that on the papers it could be said that the appellant had a claim against the respondent. Proceeding by notice of motion prevents the appellant from counter-claiming and thus puts it at a disadvantage.

I am of opinion that in such circumstances the legal authorities lay down that notice of motion is not the appropriate vehicle by which to channel the respondents' claim. In *William* v T*unstall* 1949 (3) SA 835 at 839 DOWLING J said:

KORSAH JA

> "I agree, however, that the courts must today recognise that in contemporary practice any dispute, save matrimonial causes and claims for damage, but not excluding money counts, may be decided by motion proceedings in an appropriate case. It is, however, not possible to visualise all the contingencies that may arise in relation to such cases, and I am of opinion that the court should, even when it is clear that there is no *bona fide* dispute of fact, reserve to itself a discretion, where the respondent objects to this form of procedure and it is reasonably possible that he may suffer prejudice in some form or another through its use, to deny the applicant the use of motion procedure in cases where *rauw actie* would normally be the appropriate remedy." (Emphasis added.)

The absence of the exercise of such a discretion by the learned trial Judge is apparent in his judgment.

VAN WINSEN J also expressed the following view in *Arnold v Viljoen* 1954 (3) SA 322 (C) at 329A-B:

> "Whether the circumstances are appropriate for the decision of any money claim upon motion must naturally depend upon the peculiar facts of the matter, but generally speaking I would say that where no real dispute of fact exists between the parties motion proceedings are in such cases permissible. I wish however to make it clear that I am not laying down that the absence of any real dispute of fact necessarily is the only criterion for the permissibility of motion proceedings. While this may be the major criterion, there may be others."

These cases clearly establish that, while motion proceedings may be permissible in respect of money claims, such proceedings will only be entertained where no real dispute of fact exists between the parties and where the respondent in such a proceeding will not be disadvantaged by, for example, his inability to press his counter-claim against the applicant, as in the instant appeal. See also the caveat sounded by GUBBAY JA (as he then was) in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) at p 339C, that a court must adopt a robust approach in such proceedings:

> "... always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned." (Emphasis added.)

And see *Public Service Commission & Anor v Tsomondo* 1988 (1) ZLR 427 (S) at 442G-443A, per McNALLAY JA.

KORSAH AJ

BEADLE ACJ sounded a warning in *Miller v Roussot* 1975 (1) RLR 324 at 326E that, where the

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claim sounds in money, motion proceedings:

> "... is not a form of procedure which is looked upon by this court with any favour. It is a costly procedure and in the normal course in claims of this sort, the proper thing is to proceed by way of summons."

For the reasons above given, I am of opinion that this matter ought not to have been commenced by way of motion and that it should have been dismissed or at best referred to trial by the learned trial Judge.

Consequently the appeal is allowed with costs, and the orders made by the High Court are hereby set aside and substituted with the following:

> "The application is dismissed with costs."

Gubbay CJ: I agree.

Ebrahim JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

CITY OF HARARE v CINAMON 1992 (1) ZLR 361 (SC)

Court **Supreme Court, Harare**

McNally JA, Manyarara JA & Korsah JA

Civil appeal

1 & 18 June 1992

Flynote

Civil procedure - whether High Court can alter order previously registered in High Court under s 111(3) of Labour Relations Act, 1986 - correct manner of citing municipality

Employment - applicant wrongly applying to Labour Relations Board for order against Town Clerk instead of against municipality

Headnote

Respondent had obtained an order for his promotion by the City of Harare from the Labour Relations Board, the other party being cited in that order as The Town Clerk, City of Harare. He had then successfully petitioned the High Court under s 111(3) of the Labour Relations Act for registration of the order, and when the Town Clerk wrote that the city council would not comply with the order, instituted contempt proceedings against the Town Clerk. A committal order was refused because the judge found from the record of proceedings that the real party in the initial proceedings before the Labour Relations Board was the City Council, not the Town Clerk. The

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respondent then applied to the High Court, without notice to the council or town clerk, for rectification of the Board's order and this was granted. The Council appealed against that amending order

Held, that as the order registered in the High Court had been the order asked for by the respondent and given by the Labour Relations Board, the High Court did not have the power to rectify the order since the court had made no error.

Held, further, that the error was not "a clerical error made by the court or a judge" such as to enable rectification under Rule 449.

McNALLY JA

Held, further, that, in any event, the High Court should not have made an order fundamentally affecting the City Council without any notice having been given to it of these proceedings.

Held, further, that the only way in which the desired rectification could be effected was by the respondent initiating proceedings before the Labour Relations Board for this error to be corrected.

Held, further, that it was of the utmost importance that parties to legal proceedings should be correctly and unambiguously cited.

Held, further, that although the appellant had succeeded in the appeal, it was not entitled to be awarded costs because it had sought shelter behind an ambiguity in citing the parties it could have drawn attention to earlier.

Cases :

Eagle Tanning (Pvt) Ltd & Anor v Employees of Eagle Tanning (Pvt) Ltd & Anor S-238-91 (unreported)

Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)

Seatle v Protea Assurance Co Ltd 1984 (2) SA 537 (C)

Bakoven (Ltd) v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E)

A P de Bourbon SC for the appellant

No appearance for the respondent

Judgment

McNally JA: Mr Cinamon was appointed by the City of Harare to the post of Deputy City Valuer and Estate Manager. Subsequently the post of City Valuer and Estate Manager fell vacant. He was initially appointed to act in that post, but later another person junior to him was appointed to the substantive post, over his head.

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Mr Cinamon alleged that this was an unfair labour practice in terms of s 5(2)(b) of the Labour Relations Act No. 16 of 1985 as read with s 8 of the same Act. He referred the matter to a labour relations officer (presumably in terms of s 109(1) of the Act), who in turn referred the matter to the Labour Relations Board in terms of s 109(2)(d) of the Act. The Board made a determination in terms of s 111 of the Act in favour of Mr Cinamon. It ordered that he be appointed to the post. What was to happen to the other incumbent was not made clear.

Unfortunately the ruling issued by the Chairman of the Board was issued under a heading which showed Mr Cinamon as the appellant and "The Town Clerk, City of Harare" as the respondent.

I do not think, strictly speaking, that Mr Cinamon should have been described

as "The appellant", because he was not appealing against any decision of the labour relations officer. He should have been called "The applicant". However, nothing turns on this. What is more important is the citation of the respondent. It was incorrect and ambiguous. On the face of it, the respondent was the Town Clerk. He is a separate person in law from the City of Harare. If it was intended that he should be the respondent, then Mr Cinamon was mistaken. The respondent was, in reality, the City of Harare. It should have been cited as such. It is quite apparent from the ruling of the Chairman of the Board that he considered the City of Harare to be the respondent. He said so throughout his ruling.

Thus he said:

> "I have found the City of Harare guilty of an unfair labour practice."

And later:

> "Both Mr Cinamon's legal representatives and the City of Harare representatives ... agreed to the Board considering the matter in their absence."

Elsewhere he used expressions such as "The City of Harare appointed M", "Though City of Harare later claim ...", "The Council had the discretion...".

The final paragraph read:

> "The Board agreed that Mr Cinamon had been unfairly treated and ordered that he be appointed to the post of City Valuer and Estates Manager with immediate effect.
>
> You are to comply with this order on or before the 10th August 1989."

Mr Cinamon remains to this day unappointed. No appeal was prosecuted against the Board's determination.

Mr Cinamon's next step was taken in terms of the provisions of s 111(3) of the Labour Relations Act, which reads:

> "Any party to whom an order made in terms of sub-section (1) relates may submit for registration copies thereof, duly certified by the determining authority or presiding officer thereof, to whichever court would have had

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jurisdiction to make the order had the matter been determined by it."

McNALLY JA

He approached the High Court by way of petition, without notice to the Town Clerk or to the City of Harare, and on 3 November 1989 an order was made in the High Court "that the order of the Labour Relations Board dated the 1st August 1989 be and is hereby registered in terms of s 111(3) of the Labour Relations Act, No. 16 of 1985".

That order then became, in effect, a High Court order - see s 111(4). It was served on the Town Clerk on 1 December 1989.

The return of service reads as follows as to the manner of service:

> "By handing a copy each of the Order of Court and the Labour Relations Act Order, thereof to Mr RT Kanengoni a responsible person and Deputy Town Clerk (Legal) at the place of employment of the within named 1s (*sic*) Respondent, the Town Clerk, City of Harare, Town House, Julius Nyerere Way, Harare, who accepted service on behalf of the said respondent and by exhibiting to him the originals and by explaining to him the nature and exigency thereof."

As Mr Kanengoni is in fact the Town Clerk, the wording of this return succeeds in perpetuating the confusion as to who was the respondent.

The next legal step taken by Mr Cinamon was that he instituted contempt proceedings in the High Court against "the Town Clerk, City of Harare". On 31 October 1990, GREENLAND J refused his application on the grounds that the real respondent was the City Council not the Town Clerk. The Town Clerk could not be held responsible for the City's contempt. His Lordship referred to a letter from the Town Clerk to the Chairman of the Labour Relations Board in which the Town Clerk made it clear that the non-compliance with the order was because "the Council find it impossible to comply with your order and the Council is now appealing to the High Court."

As mentioned earlier, no appeal was prosecuted, and I do not know if one was noted and then withdrawn.

Thwarted once again, Mr Cinamon returned to the charge. He applied through the Chamber Book for a High Court order to amend the citation and the order of 3 November 1989 so as to delete the words "The Town Clerk". The effect would be that the respondent would then be "City of Harare" and the order would be directed to "City of Harare". GREENLAND J granted the application, of which no notice had been given either to the Town Clerk or to the City of

McNALLY JA

Harare, on 20 November 1990. The Deputy Sheriff's return of service dated 22 November 1990 shows that this order was served on the Mayor, the Deputy Mayor, the Town Clerk and a number of City Councillors, chosen apparently at random.

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It was this that alerted the City Council to the fact that an order had been made against it, and it then appealed against the High Court order of 20 November 1990. It relied on five grounds, in summary, as follows:

1. The order was given without notice;
2. The High Court does not have power or jurisdiction to amend its orders in such circumstances;
3. The respondent failed to follow the procedure set out in High Court Rule 449;
4. The High Court does not have power to amend an order of the Labour Relations Board, and to register such amended order;
5. The respondent, by instituting contempt proceedings against the Town Clerk, had waived its rights against the City of Harare.

Before I proceed to deal with the merits, if that is the right word, of this case, I must say that the legal practitioners of the parties before the Labour Relations Board, and the Board itself, are all deserving of censure for allowing this litigation to run off course as it has done. Mr Cinamon's lawyer should know how to cite a Municipality. The Municipality's lawyers should not have allowed the error to proceed unchecked. If they had seen themselves as acting for the Town Clerk rather than the Municipality they should have made their position clear. And finally the Board should have clarified the matter. I may mention that we have previously had a similar problem arising out of sloppy citation of parties before the Labour Relations Tribunal - see *Eagle Tanning (Pvt) Ltd & Anor v Employees of Eagle Tanning (Pvt) Ltd & Anor* S-238-91 at 5. It is of the utmost importance that parties to legal proceedings should be correctly and unambiguously cited.

Having said that, I am nonetheless satisfied that the City's grounds of appeal are compelling. The court order of 3 November 1989 was made in precisely the terms requested by Mr Cinamon. The court made no error. It granted the order that was sought. If Mr Cinamon sought the wrong order from the Labour Relations Board, that was his mistake. The court, on 3 November 1989, had no power to alter the Board's order before registering it. What the court could not

do on 3 November 1989, it also could not do, by way of subsequent amendment, on 20 November 1990.

Moreover the court on 20 November 1990 should not have made an order fundamentally affecting the City of Harare without notice to the City of Harare.

And finally, insofar as the court, on 20 November 1990, purported to be correcting an error in terms of Rule 449 of the High Court Rules, 1971, it was wrong because it was not done on notice of motion or by consent, and also because the error was not "a clerical mistake by the court or a judge". Compare *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A)

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at 306F et seq, *Seatle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C), and *Bakoven (Ltd) v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E).

The ambiguity or error must be corrected where it originated, in the Labour Relations Board. I do not accept that Mr Cinamon can be held to have waived his rights against the City of Harare by reason of his taking contempt proceedings against the Town Clerk.

Since we are sitting to deal with an appeal from the order of the High Court I do not think we can remit the matter to the Board. Such action must be initiated by Mr Cinamon. We can only allow the appeal. However, I am not disposed to order costs against Mr Cinamon, who did not appear in this court. The City of Harare has brought these problems on its own head by failing to draw attention at an early stage to the ambiguity behind which it now seeks to shelter.

The appeal is allowed. The order of the High Court dated 20 November 1990 in case HC-4064-89 is set aside. In its place there will be an order that the application is dismissed. There will be no order as to the costs of appeal.

Manyarara JA: I agree.

Korsah JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

COMMISSIONER OF POLICE v D'ELIA & ANOR 1992 (1) ZLR 367 (SC)

Court **Supreme Court, Harare**

Gubbay CJ, Manyarara JA & Korsah JA

Civil appeal

8 & 22 June 1992

Flynote

Criminal Procedure and Evidence Act [Chapter 59] - Part VI - seizure and forfeiture of articles - provisions additional to other statutory provisions - duty of police to return seized articles when possession lawful

Headnote

Respondents' liquor licence had lapsed due to their lawyer's oversight. Thinking that their liquor licence had been renewed by their lawyer, they continued to sell liquor. The police then visited the respondents' premises and, using the power contained in s 94(2) of the Liquor Act, 1984, the police seized all their liquor stocks. The respondents promptly paid a deposit fine for illegally selling liquor without a licence. They then applied for and obtained a renewal of their liquor licence.

When they sought the return of the liquor seized by the police they were told that the liquor had

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been forfeited to the State and had already been disposed of. They then instituted action against the Commissioner of Police claiming the cost price of the liquor.

Held, that simply because the police had seized the liquor in terms of s 94((2) of the Liquor Act did not mean that the State was obliged to deal with the liquor in accordance with s 117(4) of the Liquor Act, which requires a court order of forfeiture. The State was entitled to proceed under Part VI of the Criminal Procedure and Evidence Act. Section 52 of that Act provides that Part VI does not derogate from the powers under any other law. This cannot be taken to mean that these powers are available only if there was no such powers in other legislation. Section 57E of the Act expressly provides that anything seized under another enactment can be dealt with under Part VI.

GUBBAY CJ

Held, further, that s 57(F)(i) of the Criminal Procedure and Evidence Act obliges the State to return a seized item to the person from whom it was seized after that person admits his guilt and pays a deposit fine, provided that that person may lawfully possess such item.

Held, further, that the respondents had to prove on a balance of probabilities that they would have possessed the liquor lawfully after its return.

Held, further, that in the particular circumstances the respondents had discharged the onus of proving that they would have lawfully possessed the liquor if it had been returned to them. There is no offence committed by simply possessing liquor. The respondents had taken immediate steps to renew their licence after their liquor had been seized. They had also offered to keep the liquor secured on their premises under the sole control of the police until the licence was renewed. They had no intention to sell the liquor until the liquor licence had been renewed.

Held, further, that as the respondents had paid a deposit fine and they were lawfully entitled to possess the article the State was obliged by s 57F(i) of the Criminal Procedure and Evidence Act to return the liquor and hence to pay the cost price thereof as claimed.

Cases cited:

S v Marais 1982 (3) SA 988 (A)

S v Campbell & Anor 1985 (2) SA 612 (SWA)

Min van Wet en Orde v Datnis Motors (Midlands) (Edms) Bpk 1989 (1) SA 926 (A)

Choonara v Min of Law & Order 1992 (1) SACR 241 (W)

Mdunge v Min of Police & Anor 1988 (2) SA 809 (N)

D P Carter for the appellant

A P de Bourbon SC for the respondents

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Judgment

Gubbay CJ: The respondents, who are husband and wife, are the proprietors of a licensed restaurant in Harare known as "La Pizza". They had a standing instruction with a legal practitioner that before the end of each licensing year application was to be made to the Secretary of the Liquor Licensing Board for the renewal of their restaurant (ordinary) liquor licence. Due to an unfortunate oversight on the part of the legal practitioner the licence for the 1989/1990 year, which expired on 30 June 1990, was not renewed. Subsequent to its expiration the respondents, in the genuine belief that their instruction had been complied with, continued to sell liquor to diners at the restaurant.

1992 (1) ZLR p369

GUBBAY CJ

On the morning of 12 October 1990 Assistant Inspector Jaboon, attached to the Licence Inspectorate of the Zimbabwe Republic Police, having been informed by the Liquor Licensing Board that the licence had been allowed to lapse, visited the restaurant. Acting pursuant to the power vested in him under s 94(2) of the Liquor Act, 1984, he seized and removed all the liquor on the premises. The suggestion made to him that it be locked in the liquor store on the premises and the key placed in his custody pending the renewal of the liquor licence, was declined.

The respondents were invited to pay a deposit fine of $100 for having contravened s 112(1)(b) of the Liquor Act, in that they had illegally sold liquor during the period 1 July to 11 October 1990. This fine was paid on 19 October 1990.

Little time was lost by the respondents in applying for the renewal of the restaurant liquor licence, and the application was duly granted on 25 October 1990. Later that day their legal practitioner wrote to the Member in Charge, Licence Inspectorate, advising that the licence had just been renewed and seeking the return of the liquor that had been seized. It was not returned for it had been forfeited to the State and already disposed of.

Aggrieved by what they perceived as an unlawful invasion of their rights, the respondents instituted a notice of motion against the Commissioner of Police in which they claimed payment of the sum of $5 481,90, being the cost price of the liquor, together with costs of the proceedings. They succeeded before SMITH J, who held that the liquor should have been returned to them in terms of s 57F(1)(i) of the Criminal Procedure and Evidence Act [*Chapter 59*]. It is against that decision that this appeal now lies.

It was not in contention that the liquor had been lawfully seized and removed by Assistant Inspector Jaboon. The dispute concerned its forfeiture.

The preliminary point raised by Mr *de Bourbon* was that the appeal was to be dismissed on the ground that where liquor is seized under s 94(2) of the Liquor Act, it may only be forfeited by order of court made under s 117(4) of that Act, directing that "any liquor in respect of which the offence has been committed, or any part of such liquor, be forfeited to the State"; and since in the present matter there was no such order, the forfeiture was invalid. Counsel, consequently, submitted that the learned Judge had erred in his view that liquor, even though seized in terms

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of the Liquor Act, may be dealt with under ss 57E and 57F of the Criminal Procedure and Evidence Act because

GUBBAY CJ

the precedings 52 excludes the exercise of the powers of search, seizure and forfeiture, conferred by Part VI of the Act, where such powers are expressly conferred by the specific enactment in respect of which the offence has been committed.

I am unable to agree. Section 52 provides that Part VI (ie ss 51 to 58) "shall not derogate from any power conferred by any other enactment ...". Plainly this phrase means that the scope of the powers of entry, search, seizure, forfeiture and disposal, as conferred in any other law are not to be taken to be diminished, impaired or affected in any way by the provisions of Part VI. See *Du Toit et al*. Commentary on the Criminal Procedure Act, at p 2-1; *Black's Law Dictionary* abridged 5 ed, at p 231. Nothing more may be read into it.

That there is no warrant for the interpretation contended for is fortified, in my opinion, by the wording of s 57E, which permits a police officer, to whom there has been delivered an article seized in terms of any other enactment, to deal with it under of Part VI. This is precisely what occurred *in casu*. Following upon the seizure, the liquor was delivered to be dealt with in terms of the aforementioned provision and retained in accordance with para (c) thereof - such delivery and retention being lawful.

The threshold problem, therefore, as was appreciated by the learned Judge, turned on an application of either para (i) or para (iii) of s 57F(1) of the Criminal Procedure and Evidence Act. This section is not materially different in wording from s 32 of the South African Criminal Procedure Act 1977. It stipulates that if, in connection with an article retained under s 57E(c), criminal proceedings are instituted and the accused admits his guilt and pays a deposit fine in accordance with s 336, the article shall:

> "(i) if the person from whom it was seized may lawfully possess such article, be returned to that person; or
>
> (ii) if the person from whom it was seized may not lawfully possess the article, be delivered to the person who may lawfully possess it; or
>
> (iii) if no person may lawfully possess the article or if the police officer concerned does not know of any person who may lawfully possess the article, be forfeited to the State."

These three requirements are compulsory. The article cannot be left in limbo. It must be returned to the person from whom it was seized or delivered to the person who may lawfully possess it or forfeited to the State. See *S v Marais* 1982 (3) SA 988 (A) at 1003H.

GUBBAY CJ

The words "may lawfully possess" have been held, correctly with respect, to mean possession

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by the person of the article from whom it was seized if his possession will not constitute an offence. See *S v Campbell & Anor* 1985 (2) SA 612 (SWA); *Du Toit et al supra* at p 2-13. Thus the article must be returned to the person from whom it had been seized unless to do so would make his possession unlawful. In the absence of a presumption of unlawfulness, the onus of showing on a balance of probabilities that the person from whom the article was seized could not lawfully possess it, rests upon the State. See *Minister van Wet en Orde v Datnis Motors (Midlands) (Edms) Bpk* 1989 (1) SA 926(A) at 935F and 936A; *Choonara v Minister of Law and Order* 1992 (1) SACR 241 (W) at 248f.

Mr Carter accepted that s 57F(1) refers to present and future possession and not possession at some time in the past. See *Mdunge v Minister of Police & Anor* 1988 (2) SA 809 (N) at 813H. The gravamen of his argument was that the respondents could not lawfully possess the liquor during the period between the payment of the deposit fine and the renewal of the liquor licence. He drew attention to the definition of "sell" in s 2(1) of the Liquor Act which includes "keeping or exposing for sale", and to s 102 which provides that evidence that an unlicensed person had on his premises more liquor then was reasonably required for the persons residing thereon, shall be *prima facie* proof of the sale of liquor by such person. In the light of these provisions he submitted that as the respondents were not the holders of a liquor licence before forfeiture had occurred, the return of the liquor to them, in that quantity, would have rendered their possession unlawful. Accordingly, the liquor had been rightfully forfeited to the State in terms of para (iii) of s 57F(1).

There is no provision in the Liquor Act which makes the mere possession of liquor, as defined in s 2, an offence. It is the act of an unlicensed person in selling liquor, or in keeping or exposing it for sale, that is criminalised. The evidential presumption created by s 102(c) is not absolute but rebuttable. It merely shifts the *onus* to the accused person to prove on a balance of probabilities that the liquor in his possession, being more than was reasonably required for the persons residing thereon, was not possessed for the purpose of sale. So, if a person with excess liquor on his premises were to establish that he was catering for a private function, such as a wedding, he would succeed in rebutting the presumption.

The learned Judge posed the question whether the respondents **could** have lawfully possessed the liquor subsequent to the payment of the deposit fine

GUBBAY CJ

and before it was forfeited to the State. With respect, I think the inquiry ought to have been whether the respondents were able to show that a return of the liquor to them would have enabled them to lawfully possess it.

The facts reveal that until 1 July 1990 the respondents were authorised to sell liquor to any person at the restaurant *bona fide* taking a meal. Thereafter, they continued to do so under the genuine misconception that their legal practitioner had secured the renewal of the requisite liquor licence. The omission to apply for its renewal was due to an oversight on the part of that legal practitioner. There is no possibility, therefore, of the respondents having deliberately and knowingly flouted the law. Immediately upon learning that the liquor licence had lapsed, it was

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made clear to Assistant Inspector Jaboon that it was intended to apply for a renewal (at the very least, as was conceded by Mr *Carter*, the police would have anticipated that steps to obtain the renewal of the licence would be taken expeditiously, for the livelihood of the respondents was in some measure dependent thereon); and it was proposed that the liquor be secured on the premises under the sole control of the police until authority was obtained to sell it.

This unusual scenario persuades me that the attitude of the respondents was that having unwittingly sold liquor without being in possession of a licence to do so, it was certainly not their intention to repeat that offence in the event of the liquor that was seized being returned to them.

In my view the respondents proved on a balance of probabilities that if the liquor had been returned to them it would not have been sold, but merely held pending the soon to be expected renewal of their liquor licence; that although unlicensed persons, they would nonetheless have lawfully possessed the liquor.

For the reasons aforegoing I would dismiss this appeal with costs.

Manyarara JA: I agree.

Korsah JA: I agree.

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

Nicholas Collins & Associates, respondents' legal practitioners

MUSHONGA & ORS v BANGO & ORS 1992 (1) ZLR 373 (HC)

Court **High Court, Bulawayo**

Cheda J

Civil action

26 June 1992

Flynote

Delict - defamation - reference to plaintiffs - plaintiffs not named but nonetheless sufficiently identified

Headnote

Seven plaintiffs sued the defendants for defamation. A newspaper article did not refer to the plaintiffs by name but simply made reference to "seven individuals". The defendants excepted to the claim for defamation, *inter alia*, on the ground that the words complained of made no reference to the plaintiffs.

Held, dismissing this exception, that as the seven individuals had been referred to as forming a certain committee, without having to engage in any scientific analysis, reasonable readers

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would have identified the plaintiffs as the persons attacked in the article.

Cases cited:

Young v Kemsley & Ors 1940 AD 258

SA Assd Newspapers Ltd & Anor v Est Pelser 1975 (4) SA 797 (A)

S v Gibson NO & Ors 1979 (4) SA 115 (D)

De Klerk v Union Govt 1958 (4) SA 496 (T)

Assn of Rhodesian Industries & Ors v Brooks (1) 1972 (1) RLR 144 (G)

J James for the plaintiffs

R M Smithwick for the second defendant

Judgment

Cheda J: On 27 June 1991 the *Chronicle*, a newspaper published by second defendant, carried an article by one William Bango, the first defendant in this case, in which the plaintiffs claim to have been defamed.

CHEDA J

Following this publication, the plaintiffs issued summons alleging that both Bango and the newspaper had defamed them as the article had an innuendo that the "seven individuals" referred to were underhand unscrupulous politicians who were working to undermine and destroy their own party, whilst actually serving the interests of a rival political party, and trying to achieve their objective unlawfully.

In their declaration the plaintiffs claimed that the "seven individuals" referred to were understood to refer to, and means the seven plaintiffs.

The second defendant noted an exception on the grounds that:

1. The words complained of by the plaintiffs make no reference to the plaintiffs.
2. Alternatively, and in any event, the words complained of are not reasonably capable of referring to the plaintiffs.
3. In the premises the plaintiffs have no *locus standi* to bring this action.

At the hearing of the exception the second defendant argued that if the person referred to in an article can only be identified after careful scientific analysis this would not be the conduct of a reasonable reader and that the article itself made no reference personally to any of the plaintiffs and there was no factual matter or allegation which can be said to make reference to the plaintiffs. Mr *Smithwick*, for the second defendant, referred to : *Young v Kemsley & Ors* 1940 AD 258*; SA Associates Newspapers Ltd & Anor v Estate Pelser* 1975 (4) SA 797 (A)*; S v*

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Gibson NO & Ors 1979 (4) SA 115 (D).

Mr *James*, for the plaintiffs, argued that the words referred to the plaintiffs as they were referred to as the "seven individuals of the interim committee of ZUM which announced the suspension of Comrade Tekere", the "new executive of ZUM".

It is these seven who had announced the suspension of Mr Tekere from the party the previous week and they were therefore objectively identified.

He referred, in addition to the cases referred to by Mr *Smithwick,* to:

1. Burchell *Law of Defamation in South Africa* p 128-9
2. *De Klerk v Union Government* 1958 (4) SA 496 (T)
3. *Association of Rhodesian Industries & Ors v Brooks* (1) 1972(1) RLR 144 (G)

CHEDA J

According to the declaration served with the summons, the article read as follows:

> "Comrade Bango said at a Press Conference in Bulawayo yesterday that the Province does not recognise the interim committee which was formed by power hungry political clowns who announced the suspension of Comrade Tekere from the party last week.
>
> He said ZUM supporters in Matabeleland would not be cheated by the so-called new leaders of the party to accept the movement's structural changes.
>
> 'We do not recognise the new executive committee ...Comrade Tekere is still our leader and no person can replace him as far as we are concerned' he said. Comrade Bango claimed that the seven individuals who alleged that they had fired Tekere from the party were said to have infiltrated ZUM through sponsorship by ZANU (PF) and their ultimate objection was to topple Comrade Tekere and then hijack the entire movement.
>
> 'Since January this year we have been suspicious that the seven individuals have been working for ZANU (PF) and, as a result, the interim executive for Matabeleland province was suspended. We were informed that the aim of this infiltration was to see to it that ZUM will be non existent during the 1995 general elections' he said."

The above, taken together with the article in the previous week in which the same people are said to have suspended Mr Tekere makes the position quite clear regarding the persons referred to.

While they do not, in the declaration, claim that they are the seven members of the interim committee, it is clear that the article refers to them as they had acted in that capacity the previous week.

Anyone reading the article and taking it together with the previous article, cannot, in my view, be said to be engaged in any scientific analysis to identify the persons concerned.

In the circumstances the exception is dismissed with costs.

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James, Moyo-Majwabu & Nyoni, plaintiffs' legal practitioners

Coghlan & Welsh, second defendant's legal practitioners

WHOLESALE CENTRE (PVT) LTD v MEHLO & ORS 1992 (1) ZLR 376 (HC)

Court **High Court, Bulawayo**

Cheda J

Civil action

26 June 1992

Flynote

Labour relations - illegal strike - employees suspended and matter referred to Labour Relations Officer - whether officer has any discretion not to order dismissal if he decides that employees have committed misconduct justifying suspension

Headnote

Some employees of a company participated in a brief illegal strike. The company suspended the employees and applied to the labour relations officer in terms of s 3(1) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 for an order terminating the contract of employment. The officer found that the grounds for suspension had been proved, in that the employees had committed the act of misconduct in question. However, she nonetheless ordered the re-instatement of the employees.

Held, that under the Regulations that once the officer had found that the grounds for suspension had been proved, she had to order the termination of the employment of the employees and had no discretion to decide that in the particular circumstances dismissal should not be ordered. The officer can recommend that the employer consider treating the employees with leniency instead of dismissing them, but has no power to order the employer to exercise leniency and re-instate the employees.

Cases cited:

Masiyiwa v TM Supermarket

Mpofu v Tedco HH-292-90

Kadoma Magnesite (Pvt) Ltd v Acting Regional Hearing Officer & Ors 1991 (1) ZLR 283 (H)

CHEDA J

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M J Gillespie for the petitioner

B Longhurst for the first respondent

Judgment

Cheda J: On 25 July 1991, the ten respondents in this application, who were employed by Wholesale Centre (Pvt) Ltd, participated in an illegal strike action which lasted about one and one quarter hours, together with some other employees of the company.

The ten respondents were eventually suspended from work and authority was sought from the Labour Relations Office to dismiss them from employment.

The matter was referred to the Labour Relations Hearing Officer for a determination.

The officer dismissed the application to have the respondents dismissed.

An appeal was noted and the Regional Hearing Officer, after making a finding that the employees had taken part in an illegal strike action, ordered the petitioner to re-instate the employees.

This matter has now come on review and the applicant argues that the Hearing Officer should have determined that the employees be dismissed according to the provisions of SI 371/85.

In reply to the petition filed by the respondents, it is accepted that the industrial action was illegal.

It is then argued that the petitioner contributed to the action in that the communication between management and the workers was very poor, and that the petitioner should have, in fairness, dismissed all the employees and thereafter re-employed those he deemed fit for re-employment.

In other words, the respondents are not arguing against the illegality of their dismissal, but are saying it would be fair if all of them were dismissed instead of some of them.

First respondent also submitted that in certain circumstances an illegal strike may be justified and the instant case falls within those circumstances

She, too, conceded that the employees had taken part in an illegal strike.

CHEDA J

She further argues that, although the strike action was illegal, she did not find it to constitute any term of misconduct set out in s 3(1) of SI 371/85. I suppose she means that none of the provisions was contravened.

In other words, to her, the illegal strike was not an act of misconduct.

I fail to understand how such an action, which was admittedly illegal, cannot amount to

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misconduct.

All the respondents, including the Regional Hearing Officer, seem to be arguing that although an illegal action was committed, the petitioner should be stopped from dismissing the respondents because the petitioner is not dismissing all of the employees or that there was no gross misconduct by the nine employees such as to warrant their dismissal.

Section 3(1) of SI 371 of 1985 provides grounds upon which an employer can suspend an employee, after which he shall apply to a labour officer for an order or determination terminating the contract of employment.

Section 3(2) spells out what the labour relations officer is expected to do when he or she receives such an application, in the following terms:

> "2. Upon application being made in terms of subsection (1) the labour relations officer shall investigate the matter and may, according to the circumstances of the case -
>
> (a) serve a determination or order on the employee concerned terminating his contract of employment if the grounds for his suspension are proved to the satisfaction of the Labour Relations officer; or
>
> (b) serve a determination or order on the employer concerned to re- instate such employee if the grounds for his suspension are not proved to the satisfaction of the labour relations officer.

This section seems to have been misunderstood by both the labour relations officer and the respondents.

The section deals with only two situations and directs what should be done in each of the two situations.

Where the grounds of suspension are proved to the satisfaction of the officer termination of the work contract follows. Where the grounds are not proved to

the officer's satisfaction re-instatement follows.

There is no room for the officer to make decisions of his own discretion after the grounds are proved, recommending re-instatement.

Such a course, if adopted, can only be a recommendation to the employer as a plea for leniency, but cannot be an order in terms of the Regulations. In *Masiyiwa v TM Supermarkets* 1990 (1) ZLR 166 (S),the provisions of s 3(2) were held to confer no discretion on the Labour Relations officer, board, or tribunal to make an order different from that provided by subss (2)(a)and (b). In *Mpofu v Tedco* HH-292-90 and in *Kadoma Magnesite (Pvt) Ltd v Acting Regional Hearing Officer & Ors* 1991 (1) ZLR 283 (H) the same issues were discussed and in both cases it was stated that there was no discretion for the hearing officer to order re-instatement once the grounds for suspension were proved to his or her satisfaction.

In this case the hearing officer found that the grounds for the suspension were proved.

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She should have then complied with s 3(2) of the Regulations.

Instead she ordered the re-instatement of the employees and seemed to exercise a discretion which she does not have.

That order cannot stand and is set aside.

I therefore order that:

The rule is confirmed in the following terms:-

(a) The determination of the first respondent dated 29 January 1992 is hereby set aside.

(b) The employment contract of the second to the tenth respondents is declared to be terminated with effect from 29 January 1992.

(c) The respondents are to pay the costs of this application jointly and severally, the one paying the others to be absolved.

Coghlan & Welsh, petitioner's legal practitioners

Ben Baron & Partners, first respondent's legal practitioners

Samp, Mlaudzi & Partners, second to tenth respondents' legal practitioners

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Endnotes

1 (Popup - Popup)

Only a portion of this judgment is material to this report.

2 (Popup - Popup)

There is a critical note on this case in *Legal Forum* (1992) vol 4 no 3 pp 8 - 16

3 (Popup - Popup)

During the course of a criminal trial in which the accused was being prosecuted for car theft, grave doubt were cast on the truthfulness of the evidence of two police witnesses. The judge commented upon this matter as follows:

4 (Popup - Popup)

The judge then dealt with the facts. This portion of the judgment has been omitted.

5 (Popup - Popup)

In these cases it was ruled that under the common law an administrative tribunal is not required to give reasons for its decision. However, in certain exceptional circumstances, the failure to give reasons may lead to an inference that an irregularity has occurred.

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